REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL CASE NO 1356 OF 1969

MEGHJI VIRJI DODHIA ……. PLAINTIFF

VERSUS

SMITH MACKENZIE & CO LTD……..….. DEFENDANT

JUDGMENT

On 27th October 1969 the plaintiff, Mr Meghji V Dodhia, filed the present suit against Smith Mackenzie & Co Ltd, Mombasa, in their capacity as agents for British India Steam Navigation Co Ltd, Kilindini Road, Mombasa claiming Shs 20,960 for four steel trunks being part of six packages of luggage booked at Mombasa for carriage to Bombay but which were not delivered at Bombay. The defenced file on 30th January 1970 denied "each and every allegation in the plaint" and, in the alternative, denied liability under a special contract printed on the passenger ticket purchased by the plaintiff.

The first paragraph of the plaint had alleged that "the defendants acknowledged to have been shipped in apparent good order and condition on board their steamship … six items of luggage". The defendants, in reply to this, had merely pleaded special contract and had denied that they had carried the six packages as common carriers.

Later, the defendants applied for leave to make certain amendments to their defence. One of the amendments sought was to "deny having acknowledged as shipped … six items of luggage" and to deny that they "ever undertook to carry such items" and to "deny having accepted for delivery six items of luggage." This in effect denied receiving luggage for carriage or carrying such luggage. This particular amendment was disallowed but other amendments applied for were allowed.

When the case came up for hearing on 13th January 1975 the plaintiff was given leave to delete reference to Smith Mackenzie & Co Ltd, as agent for the defendant, so that the suit now became a suit against British India Steam Navigation Co Ltd, plainly and simply.

The plaintiff has produced an "excess baggage charges receipt" which was issued to him by the defendant. It is numbered 02526 and dated 9th May 1969. It is not denied that the receipt is on a form of the defendant. The receipt shows the name of the steamer as "S S Kampala", the voyage number as 157, the passenger's name as "MV Dodhia", and the passenger's ticket number as 18430. The amount paid is shown as Shs 180.

I do not accept the defendant's argument that this is just a receipt for money. There is no evidence that the defendant issues any receipt for luggage as such. Each passenger is, it seems, allowed to have carried a certain fixed amount of luggage free of charge. If the luggage belonging to a passenger does not exceed

that amount, no charge is made and, presumably, no document is prepared in respect of it. But if the luggage exceeds that amount then the shipping company is not expected to carry it except for payment. A receipt is issued in those circumstances.

In the present case, the plaintiff, it appears, had the amount of luggage allowed free and had some more. Accordingly, the receipt was made out. It is described on the face of it as "excess baggage charges receipt". This clearly shows that the defendant received from the plaintiff more luggage than was allowed free of charge.

If the defendant dares to argue, in the face of the receipt, that it received no luggage from the plaintiff, what would be the position if the luggage offered did not exceed the free limit and no document of any kind was issued? The defendant cannot be heard to say in this case that it received no luggage.

It is true that the receipt does not say that the plaintiff's luggage consisted of six or what number of packages. That is hardly the plaintiff's fault. The receipt is the defendant's own document and there was nothing to prevent the defendant from writing on it the number of packages it received. The plaintiff says that there were six packages. The defendant gives no number.

Mr Leonard Douglas Dudley, the marine superintendent or the chief superintendent of the defendant, says that luggage is handled by the E A Cargo Handling Services and that the defendant is not allowed to touch it. That may, or may not, be so. The position, as has emerged in evidence, is that somebody measures the luggage of each passenger and the defendant calculates its charges on this measurement. If the defendant does not have the opportunity to examine the luggage, then it should not issue a receipt.

It should issue a receipt only after it has examined the luggage. So far as I am concerned, the defendant is bound by its own receipt and cannot be permitted to argue that it did not receive the luggage.

An individual passenger who has brought his luggage to the harbour and has tendered it against receipt is no longer in a position to see whether the luggage is left on the wharf or is loaded into the ship. The next he expects to see the luggage is at Bombay when he disembarks. It is the duty of the defendant, the shipowner, who receives charges for carriage – the receipt is a receipt for carriage charges, nothing else – to make arrangements either itself or through agents to load the packages on to the ship, to offload them at Bombay, and deliver them to the passenger.

I now come to the second part of the argument in this case. Mr RH Khanna, for the plaintiff, argues that the defendant is a common carrier and was in that capacity responsible for carrying the plaintiff's luggage safely and for delivering it at the destination. Mr Dudley agrees that his company carries goods for all without distinction. It is, therefore, a common carrier. A distinction is sometimes drawn between carriers by land and carriers by sea. Sir Gorell Barnes P said in *Baxter's Leather Co v Royal Mail Steam Packet Co* [1908] 2 KB 626, at 630:

Shipowners are not, strictly speaking, common carriers, but they are under the same kind of liability as common carriers unless that liability is cut down by a special contract.

The liability of a common carrier was described by Lord Wright in *Paterson Steamships Ltd v Canadian Co-operative Wheat Producers Ltd* [1934] AC 538, at 544, 545 in these words:

At common law, he was called an insurer, that is he was absolutely responsible for delivering in like order and conditioner at the destination the goods bailed to him for carriage. He could avoid liability for loss or damage only by showing that the loss was due to the act of God or the King's enemies.

It has been held that the liability of a common carrier in respect of a passenger's luggage in England is the same as that in respect of goods: see *Macrow v Great Western Railway Co* (1871) LR 6 QB 612, at page 618, per Cockburn CJ.

Mr Mansur Satchu, for the defendant, has put forward an alternative on the basis of a special contract

which he thinks exempts his client from liability in any event. As Sir Gorell Barnes P points out in the *Baxter's Leather Co* Case [1908] 2 KB 626, a common carrier can cut down his ordinary liability by a special contract. On principle, that statement seems open to objection. If law imposes an absolute liability (subject, of course, to excepted perils) on a class of persons it should not be possible for them to avoid that liability except for a consideration. A common carrier can, In other words, have two tariffs, one carrying full risk and the other carrying reduced or no risk. It is nullifying the law to allow a common carrier to receive charges at the only rate in existence and, at the same time, to avoid liability partly or wholly.

But I am satisfied that the position established by a long line of cases in England is that a common carrier is under no duty to have one "full-risk" tariff and one "no risk" or "reduced risk" tariff. It can, if it so chooses (and why should it not so choose?), hold itself out to carry goods on the terms of some special contract which exempts it from all liability. That certainly is the position in England and Mr Mansur Satchu, who appears for the defendant, conducted and argued the case on this basis during the trial.

It occurred to me while I was writing this judgment that Kenya law was perhaps different. This thought suggested other issues than those which had been dealt by the two advocates at the trial. I, therefore, caused the case to be listed again for further argument and put to the advocates three further matters, namely: (1) the bearing of section 188 of the Merchant Shipping Act on the issues in this case; (2) the definition of "luggage" or "baggage"; are there any items in the plaintiff's claim which are outside such definition? And (3) the burden of proof. I heard further argument on 12th February 1976 and am now in a position to complete my judgment. Mr Mansur Satchu argued at this rehearing that Kenya law, in so far as it is different from the English law, would not apply in this case because of the special condition reading as follows which was printed on the face of the ticket:

This ticket is issued by the company and accepted by the passenger subject to the conditions and regulations on the face and reverse which shall be governed by English law.

I do not know what the words "governed by" mean in this context. The ticket is clearly issued subject to the conditions printed on the face and on the reverse of it. What is, then, the purpose of saying "which [meaning the conditions] shall be governed by English law"? A contract can be "governed by" English law, but express conditions can at the most be interpreted according to English law, (if that). If conditions are stated in clear English as they are in this case, then all that remains is to interpret them. It does not make sense to say that such conditions "shall be governed by English law".

It seems that the contract was not intended to be governed by English law. It was intended to be subject to the conditions printed on the ticket. The draftsman might have meant that the validity or otherwise of the conditions subject to which the ticket was issued should be judged according to English law; but I do not think he has succeeded in saying so. If I had to put a meaning on the stipulation I have quoted, I would rule that the words "which shall be governed by English law" are a surplusage. Then, the words of the stipulation would at least make sense.

But there is no need to speculate because Kenya law is given in full in section 188 of the Merchant Shipping Act which reads as follows:

(1)If any person receives money from another person for or in respect of a passage in a ship proceeding from a place in Kenya to any place within or outside Kenya, he shall give to the person paying the money a contract ticket signed by or on behalf of the owner or charterer of the ship.

(2)The contract ticket required by this section shall specify-

(a) the amount of the fare paid;

(b) the places between which the passenger is entitled to be carried;

(c) whether the passenger is to be berthed or unberthed;

(d) whether the passenger is entitled to free food or must purchase or provide his own food for the journey;

(e) the amount of baggage the passenger is permitted to carry free of charge and;

(f) any other rights or obligations of the parties; but such contract ticket shall not contain any clause, condition or stipulation, or refer to any clause, condition or stipulation not contained in it, which purports to indemnify the owner or charterer of the ship from the consequences of any neglect to ensure that the ship was seaworthy, or from the consequences of any neglect in the management or navigation of the ship, or which would deprive the passenger of any right or remedy which he would have enjoyed were it not for such clause, condition, stipulation or reference; and if any clause, condition, stipulation or reference as aforesaid is contained in any contract ticket in contravention of this section it shall be void.

(3) Any question which arises respecting the breach or non-performance of any stipulation in any such contract ticket may, at the option of the passenger interested, be tried before a subordinate court, and the Court may award the complainant such damages and costs as it thinks just, not exceeding three times the amount of the passage money specified in the contract ticket."

There is no scope here for the application of English law. Kenya law applies to a passenger " in a ship proceeding from a place in Kenya to any place within or outside Kenya." The requirements are quite clear and are mandatory. Any contract that does not comply with section 188 is "void". The question of whether it is valid under English law does not arise. It is not impossible that the form of the passage ticket used by the defendant is a legacy of the days when Kenya did not have its own legislation.

Mr Satchu argues that section 188 applies only to the person of passengers and not to their luggage. I do not agree. It is only subsection (2) that mentions "baggage" in clause (e) and it is this subsection which makes certain types of condition or stipulation void. I think both passengers and their luggage are covered by the provisions of section 188.

I should perhaps point out that it is not as though the Kenya law imposed on shipowners absolute liability in all circumstances. Limitation of liability is envisaged and is dealt with in part VII of the Act.

Let us now analyse the provisions of section 188. These stipulate that the owner of a ship shall give to a passenger who pays money for a journey

"a contract ticket" which "shall specify" several things including:

(e)the amount of baggage the passenger is permitted to carry free of charge; and

(f)any other rights or obligations of the parties. The original ticket issued to the plaintiff is not available but a specimen ticket has been put in by consent and this does not meet at least requirement

(e). Whether requirement (f) is met is a question of opinion: the ticket certainly emphasizes "obligations".

Having specified the requirements or conditions that the ticket must contain, the section goes on to lay down what the ticket "shall not contain".

This requirement is that the contract ticket "shall not contain" or even "refer to clause, condition or stipulation". (1): Which purports to indemnify the owner or charterer of the ship from the consequences of any neglect to ensure that the ship was seaworthy, or from the consequences of any neglect in the management or navigation of the ship,

Or(2):

Which would deprive the passenger of any right or remedy which he would have enjoyed were it not for such clause, condition, stipulation or reference. The defendant relies on a condition printed on the reverse

of the ticket the essential parts of which read as follows: Notwithstanding the other conditions and terms whether express or implied and whether statutory or otherwise to which the contract contained in or evidenced by this ticket and its performance by or on behalf of the company may or might otherwise be subject, the British India Steam Navigation Co Ltd … shall be exempted from all liability in respect of any … loss, damage … of whatever kind whenever or wherever occurring and however and by whomsoever caused of or to … any baggage, property, goods, effects, articles, matters or things belonging to or carried by, with or for any passenger …

This purports to secure to the defendant the best of all worlds. It seeks to avoid all "terms" to which the passage contract "may or might be otherwise subject". Why; it is not known. Whatever might be said about any other "express or implied" terms, I do not see how the defendant can avoid any "statutory" terms which it seeks to do, unless the statute itself confers such a right on the carrier. Section 188 certainly gives no such right. It is mandatory in terms. The contract ticket is not to contain any terms of the type mentioned. The contract ticket in the present case purports to exempt the defendant from "all liability" for loss of or damage to luggage. This cannot be upheld, because the statute says that such a stipulation "shall be void". I hold, therefore, that the condition attached to the ticket in this case is void and does not "deprive the passenger of any right or remedy which he would have enjoyed were it not for such clause".

I have already held that the defendant accepted the luggage for carriage to Bombay. Part of such luggage was not delivered to the plaintiff at Bombay. The defendant has offered no explanation of how the loss came about. Nor has it sought to bring the case within any of the excepted perils admitted by law. There is no doubt that the defendant is liable to the plaintiff. The only question is whether such liability is limited in any way.

Mr Satchu argues that subsection (3) of section 188 imposes a limit on liability. That subsection has been quoted above. It applies when a question arises, "respecting the breach or non-performance of any stipulation in any such contract ticket." The only relevant stipulation in the contract ticket in this case has been held to be void. A decision was needed not on "the breach or non-performance of any stipulation" but on the nonexistence of any relevant stipulation. But the ticket can be taken to be issued subject to the provision of section 188. In that case, it can be argued that the defendant has failed to carry out its obligation to deliver at Bombay the luggage it had accepted at Mombasa. Thus understood, the contract was subject to subsection (3). Mr RN Khanna, for the plaintiff, argues, however, that his client had the choice of Court and he decided to come to the High Court. I think Mr Khanna's contention is correct. Subsection (3) says that the passenger "may" or "shall". The wording of the provision is in fact very clear. It is that the question "may, at the option of the passenger interested, be tried before a subordinate court". The passenger is, in my opinion, not compelled to take the matter before a subordinate court. Section 188(3) goes on to say that:

The Court may award the complainant such damages and costs as it thinks just, not exceeding three times the amount of the passage money specified in the contract ticket.

Mr Satchu thinks the word "Court" here means the High Court exercising its admiralty jurisdiction because this is the definition of the term in section 2. I think Mr Satchu is here stretching his point a little too far. The word occurs in the subsection which gives the passenger the option to file a suit in a magistrates court and then says what "the Court" may award as damages. Quite clearly I think the reference is to a subordinate court.

Section 2 itself says that a given definition is to be applied "except where the context otherwise requires." I think the context of the subsection in question "otherwise requires". Unless the term is so interpreted, the subsection will mean that a passenger may take his complaint to a subordinate court and that the High Court may award him the stated damages. This does not make sense.

In any case, Mr Satchu argues, to whichever Court the passenger takes his complaint he cannot be awarded more than three times the cost of passage. I do not think this follows. The limit governs the award made by a subordinate court. I think the intention of the legislature was to enable small claims to

be decided by subordinate courts, thus saving costs. If the subsection did not exist, all claims by passengers (however negligible the size of the claims) would have to be filed in the High Court.

I reject Mr Satchu's argument and hold that a passenger is not prevented by section 188(3) from filing his claim in the High Court whether or not the claim is beyond the jurisdiction of a subordinate court. He has the "option" of suing in one Court or the other. And the jurisdiction of the High Court to award damages arising out of a contract ticket is not limited to three times the amount of the passage money.

It is not necessary to decide the further point raised by Mr Satchu that "the passage money" in this context means the cost of the passage of Mr MV Dodhia who is the plaintiff and in whose name the excess baggage charges receipt was made out. In case I am wrong in the conclusion I have reached in relation to the interpretation of section 188(3), I wish to add that in my opinion, the term "passage money" means the amount paid in fares by both Mr Dodhia and Mrs Dodhia who were traveling together and to whom the luggage booked belonged. Indeed, there is little room for doubt on this point in the present case because the receipt shows that the luggage was booked on "Ticket No 18430". The counterfoil of the ticket and the passage order show the names of passengers as "Mr and Mrs MV Dodhia." I think the name "MV Dodhia" shown on the excess baggage charges receipt must be understood to include both Mr and Mrs MV Dodhia. The words used in the subsection are "the passage money specified in the contract ticket". The ticket showed the amount US $180.20 (ie on the counterfoil). The Kenya equivalent would appear to be Shs 930 and three times this is Shs 2790. If section 188 (3) were held to be applicable to the proceedings in the High Court, then I would not be able to award more than Shs 2790.

Another question that remains to be answered is whether all the items listed in the plaint can be considered as luggage or baggage. The plaintiff's claim is for the value of the following articles:

Embroidery material for saris Shs 1,200.00

One hundred saris and ladies' clothing Shs 6,600.00

Jewellery Shs 5,000.00

Six gents' suits, twenty shirts, trousers and other gents' clothing Shs 4,500.00

One trunk full of stainless steel household utensils Shs 2,400.00

One small-plate electric cooker Shs 300.00

One electric food mixer and juicer Shs 440.00

Four steel trunks Shs 400.00

Eight padlocks Shs 120.00

Total Shs 20,960.00

Mr Khanna has drawn my attention to the definition of "baggage" in Stroud's Judicial Dictionary (4th Edn) page 244 which says, *inter alia*: Baggage means such articles of necessity, or personal convenience, as are usually carried by passengers for their personal use (*Boman v Maxwell* 9 Hump 624) and is, semble, synonymous with personal luggage, and, in the United States is the word generally used for what in England is frequently called personal luggage.

Mr Khanna thinks this definition is wide enough to include all articles for which his client claims. Mr Mr Satchu accepts this definition but emphasizes the words "necessity or personal convenience" which would exclude some of the items claimed.

To the same effect is the definition in of the word "luggage" in the same dictionary. More commonly

quoted is the definition in *Macrow v Great Western Railway Co* (1871) LR 6 QB 612 at 618, 619, 622, which is as follows:

The obligation of a railway company, or other carrier of passengers, to carry the luggage of a passenger being limited to personal luggage, it follows that it is only in respect of what property falls under the denomination of personal luggage, or has been accepted by the carrier as such, that the liability to carry safely, irrespective of negligence, attaches … The term 'ordinary luggage' being thus confined to that which is personal to the passenger and carried for his use or convenience, it follows that what is carried for the purposes of business, such as merchandise or the like, or for larger or ulterior purposes, such as articles of furniture or household goods, would not come within the description of ordinary luggage unless accepted as such by the carrier.

In *Britten v Great Northern Railway Co* [1899] 1 QB 243, Channell J introduced one or two new ideas when he said that: There are certain requirements which must exist in order that the thing may be ordinary luggage; first of all, that it must be for the passenger's personal use; and next, that it must be for use in connection with the journey, which, I understand, means that it must be something that is habitually taken by the person when he is travelling, for use, not merely during the actual journey, but for use during the time he is away from home.

The term "personal luggage" was defined in *Hudston v Midland Railway Co* (1869) LR 4 QB 366 at 371 as "that description of goods which passengers usually carry as part of their luggage". In various cases quoted in *Words and Phrases* (2nd Edn) pages 186, 178 and in 8 *English and Empire Digest* pages 128-30, the following articles were not accepted as coming within the definition of "luggage":

Violoncello carried by a violoncello player

Invalid chair

Theatrical clothing belonging to an actor

A spring horse for a child to ride on

Artists' sketches

Title deeds or bank notes carried by solicitor

Bicycle

Typewriter carried for business

These were decisions, it seems, in cases involving short-distance passengers, eg by train. The duration of the journey would be hours and the passengers would probably be intending to remain away from home for a number of days. Therefore, their requirements and habits in relation to luggage cannot be compared to those of passengers travelling by sea from one country to another; the journey would probably take a week and their stay in the country of their destination might be some months. A ship passenger would be justified in taking, for example, a small oneplate cooker and some utensils for use at the destination if he intended to stay in an independent flat.

Applying these ideas to the plaintiff's list, I think "jewellery" would certainly not be regarded as luggage. Nor do I think a passenger would put four thousand shillings worth of jewellery in a trunk carried in a ship's hold. I also disallow embroidery material valued at Shs 1200. One hundred saris also seem too many to pass as luggage. These articles should have been booked as "goods," not luggage. The other articles can, I think, be properly regarded as luggage in the circumstances of this case.

In the result, I allow the plaintiff's claim to the extent of Shs 7410. I give him judgment for that sum with costs.

Judgment for plaintiff with costs.

Dated at Nairobi this 11th day of June 1976

CHANAN SINGH

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JUDGE