42/85

No. 25 of 1983

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE COURT OF APPEAL IN SINGAPORE

B E T W E E N :

CHABBRA CORPORATION PTE LTD. Appellants (Plaintiffs)

and

THE OWNERS OF AND OTHER PERSONS INTERESTED IN THE SHIP OR VESSEL "JAG SHAKTI" Respondents (Defendants)

CASE FOR THE APPELLANTS

RECORD

1. This is an Appeal pursuant to leave granted by the Court of Appeal in Singapore from that part of the Judgment of that Court of Appeal (Wee Chong Jin C.J. Chua and Lai Kew Chai J.J.) delivered on 19th August 1982 whereby the Court of Appeal varied the Judgment of the High Court of the Republic of Singapore (Rajah R.), delivered on 16th March 1981, in an action in rem to the effect that the damages which the Appellants were entitled to recover from the Respondents in respect of the wrongful misdelivery by the Respondents of a cargo of salt shipped on board the Respondents' vessel JAG DHIR should be reduced from S$389,117.62 with interest, as held by Rajah J., to S$275,620.82 with interest.

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QUESTIONS

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2. The substantial questions raised by this appeal are :-

(a) In what circumstances, if any, the correct measure of damages recoverable

by a bill of lading holder from a shipowner for breach of contract in failing to deliver cargo or in conversion for misdelivery of the cargo should not be based on the market value of the goods at the time and place of the breach of contract or conversion;

(b) Whether the correct measure of damages so recoverable should take into account the fact that the bill of lading holder is a pledgee, has only a special property in the goods and has incurred expenditure in respect of the goods which is less than the whole arrived market value. 10

(c) What having regard to the evidence at the trial was the market value of the goods at the time and place of the breach of contract and conversion by misdelivery of the goods. 20

FACTS

pp.61-67 3. Under two bills of lading numbered 1 and 2 dated 15th July 1977, there were shipped on board the Respondents' vessel JAG DHIR at Tuticorin, India, a total of 5000 metric tons of Indian salt in bulk for carriage to and delivery at Chittagong in Bangladesh. One bill was in respect of 1400 metric tons, the other in respect of 3600 tons.

4. The shippers of the cargo named in the bills of lading where Bihar Supply Syndicates("BSS"). The bills of lading stated that the goods were shipped to order or his or their assigns. The notify party was Mumtazzudin & Sons of Dacca. 30

5. The vessel arrived at Chittagong on 26th July 1977. Mumtazzudin & Sons had previously been informed of its progress and on or about that date they obtained delivery by the Respondents of the cargo of 50000 metric tons of salt without production of the bills of lading. In lieu of the bills of lading Mumtazzudin signed an indemnity in favour of the Respondent Shipowners holding them harmless against any and all consequences of their delivery of the cargo without production of the bills of lading and to meet the costs of any proceedings that might be brought against the Respondents in respect of the goods. The indemnity was not subject to any monetary limit. It was countersigned by 40

Rupali Bank as guarantors. In order to procure that guarantee Mumtazzudin deposited with Rupali Bank the sum of Takas 2.7 million which at the time of the deposit was equivalent to about US$158,823 which was in turn equivalent to the sum of S$389,117.62.

5. The cargo formed part of the quantity of 21,000 metric tons of salt sold by BSS to India Overseas Corporation ("IOC") under a contract
10 made on or about 30th May 1977 at a price of US$22.00 per metric ton FIO C&F Chittagong/ Chalna. That contract provided that payment was to be by irrevocable, valid, divisible, transferable Letter of Credit for 100% value opened in favour of BSS.

6. IOC sold on the 5000 tons of salt covered by the two bills of lading referred to in paragraph 3, but at the trial and in the Court of Appeal the identity of the buyer was an
20 issue. The Respondent Shipowners contended that Mumtazzudin had purchased 7000 metric tons of salt from IOC under a written contract dated 20th May 1977 at a price of US$22.00 per metric ton C & F Chittagong/Chalna and that the parcel of 5000 metric tons was part delivery under that contract. The Appellants contended that in May 1977 IOC made an oral agreement with Mr. Sharma acting on behalf of a Singapore firm called Atlas Enterprises ("Atlas") in which he
30 was a partner whereby IOC agreed to sell 5000 metric tons of salt to Atlas at US$22.00 per metric ton C & F Bangladesh and that this shipment was made under that contract, that the bills of lading were transferred by Atlas for value to the Appellants, a Singapore corporation owned by Mr. Sharma, and that in the course of May 1977 the Plaintiffs had in turn sold the cargo on to Mumtazzudin at US$44.00 per metric ton cash against documents.

40 7. Atlas paid IOC US$110,000 in respect of the cargo shipped under the two bills of lading. This was equivalent to the total purchase price of the 5000 metric tons of salt at US$22.00 per ton. Atlas effected payment by opening two letters of credit in favour of IOC; one (No. SL164595 dated 23 May 1977) opened through United Commercial Bank ("UCB") in the sum of US$30,800 in respect of Bill of Lading No. 1

covering 1400 metric tons at US$22.00 and the other (No. 101235 dated 23 May 1977) through Banque Nationale de Paris ("BNP") in the sum of US$79,200 in respect of Bill of Lading No. 2 covering 3600 metric tons at US$22.00. IOC in turn transferred the two letters of credit to BSS.

8. On 22nd July 1977 BSS presented the shipping documents, including the two bills of lading, under the two letters of credit to the Union Bank of India ("UBI") in Calcutta as correspondent bank and duly received payment of US$110,000. BSS endorsed the bills of lading to the banks. UBI then sent the shipping documents to UCB and BNP in Singapore. 10

9. UCB and BNP received the shipping documents from UBI on 5th August 1977. They then presented them for payment to Atlas and Atlas paid the invoice amounts and charges and the bills of lading were released to them.

10. On about 8th August 1977 Atlas requested both UCB and BNP to endorse the bills of lading presented under their respective letters of credit in favour of the Appellants. 20

11. On 8th August 1977 the Appellants issued invoices in respect of the 5000 metric tons covered by the two bills of lading showing a price due of US$44.00 per metric, giving a total price for the 5000 metric tons of US$220,000. These invoices stated that the goods had been shipped for the account and risk of Mumtazzudin. On 8th and 9th August 1977 the Appellants drew two bills of exchange on Mumtazzudin for US$61,000 and US$158,400, giving a total of US$220,000, payable at sight against documents. The Appellants instructed BNP to re-present the shipping documents, including the two bills of exchange and drafts, to Mumtazzudin for collection in Dacca. BNP instructed Sonali Bank in Bangladesh to tender the documents to Mumtazzudin. 30 40

12. Mumtazzudin did not take up the documents or pay the drafts or deliver the salt to the Appellants. BNP then released the bills of lading to the Appellants.

13. At the trial the explanation for the events described in paragraphs 7 to 12 inclusive was in issue. The Appellants' case was that Atlas paid for the cargo of salt because they were the buyers under their contract with IOC referred to in paragraph 6 above, that Atlas had transferred the bills of lading to the Appellants for value and that the Appellants presented the documents to, and drew the two
10 bills of exchange on, Mumtazzudin in accordance with that contract. When BNP released the bills of lading to the Appellants they became holders of these bills, having the property in the goods and therefore title to sue the shipowners for non-delivery of the cargo under the contract in the bills of lading or in conversion and entitled to recover damages equivalent to the arrived market value of the goods in Bangladesh.

20 14. The Respondents' explanation was that Atlas opened the letters of credit for the purpose of providing finance to Mumtazzudin for a commission to enable Mumtazzudin to perform part of his contract to purchase 7000 metric tons of salt from IOC (see paragraph 6 above) and that after Atlas had paid for the goods they were to have sent the bills of lading to Mumtazzudin. They denied that the Appellants sub-sold the salt to Mumtazzudin at US$44.00
30 per ton. They submitted that Mumtazzudin obtained title to the goods, that neither Atlas nor the Appellants had property in the goods, although Atlas had a lien for the amount advanced. The Respondents contended on this basis that the Appellants had no title to sue.

15. The Respondents have in the circumstances at all material times failed to deliver up the cargo covered by either of the two bills of lading to the Appellants.

40 16. The Appellants in April 1978 issued proceedings in rem and claiming damages for failure to deliver the salt to the Appellants or conversion and subsequently effected service on a ship in the same ownership as the JAG DHIR.

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THE JUDGMENT OF RAJAH J.

17. The trial Judge made 15 numbered findings

of fact. Significant among the findings were (adopting the judge's numbering):

p.38 1.23 (2) Atlas purchased 5000 metric tons of salt from IOC at US$22.00 per ton;

p.38 1.29 (3) that Atlas made payment of the total price of this salt by means of the two letters of credit opened through UCB and BNP;

p.39 1.17 (10) that on 5th August 1977 after Atlas had made payemnt to UCP and BNP in respect of the amounts due under their respective letters of credit the bills of lading were endorsed by each of the two banks to the Appellants thus making the Appellants indorsees of the bills of lading;

p.39 1.27 (11) that being indorsees of the bills of lading the Appellants were entitled to delivery of the cargo;

p.39 1.32 (12) that Mr. Mumtazzudin, a witness called by the Respondents, was a most unreliable witness.

On the basis of his findings of fact the Judge held that the Appellants were entitled to sue the Respondents for their failure to deliver up the cargo and were entitled to recover damages from the Respondents.

18. As to the measure of damages, the Judge held that this should be based on the value of the goods at the date of conversion. He concluded that there was no reliable evidence as to what that value was and therefore held that he should take as the measure the sum of Takas 2.7 million (equivalent to S$389,117.62). This was the amount of the deposit made by Mumtazzudin with Rupali Bank in order to obtain its guarantee to the indemnity given to the Respondents in lieu of the bills of lading (see paragraph 5 above). He rejected the Appellants' submission that the value of the goods should be based on the resale price of US$220,000 under the contract between the Appellants and Mumtazzudin. He made no finding as to whether there was such a resale contract.

THE JUDGMENT OF THE COURT OF APPEAL

19. The Court of Appeal dismissed the Respondent Shipowners' appeal save to the extent that they reduced the damages recoverable by the Appellants from S$389,117.62 to S$275,620.82. The Appellants cross appeal by which they argued that the damages should be equivalent to US$220,000 was therefore dismissed. However the Court arrived at the conclusion that the Respondents were liable to the Appellants for quite different reasons from those relied on by the Judge.

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20. Basing itself on the contemporaneous documents the Court held that Mumtazzudin, and not Atlas, had purchased the cargo from IOC and that there was an agreement between Sharma of Atlas and Mumtazzudin that Atlas would finance the transaction for Mumtazzudin by causing letters of credit to be opened by Singapore banks on behalf of Mumtazzudin in favour of IOC. Atlas had then obtained the bills of lading by paying the amounts due to the banks in respect of the letters of credit and had then caused the bills of lading to be endorsed to the Appellants, Chabbra, for value.

21. The Court held that it was the intention of the parties, Mumtazzudin and Atlas, that when the bills of lading were endorsed by the shippers to the banks and then endorsed by the banks to Atlas the property in the goods would be transferred to the indorsees and ultimately to Atlas and that accordingly Atlas obtained the property in the cargo and that when the Appellants became endorsees for value the property in the goods passed to them. The Appellants were therefore entitled to sue the Respondents in contract under the Bills of Lading Act 1855. They were also entitled to sue for conversion of the cargo being "in exactly the same circumstances as the successful plaintiff bank in London Joint Stock Bank Ltd. v British Amsterdam Maritime Agency Ltd. (1910) 16 Com. Cas. 102" in as much as Mumtazzudin not having paid for the goods was not entitled to possession of the bills of lading or to delivery of the goods.

22. As to the measure of damages, the Appellants were not entitled to recover on the

basis of the arrived market value of the goods. They were entitled to recover what payment they had incurred under the two letters of credit and it was agreed that the sum incurred in respect of the letters of credit, bank charges and insurance premia was S$275,620.82. Therefore that was the appropriate measure of damages with interest.

APPELLANTS' SUBMISSIONS

23. There being no appeal by the Respondent Shipowners against the decision of the Court of Appeal that the Appellants did have title to sue as indorsees of the bills of lading, the only question that arises on this appeal is whether the appropriate measure of damages is less than the arrived value of the cargo as held by the Court of Appeal. 10

24. The Appellants submit that whether Atlas were buyers of the cargo from IOC as held by the Judge and thereby acquired the whole property in the goods upon the endorsement of the bills of lading or merely provided finance to Mumtazzudin and thereby acquired a special property in the goods, as the Court of Appeal appears to have held, the sound arrived value of the cargo at the time and place of the failure to deliver or of the misdelivery is the correct measure of damages recoverable by the Appellants. 20

25. If, as held by the Court of Appeal, Atlas were not the purchasers from IOC but were indorsees of the bills of lading in their capacity as the party financing the transaction they would be pledgees of the cargo and as such would acquire a special property in it : they would not acquire the general property unless they were buyers of the cargo : Sewell v Burdick (1884) 10 App. Cas. 74. Not having acquired the general property in the goods, Atlas could not have become parties to the contracts of carriage evidenced by the bills of lading : Sewell v Burdick, supra. Consequently after Atlas had caused the bills to be indorsed to the Appellants the latter could not sue the Respondent Shipowners for breach of the bill of lading contracts. Their sole right of action 30 40

was in tort for conversion of the cargo. Therefore in so far as the Court of Appeal held that on its analysis of the transaction the Appellants were entitled to sue the Respondent Shipowners in contract, the Judgment is incorrect and inconsistent with Sewell v Burdick.

26. At common law (applicable in Singapore) the measure of damages properly recoverable
10 by a pledgee in an action in conversion is the full market value of the goods at the date and place of the conversion notwithstanding that the pledgee's interest in the goods may be limited to securing a debt of a lesser amount than the market value : see Swire v Leach (1865) 18 C.B. (NS) 479, The Winkfield [1902] P.42. This measure of damages is based on the assumption that the pledgee would have been able to sell the pledged goods for their full
20 market value upon the pledgor's failure to discharge the underlying debt. The fact that the pledgee would have a duty to account to his pledgor to the extent that the proceeds of the pledge exceeded the underlying debt does not go to reduce the damages for conversion recoverable by the pledgee from a third party. Consequently, assuming that the Appellants' only cause of action was in tort, the correct measure of damages is the market value of the
30 goods in Bangladesh in late July 1977 and not, as held by the Court of Appeal, the amount expended by the Appellants in relation to provision of the letters of credit. In so far as the judgment of Channell J. in London Joint Stock Bank Ltd. v. British Amsterdam Maritim Agency Ltd. (1910) 16 Com. Cas. 102 at p. 108 and 104 L.T. 143 at p. 145 suggests otherwise it is incorrect.

27. If the correct analysis of the transactions
40 is that Atlas were purchasers of the cargo from IOC and the Appellants were endorsees for value from Atlas, the Appellants would have acquired the whole property in the cargo and could therefore sue the Respondent Shipowners in respect of their misdelivery of the goods for breach of contract as well as for conversion. The correct measue of damages for breach of contract will be the full market value of the goods at the time when and place where they
50 ought to have been delivered : see Rodocanachi v Milburn (1887) 18 QBD 67. The fact that by

reason of some contract with a third party the plaintiff will have to account to that party in respect of part of the damages is irrelevant to the measure of damages recoverable from the defendant in breach of contract see Crouch v London & North Western Railway Co. (1849) 2 C & K 789. Accordingly the Respondents are not entitled to have their damages limited to the Appellants' expenditure as held by the Court of Appeal. 10

28. It is submitted that the Judge was correct to base his assessment of the relevant value on the amount of the deposit made by Mumtazzudin at Rupali Bank in July 1977 to procure the Bank's countersignature to the indemnity issued to the Respondent Shipowners. The Judge found that there was no reliable evidence as to what the value of the goods was at the date of conversion. The evidence was conflicting.

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(a) Jajit Singh Seligal, director of one of the trading companies in the Inchcape Group, gave evidence that in Bangladesh, where, as found by the Judge, salt was at material times in short supply, prices ranged from US$36 to $44 in May 1977 and up to US$44 in August 1977 and above that price later in the year. 20

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(b) Mr. Sharma of the Appellants gave evidence that in mid 1977 the sellers of salt to Bangladesh could dictate the price and that wholesale importers were willing to pay from US$44 to $50. He explained that the price of US$110,000 at which he said that he had purchased 5000 metric tons of salt from IOC in May 1977 was not the full price : a further US$60,000 had been paid, giving an actual total price of US34,000. 30

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(c) The Respondents' witness Mumtazzudin said that the declared value for import permit purposes was US$168,000 at an exchange rate of 16 Takas : US$1; thus reflecting a price of US$33.00 per ton. 40

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(d) The Respondents' witness Sushil Patwari of IOC gave evidence that up to August 1977 the price for salt did not go beyond US$23 or 23.50 per metric ton. This

however appears to have been a reference to the price in India rather than in Bangladesh.

29. The damages awarded by the Judge - S$389,117.62, equivalent to US$158,823 - would reflect a price of about US$31.75 per metric ton, which, it is submitted, is not inappropriately high having regard to the conflicting evidence. The damages awarded by the Court of Appeal - S$275,620.82 - are equivalent to a price of about US$>22.50 per metric ton.

30. The Appellants respectfully submit that this Appeal should be allowed with costs for the following among other

REASONS

1. BECAUSE the Court of Appeal misdirected itself as to the correct measure of damages.

2. BECAUSE the Court of Appeal ought to have directed itself that, whether the Appellants' cause of action was for breach of the bill of lading contracts or in conversion, the correct measure of damages was the full arrived market value of the cargo at the time and place of the breach or conversion.

3. BECAUSE the Court of Appeal misdirected itself by assuming that there were circumstances in this case by reason of which it was appropriate to base the measure of damages for misdelivery of goods under the bills of lading on the amount of the Appellants' expenditure in providing finance to a third party.

4. BECAUSE the Court of Appeal erred in fact and/or law in varying the Judgment of the trial Judge by substituting an amount of damages which was below the market value of the goods at the time and place of the breach and conversion.

ANTHONY COLMAN

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No. 25 of 1983

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ON APPEAL

FROM THE COURT OF APPEAL IN SINGAPORE

BETWEEN:

CHABBRA CORPORATION PTE LTD.	Appellants (Plaintiffs)

and

THE OWNERS OF AND OTHER PERSONS INTERESTED IN THE SHIP OR VESSEL "JAG SHAKTI"	Respondents (Defendants

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CASE FOR THE APPELLANTS

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