25,1954

No. 30 of 1953.

In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT OF CEYLON

BETWEEN

HOLLAND COLOMBO TRADING SOCIETY LIMITED Colombo (Plaintiffs) . . . *Appellants*

AND

1. SEGU MOHAMED KHAJA ALAWDEEN
2. MOHAMED OWDHU son of HAJA ALAWDEEN
3. MOHAMED LEBBE MARIKAR son of HAJA ALAWDEEN and
4. SEGU MOHAMED BUHARI son of HAJA ALAWDEEN all carrying on business in partnership under the name style and firm of "S. S. K. HAJA ALAWDEEN AND SONS" at No. 99 Second Cross Street, Pettah, Colombo (Defendants) . . . . *Respondents.*

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UNIVERSITY OF LONDON
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INSTITUTE OF ADVANCED
LEGAL STUDIES

Case for the Appellants.

RECORD.

1. This is an appeal from a Judgment and Decree dated the 18th day of August 1952 of the Supreme Court of the Island of Ceylon, which reversed a Judgment and Decree dated the 7th day of December 1949 of the District Court of Colombo in an action in which the Appellants were Plaintiffs and the Respondents were Defendants. pp. 45–55. pp. 37–43.

2. The issue which arises in this Appeal is whether the Respondents, who had bought goods from the Appellants, were liable in damages for refusal to pay the price against the tender by the Appellants of the goods or a bill of lading in respect of them. The particular questions involved are—

(A) whether there was or was not a valid tender of the goods;

(B) whether there was or was not a valid tender of a proper bill of lading (assuming the point is open to the Respondents);

(C) whether any other excuse for non acceptance was established.

3. The terms of the contract, which were contained in a document numbered P. 8, dated the 5th September 1947 confirmed by a letter P. 9 dated 25th September 1947, provided that the Appellants agreed to sell pp. 63–69.

and the Respondents agreed to buy 300 pieces 42″ × about 40 yards White Shirtings (Dutch) Lucinde, Price 40d. per yard, c.i.f. Colombo, Payment Cash against Documents, Shipment October/in one lot January 1948 under certain specified marks.

4. The following were *inter alia* terms of the said contract :—

p. 63, l. 29–p. 64, l. 5. (A) " 1. Payment to be made in cash on or before arrival of " the goods and we (the Respondents) shall not be entitled to call " for or await tender before payment; any giving of credit or " acceptance of a promissory note for the amount due to be entirely " in your discretion and interest at the rate of — per cent. per " annum to be charged by you (the Appellants) after the expiration " of two days from the receipt of notice of arrival whether credit " is allowed or not. Any tender or delivery of the goods or of the " bill of lading or of such delivery order or other document or " documents as will enable us to obtain possession of the goods " shall in every case constitute a valid tender or delivery. You " are not responsible for loss sustained through the late arrival or " non arrival of documents."

p. 64, ll. 6–10 (B) " 2. On receiving notice from you that the goods or any " part of them have arrived we shall remove the same from the " ship or wharf or your store or any place named by you within " two days of such notice at our expense and risk and we shall " pay all customs duties, dues, landing, warehouse, and other " customary charges . . ."

p. 64, ll. 27–32. (C) " 4. . . . Notwithstanding that the price of the goods " may be expressed to be fixed c.i.f. or equivalent terms, we shall " not be entitled to demand nor shall you be bound to tender or " deliver to us any insurance policy, bill of lading, invoice or other " document or documents whatsoever but any such tender or " delivery as described in clause 1 hereof shall be a good and valid " tender or delivery."

p. 65, ll. 27–30. (D) " 11. The expression ' bill of lading ' herein shall include " any document issued as or purporting to be a bill of lading " containing an acknowledgment by the ship owners or their agents " of the receipt of the goods whether on board the ship or for " shipment or otherwise and whether alone or with other goods."

p. 66, ll. 4–11. (E) " 13. We cannot take any objection to or make any claim in " respect of the goods unless the objection or claim is lodged with " you in writing before removal and not later than three days after " receipt of the notice mentioned in clause 2 hereof. . . In no case " can we refuse payment or make any objection or claim before " arbitrators or in a Court of law or otherwise on any ground not " stated in such writing or in a written notice lodged with you " within ten days from the date of removal or receipt of the notice " mentioned in clause 2 whichever shall be the earlier."

p. 70. 5. On the 15th January 1948 the Appellants advised the Respondents that shipment would be made in about two weeks time, but on the same date the Respondents intimated that, in their view, they were entitled to the goods in Colombo before the end of January 1948 and that they would not accept them if they came after that date; as it was clear the goods

could not arrive by that date they asked for cancellation. The Appellants disagreed with this view, pointing out that shipment had to be effected pp. 71, 72.
before the end of January, and stated that cancellation was not possible and that the shipping documents would be presented in due course. The Respondents on the 17th January 1948 adhered to their view and reiterated their intention not to accept.

6. Pursuant to this contract the goods were shipped on the 29th January 1948 at Rotterdam on the ms/ss Laurenskerk for carriage to Colombo under a bill of lading which is set out in full in the printed
10 Record and numbered P. 19. This bill of lading provided, *inter alia*, for pp. 73–81.
the forwarding and transhipment of the goods in the following terms :—

" 16. Forwarding and Transhipment—The cargo or any part p. 78, ll. 5–21.
" thereof may, at the option of the carrier and as often as may from
" any cause be deemed expedient, be carried in a substituted ship
" or lightered and/or landed and/or stored for the purpose of on
" carriage in the same or other ship or by any other means of
" conveyance.

" The responsibility of the carrier shall be limited to the part
" of the transport performed by him on the ship under his manage-
20 " ment and no claim will be acknowledged by the carrier for damage
" and/or loss arisen during any other part of the transport, even
" though the freight for the whole transport has been collected
" by him.

" The shipper authorises the carrier to enter into contracts on
" his behalf for the precarriage and/or oncarriage of the goods
" and/or storing, lightering, transhipping or otherwise dealing with
" such, prior to, or in the course of, or subsequent to the carriage
" in his ship without responsibility for any act, neglect or default
" on the part of the carrier even though the terms of such contracts
30 " be less favourable in any respect whatsoever to the shipper than
" the terms of this Bill of Lading."

7. Shortly after leaving Genoa on the way from Rotterdam to Colombo an explosion occurred on board the s.s. Laurenskerk with the result that the vessel returned to that port and the goods were transhipped to the s.s. Triport. The s.s. Triport arrived at Colombo at about the end p. 22, l. 22.
of March or beginning of April 1948 and the goods were duly unloaded and stored in a warehouse. The Appellants paid import duty, warehouse rent and import harbour dues, the receipts for which are set out in full in the printed Record and numbered P. 27, 28 and 29 respectively. pp. 92–95.

40 8. Meanwhile, having received the relevant shipping documents, the Appellants, by letters dated the 26th February 1948 and numbered P. 16, pp. 84, 85.
2nd March 1948 and numbered P. 18, 9th March 1948 and numbered P. 21, demanded payment of the price of the goods in accordance with the terms of the contract. The Respondents, however, maintained their attitude above indicated and refused either to accept tender of the documents or to pay the price.

9. After the arrival of the goods at Colombo the Appellants wrote to the Respondents letters dated the 3rd and 12th April and numbered p. 86.

P. 22 and P. 23 respectively pressing the Respondents to take up the documents and/or delivery of the goods. Letter P. 23 contained the following paragraph :—

p. 86, ll. 28–30. " Meantime we would point out that the goods which are lying " at your risk at Wharf are already on rent, and we shall be thankful " to know the definite date when your proprietor in India is expected " to arrive."

10. On the 17th April 1948 Messrs. Julius & Creasy, Proctors to the
p. 87. Appellants, wrote a letter to the Respondents numbered P. 24 in the following terms :— 10

" Dear Sirs,

" Indent No. HCTS/85 Holland-Colombo Trading Society Ltd.

" We are instructed by our clients Messrs. Holland-Colombo " Trading Society Ltd. in regard to the above indent for 300 pieces " White Shirtings which goods have, as already intimated, arrived " in Ceylon but have not been taken delivery of.

" We enclose our clients' bill for R.25,742·72 being the amount " due thereon. Should you fail to make payment of the amount " due herein by the 20th instant, our clients will have no option " but to sell the goods in terms of the indent against you at your 20 " risk and on your account and claim any damages they may " sustain."

11. On the 11th day of June 1948, the Respondents having at all times refused to take up the documents, take delivery of the goods or pay
pp. 12–14, l. 14. the purchase price, the goods were sold by public auction at a price of Rs.14,052·84 which sum, together with Rs.1000, the proceeds of a previous
p. 97. abortive auction, was remitted to the Appellants. The Appellants' Proctors thereafter wrote to the Respondents on the 28th August 1948 formulating a claim for Rs.13,697·06 as damages for breach of contract.

12. On the 6th October 1949 these proceedings were instituted by 30
pp. 6 & 7. the Appellants in the District Court of Colombo by their Plaint of that date. By paragraph 4 of the Plaint the Appellants set out the terms of the contract, and in paragraph 5 alleged that the Respondents wrongfully and unlawfully failed and refused to accept the said goods in the month of February 1948 and/or pay for them at any time in accordance with the terms of the said contract of sale. In paragraph 6 the Appellants set out the damages which they alleged they had sustained. By the prayer in their said Plaint, which is set out fully in the printed Record, the Appellants prayed the Court for judgment against the Respondents, jointly and/or severally, for Rs.13,697/06 with interest and for such other 40 relief as should seem meet to the Court.

p. 8. 13. On the 3rd December 1948 the Respondents filed the Answer which is set out in full in the printed Record. By paragraph 4 of the Answer the Respondents alleged that the contract was unenforceable in law as it did not satisfy s. 5 of the Sale of Goods Ordinance. In paragraph 5 of the Answer the Respondents stated that they were entitled to refuse to accept the goods, and denied that they were in breach of contract.

In paragraph 6 of the Answer the Respondents again stated that the contract was unenforceable and further pleaded that the Plaint disclosed no cause of action against them.

14. At the beginning of the hearing in the District Court of Colombo on the 22nd September 1949 the following issues were framed :—

(1) Did the Appellant company on or about the 5th September 1947 agree to sell or sell to the Respondents and did the Respondents agree to buy or buy from the Appellant company 300 pieces of White Shirting (Dutch) called Lucinde, description and price of which are given in paragraph 4 of the Plaint ? pp. 9 & 10.

(2) Did the Respondents agree to accept the said goods and to pay the price thereof by cash against documents ?

(3) Did the Respondents fail and refuse to accept the said goods or to pay for them cash against documents ?

(4) If issues 1, 2 and 3 or any of them is answered in the affirmative, has the Appellant company suffered loss and damage ?

(5) If so, what damages is the Appellant company entitled to ?

(6) Does the agreement pleaded in paragraph 4 of the Plaint satisfy the requirements of s. 5 of the Sale of Goods Ordinance ?

(7) If not, is the alleged contract unenforceable in law ?

(8) Does the Plaint disclose a cause of action against the Respondents ?

(9) If not, can the Appellant company maintain this action ?

(10) Did the Appellant company in April 1948 indicate that a part of the goods had arrived ?

(11) Did the Respondents refuse to accept the said goods ?

(12) Were the Respondents justified in refusing to accept the said goods ?

15. At the trial it was proved that the document dated the 5th September 1947 was signed by one of the Respondents on that date in the terms set out in full in the printed Record, the material parts whereof are set out above. These terms were confirmed by the Respondents by letter marked P. 9. The other material documents and correspondence were also put in and the history of the matter, as set out above, was established. From the correspondence it was clear that the original reason why the Respondents refused to carry out the contract was that they conceived the expression " Shipment : October/in one lot, January 1948 " in the contract entitled them to delivery of the goods before the end of January 1948. It was, however, conceded at the trial on behalf of the Respondents that by shipping the goods on the 28th January 1948 the Appellants had properly carried out that part of the contract. pp. 63 & 68. p. 69. pp. 70–72, 84, l. 20. p. 38, l. 39.

16. The Judgment of the District Court appears to have been written by H. A. de Silva, D.J., and read by S. J. C. Schokman, D.J. It was delivered on the 7th December 1949. After reviewing the material facts, pp. 37–42.

the contract and the correspondence, the learned District Judge dealt with various defences raised by the Respondents. These defences were as follows :—

(A) In this contract the Appellants were acting as commission agents for the Respondents and the relationship between the parties
p. 40, ll. 11–19. was not that of vendor and purchaser ; this defence was rejected.

(B) Although the contract was for 300 pieces, in fact only 291 pieces had been delivered and therefore the Respondents were entitled to reject the whole amount. This contingency was provided
p. 40, ll. 19–30. for in clause 12 of the contract and this defence was also rejected. 10

p. 41, l. 10–p. 42, l. 17. (C) Although the issue was not raised on the pleadings the Respondents contended they were entitled to repudiate the contract because the Appellants had not tendered the policy of insurance relevant to the goods. The learned District Judge, however, also rejected this defence in the following terms :—

> " If the Defendants had not taken up that unequivocal " attitude " (i.e., that they were not prepared to accept the goods in any circumstances), " I daresay the Plaintiffs would " have undoubtedly tendered them the policy of insurance which " covered the goods. Clause 4 of the contract P. 8 undoubtedly 20 " comes to the rescue of the Plaintiffs."

p. 34, ll. 2–9. (D) Certain objections were taken as to the Appellants' right to maintain the action, but these too were rejected by the learned Judge.

p. 42. 17. The learned District Judge expressed himself satisfied that the Respondents had committed a breach of contract ; he answered issues 1, 2, 3, 4, 6, 8 and 11 in the affirmative, issues 7 and 9 did not arise ; in answer to issue 10 he found that the Appellant company intimated that all the goods had arrived. Issue 12 was answered in the negative. He thereupon gave judgment for the Appellant company for Rs.13,697/06 together with 30
p. 43. legal interest from the date of the Plaint and costs. A decree of the District Court of Colombo dated the 7th December 1949 was entered accordingly.

18. The Respondents appealed to the Supreme Court from the
p. 44. Judgment and Decree of the District Court of Colombo dated the 7th December 1949. The grounds of the appeal which are set out in full in the printed Record may be summarised as follows :—

(A) That the document P. 8 was a contract of agency and that the learned District Judge erred in accepting it as a note or memorandum within the meaning of the Sale of Goods Ordinance. 40

(B) That this contract, being on c.i.f. terms, the Appellants ought to have tendered a policy of insurance covering the goods.

(C) That the invoice indicated that the consignee was the Colombo branch of the Appellant company—the Respondents were therefore entitled to reject the goods.

(D) That the Colombo branch of the Appellant company ceased to exist on the 1st April 1948 so that the Appellants had no status to maintain the action.

(E) That the Appellants did not plead the shipment in January 1948 nor explain the delay in arrival of the ship; there was deviation by the ship.

(F) That the Appellants were liable as an agent for breach of duty.

(G) That the damages were excessive.

19. The appeal was argued on the 31st July and 1st August 1952, and on the 18th August 1952 Gratiaen, J., delivered judgment with which Gunasekara, J., agreed. After setting out the material facts the learned Judge dealt with certain preliminary points :—

(A) He held that during the period when the goods were on board the s.s. Laurenskerk, although the Respondents were wrongfully in breach of contract in refusing to take up the shipping documents, the Appellants elected, as they were entitled to do, to treat the contract as still being in operation. p. 49, l. 9.

(B) The special defences raised by the Respondents as to the Appellants' right and title to maintain the action, which were rejected by the learned District Judge, were not pressed before the Supreme Court. p. 51, l. 17.

(C) It was contended on behalf of the Respondents that as the Bill of Lading was not physically produced to them there had been no valid tender on the part of the Appellants of the relevant documents. This argument was shortly rejected. p. 52, ll. 3–26.

(D) It was contended on behalf of the Appellants that having relied on a wrongful ground for repudiating the contract, the Respondents were not subsequently entitled to rely on a valid ground of repudiation. This argument was also rejected by the Supreme Court. p. 52, l. 27–p. 53, l. 2.

20. The learned Judge stated the issue in the case, and in this appeal, in the following terms :—

" The real question for determination is whether, after the " Plaintiffs had refused to accept the Defendants' repudiation of the " contract on the earlier occasions, they had ultimately, in the " light of the events which were known by both parties to have " supervened " (i.e., the transhipment and events consequent thereon) " made a valid tender in terms of clauses 1 and 4 of P. 8 " in consequence of which tender the Defendants/Respondents " became obliged under the contract to pay the contract price. If " that question be answered in favour of the Plaintiffs, the judgment " under appeal must clearly be affirmed." p. 51, ll. 25–31.

21. It is to be noted that by clauses 1 and 4 of the contract the Appellants could perform their obligations in one of two alternative ways : pp. 63 & 64.

first, by tender or delivery of the goods or secondly, by tender or delivery of the relevant documents. In dealing with the first alternative the learned Judge defined the obligation as follows :—

p. 47, ll. 35–41.

> " They could have cleared the goods themselves upon their " arrival in the port of Colombo, and then made a valid tender " of them to the Defendants ; in that event they would, without " tendering in addition any documents relating to the goods, have " been entitled to demand contemporaneous payment of the contract " price from the purchasers together with landing charges, Customs " dues etc. paid by them but not expressed to be included in the " contract price."

In stating the position in this way the learned Judge took no account of the provision of clause 2 of the contract regarding the obligation of the Respondents to remove the goods from ship or wharf and pay all customs duties, landing, warehouse and other customary charges. Furthermore, as the Port of Colombo has in fact no deep water quays, the custom of the port is that the goods are not received directly by the consignees from the ship but by landing Companies employed under direct contract by the Port Authority, the ship being moored offshore to buoys, and delivery is effected to the consignees not by the ship but by the landing Companies on production of and verification of the documents of title passed by the Principal Collector of Customs. Evidence as to this custom was not available in the Courts below owing to no issue having been raised on these points.

p. 51, ll. 36–38.

22. Gratiaen, J., in the Supreme Court, in dealing with this aspect of the case, did not make his attitude entirely clear. Thus, at one point, he said :—

> " Similarly, the Plaintiffs did not choose (as they might well " have done in view of the provisions of clause 1) to make a valid " tender of the goods themselves after they had been discharged " from the vessel."

At another point the learned Judge said :—

p. 54, l. 41.

> " They had originally based their cause of action in the plaint " on an alleged failure of the Defendants to accept a tender of the " goods themselves and it was not suggested either at the trial " or in the course of the appeal that there had been a valid tender " in that respect. When that particular averment was denied, " the Plaintiffs were permitted by the learned Judge, in his dis- " cretion, to raise an issue in which they supplemented the cause of " action pleaded in the plaint by relying in the alternative on an " alleged breach by the Defendants of their obligation to pay cash " ' against documents.' That issue necessarily involved an acceptance " by the Plaintiffs of the burden of proving a valid tender of the " documents which, in their submission, had been wrongfully " rejected by the Defendants."

p. 7, l. 15.

It is submitted that the language of paragraph 5 of the Plaint was sufficiently wide to cover both methods of performance of the contract open to the Appellants and that in any case the plea of performance by tender of documents was allowed as an alternative to and not in substitution for the plea that valid tender of the goods themselves had been made.

Furthermore, there is no suggestion in the Judgment of the learned District Judge that the Appellants had at any time abandoned their original contention that they had performed the contract by tender of the goods. Indeed the learned District Judge himself appears to have taken the view that the Appellants performed their obligations under the contract by tender of the goods as opposed to tender of the documents, though this distinction does not seem to have been taken before him. This conclusion, however, is implicit in his answer to the eleventh issue, since a finding that the Respondents refused to accept the goods predicates a tender of the goods under the terms of the contract. It is therefore respectfully submitted that it is a matter of interpretation of the evidence whether or not the Appellants tendered the goods in accordance with the terms of the contract. pp. 42, 9 & 10.

23. The evidence on the question of the Appellants' performance of the contract, either by tender of the goods or the documents, is not as full as it no doubt might have been, since the point upon which the Supreme Court ultimately found against the Appellants was not pleaded, nor taken in argument before the District Court. Nor did the Petition of Appeal raise the point. It was only before the Supreme Court that the topic arose: there the matter was "raised in somewhat general terms but "nevertheless sufficient in form in Mr. H. V. Perera's argument." p. 51, l. 20.

24. As regards tender of the goods, it is difficult to see what more the Appellants could have done to make tender after the goods had arrived in Colombo. By their letter P. 23 of the 12th April 1949 the Appellants wrote to the Respondents as follows :—

"Meantime we would point out that the goods which are lying p. 86.
"at your risk at Wharf are already on rent, and we shall be thankful
"to know the definite date when your proprietor in India is expected
"to arrive."

Again by letter P. 24 of the 17th April 1948 Messrs. Julius & Creasy wrote to the Respondents in the following terms :—

"We are instructed by our clients Messrs. Holland-Colombo p. 87.
"Trading Society Ltd. in regard to the above indent for 300 pieces
"White Shirting which goods have, as already intimated, arrived
"in Ceylon but have not been taken delivery of.

"We enclose our clients' bill for Rs.25,742·72 being the amount
"due thereon. Should you fail to make payment of the amount
"herein by the 20th instant, our clients will have no option but to
"sell the goods in terms of the indent against you at your risk and
"on your account and claim any damages they may sustain."

Customs duty, warehouse rent and import harbour dues were under clause 2 of the contract the responsibility of the Respondents. It is submitted that one or other or both of these letters clearly amounted to tender of the goods within the meaning of clause 1 of the contract. The fact that the Appellants were or were not also pressing the Respondents to take up the documents cannot effect a tender of the goods. It was doubtless a matter of indifference to the Appellants whether the Respondents accepted the goods or the documents; for their part they had completed their contract by tendering the goods.

25. In dealing with the alternative method whereby the Appellants might perform their part of the contract, namely by tender of the relative documents, the Supreme Court came to the conclusion that under a c.i.f. contract it is the seller's duty to tender a bill of lading which gives to the purchaser (*a*) the right to receive the goods; and (*b*) a right against the shipowner who carries the goods should the goods be damaged or not delivered; that there was no evidence that the original Bill of Lading P. 19 gave any right to claim possession of the goods from the owners of the s.s. " Triport " on arrival at Colombo or any rights against that vessel in respect of the voyage from Genoa to Colombo; and that the Appellants had therefore failed to tender a valid and effectual Bill of Lading and had not fulfilled their obligations under the contract.

p. 53, l. 14–p. 54, l. 35.

26. It is respectfully submitted that the Supreme Court were wrong in law for the following reasons :—

(A) The Appellants' duty is laid down in the contract, and the question is one of interpreting the contract. The learned Judge in the Supreme Court said :—

" The selection of this particular alternative mode of delivery " had the effect of equating the contract in certain respects to a " c.i.f. contract; "

p. 53, ll. 8–10.

and therefore considered the Appellants' duty as if it were a seller's duty under another form of contract, notwithstanding that clauses 1 to 4 of the contract expressly defined the Appellants' obligations, and was at pains to point out that these might be less stringent than those imposed on a seller under a c.i.f. contract as interpreted by the learned Judge.

(B) The learned Judge set out the Appellants' duty in these terms :—

p. 47, l. 42.

" They could, after the goods had been shipped at the " foreign port in terms of the contract, have made a tender to " the Defendants either of a valid and effectual bill of lading " duly indorsed or, if they so preferred, of any other document " entitling the Defendants to obtain possession of the goods on " their arrival in the port of Colombo *from the particular vessel* " *in which they did arrive.*"

Assuming that the Supreme Court intended the words in italics to govern both the expression " the bill of lading " and " any " other document," no such obligation appears in the contract. It is submitted that the true construction of the relevant portion of clause 1 of the contract is that the Appellants might perform their obligations either (1) by tender of the bill of lading, or (2) such delivery order or other document or documents as would enable them to obtain possession of the goods.

p. 64, ll. 1–4.

By clause 11 of the contract the expression " bill of lading " is defined to include " any document issued as or purporting to be " a bill of lading containing an acknowledgment by the shipowners " or their agents of the receipt of the goods whether on board ship

p. 65, ll. 27–30.

" or for shipment or otherwise and whether alone or with any other " goods." The Bill of Lading P. 19 which the Appellants tendered to the Respondents conformed with this definition.

It was therefore not open to the Supreme Court to consider the questions whether the Bill of Lading P. 19 was sufficient to entitle the Respondents to the possession of the goods, since by tendering it the Appellants had done all they undertook to do under the contract.

(C) If, contrary to the Appellants' contention, their duty under the contract P. 8 was the same as that of a seller under a c.i.f. contract, they concede that they were under an obligation to tender to the Respondents a bill of lading which would entitle the latter to possession of the goods. There was, however, ample evidence from which the Court could and should have come to the conclusion that the Bill of Lading P. 19 satisfied this test :—

(i) It was not disputed that the Appellants themselves obtained possession of the goods. The fact that the Appellants as consignees of the bill of lading succeeded in obtaining possession of the goods by presentation of the Bill of Lading P. 19 is, it is submitted, the strongest evidence that the Appellants, as endorsees, would also have succeeded in obtaining possession.

(ii) Evidence was given by Mr. J. A. Perera, who was called on behalf of the Appellants, to the effect that P. 19 was the only bill of lading received by them in respect of the goods. No separate bill of lading, so far as the parties to this action are concerned, ever existed in relation to the on-carriage of the goods by the s.s. " Triport." p. 25, ll. 7–9.

(iii) This, it is submitted, is sufficient to move the onus on to the Respondents of showing that there was some other bill of lading in respect of the goods ; but they called no evidence of any kind on this point.

(iv) If this evidence was insufficient to raise the inference that the Bill of Lading P. 19 was adequate to secure possession of the goods, the case ought to have been remitted to the District Court for further evidence since this issue was never raised by the Appellants in the District Court. The reasons given by the Supreme Court for rejecting this course are, it is submitted, wholly inadequate. p. 54, l. 35–p. 55, l. 7.

(D) In imposing the additional burden on the Appellants, as sellers under a c.i.f. contract, of tendering a bill of lading to the Respondents which gave them all rights against the owners of the s.s. " Triport," the learned Judge relied on a *dictum* of Warrington, L.J., in *Arnhold Karbeck* v. *Blythe* [1916] 1 K.B. and on a *dictum* of Bankes, L.J., in *Hansson* v. *Hamel and Horley Ltd.* (1922), 91 L.J.K.B. 65. But these *dicta*, when read in the light of the facts of those cases, do not support the broad proposition on which the Supreme Court relied :—

(i) In the case of *Arnhold Karbeck* v. *Blythe* beans had been shipped under c.i.f. contracts from Chinese ports to Naples with provision for payment net cash in London on arrival of the goods

in port of discharge in exchange for bills of lading and insurance policies, but in no case was payment to be delayed beyond three months from the date of bills of lading. The goods were shipped on the 4th August 1914 aboard a German vessel, which on the outbreak of war took refuge in an Eastern port. At the expiration of three months from the date of bill of lading the sellers tendered the documents to the purchaser who refused to accept tender and pay the price. The Court of Appeal held that they were entitled to refuse payment inasmuch as the documents, at the date of tender, had become void and unenforceable as regards the obligations of performance by considerations of public policy and to carry out the original obligations would involve entering into contractual relations with the enemy. The contract had in effect become frustrated by the outbreak of war; with the result that the bill of lading was no longer effectual to pass any rights to the consignee against the shipowner. In the present case, however, the contract was not frustrated for the goods arrived at their destination and the bill of lading remained a valid document. The Appellants did all they could in the circumstances, since they were prepared to transfer to the Respondents by endorsement of the Bill of Lading P. 19 all rights which they, the Appellants, had against the shipowners.

(ii) In *Hansson* v. *Hamel and Horley Ltd.*, a Swedish merchant agreed to sell to an English company guano c.i.f. Norway to Japan, net cash against documents. The seller agreed with *L*, the agent of a Japanese shipping line in Hamburg, for conveyance of the goods from Hamburg to Japan on terms that *L* should sign through bills of lading as soon as the goods were in his possession. When the documents were tendered to the purchaser, the latter refused to accept and pay for them. In an action for the price the Court of Appeal, affirmed by the House of Lords, held that the ocean bills of lading were not through bills of lading, inasmuch as they afforded no protection to the purchasers on the initial voyage from Norway to Hamburg and did not satisfy the conditions of the contract. Secondly, that on a sale on c.i.f. terms the contract of affreightment must be procured on shipment, and that a bill of lading procured thirteen days after shipment in Norway, at another port in another country, was not procured on shipment. The reason therefore why the purchaser was not bound to complete was because there was no overall contract on which he could sue for the period before transhipment at Hamburg. In the present case, however, the owners of the s.s. " Laurenskerk " undertook to carry the goods from Rotterdam to Colombo, which was the full extent of the voyage, with normal provision for transhipment of the goods in the event of need. This was a normal through bill of lading covering the whole voyage. No suggestion of any kind was made that the Appellants had in any way failed in their duty to obtain a proper contract of affreightment. By endorsement of the bill of lading the Respondents would have obtained all rights which the Appellants could transfer, including those against the s.s. " Triport " as agents for the owners of the s.s. " Laurenskerk."

(E) In its application to the facts of this case the statement of principle by the Supreme Court as set out at (*b*) in paragraph 25 hereof has to be qualified in the light of the custom of the Port of Colombo as set out in paragraph 21 hereof. In the light of this custom it will be seen that the consignee does not in fact take delivery of his goods from the ship over the ship's rail on to the quay-side but from the warehouse into which they have been landed by the publicly employed landing Company. A proper adherence to the issues as formulated in the District Court would have prevented the Supreme Court from deciding the case on a point as to which this important evidence of the custom of the port was lacking.

(F) Furthermore it is submitted that the Supreme Court has put the onus the wrong way round. It was, it is submitted, incumbent on the Respondents to show at any rate a *prima facie* reason for supposing that delivery of the goods was not obtainable by them under the documents tendered.

(G) In any case it was wrong, it is submitted, to decide the case on a point which had never been pleaded or raised in the Petition of Appeal and which, if pleaded, might well have involved the calling of further evidence. Nor was the point open to the Respondents having regard to the provisions of clause 13 of the contract, there being no hint or suggestion that any such writing or written notice of the point as was required by that clause had been given within the time limited or at all.

27. From the Judgment and Decree of the Supreme Court dated the 18th August 1952 the Appellants were on the 24th September 1952 granted conditional leave to appeal to the Privy Council, the leave being made final on the 21st October 1952. pp. 55–61.

28. The Appellants humbly submit that the Judgment and Decree of the Supreme Court dated the 18th August 1952 was wrong and ought to be set aside and the Judgment of the District Court of Colombo dated the 7th December 1949 ought to be restored for the following among other

REASONS.

(1) BECAUSE there was evidence on which the Supreme Court could and should have come to the conclusion that the Appellants fulfilled their obligations under the contract by tender of the goods themselves.

(2) BECAUSE on the correct construction of the contract in question the Appellants performed their obligation under the contract by tender of the bill of lading P. 19.

(3) BECAUSE the duties of the Appellants were to be found in the contract in question and not elsewhere.

(4) BECAUSE the points on which the Supreme Court decided the case were not raised in the pleadings or in the Petition of Appeal and should not have been allowed to be ventilated at such a late stage.

(5) BECAUSE no objection or claim in writing had ever been given by the Respondents pursuant to clause 13 of the contract covering the points on which the Supreme Court decided the case.

(6) BECAUSE even if the Appellants' duties were as defined by the Supreme Court, the evidence, correctly interpreted, showed that the bill of lading P. 19 was sufficient to entitle the Respondents to possession of the goods and there was no evidence to the contrary.

(7) BECAUSE the Supreme Court misdirected itself with regard to the law laid down in the cases of *Arnhold Karbeck* v. *Blythe* and *Hansson* v. *Hamel and Horley Ltd.*

(8) BECAUSE the duty of a seller under a c.i.f. contract is to procure a normal contract of affreightment for the benefit of the purchaser; there was no evidence or suggestion that the bill of lading P. 19 which was tendered by the Appellants was otherwise than a normal and proper contract of affreightment.

(9) BECAUSE the judgment of the Supreme Court of Ceylon was wrong and ought to be set aside.

(10) BECAUSE the judgment of the District Court of Colombo was right and ought to be restored.

A. A. MOCATTA.

STEPHEN CHAPMAN.

No. 30 of 1953.

In the Privy Council.

ON APPEAL

from the Supreme Court of Ceylon.

BETWEEN

HOLLAND COLOMBO TRADING SOCIETY LIMITED (Plaintiffs) . *Appellants*

AND

S. M. K. ALAWDEEN and Others (Defendants) . . *Respondents*

Case for the Appellants

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