

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
ORDINARY ORIGINAL CIVIL JURISDICTION**

**IN ITS COMMERCIAL DIVISION  
COMMERCIAL SUIT NO.11 OF 2008**

M/s.Assobhai Bhanji and Sons )  
A registered partnership firm having its )  
Office at R-32, APMC Market II, Phase-II )  
Danabunder Vashi, Navi Mumbai-400703 )...Plaintiff

V/s.

Great Circle Shipping Pvt. Ltd. )  
A company incorporated under the Indian )  
Companies Act, having their registered )  
Address at 17, Eruchshaw Building, 249, )  
Dr.D.N.Road, Fort, Mumbai-400 019 )....Defendant

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Mr.Manoj Khatri a/w Mr.Arnab Ghosh and Mr.Kumar Kothari for plaintiff.

Mr.Nimay Dave a/w Ms.Parvathy Kottol, Ms.Varsha Raman i/by M/s.Bose and Mitra and Co. for the defendant.

Mr.R.V. Narichania, Senior Advocate as Amicus Curiae.

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**CORAM : K.R.SHRIRAM,J**  
**RESERVED ON : 03.08.2017**  
**PRONOUNCED ON : 08.08.2017**

**Judgment :-**

1 Plaintiff, a registered partnership firm, carries on business, inter alia, of import and export of dairy and agro products. Defendant is a registered Multimodal Transport Operator.

2 Sometime in March-2007, one Agrizala Co. (Pte) Ltd, Singapore (Agrizala) had entered into a contract with plaintiff for supply of 780 m.t. of Indian White Crystal Sugar ("the goods"). This contract (Exh.P-

23) provided rate for the goods at USD 320 per m.t. F.O.B. Nhava Sheva/JNPT. It was also agreed that Agrizala will negotiate the freight rate and pass the same to plaintiff basis that the contract be converted to C&F contract. In effect, Agrizala would identify the carrier through whom plaintiff will transport 780 m.t. of sugar. Agrizala has, it appears, wanted to negotiate the rates because Agrizala probably was in a better position to get a more competitive rate and thereby bring down its procurement cost. The payment term agreed was D/P at sight within 3 working days from any first-class prime bank for full invoice value. The freight was to be paid by plaintiff at the rate which Agrizala had negotiated with the defendant. Agrizala by an e-mail dated 2.3.2007 (Exh.P-24) directed plaintiff to transport the said goods in 40 x 20 ft. containers from NSICT (Nhava Sheva Port) to Colombo Port, Sri Lanka, per defendant as carrier. Though nominated or identified by Agrizala, the contract of carriage, because it was C&F (cost & freight), was to be between plaintiff and defendant.

3           Plaintiff packed 780 m.t. of sugar in 15,600 bags of 50 kg. each and stuffed them into 20 ft. containers and handed them over to defendant for shipment as evidenced by the 3 bills of lading at Exh. P-2, Exh.P-7 and Exh.P-12, respectively. After shipping the goods, plaintiff submitted in accordance with the terms of contract with Agrizala, the 3 sets of bills of

lading dated 13.4.2007, 18.4.2007 and 20.4.2007 with other documents including bill of exchange through plaintiff's-bankers Union Bank of India, Vashi- Turbhe branch (UBI) for acceptance by Agrizala. UBI duly sent the documents to Agrizala's bank in Singapore, Overseas Chinese Banking Corporation (OCBC), for delivery and payment by Agrizala. The documents for the three shipments were forwarded to OCBC on or around 20.4.2007, 30.4.2007 and 7.5.2007, respectively. Agrizala was to take up the documents from OCBC against payment of the agreed purchase price being USD 260850/- equivalent to approximately Rs.1,30,00,000/-. Agrizala did not pay or accept the documents and the documents were returned to plaintiff unpaid. It came to the light of plaintiff and admittedly so, that the goods have been delivered to the order of Agrizala. The goods were taken delivery by a receiver nominated by Agrizala without the plaintiff being paid for the value of the cargo and without surrender of the bills of lading. Plaintiff demanded the value of the cargo from Agrizala which was not paid. Plaintiff demanded from defendant return of the cargo which defendant could not, since delivery had already been given to the order of Agrizala. Hence this suit.

4           It is the case of plaintiff that the bills of lading issued by defendant were documents of title which were required to be produced or surrendered to obtain delivery; a negotiable (transferable) bills of lading

and defendant, having delivered the goods without surrender of bills of lading, is guilty of conversion and breach of contract of carriage. Therefore, defendant is bound and liable to pay to plaintiff the value of the cargo which is Rs.1,30,00,000/-. Defendant has denied liability on the grounds that: -

- (a) Defendant was not the carrier because defendant was nominated by one Shealth Services Ltd., Singapore with whom Agrizala had negotiated the carriage and therefore, defendant was acting only as facilitator;
- (b) The bills of lading issued were only receipts and not evidence of contract of carriage or documents of title;
- (c) The bills of lading issued were non-negotiable documents and in view thereof, surrender of the bills of lading was not necessary to give delivery of the cargo;
- (d) Plaintiff should have joined Agrizala and Shealth Services Pvt. Ltd as parties to the suit and plaintiff not having joined these parties as defendants, the suit is bad for non-joinder of proper and necessary parties;
- (e) Prior to filing this suit plaintiff had commenced proceedings in the High Court of Republic of Singapore against Shealth Services Pvt. Ltd. the agent/counter-part of defendant alleging wrongful delivery. By an order dated 17.8.2007, the Singapore Court gave an ex-parte final judgment in favour of plaintiff by which Shealth Services Pvt. Ltd. was adjudged to pay sum of USD 60,850/- to plaintiff along with interest thereon @ 5.33% p.a.

from the date of the writ to date of judgment and USD 3,574.40 as cost. Therefore, plaintiff was not entitled to claim the same amount and seek themselves adjudged which is not permissible. Plaintiff has suppressed this fact in the suit and consequently not entitled to any relief;

(f) Plaintiff, in the Singapore proceedings, had admitted that defendant was appointed by Shealth Services Pvt. Ltd. for the shipment of goods from Mumbai. Therefore, there was no contract between plaintiff and defendant;

(g) Plaintiff's suit is barred by principles of res-judicata or principles analogous to res-judicata.

5           Based on the pleadings, this Court was pleased to frame the following issues: -

### **ISSUES**

- (1) Whether plaintiff has title to sue defendant?
- (2) Whether defendant proves that the suit needs to be dismissed for non-joinder of necessary parties?
- (3) Whether defendant proves that suit is barred by the principles of res-judicata and/or principles analogous to res-judicata in view of the Singapore proceedings?
- (4) Whether plaintiff proves defendant's delivery of the goods at Colombo without surrender of the original bill of lading was wrong and in breach of the contract of carriage?
- (5) Whether plaintiff proves that defendant was the "carriers" of the suit goods?
- (6) Whether defendant proves that plaintiff vide the

present suit is trying to unjustly enrich themselves?

(7) Whether defendant proves that their role in the suit transaction was only as a facilitator on behalf of Shealth Services Pte. Ltd. Singapore and/or Agrizala Co. Pte. Ltd., Singapore?

(8) Whether defendant proves that plaintiff has accepted and agreed with its buyer for the shipment to be under switch Bill of Lading and that they have negotiated the Bill of Lading in contravention of condition No.1(13) of the Bill of Lading?

(9) Whether defendant proves that plaintiff has recovered any amounts pursuant to an order/decreed dated 17<sup>th</sup> August 2007 passed by Singapore Court for the same claim?

(10) Whether plaintiff proves that they are entitled to a decree against defendant?

(11) What order and reliefs?

6            Plaintiff led evidence of one witness, i.e., partner of plaintiff. But defendant did not lead any evidence.

7            It is the case of plaintiff and I agree with plaintiff that the documents at Exh.P-2, Exh.P-6 and Exh.P-12 are bills of lading and not Multimodal Transport Document though documents are labelled as Multimodal Transport Document. This is because to be a multi modal document, there must be multi modal transportation, which means there must be two or more modes of transport used whereas the transportation in this case is only by one mode, i.e., by sea between 2 ports, port of lading

being as NSICT/India and port of discharge being Colombo, Srilanka. On the reverse of the bills of lading, clause 1(a) defines Multimodal transportation means carriage of goods by two or more modes of transport from the place of acceptance of the goods in India to a place of delivery of the goods outside India. Moreover, the document says BL/MTD Number. This document therefore, is a bill of lading and not a Multimodal Transport Document. The counsel for defendant did not contest this position.

8           As to whether the bills of lading are negotiable documents or non-negotiable and whether it is a document of title surrender of which is necessary for delivery, it is the case of plaintiff that they are negotiable (transferable) documents and documents of title surrender of which was necessary for delivery. Whereas, it is the case of defendant that they were non-negotiable documents surrender of which was not necessary for delivery.

9           This point of contention has arisen because the consignee in the bills of lading is shown as under: -

*“To the order of Agrizala Co. (Pte) Ltd, 30 Robinson Road, # 10-04 Robinson Towers, Singapore 048546”.*

10       The clauses on which the opposing counsels laid emphasis on the reverse of the bills of lading were clauses 1(12), 1(13), clause 4 and clause 16. The same read as under: -

*KJ*

*“1(12) Negotiable multimodal transport document means a multimodal transport document which is*

- (i) made out to order or to bearer or;*
- (ii) made out to order and is transferable by endorsement or*
- (iii) made out to bearer and is transferable without endorsement*

*1(13) Non-negotiable multimodal transport document” means and multimodal transport document which indicates only one named consignee.*

#### *(4) Negotiability and Title of the Goods*

*My accepting by Multimodal Transportation Document the consignor and his transference serve with the Multimodal Transport Operator that unless it is marked “non-negotiable” it shall constitute title to the goods and the holder by endorsement of this Multimodal Transport Document shall be entitled to receive or to transfer the goods mentioned in this Multimodal Transport Document.*

#### *(16) DELIVERY/NON-DELIVERY:*

*(1) If the goods are not taken delivery of by the consignee within a reasonable time after the Multimodal Transport Operator has called upon him to take delivery, the Multimodal Transport Operator shall be at liberty to put the goods in safe custody on behalf of the consignee at the consignee's risk and expense or to place the goods at the disposal of the consignee in accordance with the Multimodal Transport Contract or with the law or with the usage of the particular trade applicable at the price of delivery ;*

*(2) The Multimodal Transport Operator shall be discharged from his obligation to deliver the goods if where a negotiable Multimodal Transport Document has been issued in a set of more than one original, he or a person acting on his behalf, has in good faith delivered the goods against surrender of one of such originals.*

*And the following on the face of the Bill of lading: -*

*“One of the MTD (s) must be surrendered, duly endorsed in exchange for the goods. In witness whereof the original MTD all of this tenor and date have been signed in the number indicated below one of which being accomplished the other(s) to be void.”*

11 But nobody even referred to clause 2 on the reverse of the bills of lading which reads as under: -

#### *"2. APPLICABILITY*

*The provision set out of referred to this Multimodal Transport Document*

*shall apply, if the transport as described on the face of the document is by two or more modes of transport from the place of acceptance of the goods in India to a place of delivery of the goods outside India."*

12           This clause came to light when I read the terms on the reverse after reserving the matter for orders/judgment. I also felt there were some grey areas on negotiability or transferability of the bills of lading which were not addressed to my satisfaction. Therefore, I placed the matter again for directions on 25.7.2017 and pointed out these two points to the opposing counsel and also appointed Mr. R.V. Narichania, senior Advocate, as Amicus Curiae. The matter was listed again on 03.08.2017 for further arguments to hear Mr. Narichania as Amicus on these two points. Mr. Dave and Mr. Khatri also contributed.

13           Mr. Narichania, the Amicus, submitted and I agree with him, that since the carriage was not multimodal, by virtue of clause 2 on the reverse of the documents at Exh.P-2, P-7 & P-12, which I shall refer to as bills of lading, the provisions in the documents are not applicable. Mr. Dave echoed the same.

14           Therefore, the provisions set out or referred to on the bills of lading, will not apply to this transport at all because the transport described on the face of the document was not by two or more modes of transport. Only one mode was used, i.e., by sea. Hence we do not have to

consider any of the clauses or term on the face or reverse of the bills of lading. I am, therefore, not considering any of the clauses or terms relied upon by the opposing counsel.

15           The other issue which was argued was whether the bills of lading were evidence of contract of carriage and the carrier was defendant or whether defendant was only a facilitator on behalf of defendant's counter-part, Shealth Services Pte Limited and/or Agrizala. It was defendant's case that defendant was not the carrier but only a facilitator and hence the bills of lading were not evidence of contract.

16           It is the case of plaintiff that Agrizala only negotiated the rate with defendant but admittedly the consideration for the carriage was paid by plaintiff and on the bills of lading there is an endorsement "freight prepaid". Mr. Khatri submitted that no evidence was led to the contrary by defendant.

17           Defendant's counsel relied on e-mail dated 2.3.2007 (Exh.P-24), in which it is mentioned as under: -

"Shipping Line/Agent : Great Circle Shipping Pvt. Ltd., Ms. Sangeeta Bhatia, Exports/Imports Nominations & Overseas Correspondence, 17, Eruchshaw Building, 249, Dr.D.N.Road, Fort, Mumbai-400 001, Tel # - 91226652 9514 (D) 66529500 (B) Fax # 91226652 9570, Email- sangeeta@greatcirclelog. com, Vessel nomination ex-Mumbai : Please book with the above line."

18           According to defendant, Agrizala had negotiated the transportation with Shealth Services and defendant is the counter part of Shealth Services in Mumbai and since Agrizala had negotiated with defendant and nominated defendant as the line through which the cargo had to be booked, the contract of carriage was with Agrizala and not with plaintiff.

19           Mr. Dave also relied upon certain portions in the affidavit filed by plaintiff in the aborted proceedings that it had commenced in Singapore against Agrizala and Shealth. Mr. Dave submitted that plaintiff always knew even on or about 18<sup>th</sup> or 19<sup>th</sup> August 2007 before the 3<sup>rd</sup> lot of shipment was sent, that the first consignment of 260 m.t. covered under the first bill of lading, i.e., Exh.P-2 has been taken delivery by the cargo receiver at Colombo and still plaintiff never stopped defendant from giving delivery. Mr. Dave also submitted that plaintiff's witness has in the affidavit filed in Singapore proceedings stated that on 19.4.2007 he was informed by defendant that it was Shealth who had arranged and co-ordinated the shipment of the goods from Mumbai to Colombo and therefore, it was an admission that carrier was Shealth and not defendant.

20           In my view, defendant is totally wrong. First of all, the law or

the contract to wit the bills of lading does not require plaintiff to give any such instructions to defendant. Defendant was just not permitted, either in law or contract, to give delivery without original bills of lading. Having committed a breach of contract, defendant cannot say plaintiff should have warned defendant. Moreover, a lot was said that plaintiff knew on 19.4.2007 that defendant had given delivery of 1<sup>st</sup> shipment without surrender of Bill of lading and plaintiff should not have given the other two shipments to defendant. But the 2<sup>nd</sup> and 3<sup>rd</sup> Bills of lading are dated 18.4.2007 and 20.4.2007. Therefore, second shipment was already loaded on the ship on or before 18.4.2007. About 3<sup>rd</sup> shipment also the containers would have been already carted for loading or may even have been loaded before 19.4.2007. On this, question no.130 and answer thereto in the cross examination of PW-1 is relevant. It reads as under:

"Q.130 - When on 20.04.2007 you had become aware that the first lot had been taken in Colombo without payment against the same why did you not stop the delivery of the cargo under the second and the third lot?

Ans: - The second and third lots were already shipped on board the Vessel which sailed on 18th and 20th April 2007."

Defendant has not led any evidence to show when the containers were loaded or there was enough time for plaintiff to stop shipment. These are all, in my view, dishonest submissions of a carrier who has committed breach of contract.

21           It is true that Agrizala had instructed plaintiff to book the consignment through defendant. It should be noted that the sales contract (Exh.P-23) provides the rate for the goods at “USD 320 per MT F.O.B. Nhava Sheva/JNPT. The original contract provided that it was free on board (FOB) delivery. In FOB shipments, it is the buyer who arranges the carrier and pays the freight. In Exh.P-23, it is also stated “Buyer to negotiate freight and pass the same to seller basis that the contract be converted to C&F contract. Later, by e-mail dated 2.3.2007 (Exh.P-24) Agrizala, having negotiated freight with defendant, asked plaintiff to give the goods to defendant and also asked plaintiff to pay freight to defendant. This was because Agrizala had negotiated a better freight rate than plaintiff would have with defendant. When plaintiff has paid the freight, the pricing terms from F.O.B became C&F which is cost and freight. Plaintiff has paid the consideration to defendant for the transportation from NSICT India to Colombo, Sri Lanka. It is not the case of defendant that freight was paid by any 3<sup>rd</sup> party and no consideration has been received by defendant from plaintiff. Defendant simply relies upon certain pages of the affidavit, part of Exh.D-1 & Exh.D-2, filed in the aborted Singapore proceedings filed by plaintiff. The Court of Singapore has not adjudicated upon the affidavits filed. Defendant has received the goods and freight from plaintiff and therefore, it does not lie in the mouth of defendant to say it has not entered

into any contract of carriage with plaintiff. Bills of lading do not indicate anything that the contract was not with plaintiff. The bills of lading only prove contract was between plaintiff and defendant. Defendant has not led any evidence to prove to the contrary. Therefore, the bills of lading were evidence of contract between plaintiff and defendant and defendant was the carrier engaged by plaintiff.

22           As to whether the Bills of lading were negotiable (transferable) documents of title surrender of which was necessary for delivery, Mr. Dave, counsel for defendant submitted that in the bills of lading, consignee is “to the order of Agrizala Co.(Pte) Ltd.” and delivery has been given to the person as ordered by Agrizala and therefore, if anyone has an objection it can be only Agrizala and not plaintiff. Mr. Dave also submitted that if plaintiff wanted to control or exercise lien over the bills of lading, they should have, in the consignee column, simply stated “to order of shipper” or “to order” but having inserted “to the order of Agrizala”, the bills of lading was not a negotiable document and hence there was no need to surrender the bills of lading. Mr. Dave further submitted that as per the bills of lading, defendant had only undertaken to carry the said goods in the containers from NSICT to Colombo and give delivery to the order of Agrizala which they had accomplished and therefore, defendant cannot be faulted upon.

23           Mr. Khatri, counsel for plaintiff submitted that even though the consignee is “to the order of Agrizala”, for delivery, atleast one of the set of 3 bills of lading must be surrendered. Full sets of all bills of lading are still with plaintiff since their bankers, UBI returned the documents because Agrizala failed to pay and take up the same and by giving delivery without surrender of bills of lading, defendant has committed breach of contract. Mr. Khatri also submitted that if it was a non-negotiable document, the document would have expressly mentioned "non-negotiable" and as the document certainly does not say non-negotiable, it was a negotiable instrument. Mr. Khatri also submitted that if it was a non-negotiable instrument and surrender of atleast one full set of bills of lading was not required to take delivery of goods then the portion as quoted earlier on the face of the bill of lading and clause 16(2) would not have been there in the bill of lading. Mr. Khatri also submitted that clause 4 on the reverse of the bills of lading expressly provide that unless it is marked non-negotiable it shall constitute title to the goods and only by endorsement of the bills of lading, the receiver shall be entitled to receive the goods mentioned in the bills of lading. As stated earlier, I am not going to consider any provisions or the terms of the bills of lading. Maximum time was of course used by the opposing counsel on the issue whether surrender of duly endorsed bills of lading was necessary for delivery.

24           On this issue as to whether surrender of bills of lading was necessary for delivery, it should be noted that the contract between plaintiff and Agrizala was on C&F terms and provided for Agrizala to pay against documents. The documents included 3/3 sets of bills of lading. Agrizala did not pay and take the documents from the Bank. Further the bills of lading said, “to the order of Agrizala”. How was the receiver to whom Agrizala was to direct delivery to take possession? How would the carrier know who was the person to be given delivery to and, he was the order of Agrizala? Naturally against production of bills of lading. Or else delivery could not be given. The bills of lading also do not say “non-negotiable”. Let us take a situation where destination was a port in USA instead of Colombo. The documents would have reached Agrizala's bank much before the goods reached USA. If Agrizala had not paid and taken the documents, plaintiff could have surrendered the bills of lading to defendant and obtained fresh bills of lading showing a different consignee or an alternate buyer. If plaintiff did not want to retain this right of disposal, he would have sent the documents directly to Agrizala and not on D/P basis through banking channel.

25           Mr. Narichania, the Amicus submitted that the established principle of law in the mercantile world is that in a contract for the carriage

of goods by sea, delivery of the cargo is to be made at the discharge port by the carrier to the consignee only upon production or surrender by the consignee of the original bill of lading. Mr. Narichania submitted that if a shipowner delivers without production or surrender of the bill of lading, he does so at his peril. This is the case where in the bill of lading the consignee is to order and there is no named consignee. What happens in the case where consignee is named. As noted, it has been the stand of defendant that because the bill of lading mentions "to the order of Agrizala", it means goods are deliverable to a specific person as consignee and the carrier's duty is to simply deliver the goods to the consignee on proof of identity and the carrier would not need to obtain the bills of lading from the consignee to make delivery. The element of transferability is not imported into the document.

26           The basic issue, therefore, to be considered was when it came to delivery, whether there was a distinction between the delivery of goods covered by bills of lading that were made out "to order" or "to bearer" and commonly known as an order bill of lading and one that specified the name of the consignee without the addition of the words "to order" or "assigns". This latter type of bill of lading can be referred to as a "non-negotiable" bill of lading, a "straight consigned" bill and a "straight bill". For convenience, we will call it a straight bill.

27           The carrier when he receives the cargo may issue a bill of lading or a sea waybill. The way bill is only a receipt and is not a document of title. Whereas, bill of lading is a receipt, evidence of contract of carriage and document of title. A straight bill is not the same as a sea waybill. While it is true that a bill of lading devoid of the characteristic of negotiability, is substantially similar in effect to that of a sea waybill but if the parties had intended to create sea waybill they would have done so. The main two characteristics of a bill of lading are, (a) it is negotiable, i.e., transferable and (b) it is a document of title, requiring its presentation to obtain delivery of the cargo. In the case of a straight bill, while the characteristic of transferability may be absent, I see no reason why one should thereby infer that the parties had intended to do away with the other characteristic, i.e., delivery upon presentation. The document issued in this case though titled as multimodal transport document also has a box for "BL/MTD number" and a box for "number of BL/MTD (s)" issued. If it was to be used as a sea waybill, defendant would have issued such a document. In my view, clear words must be present to imply that the parties intended the instrument to be treated, in all respects, as if it were a sea waybill and that its presentation by the named consignee is not necessary. If the parties had wanted to have a sea waybill they could have quite easily adopted that format. They would not have issued a bill of lading with three originals.

28           Moreover, there is nothing to show or at least defendant did not show that in respect of a straight bill, the production of the straight bill is not a prerequisite to obtaining delivery. Mr. Narichania cited two judgments, one of the Court of Appeal of the Republic of Singapore in the matter of <sup>1</sup>*Voss vs. APL Co. Pte. Ltd.* and other of the House of Lords of England and Wales in the matter of <sup>2</sup>*The "Rafaela S"*. In both these judgments, the Courts have concluded after considering various authorities and views of various academic writers from their texts, that there is much to commend the rule that even in respect of a straight bill presentation of it is a prerequisite to obtaining delivery. If nothing else, the advantage of this rule is that it is simple to apply. It would prevent confusion and avoid the shipowners and/or their agents having to decide whether a bill is a straight bill or an order bill and run the risk attendant thereto if the determination they make on that point should turn out to be erroneous. The rule would obviate such wholly unnecessary litigation. In *Voss vs. APL* (supra) the Court concluded:

*"..... In essence, APL's scheme envisages that as long as the shipping document is non-negotiable on its face, presentation of the original BL or sea waybill is unnecessary for delivery. We think that this approach is overly restrictive for an unpaid seller who wishes to use a non-negotiable BL while retaining his security for payment."*

I am in respectful agreement with the conclusion/opinion in both these

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1. (2002) Vol.2 LLR 707

2. (2005) Vol.1 LLR 347

judgements.

29           In *Voss vs. APL* (supra), the facts were, one Mr. Peter Voss, who carried on an automobile business in Germany offered to sell a convertible Mercedes Benz Motorcar to a Korean company in Seoul, Seohwan Trading Co. (Seohwan) at a c. and f. price of DM108,600. A down-payment of DM48,500 was made by Seohwan.

Mr. Voss arranged with APL to ship the motorcar on board *Hyundai General* from Hamburg to Busan, South Korea. The car was loaded onto the vessel on Aug. 28, 2000.

The bill of lading bore the name of the buyer, Seohwan Trading Co. in the box entitled "Consignee" but without the words "to order". The bill also provided for a set of three originals issued by the carrier and upon surrender of any one negotiable bill of lading properly endorsed all others stood void.

Mr. Voss held all three sets of the original bill of lading because the buyer had yet to pay Mr. Voss for the balance of the purchase price. APL asserted payment had been made.

The vessel arrived at Busan. APL released the motorcar to Seohwan without production of any of the three sets of the bill of lading.

In November 2000 Mr. Voss wrote to Seohwan demanding payment of the balance. No reply was received and as the balance was still

not paid by mid-December 2000 Mr. Voss demanded payment from APL.

APL denied liability on the ground that they were not wrong to deliver the motorcar to Seohwan without the production of the bill of lading.

Mr. Voss claimed against APL and applied for summary judgment. APL applied for the determination of the question of law whether in relation to a straight bill making goods deliverable to a specific person as consignee, without words importing transferability, such as to "XYZ or order" the shipowner may deliver the same to XYZ without production of the bill of lading.

30           The Singapore Court also held that a straight bill of lading is not the same as a sea waybill and by holding so it has the advantage of providing a seller, or in the case of documentary credit, the bank, with some security against default by the buyer and the buyer of some assurance that the seller has shipped the cargo before he is required to make payment. In short, it gives both the buyer and the seller, where they, for their own reasons, want only a straight BL to be issued, a fair measure of protection. That was what the seller wanted, payment before delivery by carrier. In contrast, the sea waybill is only a contract of carriage whereby the carrier undertakes to deliver the cargo to the person identified by the shipper as entitled to take delivery of the cargo. The sea waybill is retained

by the shipper and all the consignee need to show delivery is proof of his identity. It is a receipt, not a document of title. It, unlike a bill of lading cannot be used as a security to obtain financing. Adopting the rule that presentation of a straight bill is a prerequisite to obtaining delivery also avoids the undesirable consequences of the shipper's rights of suit under the original contract of carriage surviving any transfer of the document to the consignee.

31           In The "Rafaela S" (supra), the House of Lords dismissed the appeal and confirmed the order of the Court of Appeal. Lord Justice Rix, sitting in the Court of Appeal (The "Rafaela S" (2003) Vol.2 LLR 113) went on to give a view that a straight bill of lading was in principle a document of title even in the absence of an express provision requiring its production to obtain delivery. Lord Justice Rix went on to say that a straight bill of lading, otherwise in the form of a classic bill of lading, should be viewed as a bill of lading within the meaning of the Hague Rules notwithstanding that it was non-negotiable, because

(i) the Hague Rules were predominantly concerned with the content of a contract of carriage in circumstances where such a contract as found in a bill of lading might come to affect a third party into whose hands such a bill was transferred; a named consignee under a straight bill of lading was as much a third party as a named consignee under a classic bill;

(ii) although it could not be transferred more than once, it could be

transferred by delivery (just like a classic bill) to the named consignee; in those circumstances, the shipper and his bankers and insurers needed the same protection as the shipper under a classic bill; and the consignee himself and his insurers in turn needed to have rights against the carrier under the contract of carriage;

(iii) the practice was that a straight bill of lading, unlike a mere sea waybill, was written on the form of an otherwise classic bill and required production of the bill on delivery, and therefore transfer to a consignee to enable him to obtain delivery;

(iv) a straight bill of lading was in principle, function and form much closer to a classic negotiable bill, than to a non-negotiable receipt;

(v) the travaux préparatoires of The Hague Rules, despite lacking unequivocal cogency, supported the view that a straight bill of lading was a bill of lading within the meaning of the Rules;

(vi) the terms of COGSA, 1971 and COGSA, 1992 could not control the meaning of The Hague Rules, which were not only much earlier, but also of international and not merely domestic scope.

(vii) A straight bill of lading which had to be produced to obtain delivery was a document of title, and was a "similar" document of title within the meaning of Section 1(4) of COGSA, 1971.

(viii) A straight bill of lading was in principle a document of title even in the absence of an express provision requiring its production to obtain delivery.

The Court of Appeal also went on to hold as under

*"A shipper needs the carrier to assist him in policing his security in the retention of the bill. He is entitled to redirect the consignment on notice to the carrier; and, although notice is required, a rule of production of the bill is the only safe way, for the carrier as well as the shipper, to police such new instructions. In any event, if proof of identity is necessary, as in practice it is, what is wrong with the bill itself as a leading from of proof? That is of course an inconvenient rule where the carriage is very short, as in cross-Channel shipments, and that is why sea waybills are used in such trades. But it is clear that straight bills are used in intercontinental carriage and therefore, the inconvenience argument fades."*

32           Therefore, regardless of whether words requiring production of a bill of lading to take delivery appear in a straight (and therefore non-negotiable) bill, such a bill is likely to be regarded, at least in principle under English Law, to be a document of title and with that there will be a requirement to produce an original bill to take delivery.

33           As stated earlier, that is what plaintiff herein also understood that the bills of lading will provide some security against default by Agrizala. The sale contract provided for documents to be submitted to the bank by plaintiff after shipment and that included full set of bills of lading. It should also be noted that although defendant was identified by Agrizala, the contract of carriage with defendant was entered into by plaintiff. Certainly, defendant cannot come and say that what was intended to be issued was a sea waybill. If that was so, defendant would have issued a document which in true sense could have been called a waybill not in the

format that was issued.

34           So far as characteristic of transferability is concerned, in my view, that characteristic is not taken away in the bills of lading in the present case. I say this because the consignee is described as "to the order of Agrizala". It does not say just Agrizala. If delivery has to be given to the order of Agrizala, certainly Agrizala will have to endorse the bills of lading in favour of the person to whom it orders the carrier to deliver. For Agrizala to so endorse, it needed the original bills of lading. If original bills of lading had to go to Agrizala, it had to be transferred by plaintiff in favour of Agrizala. If a negotiable/ transferable document was not needed, the parties would have chosen to use a sea waybill but instead chose the format of bill of lading. They had an option but nevertheless choose to adopt the format of a bill of lading. The Court, therefore, should not convert that arrangement into something the parties did not want to have in the first place.

35           In the circumstances, I hold that even in respect of a straight bill of lading or in other words where in a bill of lading there is a named consignee or whenever a contract of carriage is issued in the bill of lading format, the carrier should only deliver the cargo against its presentation.

36           The next point which was argued by defendant was plaintiff having sued Agrizala and Shealth and having prosecuted the suit for some time, this suit is hit by resjudicata or principles analogous to resjudicata.

37           Section 11 of the Code of Civil Procedure 1908 reads as under:

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*“Resjudicata – No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”*

38           Admittedly, defendant was not a party to either of the two proceedings. The cause of action against Agrizala was for non-payment of goods sold and delivered and against Shealth it is in tort. The cause of action in the present action is for breach of contract of carriage. All are different and distinct causes of action. Therefore, the suit being barred by principles of resjudicata or principles analogous to principles of resjudicata, does not arise. Mr. Dave, anyway did not press this point much.

39           One more point raised by defendant was that plaintiff for the first time sent a communication to defendant only on or about May-2007 when around 3<sup>rd</sup> week of April 2011 itself plaintiff was aware that delivery

had already been given to the receiver. It was also submitted that plaintiff in e-mail to Agrizala stated “when you received payment, you say its o.k.” The counsel submitted that in view thereof plaintiff always knew that defendant was not liable and Agrizala was to make payment. I cannot accept this submission because, as stated earlier also, plaintiff had a cause of action against 3 parties (a) defendant - under the contract of carriage; (b) Agrizala - under the Sales Contract and (c) Shealth Services in tort. Just because plaintiff in its desperation to recover money for the goods sold, filed 2 separate suits in Singapore against Agrizala and Shealth Services, which they later aborted, can never be taken as an action that would exonerate defendant.

40 Further the suit against Agrizala was stayed because it had an arbitration clause. The suit against Shealth was aborted because plaintiff was directed to deposit cost of US\$ 6000/- by the Court. Plaintiff has not got any decree in both the suits to be even remotely accused of unjustly enriching itself.

Defendant also submitted that plaintiff is trying to unjustly enrich because it might have recovered amounts from Agrizala or Shealth. Plaintiff has never said so and defendant has not led any evidence to prove that plaintiff has received money from the Agrizala or Shealth services.

41 Further Mr. Dave relying on a sentence in email dated 23.05.2007 (part of Exhibit D-2) submitted that plaintiff had agreed with Agrizala to take delivery without B/L as it read "Sir please note if we would not have trusted you we would not have asked you take delivery of cargo. We are open with you itself." Mr. Dave's submission cannot be accepted because PW-1 in response to Q.140 has answered, he was desperate to get money and he was doing everything to reduce his loss. On this, question no.140 and answer thereto in the cross examination of PW-1 is relevant. It reads as under:

*"Attention of the witness is drawn to the email dated 23.05.2007, 12.40 p.m. at page no.40 which forms part of your affidavit dated 19.10.2007 (Sr. No.5 Article 'B') and in particular the line "Sir, please note that if we would not have trusted you we would not have asked you take delivery of cargo".*

*Q.140 - Can you explain what you meant by the above statement made in your said email?*

*Ans:- As the delivery of the cargo had already been taken and I had not received any money I was trying all amicable ways to recover my monies and therefore I had made this statement."*

No evidence to contradict what PW-1 said was led by defendant.

42 Though issue has been raised about plaintiff's consent for issuance of switch bill of lading, no submissions were made about switch bill of lading. Mr. Dave in fairness agreed that the onus would have been on

defendant to prove this fact and defendant has not proved. In fact, none of the issues where onus has been on defendant has been proved because defendant has not led any evidence.

43           About non-joinder of Agrizala and Shealth, in my view they are not necessary parties as they are not party to the contract evidenced by the 3 Bills of lading.

44           Mr. Khatri and Mr. Dave relied on following judgments: -

<sup>3</sup>(1) *Irano-Hind Shipping Co. Ltd. Vs. Ajanta Pharma Limited & Anr.*

<sup>4</sup>(2) *British India Steam Navigation Co. Ltd. Vs. Shanmughavilas Cashew Industries & Ors.*

<sup>5</sup>(3) *Kohinoor Carpet Manufacturers Vs. Forbes Gokak Ltd. & Anr.*

<sup>6</sup>(4) *Dodsal Private Ltd. & Anr. Vs. Narmada Seaways Ltd. & Ors.*

<sup>7</sup>(5) *The Maurice Desgagnes*

<sup>8</sup>(6) *Motis Exports Ltd. Vs. Dampskibsselskabet (C.A)*

None of these judgments were of any assistance to the matter at hand.

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3. Appeal No.782/2000 in Notice of Motion No.166/2000 in Admiralty Suit No.88/1997 decided by this Court on 4<sup>th</sup> April, 2001

4. (1990) 3 Supreme Court Cases 481

5. (2002) 4 Bom CR 295

6. 1988 Mh.L.J. 723

7. Lloyd's Law Reports [1977] Vol.1] Part 3

8. [2000] 1 Lloyd's Report 211

45 In the circumstances, in my view, plaintiff's suit must be decreed, and is hereby decreed in the sum of Rs.1,30,00,000/- with interest @ 12% per annum, from the date of filing of the suit till payment/realization, with costs in the sum of Rs.2,00,000/-.

46 Therefore, issues are answered as under: -

| Sr. Nos. | Issues                                                                                                                                                                                                                                           | Findings |
|----------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------|
| 1        | Whether plaintiff has title to sue defendant?                                                                                                                                                                                                    | Yes      |
| 2        | Whether defendant proves that the suit needs to be dismissed for non-joinder of necessary parties?                                                                                                                                               | No       |
| 3        | Whether defendant proves that suit is barred by the principles of res-judicata and/or principles analogous to res-judicata in view of the Singapore proceedings?                                                                                 | No       |
| 4        | Whether plaintiff proves defendant's delivery of the goods at Colombo without surrender of the original bill of lading was wrong and in breach of the contract of carriage?                                                                      | Yes      |
| 5        | Whether plaintiff proves that defendant was the "carriers" of the suit goods?                                                                                                                                                                    | Yes      |
| 6        | Whether defendant proves that plaintiff vide the present suit is trying to unjustly enrich themselves?                                                                                                                                           | No       |
| 7        | Whether defendant proves that their role in the suit transaction was only as a facilitator on behalf of Shealth Services Pte. Ltd. Singapore and/or Agrizala Co. Pte. Ltd., Singapore?                                                           | No       |
| 8        | Whether defendant proves that plaintiff has accepted and agreed with its buyer for the shipment to be under switch Bill of Lading and that they have negotiated the Bill of Lading in contravention of condition No.1(13) of the Bill of Lading? | No       |

| <b>Sr.<br/>Nos.</b> | <b>Issues</b>                                                                                                                                                                   | <b>Findings</b>  |
|---------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------|
| 9                   | Whether defendant proves that plaintiff has recovered any amounts pursuant to an order/ decree dated 17 <sup>th</sup> August 2007 passed by Singapore Court for the same claim? | No               |
| 10                  | Whether plaintiff proves that they are entitled to a decree against defendant?                                                                                                  | Yes              |
| 11                  | What order and reliefs?                                                                                                                                                         | As decreed above |

47                Suit accordingly stands disposed.

48                The Court appreciates the immense assistance by Mr. Narichania, the Amicus Curiae.

(K.R.SHRIRAM,J)