

[FISHER, C.J. AND STUART, P.J.]

N. P. LANITIS & Co.

v.

THE IMPERIAL OTTOMAN BANK.

FISHER,
C.J.
&
STUART,
P.J.
1923
April 21

SELLING AGENTS—SHIPPING AGENTS—SURPLUS ON TWO BILLS OF LADING
EQUIVALENT TO SHORTAGE ON TWO OTHER BILLS OF LADING—RESPONSIBILITY
FOR ADJUSTMENT—RESPONSIBILITY FOR REDUCING LOSS—MEASURE OF DAMAGES.

The facts are as follows:—

Defendant bank undertook to ship by the *SS. Pruth* from Port Said a quantity of carobs for two Cyprus firms, and further to sell this quantity in England. Defendant bank entered into a contract with plaintiffs to sell a quantity of plaintiffs' carobs which plaintiffs shipped by the same steamer from Port Said. The plaintiffs' two bills of lading were handed by plaintiffs' agent at Port Said to defendant bank. On arrival in England the bags with plaintiffs' mark were found 154 short and the bags marked with the marks of the Bank's other clients were found 160 in excess. The six surplus bags appear to have been sweepings. Plaintiffs claim that these 154 bags in excess were in reality theirs and that the Bank being in charge of the whole shipment should have adjusted the error and should have sold the surplus bags marked with their other clients marks and have credited the sale price to plaintiffs.

The plaintiffs claimed £443 from defendant Bank being the value of the 154 bags entrusted by plaintiffs' agent at Port Said to the defendant Bank for sale in London, and which bags defendant Bank did not sell for plaintiffs' account.

The District Court judgment is as follows:—

In this case the plaintiffs sue the defendant Bank for the sum of £443 16s. 8d. the value of 154 bags of carobs sent by the plaintiffs to the defendant Bank, London, on two bills of lading, the one for 850 bags and the other for 725 bags. The carobs in question together with three other consignments were shipped from Port Said on the *SS. Pruth*. The defendant Bank received all five consignments correct in toto, and settled the respective bills of lading accordingly. Subsequently the Bank discovered that the plaintiffs' consignment was 154 bags short, according to the marks specified in the bills of lading, and that there was an equivalent amount of bags in excess on the bills of lading of one *Gavrielides* and one *Katoni* corresponding to their specified marks respectively. The Bank advised the plaintiffs to come to an arrangement as to the disposal of the 154 bags with the other shippers. In the

FISHER,
C.J.
&
STUART,
P.J.

N. P. LANI-
TIS & Co.

v.
THE
IMPERIAL
OTTOMAN
BANK

meanwhile the Bank sold the carobs of all the shippers as selling agents with the exception of the 154 bags in question. Three years later, viz., in February, 1921, the Bank sold the surplus bags at a greatly reduced rate and credited the accounts of Gavrielides and Katoni.

We find the Bank having accepted the bills of lading as correct were wrong in appropriating the bags in question to other shippers on the basis of their marks only. It should have been obvious to the Bank that the surplus of bags bearing the marks of Gavrielides and Katoni corresponded to the shortage of bags on the plaintiffs' consignment, therefore we find that the Bank is liable to the plaintiffs for the damages they have sustained in consequence. As to the amount of damages it is admitted that the carobs were sold at £42 per ton in October, 1918, and therefore this rate must be the measure of damages due to the plaintiffs. The Bank might have protected themselves at the time by selling the disputed bags at the same rate and retained the money until the settlement of the dispute regarding the bags in question.

Judgment for plaintiffs as claimed with costs to be taxed.

From this judgment the defendant Bank appeals.

For Appellant *Artemis* and *N. Paschalis*.

For Respondent *Lanitis*.

Judgment: CHIEF JUSTICE: In my opinion the decision of the District Court was right.

The defendant Bank was agent for sale as stated at the settlement of issues, and was employed by the plaintiffs and two other persons to sell consignments of carobs amounting to 4,057 sacks. These consignments were shipped under five bills of lading, two of which were in respect of the plaintiffs' consignments. All consignments were shipped from Port Said in the *SS. Pruth*, and on arrival in London the Bank took delivery of all the carobs in the ship, (*see* letter of the 18th December, 1918). The total number of sacks in the ship was 4,063 a number which, with the exception of six attributable apparently to sweepings, corresponded to the total number of sacks in the bills of lading. The Bank carried out their mandate with regard to all the sacks of which they took delivery except the 154 which are the subject matter of this action. By reason of these 154 sacks having been kept out of the sale, a loss, due to depreciation in price, has resulted, the amount of which has not been disputed. The Bank contend that they are absolved from any liability to the plaintiffs for any loss that has occurred because these sacks were not marked in accordance with the plaintiffs' bills of lading, the fact being that in one of the plaintiffs' bills of lading 850 sacks marked E.G.N.

were mentioned and only 800 were found to be so marked, and in the other 725 sacks marked N.C.P. were mentioned and only 621 were found to be so marked. In my opinion the Bank took, or must be held to have taken, delivery of the 154 sacks under the plaintiffs' bills of lading. They duly appropriated the sacks covered by the other bills of lading and I do not think they can be absolved from liability to the plaintiffs merely because the carobs were in sacks which did not bear the marks mentioned in the bills of lading under which they took delivery. They were identifiable by other means than the marks, and in my opinion should have been allotted to the plaintiffs' consignment and sold accordingly.

PUISNE JUDGE: This is especially a case of *ex facto jus oritur* and my judgment does not travel beyond the specific facts. It may be as appellant's counsel contends that an agent selling for various principals, whose sole ground of contact is merely the common utilization at the same time and place of the same agents' services in selling similar goods, cannot adjust quantities between the principals so that a shortage ascertained in the quantity of goods for sale attributed to one principal may be supplied out of an equivalent surplus ascertained in the quantity attributed to another principal, even where it is practically certain that there has been simply some confusion in handling the various quantities. But that is not this case and the salesman here has not been merely a simple agent for sale.

Mr. Artemis has been frankness itself, but the moment he admitted that the Bank had not only been the selling agents for the three principals concerned but also had been the shipping agent for two of them the appeal in my opinion became hopeless.

Three Cyprus exporters of carobs, Messrs. Gavrielides, Katoni and Lanitis desired in 1918 to ship certain quantities of carobs from Port Said to which port the carobs had been originally sent from Cyprus and have them sold in London through the agency of the Bank. The matter was arranged through the local Limassol (Cyprus) branch of the bank. Besides this arrangement for sale the Bank also undertook to act as shipping agent at Port Said for Messrs. Gavrielides and Katoni. Mr. Lanitis had his own shipping agent at Port Said. The carobs were all packed in sacks of similar weight and description save for markings and were all shipped on board the *SS. Pruth*; the Bank shipped in three parcels for Messrs. Gavrielides and Katoni and Mr. Lanitis' agent shipped in two parcels for him; the appropriate bills of lading were drawn respectively. All the parcels were consigned to the Bank in London. The *SS. Pruth* had no other carob cargo than the consignments shipped on behalf of the three merchants and when it arrived at

FISHER,
C.J.
&
STUART,
P.J.
N. P. LANITIS & Co.
P.
THE
IMPERIAL
OTTOMAN
BANK

FISHER,
C.J.
&
STUART,
P.J.

N. P. LANI-
TIS & Co.
v.
THE
IMPERIAL
OTTOMAN
BANK

the Port of destination it discharged (with a trifling discrepancy of six sacks in excess admittedly due to sweepings at time of shipment) the like number of sacks as the ship had given bills of lading for. The Bank as consignee took possession of all the parcels.

Now the Bank as shipping agent for Mr. Gavrielides and Mr. Katoni knew exactly how many sacks it had shipped for each of them and therefore the Bank knew on discharge by the *SS. Pruth* the exact number of sacks it was to receive for each of them. If there had been any diminution of these numbers the Bank would have known at once from the fact that it had been the shipping agent that sacks had been lost or misplaced, and if there were any increases in these numbers the Bank would also have at once known from the same fact of having been the shipping agent that these increases had not been part of the shipments it had shipped. When therefore it seemed from certain markings on the sacks that there were more sacks to be attributed to Messrs. Gavrielides and Katoni than the numbers given in the bills of lading the Bank knew from its own specific knowledge of what it had shipped that these surplus sacks over and above the numbers shipped were not to be attributed to Messrs. Gavrielides and Katoni; for the Bank to ignore its own specific knowledge would be to act unconscientiously.

But the Bank knew also, as consignee of Mr. Lanitis, that the apparent surplus (according to markings) in favour of Gavrielides and Katoni were the exact equivalent of a shortage, according to markings in the consignment under the bills of lading of Mr. Lanitis, and the Bank knew that the total carob cargo of the *SS. Pruth* had been made up of the consignments of three exporters alone and that the total cargo was itself correct. The Bank of course had not shipped for Mr. Lanitis and so could not have specific knowledge as to whether his bills of lading were correct or not, and it may be that if the Bank had been consignee and selling agent for Mr. Lanitis alone and not for the other two consignors there would not have been any duty incumbent on the Bank to seek for that which seemed not forthcoming. But here, so far from the apparent shortage not being forthcoming, the Bank had the supposed shortage in its own possession and knew too that it had the shortage in its own possession. To repeat—the total number of sacks shipped on the *SS. Pruth* was the total number discharged by the *SS. Pruth*; the consignee of all the sacks so discharged was the Bank; the number of consignors were three; the Bank had been the shipping agent for two of them and so knew both by the bills of lading of its own shipments and independently of the bills of lading by having done the shipping, and one must credit the Bank with arithmetic knowledge of elementary addition and subtraction.

Under the special circumstances of this case then the markings on the sacks are of no importance. Had the Bank been the shipping agent of all three exporters it might have shipped the whole consignment under one bill of lading and have had a common marking. Could it be listened to alleging it did not know the correct appropriation. Can the Bank have less certainty as to the number of sacks to be attributed to each because it has to do an elementary sum in arithmetic on figures within its own knowledge.

There is no evidence before us as to how the error in the use of the sacks arose. Doubtless there was great confusion in 1918 at a port such as Port Said and counsel could not say whether in fact the actual person who shipped at Port Said for Mr. Lanitis did not ship also for the Bank or vice-versa. But, however this may be, I decline to suppose that the Bank as shipping agent received from the ship's master or mate bills of lading for less numbers of sacks than it put on board for its principals Gavrielides and Katoni, and that the agent for Mr. Lanitis received a bill of lading for a much greater number of sacks than he put already aboard for Mr. Lanitis. Of course when I say knowledge of the Bank I mean knowledge that must be imputed to the Bank in consequence of its own acts and various agencies. It may very well be that at the time all this occurred particular officials at Limassol, Port Said and London of the various Bank branches had no clear individual knowledge of the facts. Still taking for granted that ignorance did prevail in the various branches of the Bank as to what had been really done in some other branch one wonders, as the Court below did, why the Bank did not sell and afterwards inquire and apportion results. All the consignments had been sent for sale. There may of course be an entirely reasonable explanation but it is not before us, but I do not think any one could have taken the Bank to task had it sold first and afterwards inquired.

FISHER,
C.J.
&
STUART,
P.J.
N. P. LANI-
TIS & Co.
v.
THE
IMPERIAL
OTTOMAN
BANK