CANADIAN NATIONAL STEAMSHIPS (DEFENDANT) ..... APPELLANT;

AND

WILLIAM BAYLISS (PLAINTIFF)..... RESPONDENT.

1936
* Nov. 4.

1937
* Feb. 2.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Shipping—Damage to goods—Peril of the sea—Negligence—Fault of carrier or of his agent or servant—Burden of proof—Barbados Carriage of Goods by Sea Act, 1926—Clause q, rule 2, article 3 of the schedule of the Act.

Upon an action against a carrier for damages to goods shipped under bills of lading which specifically stated that the vessel should not be liable for damage caused by perils of the sea, the grounds of defence were, first that, the carrier having established at the trial a *prima facie* case of loss by a peril of the sea, the burden of proving negligence consequently rested on the respondent, and secondly, that the carrier had discharged the burden of proof resting on him under clause *q*, rule 2, article 3 of the schedule of the Barbados Carriage of Goods by Sea Act, 1926, which was made applicable to the contract.

Held that, the issue raised by the first ground being an issue of fact, it was incumbent upon the carrier to acquit himself of the onus of showing that the weather encountered during the voyage was the cause of the damage and that it was of such a nature that the danger of damage to the cargo arising from it could not have been foreseen or guarded against as one of the probable incidents of the voyage—In this case, the concurrent findings of fact, on that issue, by the trial and appellate courts in favour of the respondent must stand.

Held, also, that under clause *q*, rule 2, article 3 the burden rests upon the carrier to show that neither the actual fault nor the privity of the carrier, nor the fault or neglect of the agents or servants of the carrier, contributed to the loss or the damage; and the carrier does not acquit himself of this onus by showing that he has employed competent stevedores to stow the damaged cargo, or that proper directions as to the stowage of the cargo have been given.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, affirming the judgment of the Superior Court, E. M. McDougall J. and maintaining the respondent's action in damages for $4,549.03.

On the 25th February, 1931, the ss. *Lady Drake,* a vessel belonging to the appellant company, received at Barbados, in the British West Indies, a shipment of molasses in puncheons, barrels and half-barrels for delivery at the port of Saint John, New Brunswick. The vessel called at several intermediate points, among others, Hamilton, Bermuda,

* PRESENT:—Duff C.J. and Rinfret, Crocket, Davis and Kerwin JJ.

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where she arrived on the 4th of March, after having passed through some heavy weather. The master caused the shipment of molasses which had been placed in no. 2 hold, to be inspected, when everything was found to be in satisfactory condition. Leaving Hamilton on the afternoon of the same day, with the weather much as it had been upon arrival, the vessel ran into somewhat heavier weather during the night, and in the early morning of the 5th March. At 7.30 on that morning, it was discovered that the barrels and puncheons of molasses had been completely broken up, and the hold was awash with a mass of bulk molasses, the barrel staves floating on the surface. The respondent, on the failure of the appellant company to deliver the molasses in accordance with the contract of carriage, instituted the present action, claiming the sum of $4,549.03, which the parties agreed represent the extent of the damage.

I. C. Rand K.C. for the appellant.

E. Languedoc K.C. for the respondent.

The judgment of the court was delivered by

DUFF C.J.—The appeal is concerned with the judgment recovered by the respondent against the appellants in the Superior Court of the district of Montreal for damages to molasses shipped on February 26, 1931, in the steamship *Lady Drake* from Barbados for delivery at Saint John, New Brunswick, and the judgment of the Court of King's Bench affirming it. The molasses damaged was part of five separate consignments shipped by Messrs. Jones & Swan of Barbados and stowed in no. 2 hold of the vessel as part of an aggregate quantity of 268 puncheons, 238 barrels and 80 half-barrels.

The vessel left Hamilton, Bermuda, at 1.30 p.m. on the afternoon of the 4th of March, 1931, and met with heavy weather. On the morning of March 5th, about 7.30, it was discovered that no. 2 hold was virtually awash with molasses and floating barrel staves.

The goods were shipped under bills of lading which specifically stated that the vessel should not be liable for damage caused by perils of the sea. The bills of lading contained a term importing the provisions of the Barbados *Carriage of Goods by Sea Act*, 1926.

The appellants in this court contended that they were entitled to judgment on the grounds, first, that the damage was attributable to a peril of the sea, and, second, that the appellants had discharged the burden of proof resting on them under clause *q*, rule 2, article 3 of the schedule of the Act. It will be convenient to deal with these contentions in the order in which I have stated them.

Counsel for the appellant accepted the definition of "perils of the sea" given in the last edition of Scrutton on Charter Parties (p. 261) as follows:

> Any damage to the goods carried, by sea-water, storms, collision, stranding, or other perils peculiar to the sea or to a ship at sea, which could not be foreseen and guarded against by the shipowner or his servants as necessary or probable incidents of the adventure.

His main contention was that the appellants having established at the trial a *prima facie* case of loss by a peril of the sea within this definition, the burden of proving negligence consequently rested on the respondent on the authority of *The Glendarroch* (1). At the trial the defence raised under this head was that the heavy seas that were encountered after leaving Hamilton and before the discovery of the loss and damage on the following morning were of such a character as to bring the damage within the words quoted above, that is to say,

> damage caused by * * * storms * * * or other perils peculiar to the sea or to a ship at sea which could not be foreseen and guarded against by the ship owner or his servants as necessary or probable incidents of the adventure.

The issue raised by this defence was, of course, an issue of fact and it was incumbent upon the appellants to acquit themselves of the onus of showing that the weather encountered was the cause of the damage and that it was of such a nature that the danger of damage to the cargo arising from it could not have been foreseen or guarded against as one of the probable incidents of the voyage. The trial judge and the Court of King's Bench have unanimously held that this issue must be decided against the appellants on the ground that, upon the evidence, the proper conclusion is that the dangers arising from such weather as the ship encountered could be guarded against and that they ought to have been foreseen. There is no satisfactory reason for impeaching these concurrent findings of fact and they must, therefore, stand. They constitute a complete

(1) [1894] Prob. 226.

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answer to the contention that the appellants have brought themselves within the exception "perils of the sea."

The contention founded upon clause *q*, rule 2, article 3, remains to be dealt with. That clause is in the following words:

> Any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier, nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

The judges below have unanimously held that the burden of proof under this clause has not been discharged. It was very vigourously urged by counsel on behalf of the appellants that he had established a *prima facie* case of absence of negligence by proving proper stowage. But it will be observed that the burden resting upon the carrier under this clause is a very heavy one. He has to show that neither the actual fault nor the privity of the carrier, nor the fault or neglect of the agents or servants of the carrier contributed to the loss or the damage. The carrier does not acquit himself of this onus by showing that he has employed competent stevedores to stow the damaged cargo, or that proper directions as to the stowage of the cargo have been given; and, if the fact is, as in this case it has been found, that no peril was encountered that could not have been provided against by proper care, the fact that the puncheons and barrels containing this cargo of molasses in no. 2 hold were broken is a fact concerning which the courts below, as judges of fact, necessarily asked themselves the question: How is this to be accounted for? I agree with the courts below in thinking that the more reasonable hypothesis, in all the circumstances, is that in this particular hold there was some inattention to precautions which would, it is not unreasonable to consider, have, probably, had the effect of preventing the loss.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Beauregard, Phillimore & St. Germain.*

Solicitor for the respondent: *Erroll Languedoc.*