**Tanzania Transport Co v Davda Ltd**

**Division:** High Court of Tanzania at Dar Es Salaam

**Date of judgment:** 24 January 1974

**Case Number:** 17/1972 (101/74)

**Before:** Biron J

**Sourced by:** LawAfrica

*[1] Sale of Goods – Suit against carrier – Not barred by suit against purchaser when delivery not known.*

*[2] Sale of goods – Goods delivered to carrier for transmission to the buyer – No deemed delivery to buyer on terms of contract – Sale of Goods Ordinance* (*Cap.* 214), *s.* 34 (1) (*T*)*.*

(1) *Verschures Creameries Ltd. v. Hull and Netherlands Steamship Co. Ltd*., [1921] 2 K.B. 608.

**JUDGMENT**

**BIRON J:** This is an appeal from the judgment of the district court of Dar es Salaam upholding the respondent’s claim for Shs. 6,543/20, being the price of goods sold and delivered or rather misdelivered, and the interest thereon. For the sake of convenience and in order to avoid confusion, I am retaining the descriptions of the parties as they were described in the proceedings, or rather, the pleadings, the appellant being the first defendant company and the respondent being the plaintiff company. For reasons which will hereinafter become apparent, it is necessary to set out the proceedings which preceded the actual trial between the two parties. The plaintiff company, which on its printed invoice, describes itself as “direct importers and exporters, general merchants and commission agents, carrying on business in Dar es Salaam”, sold a quantity of goods, textiles to the second defendant, a merchant in Tanga, apparently to the value of Shs. 7,142/20, which sum included related charges. It is common ground that it was agreed between the parties that the goods should be transported to Tanga by the first defendant, a transport company, and the plaintiff duly delivered the goods to the first defendant company’s agent in Dar es Salaam for transportation to Tanga. On 26 May 1970, the plaintiff filed a claim in the district court of Dar es Salaam, suing both defendants. And it is necessary to set out the relevant averments in the plaint. They read:

“2. (*a*) the first defendant is a firm of transporters and the address for service is c/o Deekay Motors, Morogoro Road, Dar es Salaam.

( *b*) The second defendant is a merchant carrying on business at Tanga, and the address for service is P.O. Box 2067, Tanga. 3. ( *a*) O n or about 19.11.69, the plaintiff company entrusted the first defendant at Dar es Salaam to convey and transport to Tanga two cases of cotton piece goods vide defendant’s waybills Nos. 1003, and 1009, consigned to National Bank of Commerce, Tanga, for reward to the first defendant for delivery to the second defendant.

( *b*) The first defendant has neither delivered nor returned the said goods to the plaintiff in spite of demands.

( *c*) The second defendant neglects and refuses to pay for the said goods in case he has received the said goods.

4. ( *a*) The value of the contents of the said cases amounts to Shs. 6,543/20 and the plaintiff company claims the said amount from the first defendant by way of damage suffered, and for goods sold and delivered to the second defendant.

( *b*) The company also claims interest by way of damages in the sum of Shs. 266/80 on the said principal at 9 per cent p.a. from 19.11.69 to the date of filing of suit.” The summonses were sent to the District Court in Tanga for service on the defendants in Tanga, but were returned unserved. Subsequently, the plaintiff company obtained an order for substituted service and service was effected by publication of the summons in the “Nationalist” newspaper. No appearance was entered by either defendant, and the plaintiff duly obtained *ex parte* judgment against both defendants on his claim. Thereafter, when a vehicle of the first defendant company was attached in execution of the decree founded on the judgment, the first defendant company filed an application in the district court to set aside the *ex parte* judgment, which was in the sum of Shs. 8,275/85. In his affidavit, the proprietor of the first defendant company averred that he had no knowledge of the suit filed against his company for apart from the fact, as is common ground, that the company was never directly served, he could not read English, so he did not see the advertisement in the “Nationalist” newspaper. After some appearances the parties agreed to a consent order in terms as follows: “*Order*: judgment to be set aside and the first defendant to deposit a sum of Shs. 2,000/- into the court in Dar es Salaam, pending the outcome of the suit and costs and court brokers charges, also to wait the outcome of the suit. Defence to be filed by 24.11.71.” In its defence the first defendant company averred, *inter alia*, that the plaint disclosed no cause of action, and further that: “Without prejudice to the foregoing, the 1st defendant duly delivered the goods in question to the 2nd defendant and was not required to deliver them to the plaintiff.” The first averment, that the plaint disclosed no cause of action, was not taken as a preliminary point, but was included amongst the issues, on the framing of which however, counsel could not agree, and the magistrate himself framed the issues as follow: “(1) Did the plaintiff have any property in the goods and if not, can he sue the defendant?

(2) Has the plaintiff waived his right to sue the defendant? (3) Is the defendant exempted from any liability in view of the conditions laid in the waybill?

(4) Is the plaintiff entitled to claim damages from defendant?

(5) Is the first defendant in any way negligent? (6) Did the plaintiff recognise and/or adopt the first defendant’s act of misdelivery?”

At the hearing only one witness gave evidence for the plaintiff company and he was the director of the company. He testified to the effect that he sold the goods to the second defendant when he came to Dar es Salaam and that they agreed that the goods were to be transported by the first defendant company. He also produced the invoice which is headed: “Terms: Cash sight draft through bank”. The sight draft was also produced and it is made payable to the National Bank of Commerce, City Drive Branch. The amount stated therein is Shs. 7,143/20. The sight draft which is addressed to the second defendant, was never in fact endorsed by him. It should be noted that according to the proceedings, the second defendant would appear to have left the country and he is outside the jurisdiction of the court. The proprietor of the first defendant company also produced the relevant waybills or copies thereof, whereby the goods were consigned to Tanga. Although these waybills bear the consignee’s name as the National Bank of Commerce, there then follows some letters, which are followed by the name of the second defendant, Mohamed Hussain. Although it was argued on behalf of the first defendant company that these letters interposed between the name of the bank and that of the second defendant were “Mr.”, I agree with the finding of the magistrate, that the letters in fact read “A/C”, as such reading is amply borne out by the consignment notes produced. For the first defendant company, evidence was given by its sole proprietor and an employee of the company. The effect of their evidence was that the company transported the goods, which were handed to the second defendant by the employee, and the second defendant duly signed for them. It is common ground that the second defendant has not in fact paid for these goods, and as noted, he is out of the country. To deal with the issues of fact first, I fully agree with the magistrate, that the evidence establishes that the plaintiff company sold the goods to the second defendant, and that it was a condition of the sale, as stated in the invoice quoted “Terms: cash sight draft through bank”. I have already stated that I agree with the magistrate’s finding that the goods were consigned to the National Bank of Commerce, A/c Mohamed Hussain, Tanga, the second defendant. And, as stated, it is not disputed by the first defendant company that the company delivered the goods to the second defendant. It is now necessary to deal with the points of law raised. First of all, it was submitted by Mr. Raithatha, both at the trial and at the hearing of this appeal, that, in view of the fact that the plaintiff had elected to sue the purchaser of the goods, the second defendant, and had in fact obtained judgment against him, he was precluded from suing the first defendant company. In support of this contention Mr. Raithatha cited the case of *Verschures Creameries Ltd. v. Hull and Netherlands Steamship Co. Ltd*., [1921] 2 K.B., 608, the headnote to which reads: “Goods were delivered by the owners to forwarding agents to be carried by sea to Hull and thence forwarded to a customer in Manchester. When the goods arrived at Hull the owners instructed the forwarding agents not to deliver to the customer, but the goods were nevertheless delivered to him. The owners thereupon invoiced the goods to the customer and sued him and recovered judgment for the price of goods sold and delivered, and then, failing to get satisfaction, took proceedings in bankruptcy against him: **HELD**: that they could not afterwards sue the forwarding agents for negligence and breach of duty. Judgment of Bailhache, J. affirmed.” The magistrate in his judgment duly considered this case and distinguished it on it facts from this instant case, in that, in the case cited, the plaintiff, in full knowledge of the misdelivery of the goods, had elected to sue the carriers; the court therefore held that he was thereafter precluded from suing the purchasers of the goods, in that, as stated in the judgment, he could not blow hot and cold, or as it is technically known in Scottish legal terminology, he could not approbate and reprobate at the same time. In the instant case, the plaintiff company was certainly not aware that the goods had in fact been delivered to the second defendant. This is borne out by its letter before suing addressed to the first defendant company, and produced at the hearing. This reads: 6 March 70. M/s. Tanzania Transport Co., P.O. Box 62, DAR ES SALAAM. Dear Sir, Re: M/s. D. G. Davda Ltd. of D’Salaam I have been instructed by my client abovenamed to refer to your waybill Nos. 954, 1003 and 1009 of 19 November 1969 (No. 954 is undated) for goods entrusted to you for carriage and consigned to National Bank of Commerce, Tanga. So far they have not reached my client’s customers. You are therefore requested to return the said goods within 7 days as repeated requests to do so by my client have had no response from you. If you fail to return the said goods within 7 days my instructions are to file suit against you for the value of the said goods, at your risk as to costs and consequences thereof. Yours faithfully, Sgd. M. G. Pardhan and even in the plaint as set out above, it was averred that: “The first defendant has neither delivered nor returned the said goods to the plaintiff in spite of demands. The second defendant neglects and refuses to pay for the said goods in case he has received the said goods.” It is thus abundantly clear that it was not the case that the plaintiff company, in the full knowledge of the position elected to sue the second defendant, and was therefore precluded from suing the first defendant company. The magistrate’s finding on this issue is accordingly upheld. Mr. Raithatha further called in aid s. 34 (1) of the Sale of Goods Ordinance (Cap. 214), which reads: “34. ( 1) W here, in pursuance of a contract of sale, the seller is authorised or required to send the goods to the buyer, delivery of the goods to the carrier, whether named by the buyer or not, for the purpose of transmission to the buyer is *prima facie* deemed to be a delivery of goods to the buyer.” As will be noted, the section expressly says that where the goods are delivered to an agreed carrier for transmission to the buyer, they are *prima facie*, deemed to be delivered to the buyer. In this instant case such *prima facie* presumption is displaced by the agreement between the parties, in that it was an express condition of the sale, and I make no apology for repeating the wording at the head of the invoice: “Terms: Cash sight draft through bank”. And the goods were consigned to the National Bank of Commerce account of the second defendant, which cannot but mean that the goods were only to be delivered to the second defendant on payment by him to the bank, by his endorsement of the sight draft, which was forwarded to the bank. In delivering the goods to the second defendant, the first defendant company could be said to have been in breach of its agreement with the plaintiff, and therefore liable in damages for such breach. However, the magistrate found, and I would not quarrel with such finding, that the first defendant company was negligent in so delivering the goods to the second defendant. The magistrate further considered whether, as was argued and made an issue, the first defendant company was exempted from liability for its negligence, and after carefully studying the conditions printed at the back of the waybills produced, he found that there was no condition exempting liability for negligence and/or misdelivery. Although there was a waybill produced at the hearing which differs from all the other waybills or consignment notes produced, and which does bear a clause exempting the first defendant company from liability for negligence or misdelivery, it is not I think, disputed that this waybill was in fact not of the same type as those used by the parties. It is more than likely that this particular type of waybill laying down different terms and conditions of carriage, was brought into use by the first defendant company after this case. And it is not, I think, disputed that this particular waybill is not relevant to these proceedings, as the terms and conditions it bears were not those agreed to by the parties. In the result, for the reasons I have attempted to set out, I fully, with respect, agree with the finding of the magistrate upholding the plaintiff’s claim. The appeal is accordingly dismissed with costs to the respondent company. *Order accordingly*. For the appellant: *MJ Raithatha* For the respondent: *MBH Rahim* (instructed by *MG Pardhan & Co*, Dar es Salaam)