Judgment sheet

IN THE HIGH COURT OF SINDH AT KARACHI

Adm. Suit No. 20 of 2013

Present

Mr. Justice Muhammad Jaffer Raza

Muhammad Yaqoob

Versus

M/s. A.P. Moller – Maersk A.S. and another.

Plaintiff	:	Muhammad Yaqoob, through Mr. Mazhar Imtiaz Lari, Advocate a/w Syed Zeeshan Ahmed, Advocates.
Defendants	:	M/s. A.P. Moller – Maersk A.S. Through Aga Zafar Ahmed, Advocate
Dates of Hearing:		03.02.2025, 10.02.2025 and 17.02.2025
Date of announcement:		14.03.2025

J U D G M E N T

MUHAMMAD JAFFER RAZA – J: *"The law takes no cognizance of carelessness in the abstract. It concerns itself with carelessness only when there is a duty of care and where failure in that duty has caused damage. In such circumstances carelessness assumes the legal quality of negligence and entails the consequences in law of negligence. The cardinal principle of liability is that the party complained of should owe to the party complaining a duty to take care, and that the party complaining should be able to prove that he has suffered damage in consequence of a breach of that duty."* Lord Macmillan in the celebrated case of ***Donoghue v. Stevenson***[1] laid down the foundation of modern-day tort of negligence in these words, and it is on this premise that the present *lis* rests.

BRIEF FACTS

[1] (1932) AC 562.

2. Instant Admiralty Suit has been filed under Section 3(2)(H) of the Admiralty jurisdiction of this Court for recovery of US$ 15,058/-. The Plaintiff has prayed as follows: -

> "The plaintiff, therefore pray for judgement and decree for U.S. $15,058.00 against the defendants jointly and severally with cost and interest/markup/damages/compensation @ 19 % per annum, with quarterly rest thereon pendentelite and future and for any other or better relief which the Hon'ble Court may deem fit and proper in the circumstances of the case."

3. Brief facts of the case are that the Plaintiff entered into a contract with M/s. Shijiazhuang Taniyi Paper Company Ltd., China **("Shipper")** for the import of 18,337 Kgs of "uncoated offset copy paper" @ US$ 720.00 per M. Ton CFR Karachi and accordingly opened a letter of credit through a local bank. The said supplies according to the learned counsel for the Plaintiff, were shipped in 1 x 20 ft. container and the said consignment was set to have 8,400 packages/reams of uncoated offset copy paper having a gross weight of 20,875 Kgs (includes weight of the packaging material) and a net weight of 18,337 Kgs. The said container was received by the Defendant No.1 **("Carrier")** at the designated container terminal and subsequently loaded on the vessel "Maersk Drammen" on 22.11.2012, whereafter, the Defendant No.1 issued bill of lading No.MAEU/587394101 on 04.12.2012. Subsequently the said consignment was transshipped on vessel M.V. "Maersk Kingstone". The said vessel arrived at Port Qasim on 27.12.2012 and discharged the said container in the custody of DP World. The container upon arrival was weighed and weighment certificate dated 27.12.2012 was issued by DP World. According to learned counsel for the Plaintiff, after the weighment the Plaintiff was shocked and perplexed to find out that the actual weight of the consignment in the container was far less than what has been described above. Therefore, before taking the delivery of consignment, the Plaintiff applied for a

joint survey of the consignment keeping in view the weighment certificate issued by DP World. The joint survey was held on 08.01.2013, according to which, out of 8400 packages only 1000 packages were available. In terms of weighment certificate, the learned counsel for the Plaintiff submitted that the gross weight of the consignment was 2280 Kgs instead of 20,875 Kgs and hence there was a short fall of 16,154 Kgs. Simply put, the consignment received was substantially less than the weight stated in the commercial invoice and the Bill of Lading.

4. The Plaintiff in this regard has categorically stated that by virtue of Article 3(3) (c) of the Carriage of Goods by Sea Act 1925 **("Act")**, it was the responsibility of the Defendant to ensure that the container contained the goods as reflected in the Bill of Lading. It has also been argued by the learned counsel for the Plaintiff that the Defendants had not only the opportunity, but the expertise to verify the declaration of the Shipper with regard to its weight. The discrepancy in the weight, it was argued, was drastic enough for any reasonable man to identity and inform the Plaintiff. It was lastly contended that the Defendants were in breach of their duty and it was this breach on their part, which resulted in the loss incurred by the Plaintiff.

5. Conversely, learned counsel for the Defendants filed Written Statement on 15.02.2014 and at the very outset stated that the suit is not maintainable. Learned counsel for the Defendants has also stated that the Defendants were under no obligation, in either contract or tort, to verify the contents and the weight of the goods. Learned counsel for the Defendants has also stated that the container was safely carried and duly delivered to the Plaintiff and the seal was intact. Learned counsel for the Defendants in this regard has further stated that the joint survey, which is admitted by both the parties, was carried out and the seal at the time of joint survey, was intact. It has been contended by the learned counsel that Bill of Lading is always issued by the Carrier or its agent in consonance with particulars as furnished by the Shippers and therefore, the Defendants cannot assume any

responsibility for the quantity, description and weight of the goods. Learned counsel has further stated that the Defendants were under no obligation to check the weight of the container at the time when the same was loaded on to the vessel. Lastly learned counsel has submitted that the Plaintiff, if at all, has been defrauded by the Shippers for which the Defendants cannot be held accountable.

6. I have heard the learned counsel for the parties and perused the Court file with their valuable assistance. It has transpired that eight (08) issues were settled vide order dated 24.08.2015 and thereafter on 22.08.2023, by consent, the parties agreed that the only issue requiring determination was as follows: -

> "Whether bill of lading No.587394101 dated 4.12.2012 stated that the particulars in the bill of lading are *"**furnished by the Shipper"*** and that it is the ***"Shipper's Load, Stow, Weight and Count"***? If so, its effect?

Hence, in light of the said order I will only answer the above issue.

Issue No.1. Affirmative.

The Suit is dismissed with no order as to cost.

7. On 02.10.2018 Faisal Aziz advocate was appointed Commissioner for recording evidence and on 07.05.2019 the said Commissioner returned the commission to this court.

During examination, the witness of the Plaintiff Muhammad Yaqoob appeared for examination and exhibited the following documents: -

Sr. No.	Description of documents	Exhibits
1.	Original Letter of Credit No.LC/01/013/5764 dated 13.11.2011 containing three pages along with copy of Debit Advice	Ex-P/1
2.	Original commercial invoice bearing No.TY121101 dated 16.11.2012	Ex-P/2
3.	Original packing list bearing No. TY121101 dated 16.11.2012.	Ex-P/3

4.	Original bill of lading for Ocean Transport bearing No.587394101 dated 4.12.2012 containing two pages (double side)	Ex-P/4
5.	Photocopy of weighment certificate issued by DP World Terminal bearing Sr. No.400224	X/1
6.	Copy of joint survey report dated 8.1.2013	Ex. P/5
7.	Copy of legal notice dated 31.01.2013	Ex. P/6
8.	Copy of reply to legal notice dated 26.02.2013	Ex. P/7

Thereafter, the Affidavit-in-Evidence of the Defendants' representative, namely, Fazlur Rehman son of Lal Muhammad, duly authorized officer of the Defendants, was held and the said witness exhibited the following documents: -

Sr. No.	Description of documents	Exhibits
1.	Copy of board resolution dated 5.3.2015	Ex. D/1
2.	Copy of General Power of Attorney dated 27.4.2015	Ex. D/2
3.	Copy of Power of Attorney dated 27.4.2015	Ex. D/3
4.	Copy of bill of lading along with legal copy of its terms and conditions	Ex. D/4

8. My finding on the only issue is in the succeeding paragraphs.

9. The claim of the Plaintiff can conveniently be bifurcated into two parts. Claim under contract and claim under tort. Each will be dealt with separately in the judgment.

Claim under contract: -

10. The contractual aspect of the claim of the Plaintiff can be sub classified into two parts which will be dealt with separately.

- **Contractual obligation with the Carrier.**
- **Contractual obligation with the Shipper.**

Contractual obligation with the Carrier.

11. The Plaintiff's claim is under Section 3 (2) (h) of the Ordinance 1980 and is essentially a claim arising out of *"agreement relating to the carriage of goods"*. The same is reproduced below: -

> *"3. Admiralty Jurisdiction of the High Court. -*
> *(2) The Admiralty jurisdiction of the High Court shall be as follows, that is to say, jurisdiction to hear and determine any of the following causes, questions or claims-*
> *(h) any claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship;"*

12. In this respect it is first imperative to highlight that the contract between the parties to the suit is essentially the Bill of Lading and it is the terms of the said Bill of Lading which will assist in adjudication of the Plaintiff's claim. In this regard it was most candidly conceded by the Plaintiff is paragraph number 7 of the plaint as under: -

> *"That it is not denied by the plaintiff that the subject Bill of Lading had an endorsement* ***"Shipper's Load, Stow, Weight And Count"*** *and also* ***"Said to Contain"*** *and further the Bill of Lading also mentions* ***"Above particulars as declared by the Shipper, but without responsibility of or representation by Carrier"*** *but the same could not relieve the defendant No.1 from the duties and liabilities cast upon it by virtue of Article 3(3)(c) of the Carriage of Goods by Sea Act 1925."*

13. Other relevant terms of the Bill of Lading are reproduced below and it is in this context that the Plaintiff's claim under contract will be examined.

> "***11. Shipper-packed Containers***
>
> *If a Container has not been packed by the Carrier:*
> *11.1 …….*
> *11.2 …….*
> *11.3 The Merchant is responsible for the packing and sealing of all Shipper-packed Containers and, if a Shipper-packed Container is delivered by the Carrier with its original seal as affixed by the Shipper intact, the Carrier shall not be liable for any shortage of Goods ascertained at delivery.*
>
> ***14. Description of Goods***

> ***14.1*** *This bill of lading shall be prima facie evidence of the receipt by the Carrier in apparent good order and condition, except as otherwise noted, of the total number of Containers or other packages or units indicated in the box entitled "Carriers Receipt" on the reverse side hereof.*
> ***14.2*** *No representation is made by the Carrier as to the weight, contents, measure, quantity, quality, description, condition, marks, numbers of value of the Goods and Carrier shall be under no responsibility whatsoever in respect of such description or particulars.*
> ***14.3*** *The Shipper warrants to the Carrier that the particulars relating to the Goods as set out on the reverse hereof have been checked by the Shipper on receipt of this bill of lading and that such particulars, and any other particular furnished by or on behalf of the Shipper, are adequate and correct. The Shipper also warrants that the Goods are lawful goods, and contain no contraband, drugs, other illegal substances or stowaways, and that the Goods will not cause loss damage or expense to the Carrier, or to any other cargo during the Carriage.*
>
> ***16. Freight, Expenses and Fees.***
>
> *16.1 Full freight shall be payable based on particulars furnished by or on behalf of the Shipper. The Carrier may at any time open the Goods or Container(s) and, if the Shipper's particulars are incorrect the Merchant and the Goods shall be liable for the correct Freight and any expenses incurred in examining, weighing, measuring, or valuing the Goods."* (Emphasis added)

14. At this juncture it is also germane to mention that the Bill of Lading itself on the very first page mentions states **"PARTICULARS FURNISHED BY SHIPPER"**. This is in addition to what has been stated in paragraph number 7 of the plaint, reproduced above.

15. It is evident from the perusal of the clauses above that the Carrier explicitly limited its liability, more particularly in clauses 11.3, 14.2 and 14.3. Moreover, certain admissions made on behalf of the witness of the Plaintiff are detrimental to their claim. The same are reproduced below: -

> *"It is correct that the Defendant No.1 is a Ship Company and not a Terminal Operator. I have gone through the Bill of Lading (Ex-P/4). It is not in my knowledge that the Supplier stuff/Pack the consignment in the Container. I did not appoint any person at loading Port to stuff the Container. It is incorrect to suggest that I have falsely deposed above that "I have knowledge that the Supplier stuff/Pack the consignment in the Container" whereas I know that the supplier had stuffed the*

> *container. It is correct that as per joint Survey Report Ex-P/5 it was jointly determined by the Surveyors that shortage of packages is at supplier's end. It is correct that the seal of container was open in the presence of attending supervisors and Custom Officials."* (Emphasis added)

16. The contractual obligation of the Carrier was therefore restricted to carrying the shipment and did not extend, in the circumstances of this case, to the weight of the goods loaded on to the vessel. The Honourable Supreme Court of Pakistan in the case of ***Eastern Federal: Union Insurance Company versus American President Lines***[2] held that a Bill of Lading with notations like CY/CY, or "Shipper's Load and Count" mean that the Carrier was not associated with the stuffing of the container and in such case, the Carrier need not prove these facts. In the dicta of the Honourable Court all the Carrier had to establish was that the seal was intact and then the burden shifts to the merchant to prove otherwise. In paragraphs number 21 and 22 the Honourable Court held as under: -

> *"21. A bill of lading with notations like CY/CY, CFS or SLC is a prima facie evidence as provided by law but its rebuttal by the Carrier becomes easier and the burden becomes much lighter than in other cases. Such or similar notations on the bill of lading have gained currency and their meaning is well understood in shipping, commercial and banking circles to mean that the Carrier was not associated with the stuffing of the container which was exclusively done by the Shipper. In the face of such bill of lading the Carrier need not prove these facts unless rebutted. It has only to establish that such sealed container was properly and carefully loaded, handled, stowed, carried, kept, cared for and discharged. The burden will then shift to the Shipper to prove that the number of packages or goods as shown in the bill of lading were stuffed in it. Without such proof the claim for loss or damage cannot succeed. Where the bill of lading is in respect of a container without describing the goods contained in it, the words `apparent order and condition' will refer to the apparent condition of the container.*
>
> *22. In the present case admittedly the bill of lading was marked with notations CY/CY, STC, which prima facie established that the containers were stuffed exclusively by the Shipper. The respondents have proved by cogent evidence that the containers were discharged at Karachi with seals intact. They have further, by evidence in rebuttal, proved that they have discharged their duties as Carriers properly. The appellant has not produced any evidence in rebuttal to prove the number and condition*

[2] PLD 1992 SC 291

> *of bales stuffed in the containers. Therefore, for somewhat different reasons the appeal is dismissed."* (Emphasis added).

17. The Madras High Court echoed similar views in the case of ***Container Corp of India versus Priya Dyes & Chemicals***[3] and in paragraph number 32 held as under: -

> *"32. We are in entire agreement with the views expressed in the decisions referred above. In the present case also, the endorsement "SHIPPERS LOAD, STOW AND COUNT FREIGHT PREPAID CY/CY X20' CNTR SAID TO CONTAIN" found on Ex.A4 bill of lading, only means that there was no admission or acceptance of total number of cartons by the Carriers, namely defendants 1 and 2, as declared by the consignor, the third defendant. We are of the considered view that the Clauses in the endorsement, referred above, have been put on the bill of lading to protect the Carrier if there is a complaint of short delivery or non-delivery. The plaintiffs have also not discharged their burden in establishing that 250 cartons were actually shipped in the container and in such circumstances, the Carriers, namely defendants 1 and 2, and the bailees, namely defendants 4 and 5, cannot be held liable for the short delivery."* (Emphasis added).

18. It is admitted by the parties in the instant case that a joint survey was carried out. Incidentally, the result of the joint survey is also accepted by the Plaintiff and the Defendants. The conclusion of the joint survey is relevant for present purposes and the same is reproduced below: -

> *"**CONCLUSION***
> *Total consignment was consisting of 8400 packages with 18,337 M. Ton net weight. Container was received intact with original seal. Seal was broken by custom and they found 1000 packages. Therefore, it was jointly decided that the shortage of 7400 packages is at suppliers end."* (Emphasis added).

19. In light of the joint survey report, conclusion for which is reproduced above, and the candid admission of the Plaintiff witness in respect to the seal being intact, it is manifest that the seal of the container was unbroken. Under the dicta laid down by the Honourable Supreme Court in the case of ***Eastern Federal: Union Insurance Company*** (Supra) it is held that the Carrier was under

[3] AIR 2013 Madras 85 (DB)

no contractual obligation to ensure that the representation made by the Shipper was accurate and the obligation of the Shipper (which was discharged completely) was only to carry the goods safely.

20. The learned counsel for the Plaintiff, during the course of arguments, has relied heavily on Article III (more particularly the provisio to Article III (3) (c) of the Act) and the same is reproduced below: -

> *"Article III – Responsibilities and Liabilities*
> *1. The Carrier shall be bound before and at the beginning of the voyage, to exercise due diligence to-*
> *(a) make the ship seaworthy:*
> *(b) properly man, equip, and supply the ship:*
> *(c) Make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.*
>
> *2. Subject to the provisions of Article IV, the Carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried.*
> *3. After receiving the goods into his charge, the Carrier, or the master or agent of the Carrier, shall, on demand of the Shipper, issue to the Shipper a bill of lading showing among other things –*
> *(a) The leading marks necessary for identification of the goods as the same are furnished in writing by the Shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage:*
> *(b) Either the number of packages or pieces, or the quantity, or weight, as the case may be, as furnished in writing by the Shipper:*
> *(c) The apparent order and condition of the goods:*
> *Provided that no Carrier, master or agent of the Carrier, shall be bound to state or show in the bill or lading any marks, number, quantity, or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking.*
> *4. Such a bill of lading shall be prima facie evidence of the receipt by the Carrier of the goods as therein described in accordance with paragraph 3 (a), (b) and (c)."* (Emphasis added)

21. The reliance of the Plaintiff on Article III above is misplaced for the following reasons: -

a) The argument advanced by the learned counsel for the Plaintiff is essentially that the Carrier had reasonable means of checking the accuracy

of the Shipper's representation whilst keeping the seal intact. Further it is argued that the Shipper is in collusion with the Carrier. The arguments advanced are implausible and the Plaintiff has not led any evidence to establish either the reasonable means or the said collusion. Moreover, the witness of the Plaintiff during his cross examination made the following admission: -

> *"No Pre-shipment inspection was carried out at the Port of Loading. It is correct that the Defendant No.1 is a Ship Company and not a Terminal Operator."*
> *"It is incorrect to suggest that the Plaintiff and supplier are in collusion with each other"*

b) The arguments advanced by the learned counsel for the Plaintiff would arguably have merit, only if the learned counsel was able to establish that the Terminal Operator was operating under the instructions of the Carrier or was owned and operated by the Carrier. Moreover, the argument regarding the alleged collusion has crumbled by the statement of the Plaintiff witness, wherein he does not allege any collusion.

c) The reliance on Article III is also misplaced for the reason that the Act does not apply to goods coming into Pakistan (in this case China) and only applies to goods going either outside Pakistan or within Pakistan to a different port. Reliance in this regard can be made on Section 2 of the Act which is reproduced below: -

> *"SECTION 2 Application of Rules. 2. Subject to the provisions of this Act, the rules set out in the Schedule (hereinafter referred to as "the Rules") shall have effect in relation to and in connection with the carriage of goods by sea in ships carrying goods from any port in Pakistan to any other port whether in or outside [Pakistan]."*

d) The above reproduced section has been interpreted by the courts in three judgements, all of which shall be discussed and reproduced below:

In the case of ***British India Steam Navigation Co. Ltd Versus Abdul Razzaq-Abdul Kader***[4] the Honourable Supreme Court held as under: -

> *"The Pakistan Carriage of Goods by Sea Act, 1925, is also not attracted to the case, as that measure, on, the face of it, applies to carriage of goods by sea, shipped from, any port in the Provinces and the Capital of the Federation, to any other port, whether in or outside Pakistan."*

In the case of ***The National Electric Radio, Refrigeration co. (Pakistan) ltd., Karachi versus Messrs Sachiliae Lauro, Naples (Italy) and 3 others***[5] it was held as under: -

> *"10. The provisions of the rules to the Carriage of Goods by Sea Act, 1925 do not apply in relation to carriage of goods by sea in a ship. carrying goods from a foreign port to a port in Pakistan, as is the present " case. Therefore, the rights and liabilities of the parties have to ascertained by reference to the proper law of the contract, which in this case, is the Pakistan law."* (Emphasis added)

In the case of ***New Zealand Insurance co. ltd., Chittagong versus M. A. Roof and others*** [6] it was held in paragraph number 7 as under: -

> *"The Carriage of Goods by Sea Act, as In force in Pakistan, applies to the carriage of goods by sea from any port in Pakistan to any other port whether in or outside Pakistan, but does not apply to the carriage of goods by sea from a foreign port to a port in Pakistan, vide section 2 of that Act. Thus, the carriage of goods by sea between ports In Pakistan and from any port in Pakistan to any other port outside Pakistan is regulated by the provisions of the said Act of 1925, including the internationally recognised rules relating to bills of lading as contained in the schedule to that Act ; a bill of lading in respect of such carriage of goods by sea should be in conformity with the provisions of that Act and not in derogation thereof. As regards the shipment of goods from a foreign port in Pakistan, such shipment is governed by the conditions of the relevant contract of carriage, the Carriage of Goods by Sea Act, 1925, not being applicable thereto."*

In paragraph number 10 of the said judgment the Honourable Court further opined as under: -

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[4] PLD 1967 SC 68
[5] PLD 1977 Karachi 264
[6] PLD 1962 Dacca 31

> *"10. From the foregoing discussion, it therefore, follows that in the case of carriage of goods by sea between ports in Pakistan and from any port in Pakistan to any other port outside Pakistan, the Carriage of Goods by Sea Act, 1925, shall apply with the result that the suit against the Carrier and the ship in respect of loss or damage of goods shall be barred by limitation unless the suit is brought within one year after delivery of the goods or the date when the goods should have been delivered. It further follows that In the case of shipment of goods by sea from a foreign port to a port in Pakistan, such shipment is governed by the conditions of the relevant contract of carriage. If the connected bill of lading contains a clause corresponding to clause 6 of Article III of the rules relating do bills of lading referred to hereinbefore, no rule of limitation shall apply, but the claim against the Carrier and the ship in respect of loss or damage shall be extinguished at the expiry f of one year from the date of delivery of the goods or the date when the goods should have been delivered."*

e) In light of the judgements reproduced above it is clear that the reliance of the learned counsel for the Plaintiff on the Act is misplaced as the provisions of the Act are inapplicable in the case for the reason that the goods were coming into Pakistan from China. Therefore, the only contractual or legal obligation between the parties can be deciphered from the terms of the Bill of Lading. It has already been held above that the said terms restrict and limit the liability of the Carrier and in this respect the argument of the Plaintiff fails.

Contractual obligation with the Shipper.

22. It is admitted by the Plaintiff that the Plaintiff was defrauded by the Shipper. The Shipper according to learned counsel made a misrepresentation by supplying goods which were, in terms of weight, significantly different. Relevant part of the cross examination of the Plaintiff is reproduced as under: -

> *"It is correct that Cargo was insured. It is correct that I filed my Insurance Claim with the Insurance Company. The Insurance company rejected our Claim.*
> *"It is correct that as per joint Survey Report Ex-P/5 it was jointly determined by the Surveyors that shortage of packages is at supplier's end. It is correct that I have not filed any case against the Supplier. It is also correct that I have not sent any legal notice to the supplier. Voluntarily states that the supplier was untraceable. I tried to*

communicate to the supplier through email and Telephone but he did not respond.
"It is correct that the supplier has defrauded the Plaintiff."

23. The contractual obligation between the Plaintiff and the Shipper is reflected in the "commercial invoice" (Ex-P/2). The Plaintiff however has chosen, presumably realizing the futility of it, not to institute any proceedings against the Shipper. Therefore, it is held that the claim of the Plaintiff, if any, under contract, is against the Shipper and not the Defendants. No further deliberation on the said issue is warranted considering that the Shipper has not been impleaded as a party in the instant suit.

Claim under tort

24. The claim of the Plaintiff in relation to contract has been adjudicated in the aforementioned paragraphs. The said claim, as has been adjudicated above, has failed. Therefore, I will now turn to examine the claim of the Plaintiff under tort. It has been argued by the learned counsel for the Plaintiff that the Defendants were negligent and did not discharge the duty of care owed to the Plaintiff. To put it succinctly, the case of the Plaintiff is that even though the fraud was perpetrated by the Shipper, the Defendants by failing to discharge their duty of care owed to the Plaintiff, could have ***prevented*** the fraud.

25. The law surrounding the tort of negligence has been developed considerably in the United Kingdom. The House of Lords in the case ***Caparo Industries plc. and Dickman and others***[7] held as under: -

"What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there 618 Lord Bridge of Harwich Caparo Plc. v. Dickman (H.L.(E.)) [1990] should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of "proximity" or "neighbourhood" and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other. But it is implicit in the passages referred to that the concepts of proximity and fairness embodied in these additional ingredients are not susceptible of any such precise definition as would be necessary to give

[7] 2 AC 605 1990

> *them utility as practical tests, but amount in effect to little more than convenient labels to attach to the features of different specific situations which, on a detailed examination of all the circumstances, the law recognises pragmatically as giving rise to a duty of care of a given scope. Whilst recognising, of course, the importance of the underlying general principles common to the whole field of negligence, I think the law has now moved in the direction of attaching greater significance to the more traditional categorisation of distinct and recognisable situations as guides to the existence, the scope and the limits of the varied duties of care which the law imposes."*

26. The "neighborhood principle" referred in **Caparo** (supra) was expounded earlier by Lord Atkin in the case of **Donoghue** (supra) in the following words: -

> *"You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be, persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplations as being so affected when I am directing my mind to the acts or omissions which are called in question."*

27. In light of the principles set out above it will be advantageous to lay down the test at the outset, prior to adjudicating the claim of the Plaintiff under tort. The test can be broken down as follows: -

a) Duty of care.
    - Reasonable foresight.
    - Proximity.
    - Fair, just and reasonable.
b) Breach of the duty.
c) Causation.
d) Damage.
e) Remoteness.

Needless to mention that all the ingredients above must be applicable to a case for the court to award damages under tort.

28. In light of the facts of the present case I hold that the Plaintiff has been unable to cross the first threshold i.e. establish that a duty of care was owed under tort. It has already been established above that no duty of care was owed under contract. The Carrier, in my opinion could not reasonably foresee that the Shipper

would defraud the Plaintiff and neither can the duty be imposed on the Carrier to go over and above the scope of their contractual obligations. The Carrier cannot be expected to weigh each container in an attempt to detect fraud being played by Shippers. Therefore, to impose damages on the Carrier would not be fair, just and reasonable.

29. Even if the Plaintiff was able to establish duty of care, the breach, causation and damage would naturally flow in the circumstances of the present lis, though that may not always be the case. However, his claim would fail on the count of remoteness. The Privy council in the case of ***Overseas Tankship (UK) Ltd v. Morts Dock and Engineering Co Ltd*** [8] laid down the test of foreseeability in the following words: -

> *"The essential factor in determining liability for the consequences of a tortious act of negligence is whether the damage is of such a kind as the reasonable man should have foreseen. Liability does not depend solely on the damage being the "direct" or "natural" consequence of the precedent act; but if a man should not be held liable for damage unpredictable by a reasonable man because it was "direct" or "natural," equally he should not escape liability, however "indirect" the damage, if he foresaw or could reasonably have foreseen the intervening events which led to its being done. Foreseeability is thus the effective test"*

30. The damage in the present case would be too remote as the Carrier could not foresee the fraud perpetrated by the Shipper upon the Plaintiff. The test in this regard is an objective one and I hold that no reasonable man could have reasonably foreseen the fate of the Plaintiff.

31. The test laid down by the Indian Supreme Court is even more stringent. In the case of ***Poonam Verma Vs. Ashwin Patel and Others***[9] the court in held as under: -

> *"13. Negligence as a tort is the breach of a duty caused by omission to do something which a reasonable man would do. or doing something which a prudent and reasonable man would not do. (See : Blyth vs. Birmingham Waterworks Co. (1856) 11 Ex 781; Bridges vs. Directors, etc. of N.L. Be. (1873-74) LR 7 HR 213; Governor-General in Council vs. Mt. Saliman (1948) ILR 27 Pat. 207; Winfield and Jolowicz on Tort).*
> *14. The definition involves the following constituents:*

[8] A.C.388 Privy Council Australia. 1961
[9] AIR 1996 SC 2111

(1) a legal duty to exercise due care;
(2) breach of the duty; and
(3) consequential damages.
15. The breach of duty may be occasioned either by not doing something which a reasonable man, under a given set of circumstances would do, or, by doing some act which a reasonable prudent man would not do."
(Emphasis added)

32. It has already been held above that there is no breach of contractual obligation/s by the Carrier and on that score the dicta laid down in the case of **Poonam** (supra) is of no assistance to the Plaintiff.

33. In light of the above it is held that the Plaintiff has not been able to establish his claim under tort. For the foregoing reasons the instant suit is dismissed with no order as to cost.

Office to prepare decree in the above terms.

Judge

Nadeem