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In the Privy Council.

No. 8 of 1951.

ON APPEAL FROM THE COURT OF APPEAL FOR THE COLONY OF SINGAPORE, ISLAND OF SINGAPORE

UNIVERSITY OF LONDON
W.C.1.
20 JUL 1953
INSTITUTE OF ADVANCED
LEGAL STUDIES

BETWEEN

THE FIRESTONE TIRE & RUBBER COMPANY (S.S.) LIMITED ... ... (*Plaintiffs*) APPELLANTS

AND

SINGAPORE HARBOUR BOARD ... (*Defendants*) RESPONDENTS.

CASE FOR THE APPELLANTS

RECORD

1.—This is an Appeal from a Judgment of the Court of Appeal for the Colony of Singapore, Island of Singapore (their Lordships Chief Justice Murray-Aynsley, the Honourable Mr. Justice Evans and the Honourable Mr. Justice Gordon Smith) dated the 28th March, 1950, whereby by a majority (Mr. Justice Evans dissenting) the appeal of the above-named Respondents, the Singapore Harbour Board, from a judgment of the Honourable Mr. Justice Brown dated the 9th December, 1949, in favour of the above-named Appellants, the Firestone Tire & Rubber Company (S.S.) Limited, was allowed, and it was ordered that the Respondents' costs of action and of the said appeal should be paid by the Appellants. p. 43 p. 25

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2.—The question arising for determination is whether in the events which have happened the Appellants' action against the Respondents is barred by virtue of Section 2 sub-section (2) of the Public Authorities Protection Ordinance (Cap. 149) of the Straits Settlements.

3.—The Appellants by Writ of Summons dated the 19th June, 1948, claimed against the Respondents damages for breach of a contract of bailment. By their Statement of Claim in the action delivered on the 5th July, 1948, the Appellants alleged (*inter alia*) :— pp. 1–4

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(i) That the Appellants were the consignees of a cargo of 3,960 loose new rubber tyres and 33 cases of new rubber tubes (hereinafter collectively called "the said cargo") consigned to

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them from Bombay on the S.S. " Samokla " which arrived at Singapore on the 4th July, 1946.

(ii) That the said cargo was discharged from the S.S. " Samokla " into the Respondents' godown No. 1 on the 11th, 12th, 13th and 14th July, 1946.

(iii) That the Respondents received and took charge of the said cargo upon the implied terms that it should be taken care of by the Respondents and delivered to the Appellants on request, and that in consideration thereof the Appellants paid to the Respondents the usual rent for storage space. 10

(iv) That the Respondents did not take care of, and failed to deliver to the Appellants, part of the said cargo namely 17 tyres to the total value of $2,053.10 (hereinafter called " the missing goods ") and 1 heavy duty tube to the value of $7.20. The Appellants accordingly claimed $2,060.30 damages of which $7.20 in respect of the said tube was subsequently abandoned.

pp. 4–5

4.—The Respondents by their Defence delivered on the 7th August, 1948, while admitting that on being requested by the Appellants to deliver the missing goods they failed to do so, joined issue with the Appellants on each of their other allegations and, on various grounds not in issue in this 20 appeal, denied liability to the Appellants. They further pleaded that the right or remedy claimed against them by the Appellants was for an alleged act done in pursuance of execution or intended execution of the Ports Ordinance or an alleged neglect or default in the execution of the Ports Ordinance and/or the By-Laws made thereunder, and they submitted that the action was not maintainable as it was not commenced within six months after the alleged Act, default or neglect complained of as required by Section 2 (2) of the Public Authorities' Protection Ordinance.

pp. 6–18

5.—The action was heard by Mr. Justice Brown on the 28th, 29th and 30th November, 1949, and the following relevant facts and matters were 30 proved or admitted :—

pp. 7 & 45

(i) On or about the 25th June, 1946, the Firestone Tire & Rubber Company of India Limited (hereinafter called " the consignors ") consigned the said cargo to the Appellants from Bombay per S.S. " Samokla " on the terms contained in a Bill of Lading dated in Bombay the 18th June, 1946, between the consignors and the Peninsular and Oriental Steam Navigation Company. A copy of the said Bill of Lading was sent on the 25th June, 1946, by the consignors to the Appellants.

p. 45 &
pp. 52–59

(ii) On or about the 28th June, 1946, Islay Kerr & Company 40 Limited of Singapore, Shipping Agents, as agents for the said

p. 46

Peninsular and Oriental Steam Navigation Company, supplied to the Appellants a Delivery Order dated the 28th June, 1946, addressed to the Respondents and requesting them to deliver the said cargo to the Appellants.

(iii) On or about the 4th July, 1946, the said Delivery Order was transmitted by the Appellants to the Respondents, whereby the Appellants demanded of the Respondents delivery of the said cargo, including the missing goods.

(iv) On the 4th July, 1946, the S.S. "Samokla" arrived in Singapore and berthed at godowns Nos. 1 and 2. The berth was allocated by the Respondents in consequence of an application previously lodged by the said Shipping Agents. p. 13

(v) On the 11th ,12th, 13th and 14th July, 1946, the said cargo was discharged from the S.S. "Samokla" by the Respondents' servants and was received by the Respondents into their godown No. 1 on the dock at Singapore. The said cargo was checked on the wharf by Seah Quee Bak the Respondents' Stevedore Foreman in the presence of Merdith Cole Dack the Appellants' representative. pp. 7, 8, 10

(vi) On or about the dates aforesaid parts of the said cargo were delivered by the Respondents' servants out of the godown No. 1 into lorries belonging to the Appellants or their customers, but the missing goods (which formed the remaining part of the said cargo) were lost whilst they were in the Respondents' custody, and were never delivered to the Appellants or to their order. The said Dack, the Appellants' representative, reported to the Respondents' Clerk on duty at the said godown that the missing goods were missing, and an abortive search of the premises was made. p. 8

(vii) At the same time as the said cargo was being unloaded, a large consignment of tyres for the military authorities (hereinafter called "the B.O.D.") was also being unloaded from S.S. "Samokla" into the said godown No. 1, and the said Dack suggested to the Respondents' said Clerk that the missing goods might have been taken in error by the B.O.D. In spite of this suggestion the Respondents did not then or at all communicate with the B.O.D. to enquire whether the missing goods or any of the Appellants' tyres had been taken by the B.O.D. in error. pp. 8 & 24

(viii) On the 1st August, 1946, the Appellants sent to the Respondents an invoice which operated as written notice that certain tyres (including the missing goods) and 1 tube had not been received by them from the Respondents ex S.S. "Samokla." p. 47

(ix) The Respondents, however, failed or neglected to trace the missing goods or any of them, and denied liability in respect of their loss. As a result, the Appellants have recovered neither the missing goods nor their value.

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6.—The material provisions of the Public Authorities Protection Ordinance read :—

2. (1) Where any action, prosecution or other proceeding is commenced against any person for any act done in pursuance or execution, or intended execution of any Ordinance or Rules made there under or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Ordinance, Rules, duty, or authority the following subsections shall have effect.

(2) The action, prosecution or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect or default complained of, or in case of a continuance of injury or damage, within six months next after the ceasing thereof: 10

7.—Section 73 of the Ports Ordinance (so far as material) reads :—
The Board may—

(c) carry on the business of builders and repairers of ships and machinery, of wharfingers and warehousemen, of dealers in coal and other kinds of fuel and dealers in stores connected with or required in the above-named business. 20

pp. 12, 21

8.—It was the contention of the Respondents that the word " may " in Section 73 should be construed as " must," that the Respondents were therefore obliged by the Ports Ordinance to provide godowns and carry on the business of warehousemen and that in storing the said cargo they were acting in the execution of a public duty or authority.

p. 17

9.—The Appellants in reply to such contention submitted that " may " in the said Section 73 of the Ports Ordinance could not be read as " must," and they drew attention (*inter alia*) to item (p) therein, reading :—
The Board may

(p) be insurers of goods in the custody of the Board. 30

10.—In further support of their submission that the said Section 73 of the Ports Ordinance and the By-Laws made under the Ports Ordinance were permissive and not imperative, the Appellants also drew attention (*inter alia*) to

BY-LAW 39 :

p. 17

Liability for storage space

39. The Board shall not be bound to find storage for any goods either in the godowns or in the open, and after notification to the owners, consignees, shippers, or agents of the ship that accommodation for such goods is not available, the Board shall not be responsible for any loss or damage that may accrue from whatever cause or reason to such goods and the Board may remove such goods at the expense of the Owner. 40

11.—The learned Judge held :— RECORD

(i) that the missing goods were received by the Respondents in their godown ; p. 19

(ii) that when the Respondents' servants took the said cargo from the wharf to the godown, the Respondents were impliedly contracting to act as bailees of the said cargo for a reward which they were statutorily empowered to fix ; p. 20

(iii) that the Respondents were liable to the Appellants for breach of their contract of bailment, in that not having communicated with the B.O.D. after they had been notified that some of the Appellants' tyres were missing, they had not taken every reasonable step in using due care and diligence to keep the said cargo in safe custody, and that they had not anyhow discharged their burden of proving that the loss of the missing goods was not due to any fault of theirs ; p. 24 10 p. 25

(iv) that in considering whether the Appellants' action was barred by the Public Authorities Protection Ordinance, notwithstanding that the Respondents were undoubtedly a public Authority, on the facts as found and the authorities as reviewed, the test to be applied could be thus expressed : " Were the " defendants " (referring to the Respondents) " dealing with the " plaintiffs " (referring to the Appellants) " as members of the " public in the course of an implied contract which was truly " founded on their statutory powers or their public position ? " Or were they dealing with the plaintiffs " (referring to the Appellants) " as individuals in the course of an implied contract " which was an incident in carrying on their business as ware- " housemen ? " p. 21 pp. 21–23 20 p. 23

(v) that this case fell within the latter category ;

(vi) that even leaving By-Law 39 aforementioned out of account, there was nothing in the Ports Ordinance which compelled the Respondents to store the said cargo, nor were the Appellants, for their part, bound to store the said cargo in the Respondents' godown ; 30

(vii) that the authority which enabled the Respondents to store the said cargo, namely, Section 73 (c) of the Ports Ordinance, was no more than a general authority to " carry on the business of warehousemen " ; and

(viii) that the action was accordingly not barred by the Public Authorities Protection Ordinance. p. 24 40

12.—On the 9th December, 1949, the learned Judge therefore adjudged that the Appellants whould recover from the Respondents the sum of $2,053.10 with costs, and judgment was entered accordingly. p. 25

RECORD

13.—The Respondents appealed against the said Judgment to the Court of Appeal for the Colony of Singapore, Island of Singapore, and the appeal was heard before Chief Justice Murray-Aynsley, Mr. Justice Evans and Mr. Justice Gordon Smith.

pp. 26–44

14.—On the 28th March, 1950, Judgments were delivered allowing the appeal by a majority (Mr. Justice Evans dissenting).

pp. 26–28

15.—The learned Chief Justice held that the Respondents were bailees for reward, that they had not shown the cause of the loss of the missing goods and had not discharged the onus of proving that the said loss did not occur in consequence of any neglect on their part to exercise due care and diligence. He preferred, however, to consider the claim as if it had "proceeded on the lines of the old action of detinue" and found that the Respondents had not answered such a claim. He disagreed with the finding of a specific act of negligence by the trial Judge, namely, the omission to communicate with the B.O.D., but did not consider the matter in detail owing to the conclusion to which he had come on the other points.

p. 27

pp. 28–33

With regard to the defence under the Public Authorities Protection Ordinance the learned Chief Justice, after reviewing a number of authorities, held that the Respondents were entitled to the protection of the said Ordinance and that the Appellants' action was barred. His reasons are in substance contained in the following passages :—

p. 31

(1) "The next case of importance was *Bradford Corporation* "v. *Myers* (1916, 1 A.C. 242). This case arose out of a tort "committed in the course of the performance of a contract made "by the appellants in the course of their duties as gas undertakers. "The Corporation was obliged to supply gas and authorised to "sell coke. This distinction was stressed in the judgments of "the House and this stress caused the actual decision to be "misunderstood. In view of later cases it must be taken to be "limited to cases in which there is a contract and either a breach "of contract or a tort arising out of the performance of that "contract. When there is no contract there is no distinction "between activities which are obligatory and those which are "merely permissive : (*Griffiths* v. *Smith* 1941, A.C. 170)."

p. 32

(2) "In the popular interpretation of *Myers*' case all the "emphasis was on the word 'duty.' The distinction between "duty and authority was overlooked."

(3) "I think that *Myers*' case should not now be considered "as depending entirely on the existence of a contract. I think "that too much attention has been paid to the consideration of "whether there was or was not a contract. I do not think that "that was the criterion."

p. 33

(4) "In the present case the appellants" (referring to what are now the Respondents) "are a public authority incorporated

"to carry on a trade. To do that they are given certain powers.
"As long as they use those powers to carry on that trade in my "opinion, they continue to exercise authority under that "Ordinance although they can only carry on that trade by "entering into contracts with shipowners and others, though no "particular ship has a right to use the docks. In the words of "Lord Shaw in *Myers'* case (at 262) 'when the act or neglect "'had reference to the execution of their duty or authority— "'something founded truly on their statutory powers or their "'public position—to that, and that only, will the limitation "'apply.' I think that the distinction is between performing "the public duty or authority and doing things to enable the "authority to perform those duties or authority, e.g. making "a contract for the erection of a building. I am afraid that one "cannot decide these cases without the use of some such "expression as indirect, incidental, etc.

"In my opinion, in the present case, the appellants" (referring to the Respondents) "were directly performing their "duties under the Ordinance their duties as dock owners, even "though the particular operation was not an essential part of the "work of a dock authority, and it may be that in most cases "dock authorities leave persons interested to make their own "arrangements. The appellants" (referring to the Respondents) "were entitled to use their discretion in the use of the powers "conferred by the Ordinance."

16.—Mr. Justice Gordon Smith delivered a Judgment substantially concurring with the Judgment of the learned Chief Justice on the liability of the Respondents for the loss of the goods, subject however to the protection afforded by the Public Authorities Protection Ordinance, and likewise allowing the appeal accordingly.

pp. 40–43

17.—Mr. Justice Evans, in a dissenting Judgment, expressed the view that whether or not Mr. Justice Brown was wrong in finding that there was an implied contract between the parties and that the Appellants were negligent, the appeal could not succeed on either of those grounds, since on the facts an action would lie in detinue to which there was no defence, unless the defence raised under the Public Authorities Protection Ordinance could succeed. The learned Judge came therefore to the same conclusion as the majority of the Court in favour of the Respondents on this part of the case.

pp. 34–36

18.—With regard to the defence under the Public Authorities Protection Ordinance, as to which Mr. Justice Evans dissented from the other Judgments, he too reviewed the authorities, and, whilst accepting as admitted that the Respondents were a public Authority, was of opinion that the loss of the Appellants' goods did not occur in the execution or

pp. 36–40
p. 37

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p. 39

intended execution by the Respondents of any public duty or authority. In his view, the Ports Ordinance created the Respondents, vested property in them and defined their many powers, but left their duties without precise definition. He saw no reason to read Section 73 (c) of the Ports Ordinance otherwise than as an enabling section. He rejected the Respondents' argument that they were under a duty to manage the port and that their dealings with the Appellants were essential to that duty and not merely incidental thereto. He came to the conclusion that the Respondents had no public duty to run a warehousing business and that, in so doing, they were not exercising any authority or power for the benefit 10

p. 40

of the public but were carrying on a trade. The learned Judge finally drew attention to Regulations 32A and 39 of the Respondents' By-Laws to show that the Respondents were under no duty to receive all goods or all goods discharged. Their liability in the action arose directly out of a contract express or implied which they chose to make with the Peninsular and Oriental Steam Navigation Company afore-mentioned in the course of conducting a warehousing business, and in the learned Judge's opinion the case was indistinguishable from that of *Bradford Corporation* v. *Myers* (1916 1 A.C. 242).

19.—The Appellants therefore humbly submit that this Appeal ought 20 to be allowed for the following amongst other

REASONS

1. BECAUSE, as was held both at first instance and unanimously in the Court of Appeal, subject only to the protection (if any) afforded to them by the Public Authorities Protection Ordinance, the Respondents are liable to the Appellants in detinue for their failure to deliver to the Appellants the missing goods upon the Appellants' demand therefor.

2. BECAUSE, in undertaking to store the missing goods in their godowns, the Respondents were not acting in the direct 30 execution of an Ordinance or other statutory enactment or in discharge of a duty owed to all the public alike or in the exercise of an authority exercised impartially with regard to all the public, but were acting primarily for the purpose of carrying on their business of warehousemen, and were accordingly acting outside the protection of the Public Authorities Protection Ordinance.

3. BECAUSE the distinction which was taken by the learned Chief Justice as the test of whether or not the Public Authorities Protection Ordinance applied, that is to say, the 40 distinction " between performing the public duty or authority

"and doing things to enable the authority to perform those "duties or authority," is a test which is warranted neither in principle nor on authority, and is wrong.

4. BECAUSE this case is indistinguishable in principle from the decision of the House of Lords in *Bradford Corporation* v. *Myers* (1916 1 A.C. 242).

5. BECAUSE the last aforementioned decision is in no way inconsistent with, nor has it in any way been modified explained or otherwise affected by the later decision of the House of Lords in *Griffiths* v. *Smith* (1941 A.C. 170).

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6. BECAUSE the decision of the Court of Appeal herein was wrong and ought to be reversed.

WALTER RAEBURN.
R. WITHERS PAYNE.

In the Privy Council.

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