31411 No. 8 of 1951.

In the Privy Council.

ON APPEAL

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

BETWEEN

THE FIRESTONE TIRE & RUBBER COMPANY (SS) LIMITED (Plaintiffs) . . . . . *Appellants*

AND

SINGAPORE HARBOUR BOARD (Defendants) . *Respondents.*

Case for the Respondents

RECORD.

1. This is an appeal by leave of the High Court of the Colony of Singapore against the judgment of the Court of Appeal of the said High Court dated the 3rd April 1950, whereby the judgment of Brown, J., dated the 9th December 1949, awarding the Appellants the sum of $2,053.10 with costs against the Respondents was reversed with costs. p. 44, ll. 13–41. p. 43, l. 18—p. 44, l. 12. p. 25, l. 18—p. 26, l. 9.

2. The Primary question for decision is whether, as the Respondents contend and as the Court of Appeal has held, the Appellants' claim against the Respondents is barred by section 2 of the Straits Settlements Public Authorities Protection Ordinance (Chapter 14 of the 1936 Edition of the Straits Settlements Ordinances) as amended by the Public Authorities Protection (Amendment) Ordinance 1939 (No. 19 of 1939). Section 2 of this Ordinance, as amended, is so far as is material in substantially the same terms as section 1 of the Public Authorities Protection Act 1893 and section 21 (1) of the Limitation Act 1939. Should this question be decided adversely to the Respondents the secondary question will arise of whether on the pleadings and the evidence the Respondents are in any event liable to the Appellants. p. 36, ll. 17–19. p. 33, ll. 43–44, p. 43, ll. 10–11. p. 28, ll. 15–16. pp. 3–5; p. 7, l. 23—p. 16, l. 36.

3. The Respondents are a statutory corporation constituted under the Singapore Ports Ordinance (Cap. 149) (formerly Straits Settlements Ports Ordinance) and are charged with the duty of carrying out the provisions of the Ordinance within the prescribed limits of the Port of Singapore (section 4 (4)). The members of the Board are appointed and removable by the Governor. Part XII of the Ordinance which is headed

" Works & Duties " contains a single section, section 73. By that section the Respondents are empowered to construct maintain and repair (inter alia) within the limits of the lands vested in them, wharves and also tramways, warehouses, sheds, engines, cranes, scales and other appliances for conveying, receiving and storing goods to be landed or shipped or otherwise dealt with, and to carry on the business of (inter alia) wharfingers and warehousemen. By section 46 the Respondents may levy rates for (inter alia) wharfage, storage, or demurrage at any wharf, building or other place in the possession of the Board. It is provided by section 48 (1) that the scales of rates shall after approval by the Governor of the Colony, be published in the Gazette and thereupon have the force of law. By section 60 it is provided that the Respondents shall make so far as in their power lies ample provision year by year by (inter alia) increase of rates for (inter alia) the efficient administration of the property vested in the Respondents under the Ordinance. By section 61 the Governor in Council is entitled in certain circumstances himself to increase rates. Sections 62 to 64 contain statutory provisions for the recovery of rates by the Board.

4. On or about the 18th June 1946 the Firestone Tyre & Rubber Company of India Limited (hereinafter referred to as " Firestone, Bombay ") shipped on board the Peninsula & Oriental Steamship Company's s.s. " Samokla " then lying at Bombay a cargo consisting of 3,960 loose new rubber tyres and 33 cases of new rubber tubes for carriage to Singapore under the terms of a bill of lading No. 319 and dated the 18th June 1946. The Bill of lading, which did not name any consignee, exempted the ship-owners from liability for " accident, loss or damage of any description resulting from any of the following causes or perils, viz :— . . . risk of storage afloat or on shore . . . loss by thefts or robberies by sea or by land, and whether by persons directly or indirectly in the employment or service of the Company or otherwise . . . any act neglect or default whatsoever, or error in judgment of . . . stevedores or others." The bill of lading also provided that " owing to existing conditions at port of discharge ship not responsible for short deliveries or shortage of contents " and that " the Company shall have the option of making delivery of goods either over the ship's side or from . . . warehouse or dock or wharf or quay at Consignee's risk. In all cases the Company's liability is to cease as soon as the goods are lifted from and leave the ship's deck . . ."

pp. 52–59.
p. 52, ll. 42–43.
p. 53, ll. 18–36.
p. 59, ll. 13–14.
p. 54, ll. 16–20.

5. In addition to the tyres and tubes hereinbefore mentioned the s.s. " Samokla " carried other cargo including a cargo of tyres consigned to the military authorities in Singapore.

p. 8, ll. 11–13.

6. The s.s. " Samokla " arrived at Singapore on the 22nd June 1946 and on the 28th June 1946 the Shipowners' agents issued to the Appellants a delivery order addressed to the Respondents in respect of the cargo mentioned in the bill of lading. The Appellants presented the delivery order to the Respondents on the 4th July 1946. The ship discharged between the 11th and the 14th July 1946 and (as the Respondents now admit) the whole cargo mentioned in the bill of lading was received into the Respondents' " godown ". Thereafter the Appellants took delivery

p. 46, l. 15.
p. 46, ll. 10–33.
p. 58, ll. 30–38.
p. 14, l. 6.
p. 7, ll. 43–44.
p. 8, ll. 2–4.
p. 8, ll. 4–5.
p. 8, ll. 20–23.

from the Respondents' " godown " of the whole of the cargo with the exception of the 17 tyres which form the subject matter of this action. These 17 tyres could not be found. p. 8, l. 23.

7. On the 19th June 1948 the Appellants served a writ upon the Respondent claiming " damages for breach of a contract of bailment." By their statement of Claim dated the 5th July 1948 the Appellants alleged that (A) they were the consignees of the cargo ; (B) the Respondents received the cargo into their godown and took charge of the same upon the implied terms that the said cargo should be taken care of by the Respondents and delivered to the Appellants on request ; (C) the Appellants paid to the Defendants the usual rent for storage space in consideration of the Defendants undertaking the custody of the cargo ; (D) the Respondents did not take care of part of the cargo ; and (E) the Respondents failed to deliver part of the cargo to the Appellants although requested so to do and that part was thereby lost to the Appellants. pp. 1–2. pp. 3–4, l. 24. p. 3, ll. 11–14. p. 3, ll. 15–17. p. 3, ll. 32–35. p. 3, ll. 35–38. p. 3, ll. 39–40. p. 4, ll. 1–5.

8. So far as is now material the Respondents by the Defence (A) denied that the Appellants were the consignees of the cargo (B) alleged that the 17 tyres were lost by theft from the godown despite reasonable precautions taken against theft (C) alleged that the cargo was received and held by the Respondents subject to the Respondents' bye-laws and on no other implied terms (D) denied that they ever had any contractual relationship with the Plaintiffs in connection with the cargo, and (E) alleged that the action was barred by the Public Authorities Protection Ordinance. p. 5, ll. 35–37. p. 5, ll. 1–4. p. 5, ll. 14–20. p. 5, ll. 24–26. p. 5, ll. 9–13.

9. At the trial before Brown, J., on the 28th, 29th and 30th November 1948 it was conceded by Counsel for the Appellants that there was adequate Police Protection on the Wharves and that despite that protection there was pilferage. Meredith Cole Dack, a Director of the Appellants gave evidence on their behalf that prior to June 1946 the Appellants ordered from Firestone, Bombay, as many tyres and tubes as Firestone, Bombay, could supply, that the tyres belonged to three of the Appellants' local contractors to whom they had been sold for re-sale and that all the contractors were at the godown at times during the four days when the ship was discharging. So far as possible as soon as the tyres came into the godown the witness checked them out again and delivered them to the dealers. Mr. Dack also deposed that " we had a lot of trouble keeping ours separate from the Army's and when it was over I suggested that as we were short the Army might have some of ours." The witness further stated that he paid the Respondents their charges for the tyres received, but not for the tyres not received. For these latter tyres the Respondents did not attempt to charge the Appellants. Mr. Dack was unable to say what was included in the charges but he assumed that they included the charge for stevedoring from ship to godown. p. 14, ll. 36–39. p. 7, l. 23—p. 9, l. 25. p. 7, ll. 25–26. p. 8, ll. 7–8. p. 8, l. 9. p. 8, ll. 14–15. p. 8, ll. 25–27. p. 9, ll. 3–4. p. 9, l. 4. p. 9, ll. 20–21.

10. In a reserved Judgment delivered on the 9th December 1948, Brown, J., gave judgment for the Appellants for $2,053.10 with costs to be taxed on the higher scale. On the plea under the Public Authorities Protection Ordinance Brown, J., having held (as was admitted in the Court of Appeal) that the Respondents are a public authority and having p. 18, l. 23—p. 25, l. 14. p. 21, ll. 14–18. p. 28, ll. 14–15. p. 37, ll. 42–43. p. 22, ll. 13–30.

cited two passages from the speeches in *Bradford Corporation* v. *Myers* [1916] A.C. 242, and reviewed some of the earlier authorities, said :—

p. 22, l. 41—p. 23, l. 25.

p. 23, ll. 31–44.

> " In the light of these authorities the test is to my mind clear : were the Defendants dealing with the Plaintiffs 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 as individuals in the course of an implied contract which was an incident in carrying on their business as warehousemen ? In other words, was the Plaintiffs' position analogous to the member of the public who boards a municipal tramcar, or was it analogous to that of the individual who bought the Bradford Corporation's Coke ? In my opinion the latter was the case. Leaving bye-law 39 out of account, I can find nothing in the Port's Ordinance which compelled the Defendants to store the Plaintiffs' tyres, and the authority which enabled them to do so is a general authority to ' carry on the business of Warehousemen.' Equally, the Plaintiffs were not bound to store the tyres in the Defendants' Godown."

p. 24, ll. 4–5.

The learned Judge then held that the action was not barred by the Ordinance.

11. The Respondents humbly submit that the learned Judge erred in adopting as the test, the voluntary nature of the transaction. In the Respondents' submission the true test is that laid down by Viscount Maugham in the case of *Griffiths* v. *Smith* [1941] A.C. 170, at page 185, when he says :—

p. 32, ll. 21–27.

> " It is sufficient to establish that the act was in substance done in the course of exercising for the benefit of the public an authority or power conferred on the public authority not being a mere incidental power, such as a power to carry on a trade. The words in the section are " public duty or authority " and the latter word must be taken to have its ordinary meaning of legal power or right, and does not imply a positive obligation."

Neither the case of " *Griffiths* v. *Smith* " nor that of *Western India Match Co., Ltd.* v. *Lock* [1946] K.B. 601, were cited to Brown, J. The Respondents contend that their power to carry on the business of Warehousemen within the Port of Singapore is a power exercisable and exercised for the benefit of the public and is one of the principal powers conferred upon the Respondents by the Ports Ordinance.

12. On the further issue which arose for decision the learned Judge held that the Respondents were bailees of the goods for reward, under an implied contract with the Appellants, that the Respondents could not avail themselves of the exceptions contained in the Bill of Lading and that the Respondents had the ordinary liability of such a bailee subject to the partial limitation contained in certain of their bye-laws. Brown, J., continued :

p. 20, ll. 22–25.

p. 20, l. 29—p. 21, l. 10.

p. 20, ll. 10–12.

p. 24, ll. 6–10.

> " I now come to the final question in this case of whether, upon the facts, the Defendants are liable for a breach of their

contract of bailment. Their duty as bailees was to use due care and diligence. They are not liable unless they were negligent. But the onus of proving they were not negligent lies upon them . . . "

The learned Judge then held that the Respondents were in breach of their duty to the Appellants in that they failed to make inquiries of the military authorities to ascertain whether the tyres had been taken by those authorities in error and that such action, if taken, might have resulted in the recovery of the tyres. He therefore held that the Respondents had failed to discharge the burden of proof which lay upon them. p. 24, ll. 13–27. p. 25, ll. 7–9.

13. The Respondents humbly submit that the learned Judge was in error in holding that there was any contract between the Respondents and the Appellants. By the terms of the bill of lading the owners of the s.s. " Samokla " had an option of making delivery of the goods from a warehouse and exercised that option by making or attempting to make delivery from the Respondents' godown. In the Respondent's submission they received and held the tyres on behalf of the shipowners, and if the Respondents were parties to any implied contract it was an implied contract with the shipowners, alone, by which the Respondents undertook to deliver the tyres to the order of the shipowners. The Respondents contend that such a relationship gives rise to no implied contract with the person nominated by the shipowners to take delivery of the tyres. Alternatively the Respondents' contention is that any contract of bailment with the Appellants was not a bald bailment but was a bailment subject to the terms of the bill of lading and to the Respondents' bye-laws. p. 20, ll. 22–25. p. 54, ll. 16–18.

14. On the learned Judge's decision that the Respondents were under a duty to make inquiries of the military authorities to ascertain whether the tyres had been taken by them, the Respondents humbly submit that they were under no such duty if the tyres had been lost in circumstances for which they were not liable, while if the tyres were lost in circumstances for which the Respondents were liable their failure to make such inquiries was irrelevant. p. 24, ll. 20–27.

15. From the judgment of Brown, J., the Respondents appealed to the Court of Appeal of the High Court of the Colony of Singapore.

16. By its judgment dated the 28th March 1950 the Court of Appeal (Murray-Aynsley, C.J. and Gordon Smith, J., Evans, J. dissenting) allowed the appeal, reversed the judgment of Brown, J. and ordered the Appellants to pay the Respondents' costs of the action in the Court of First Instance to be taxed on the Higher Scale as between Solicitor and Client and the Respondents' said costs in the Court of Appeal to be taxed on the Higher Scale as between Party and Party. p. 43, l. 19—p. 44, l. 11 p. 26, l. 26—p. 33, l. 45 p. 40, l. 35—p. 43, l. 14. p. 34, l. 17—p. 40, l. 16.

17. On the main question as to whether or not the Appellants' claim was barred by the Public Authorities Protection Ordinance the opinions expressed by the learned Judges were as follows :—

Murray-Aynsley, C.J., after stating that it was conceded that the Respondents were a public authority within the meaning of the p. 28, ll. 13–14.

p. 28, l. 12—p. 33, l. 33. Ordinance and reviewing the authorities including the cases of *Griffiths* v. *Smith* [1941] A.C. 170 and *Western India Match Co. Ltd.* v. *Lock* [1946] 1 K.B. 601 concluded :—

p. 33, ll. 34–42. " In my opinion, in the present case, the appellants 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 were entitled to use their discretion in the use of the powers conferred by the Ordinance. The exception might have come into play if they had entered into a contract for the building of a house for an employee, a thing permitted but not the duty or the function of a dock authority as such."

p. 42, ll. 18–43. Gordon Smith, J., after drawing attention to the speeches in *Griffiths* v. *Smith* [1941] A.C. 170 concluded :—

p. 42, l. 44—p. 43, l. 11. " It seems to me clear that the Appellants were carrying out a public duty in transferring goods discharged from a ship alongside the wharf by the ship's crew on to the wharf, to their own godowns or warehouses, pending future delivery to the consignees.

" The fact that the consignees had previously handed to the Appellants a formal Delivery Order instructing delivery of such goods to themselves does not, in my opinion, affect the matter one way or the other, nor does such Delivery Order constitute a contract between themselves and the Appellants. It may be that in the course of such transference or during the period of temporarily warehousing the goods the consignee suffers some private wrong or injury in relation to such goods due to the default or negligence of the Appellants, but the question is whether it was committed by the Appellants in the execution or intended execution of a public duty or authority. In my opinion, this was so and the Appellants are entitled to the protection of the Ordinance."

p. 39, ll. 44–45. Evans, J., dissenting, held that the Respondents were under no duty to engage in a warehousing business and that this liability
p. 40, ll. 11–13. arose out of a contract express or implied which they had chosen to make with the shipowners. In the opinion of the learned Judge
p. 40, ll. 13–14. the case was indistinguishable from that of *Bradford Corporation* v. *Myers* [1916] A.C. 242 and the Ordinance provided no defence to the Appellants' claim.

18. On the other questions which would have arisen for decision had the Court of Appeal not decided the main question in favour of the Respondents the Court expressed the following opinions :—

Murray-Aynsley, C.J., held that—

p. 27, ll. 4–5. (A) it was not known what happened to the goods ;

p. 27, l. 12. (B) the Respondents were bailees for reward ;

(C) the Appellant had not established any positive negligent act or omission but that the Respondents had not shown the cause of the loss ; p. 27, ll. 12–14.

(D) the Respondents had not answered the claim in detinue ; p. 28, ll. 4–5.

(E) it was quite probable that there was a contract between the parties, but that the question was immaterial to the defence under the Ordinance. p. 32, ll. 32–33.

Evans, J., held that—

(A) there was no implied contract between the parties ; p. 35, ll. 8–21.

(B) the case was one of detinue ; p. 35, l. 35.

(C) there was a plea of theft, but that it failed ; p. 36, ll. 3–5.

(D) the Plaintiff need only allege demand and refusal of his own goods. p. 36, ll. 5–6.

Gordon Smith, J., said that the matter could have been more simply pleaded and argued as one of detinue and not as one of implied contract arising out of bailment and that he agreed generally with the conclusions reached by the other two learned Judges and had nothing to add. p. 41, ll. 11–18.

19. As appears from the Judgment of Evans, J., the case was argued by both sides as being a claim for breach of an implied contract and not as a claim in tort. Further the claim is so pleaded. The Respondents respectfully submit that it was not open to the Court of Appeal to come to any decision upon the liability (if any) of the Respondents to the Appellants in a claim in detinue. If such a claim had been advanced at the trial an amendment of the pleadings would have been necessary and the interest of the Appellants in the tyres would have become an issue. The Respondents submit that such evidence as there is on this point shows the Appellants are not the owners of the tyres and had no sufficient interest in the goods to found an action in tort. p. 35, ll. 28–30. p. 2, ll. 7–9. p. 8, ll. 7–8.

20. Further or alternatively it is humbly submitted that the Respondents having proved that the tyres could have been lost by theft, on which hypothesis the Respondents would not have been liable to the Appellants, the burden of proof lay upon the Appellants to prove affirmatively that the tyres were lost by negligence or by a breach of contract for which the Respondents are liable and that they failed to discharge this burden. p. 14, ll. 36–39.

21. Leave to appeal to His Majesty in Council was granted by the High Court of the Colony of Singapore on the 18th September 1950. p. 44, ll. 15–41.

22. The Respondents humbly submit that this Appeal should be dismissed with costs for the following among other

REASONS

(1) BECAUSE the Appellants' claim is barred by the Public Authorities Protection Ordinance.

(2) BECAUSE the Appellants have failed to prove any contract between them and the Respondents.

(3) BECAUSE if the Respondents were in any contractual relationship with the Appellants such contract incorporated the protective clauses of the bill of lading.

(4) BECAUSE it is not open to the Appellants on the pleadings and on the conduct of the case in the Courts below to claim against the Respondents in tort.

(5) BECAUSE the Appellants have failed to prove that the tyres were lost in circumstances rendering the Respondents liable for such loss.

(6) BECAUSE the Appellants had no sufficient interest in the tyres to support a claim against the Respondents.

(7) BECAUSE the Order appealed against is right and should be affirmed.

KENNETH DIPLOCK.

J. F. DONALDSON.

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Case for the Respondents

PARKER, GARRETT & CO.,
St. Michael's Rectory,
Cornhill, E.C.3,
Respondents' Solicitors.

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