A

## LALA TOTARAM & SONS

*v.*

## PORTS AUTHORITY OF FIJI

[COURT OF APPEAL, 1978 (Gould V. P., Marsack J. A., Henry J. A.), 15th, 22nd March]

B

Civil Jurisdiction

*Carriage of goods by sea—loss of goods while in store—liability of Ports Authority—Ports Authority of Fiji Act* 1975 *ss.* 45, 46(1) *and* 50.

C Goods consigned to the appellant and held by the respondent in store pending collection were lost. The appellant sought to recover the value of the missing goods.

*Held :* 1. When goods are temporarily stored by the Ports Authority pending collection without any request from the consignee or acceptance by the Authority, s. 50 of the Act has no application.

D 2. The words "short delivery" in s. 45 of the Act mean goods which are not delivered, whether such goods are the whole or only part of the consignment which should have been delivered.

Case referred to: *Great Western Railway v. Willis* (1917) A. C. 148.

Appeal from the Supreme Court reversing the Magistrate's Court decision in favour of the appellant.

E

*G. P. Lala & B. C. Patel* for the appellant.

*B. N. Sweetman* for the respondent.

The following judgments were read:

MARSACK J. A. :

F This is an appeal against a judgment of the Supreme Court sitting at Suva, entered on the 5th August 1977, reversing a judgment of the Magistrate's Court under which the appellant was awarded damages against the respondent (which for convenience will be referred to herein as "the Authority") in the sum of $1045.68. Under the provisions of section 12(1)(d) of the Court of Appeal Ordinance this appeal is limited to questions of law.

G The main facts upon which the original claim was based are not in dispute. A case said to contain cotton goods, consigned to the appellant, arrived in Fiji from Hong Kong in the ship 'Straat Cumberland' on the 8th January 1976. It was entered on import warrant No. 04844 of the 23rd January 1976. After it was landed the case was stored at the Inland Freight Station, Amy Street, Suva, by direction and under

the control of the Authority. When the appellant sought to uplift the case the Authority was unable to deliver it, and the goods are presumed to have been lost. A The nature and value of the goods were not declared in writing to the Authority before they came in its custody or under its control, provision for which declaration is made in Section 46(1) of the Ports Authority of Fiji Act 20/75.

The determination of the matter requires a consideration of the legislative provisions contained in Part X of the Ports Authority of Fiji Act 1975, which Part is headed "Liability of the Authority". The sections particularly concerned are 45, B 46(1) and 50, which are in the following terms:

> "45. The Authority shall not be liable for any loss caused to any person as a result of the short delivery of or damage to any goods in its custody or under its control, other than goods the nature and value of which have been declared in accordance with the provisions of subsection (1), and transhipment goods as defined in subsection (3), of section 46 of this Act." C

> "46(1). The Authority shall only be liable for the loss of or damage to any transhipment or other goods if the nature and value of the goods were declared in writing to the Authority before they came into custody or under its control, in which case the liability of the Authority shall, subject to the provisions of the next following subsection, be limited to the sum of two thousand dollars and shall, in the case of transhipment goods, cease when the goods have been D delivered alongside the on-carrying vessel for loading."

> "50. Nothing in this Part of this Act shall apply to any goods accepted by the Authority for storage in a warehouse under its powers contained in paragraph (d) or in sub-paragraph (iv) of paragraph (f), of subsection (1) of section 11 of this Act or to any liability of the Authority in respect of any loss of the same or damage thereto." E

The learned Magistrate held that non-delivery of the goods was *prima facie* evidence of negligence and he was of the firm opinion that this was a case of bailment for reward. Accordingly, in his judgment the Authority would be liable in damages to the respondent for what he refers to as a "fundamental breach of contract". He proceeded however to hold that even if he were wrong on this aspect of the case, the present appellant was still entitled to recover on the ground that section 45 F protected the Authority only in case of "short delivery" and not "non-delivery". He adopted the definition in the Oxford English Dictionary of "short-delivery" as "delivery or shipment of goods less in quantity than agreed on or invoice". Non-delivery in the learned Magistrate's opinion does not come within its definition.

In the Supreme Court the learned Judge ruled that "short-delivery" of goods in G section 45 means "goods which are not delivered, whether such goods are the whole or part of the consignment which should have been delivered." For this reason he held that as the nature and value of the goods had not been declared, the Authority was protected by section 45 from any liability for loss of the goods held under its control.

It is first necessary, in my view, to consider the correct interpretation to be placed H on section 50 as, if section 50 applies, then sections 45 and 46(1), upon which the judgment under appeal is based, would have no application. Section 11, referred to in section 50, provides that the Authority shall have the power, inter alia, to provide

A services within a port in sorting, weighing, measuring, storing, warehousing or otherwise handling in goods. It was contended by counsel for the appellant that in uplifting the goods concerned here and storing them at the Inland Freight Station the Authority was exercising the powers conferred on it by section 11(1) (f)(iv) and therefore Part X, including sections 45 and 46, did not apply. The learned Judge held that in the present case there was no application for storage of the goods in the Inland Freight nor "acceptance by the appellant (present respondent) of the goods
B for storage in a warehouse pursuant to any application". He then proceeded to hold that section 50 of the Act had no application to the facts in this case.

It is a little difficult to ascertain from the judgment in the Court below exactly what findings of facts were made as to the taking over of the goods in question by the respondent. All that can be said with certainty is that when the goods were landed from the 'Straat Cumberland' they were taken for storage at the Inland Freight Sta-
C tion by the direction and under the control of the Ports Authority. In my view the learned Judge was correct in his interpretation of section 50; for the use of the words "accepted by the Authority for storage in a warehouse" can properly be held to imply that the acceptance followed upon an application or a request from the owner of the goods. An acceptance by one party necessarily involves some prior request or approach from the other party. This is supported by the wording of Regulation 10 of
D the Ports Authority of Fiji (Tariff) Regulations 1975 which, before fixing what is referred to as "store brand" states "where an authority's designed wharf storage area or an inland freight station is available, application for warehouse storage, open or covered, may be made in this area".

Accordingly I would hold that section 50 does not apply and the appeal falls to be decided on the interpretation of sections 45 and 46(1).

E The greater part of the argument before us was devoted to the interpretation of the phase "short delivery" in section 45. It is clear that if the inability of the Authority to produce the goods which were in its custody can be held to come within the term "short delivery" then the appellant can have no claim, because of the provisions of section 45. It could perhaps be said with propriety that the use of the term "short delivery" might give rise to some misunderstanding: as in certain circumstances the
F definition quoted from the Oxford English Dictionary, if applied, might be held to protect the Authority from liability for the loss of 90% of a consignment but not for the loss of the whole of it. Bearing in mind what I think is the clear intention of the legislation, I am of opinion that no violence will be done to the meaning of the phrase "short delivery" if it is interpreted here as "failure to deliver what had been entrusted to the Authority".

G Section 46 would appear, on the face of it, to protect the Authority in all cases where, as is the position here, no declaration as to nature and value has been furnished. In this connection the learned Judge said:

> "Section 46 makes it clear when and to what extent the Authority can be held liable for loss or damage to goods and it is only when the goods are declared that liability can arise. That is the clear intention of the legislature."

H However, the learned Judge did not pursue the matter further, but decided the appeal on the provisions of section 45, after holding that "short delivery" of the goods in section 45 means goods which are not delivered, whether such goods are the whole or part of the consignment which should have been delivered.

Sections 45 and 46 must be read together. As I see it, section 46 lays down the requirements of the declaration of nature and value of the goods, and provides for limitation of financial liability to a specific sum. It also enumerates exceptions to the rule that a declaration of nature and value of the goods may give a right to compensation. If the real significance of section 46 were that in no case would the Authority be under any liability in the absence of such declaration, then section 45 would be completely redundant. The only way to read the sections, in my opinion, is this: Section 45 covers the matter of liability for loss or damage to goods in the custody of the Authority or under its control. As they admittedly were in the present case. Section 46 is a general provisions applying to all cases where liability might attach, except those specifically referred to in section 45. Accordingly, in my view, the learned Judge was right in deciding the appeal by reference to section 45. Under that section the Authority is under no liability for the loss of goods under its control unless the restricted meaning of "short delivery", as contended by the appellant, was held not to cover the total loss as was the case here. For the reasons I have given I am of opinion that the restricted meaning cannot be accepted, and that the Authority was, in the circumstances of the present case, absolved from liability. In the result I would dismiss the appeal with costs.

HENRY. J. A.:

I have read the judgment of Marsack J. A. and respectfully agree with his conclusions. The determination of this appeal is important for all concerned in the handling and storage of cargo through ports in Fiji so I will state my reasons for such agreement.

In the result I would dismiss the appeal with costs.

This is an appeal from the Supreme Court acting in its appellate jurisdiction on an appeal from the Magistrates Court at Suva. Respondent is a statutory body created and governed by the Ports Authority of Fiji Act 1975. For convenience I shall refer to it as "the Authority" and also use the expression "the Act". Appellant claimed damages for the loss of one case of goods alleged to have been in the custody or control of the Authority and not duly delivered. The learned Magistrate found that the appellant was liable and entered judgment for $1,045.68 and costs. An appeal was made to the Supreme Court on a number of grounds which need not be set out. The learned Judge reversed the decision and gave judgment for respondent with costs in both Courts. This appeal, which is confined to points of law, has been brought against that decision.

In this Court no question was raised in respect of the finding that the Authority was primarily liable for the loss. The sole question raised in the notice of appeal was whether the provisions of section 45 enabled respondent to escape from such liability by reason of the exemptions stated therein. During argument counsel for appellant sought to argue that section 50 was a provision which exempted appellant's claim from the provisions of section 45 and therefore there was no bar to the action. Counsel for respondent raised an objection that this point was not included in the notice of appeal but said he was prepared to deal with it and so the hearing proceeded.

The Court is concerned solely with the provisions of Part X which is a code governing the extent of liability of the Authority for claims for loss or damage to

goods in its custody or control and for claims for loss or damage to vessels and goods
A on such vessels. In broad outline the scheme of Part X is:—

1. Sections 45 and 46 define the limits of liability for loss caused by short delivery of or damage to goods in the custody or control of the Authority.

2. Section 47 deals with liability for loss or damage to any vessel or goods on
B such vessel. Except to state its purpose section 47 requires no further consideration.

3. Section 50 exempts from the provisions of Part X all goods accepted for storage in a warehouse under the powers of the Authority contained in section 11(1)(d) and section 11(f) (iv) of the Act.

Section 45 provides as follows:

C "Section 45. The Authority shall not be liable for any loss caused to any person as a result of the short delivery of or damage to any goods in its custody or under its control, other than goods the nature and value of which have been declared in accordance with the provisions of subsection (1), and transhipment goods as defined in subsection (3), of section 46 of this Act."

D The provisions of sections 45 and 46 may now be summaried. Section 45 exempts the Authority from liability for any loss caused as a result of short delivery or damage to any goods in the custody of or under the control of the Authority but with two exceptions, namely, (1) goods specially declared under section 46(1), and (2) transhipment goods as defined by section 46(3). It is common ground that neither exception applies to appellant's claim. Except for the argument based on section 50 the sole question is whether or not section 45 provides a defence
E against the claim of appellant.

The contention of counsel for appellant is, to state it shortly, that, since the obligation was to deliver only one item of goods, namely, one case, there could be no short delivery in terms of that expression in section 45. It was claimed that this was an instance of non-delivery and not of short delivery and thus outside the provisions of section 45. Taken to its logical conclusion this means that, however large the num-
F ber of items required to be delivered, liability remains if *all* are not delivered but it is exempted if only *some* are not delivered. This raises an anomalous situation to say the least, so the words of section 45 must be carefully examined to see if the legislature intended such a result. If, after examination that is the meaning, then effect must be so given to section 45.

G I desire to say at once that, since the expression "non-delivery" is not used in section 45, it is not permissible to use the terms "non-delivery" and "short delivery" as mutually exclusive concepts which apply to section 45 and then to decide into which category the goods in question fall. Nor is it permissible to isolate the expression "short delivery" and consider its meaning out of the general context of section 45. What has to be construed are the words "loss caused ..... as a result of *short delivery* of or *damage* to *any goods*." I have underlined the three expressions which ought to be
H read together. The term "any goods" is the dominant expression and defines the subject matter of both short delivery and damage. The loss intended to be covered is the loss of any goods short delivered and any goods damaged. The term "any

goods" is not restricted by any contractual relationship with the Authority. That determines no more than the number or quantity of goods in the custody or control of the Authority. All such goods come within the term "any goods". It is the statute, not the transaction between the parties, which is to be construed. Once the statute, which is of general import, is construed it is then applied to the facts of the particular case.

The word "any" is of the widest import and means what it says, and is in no way limited in number merely because goods may be counted. The word "short" does not restrict the term, because, if there is a short delivery of *any*, that shortage comes within section 45. That shortage may be of all or any part of the goods held under a particular transaction but each item comes within the term "any goods".

In my judgment the loss of a single item being the only item in the custody or control of the Authority comes within section 45 therefore section 45 applies to the present case.

Reliance were placed on the decision of *Great Western Railway v. Wills* [1917] A.C. 148. I find no assistance from a case which is concerned with the construction of words used in a different instrument and referable to a particular contract. We are here concerned primarily with the expression "any goods" used in a special statute designed to cover situations which may arise in the day to day working of a port and the words must be construed in that context.

There remains the question whether or not section 50 exempts the claim of appellant from the provisions of section 45. Section 50 provides:

> "Section 50. Nothing in this Part of this Act shall apply to any goods accepted by the Authority for storage in a warehouse under its powers contained in paragraph (d) (iv) of paragraph (f), of sub-section (1) of section 11 of this Act or to any liability of the Authority in respect of any loss of the same or damage thereto."

The exemption provided for is in respect of goods accepted for storage in a warehouse set up in accordance with the provisions of section 11(1)(d), or, section 11(1) (iv) of the Act. In the end counsel for appellant did not define precisely what the point of law was as distinct from any question of fact involved. An acceptance of goods in terms of section 50 was not pleaded as a cause of action. In the Magistrates Court it appears to have been referred to only on the question whether or not a bailment had been proved and first arose in the argument of counsel for respondent (then defendant). The citation appeared to be confined to some question whether the Bailment Ordinance (Cap. 208) applied. The learned Magistrate after dealing with section 50 on that basis passed on to deal with section 45. This is consistent with the absence of any contention that section 50 ousted the operation of section 45 as is now claimed.

However section 50 was dealt with at some length by the learned Judge before he turned to deal with section 45. In these circumstances it was essential for counsel for appellant to spell out clearly what questions of law were involved as distinct from the questions of fact which the learned Judge found, particularly since his notice of appeal referred only to section 45. The learned Judge, after reviewing the method

under which the goods came into the custody of respondent by reason of the fact that they were landed from a ship and were held in the usual course until the consignee (the appellant) claimed delivery said:

> "In the instant case there was no application for storage of the goods in the Inland Freight Station nor acceptance by the appellant of the goods for storage in a warehouse pursuant to any application and in my view section 50 of the Act has no application to the facts in this case."

The goods were apparently moved from the vicinity of wharf facilities to an "inland freight station" in Amy Street Suva. This was without any request from appellant or acceptance in any form by respondent of the goods for storage in that place. The case was simply removed from one place of storage to another for the convenience of the Authority. The learned Judge after showing that the goods were held in the ordinary way until claimed by a consignee said of such removal:—

> "Before considering Part X of the Act it is necessary to consider whether the removal of the goods to the Inland Freight Station in Amy Street Suva in any way altered the legal position regarding the goods.
>
> The goods were in the physical custody of the appellant but still under Customs control until released to the consignee. It matters not whether the goods were lost at the wharf or at the Inland Freight Station."

In my judgment the findings made by the learned Judge were correct. There is no pleading and no evidence that the goods were "accepted by the Authority for storage". "Accepted" in section 50 connotes a special act of acceptance following a request that goods be stored. The term signifies a different state of affairs from carrying out the statutory machinery and powers of controlling the custody of goods arriving by ship at a port until they may be legally released to a consignee.

I would dismiss the appeal with costs.

GOULD. V. P.:

I have had the advantage of reading the judgments of Marsack J. A. and Henry J. A. in this appeal and agree with them that the appeal must be dismissed with costs. The facts are set out in the judgments of my brethren and I would like only to add a few words of my own on the subject of sections 45, 46 and 50 of the Ports Authority of Fiji Act, 1975, which have been prominent in argument.

As to section 50, I think that the subsections of section 11 metioned therein, namely s.11(1) (d) and s. 11(1) (f) (iv), tend to show that the intended reference is to that part of the Board's functions which relates to the commercial storage of goods, rather than the function of taking the goods into its custody or control for the purpose of delivering them to the consignee. Section 11(1) (d) relates to the carrying on of the business of (inter alia) warehousemen; section 11(1) (f) (iv) authorises the Authority to provide services, which may include storing and/or warehousing. Carrying on business as warehousemen differs in my opinion from the primary function of taking into custody or control. There is a separation in s. 11(1) (f) (iv) between storing and warehousing, but section 50 refers only to "accepted for storage in a warehouse," a particular variety of storage. I think the reference in section 50 points to the type of arrangement which is made between the Authority and the owner of the goods for storage on a commercial basis rather than to the position which arises automatically by virtue of the fact that the Authority has necessarily taken possession and control of the goods on arrival. Section 50 applies to the former; sections 45 and 46 to the latter.

Clearly sections 45 and 46 must be read together. Section 45 in itself creates no liability in the Authority for anything; section 46 may by implication do so but this question does not arise; it is not seriously denied that the Authority is liable under the law of bailment or negligence, unless it can claim the protection of section 45. That section provides that there is no liability in respect of goods in the Authority's custody or control except (a) goods declared under section 46(1) and (b) transhipment goods as in section 46(3). Whether transhipment goods have to be declared under both subsections (1) and (3) may not be clear but the question is immaterial. Section 46(1) deals with, and limits liability in respect of transhipment goods and declared goods (which are the "other" goods of section 46(1)). These are the two classes excepted from section 45, which means that the exemption given by the opening lines of section 45 applies to the goods now in question (being of neither of those classes) if the failure to produce and hand them over amounted to "short delivery".

Study of the two sections in combination (omitting reference to transhipment goods which can be grouped with declared goods) I arrive at the following. Declared goods might be thought to be in a higher category than undeclared goods; but there is only limited compensation (up to $2,000) for "loss of or damage to" them. I think it must be accepted that loss of or damage to such goods would include short delivery. The words used are not "total loss", and "damage" might or might not result in short delivery: and if short delivery were not included, why should there be a $2,000 limit for loss or damage, but no limit for short delivery.

But if short delivery and total loss of what I have called the higher categtory of goods (declared goods) are subject to a limited compensation why would the legislature intend, by section 45, to negate all liability for short delivery of the lower class (undeclared) but neglect to do so in the case of total loss. Why should compensation for total loss of undeclared goods be unlimited when that for declared goods is limited to $2,000? In spite of the obscure drafting of the two sections I think that to adopt the narrower construction of "short delivery" in section 45 would lead to absurdity and that the approach of the learned appellate Judge is to be upheld viz. that in section 45 "short delivery" means goods which are not delivered, whether the whole or part of the consignment which ought to have been delivered.

For these reasons, as well as for those expressed in the judgments of my learned brethren I am of opinion that the appeal must be dismissed with costs; the Court being unanimous it is so ordered.

*Appeal dismissed.*