

Present:  
 Mr. Justice Md. Iqbal Kabir  
 And  
 Mrs. Justice Jesmin Ara Begum

First Appeal No. 489 of 2000

M/s. AURORA TANKERS (UK) LTD. and another  
 .... Appellants

Versus

Lever Brothers Bangladesh Limited, 51, Kalurghat  
 Heavy Industrial Area, P.S.-Chandgaon, District-  
 Chattogram and another

....Respondents

Mr. Muhammad Ohiullah, Advocate

....For the Appellants

No one appears

....For the Respondents

Judgment on 27.11.2025.

Md. Iqbal Kabir, J:

This appeal has been presented, at the instance of the Defendant Nos. 1 and 2/ Appellants, against the judgment and decree dated 10.06.1999 and 15.06.1999 respectively, passed by the learned Subordinate Judge, 3<sup>rd</sup> Court, Chattogram in Money Suit No. 55 of 1996, decreeing the suit against the Defendant Nos. 1 and 2/ Appellants.

The short facts narrated to the appeal are that the plaintiff–respondent No. 1 is a company incorporated under the Companies Act in Bangladesh and is engaged in business as manufacturer, importer, and exporter. The plaintiffs opened the requisite Letters of Credit through Standard Chartered Bank Ltd., Chittagong, and imported 2(two) consignments, namely (i) 2659.612 metric tons of Toilet Soap Grade Tallow (FFA 2.5% max) and (ii) 1289.300 metric tons of Toilet Soap Grade Tallow (FFA 4% max), in bulk, covered by Invoice Nos. 52826 and 52825, both dated 18.11.1995, issued by M/s. Gardner Smith Pty. Ltd., Australia.

The consignments were shipped from the Port of Buenos Aires, Argentina, under Tanker Bills of Lading No. BUE-50-101(S), dated 18.11.1995, for carriage to Chittagong Port by Motor Tanker COURAGE V.10, owned and/or controlled by defendant No. 1. Defendant No. 2 acted as the local agent of defendant No. 1 at Chittagong. The vessel arrived at the outer anchorage of Chittagong Port on 02.01.1996, berthed at River Mooring No. 3 on 03.01.1996, and discharged the cargoes into the shore tanks of defendant No. 3, which constitute a Customs Bonded Warehouse, on 01.01.1996, 04.01.1996, and 05.01.1996.

The discharge was carried out under constant and strict supervision of surveyors appointed by the plaintiffs and defendants Nos.1-3, in the presence of the Customs Officer and representatives of all concerned parties. After completion of discharge, joint surveys were conducted and Joint Discharge Reports dated 10.01.1996 and 13.01.1996 were issued. According to the survey reports of M/s N.A. Survey & Inspection Co. Ltd. and the said Joint Discharge Reports, shortages of 9.566 metric tons from the consignment of 2659.612 metric tons and 7.396 metric tons from the consignment of 1289.300 metric tons were found upon discharge into the bonded warehouse.

It is further stated that at the port of loading the full quantities, as per the Bills of Lading, were duly loaded into the vessel, as certified by M/s Inchcape Testing Services. Despite delivery of the cargoes in good order and condition at shipment, a total shortage of 16.962 metric tons occurred at discharge, causing the plaintiffs a loss of Tk. 5,37,106.36 as detailed in the claim schedule. The plaintiffs contend that defendant No. 1, as carrier, is legally liable for the short delivery and bound to compensate the plaintiffs for the loss suffered. Hence, the suit.

However, upon receipt of the summons, the defendant Nos. 1 and 2, being the appellants, entered appearance and contested the suit by filing a written statement, categorically denying all material allegations made in the plaint. In their written statement, the defendant Nos. 1 and 2/Appellants contended, inter alia, that after the arrival of the carrying vessel M.T. Courage at

Chittagong Port and prior to commencement of discharge, an Ullage Survey was duly conducted on board the vessel to ascertain the quantity of cargo on board. The said survey revealed that the quantity of tallow on board was 2655.783 metric tons, which was well within the permissible 1% ocean allowance, and that the second consignment measured 1293.322 metric tons, reflecting an excess of 4.022 metric tons.

It was further contended that the entire quantity of cargo shipped on board the vessel by the shipper was fully and properly discharged through the vessel's hose pipe connection into the receivers' shore tanks. Upon completion of discharge, all concerned surveyors inspected the vessel's tanks and issued both a Dryness Certificate and a Discharge Certificate, certifying that no cargo whatsoever remained in the vessel's tanks, which were found completely dry. The further case of the defendant Nos. 1 and 2/Appellants is that, under the provisions of law as well as international trade usage and practice, carriers are entitled to a 1% ocean allowance in respect of oil and similar liquid cargoes, which allowance is also recognized and accepted by the Customs Authorities of Bangladesh. As such, the defendant Nos. 1 and 2/Appellants cannot, in any manner, be held liable for the alleged shortage claimed by the plaintiffs. It was lastly contended that the suit as instituted by the plaintiffs is not maintainable in the eye of law, that the plaintiffs have no cause of action against the defendant Nos. 1 and 2, and that the suit is liable to be dismissed in limine.

Based on the pleadings filed by the parties, the trial Court framed as many as five issues and those are mention herein below:

- 1) Is the plaintiff's suit maintainable or not?
- 2) Does the plaintiff have any cause of action for filing the instant suit?
- 3) Is the plaintiff's suit barred by limitation or not?
- 4) Is the plaintiff entitled to the relief as prayed for?
- 5) To what other relief or reliefs is the plaintiff entitled to?

In support of its case, the plaintiffs examined one witness. The defendants did not examine any witness. However, the documents of the plaintiffs were marked as Exhibit-1, Power of Attorney dated 20.03.1997, Exhibit-1(ka), Power

of Attorney dated 12.07.1998, Exhibit-2, Invoice, Exhibit-3-3(Ka), Bill of Lading, Exhibit-4, Bill of lading, Exhibit-4(ka), Survey Reports, Exhibit-5, Joint Survey Report, Exhibit-6-6(ka), Certificate of Independent Surveys, Exhibit-7, Letter dated 07.03.1996, Exhibit-7(ka), Letter dated 01.04.1996, Exhibit-7(kha), Letter dated 12.08.1996, Exhibit-7(Ga), Letter dated 17.08.1996, Exhibit-7(Ghha), Exhibit-7(Uma), Letter dated 09.11.1996.

However, the Court below, upon considering the plaint, written statement, issues, depositions and other materials on record, decreed the suit against the defendant Nos. 1 and 2/Appellants.

Being aggrieved by and dissatisfied with the impugned judgment and decree passed by the Subordinate Judge, 3<sup>rd</sup> Court, Chittagong in Money Suit No. 55 of 1996, the Defendant Nos. 1 and 2 as Appellants preferred the instant appeal.

This is a long-pending matter; on several dates it appeared in the daily cause list for hearing. However, on the part of the respondents no one appears to defend the judgment and decree.

Mr. Muhammad Ohiullah, learned Advocate for the Appellants submits that the Court below erred in not holding that there is no difference between the Bill of Lading figures and the figures found as per Ullage Survey report prior to commencing discharge and that as per Ullage Survey 2655.783 metric tons of Toilet Soap Grade Tallow were discharged from one consignment and from another consignment 1293.392 metric tons of Toilet Soap Grade Tallow were discharged into the shore tanks and as such the Court below wrongly found shortage of the cargo on the basis of shore tank survey report which was done after disconnecting the hose pipes from the vessel and that it is also submitted on behalf of the Defendant Nos. 1 and 2/Appellants that the Court below erred in not holding that the defendant Nos. 1 and 2 are not liable for the alleged shortage of cargo as the carrier is also entitled to 1% Ocean allowance while carrying the tallow in bulk and therefore the decree passed by the Court below is liable to be set aside and that it is also submitted that the Court below erred in law in not

holding that the responsibility of the carrier in respect of oil cargo ceased and came to end as soon as the cargo was free from the vessel's permanent hose pipe connection and as such these defendant Nos. 1 and 2/Appellants are completely immune from any liability whatsoever and that the Court below erred in law in not holding its decision on the basis of the survey report prior to the discharge of the cargo. He further alleged that the Court below erred in holding these defendants liable although the entire quantity of the cargo was discharged into the shore tanks of the defendant Nos. 3/Respondent by the ship's permanent hose connection and that upon completion of discharge of the cargo from the ship's tank an inspection was held whereupon dry tank certificate was issued since no cargo was found in the tank. According to him the Court below erred in holding these defendant Nos. 1 and 2/Appellants liable on the basis of shore tank's figure survey although these defendant Nos. 1 and 2/Appellants had discharged the cargo in full and that in case of conflict between shore tank survey report and Ullage Survey carried out prior to discharge of the cargo, Ullage Survey report must prevail over shore tank figure survey report and that the Court below erred in law in holding these defendant No. 1 and 2/Appellant liable since as per the Bill of lading the quantity, measurement, weight, gauge, quality, nature, value and condition of the cargo were unknown to the carrier and as such no liability and responsibility attached on the part of these defendant Nos. 1 and 2/Appellants for the alleged shortage claim of the plaintiffs. Thus, it has been claimed that the judgment of the Court below is bad in law and erroneous and should be set aside and the suit is liable to be dismissed against the defendant Nos. 1 and 2/Appellants.

We have perused the memorandum of appeal, impugned judgment and also perused the documents so exhibited by the parties. This Court also considered the submissions, cited decisions and law so placed by the learned counsel for the appellant.

It is pertinent to note that from the materials on record along with exhibits- 4 and 4 (Ka) it appears that the plaintiffs imported 2659.62 metric tons of Soap

Grade Tallow and 1289.300 metric tons of Laundry Soap Grade Tallow from Australia, and the defendant No. 1 carried the aforesaid goods in the motor tanker M.T. COURAGE which arrived at the Port of Chittagong on 02.01.1996 and discharged her cargo from 03.01.1996 to 05.01.1996 in the tanks of the defendant No. 3 under the supervision of the Surveyors appointed by the concerned parties including the customs officials.

It is transpired, it was a claim of the defendants/Appellants that after arrival of the carrying motor tanker M.T. COURAGE at the port of Chittagong and prior to commencing the discharge of the cargo an Ullage Survey was conducted on board the vessel in presence of the surveyors appointed by the plaintiffs, defendants and all concerned parties together with the customs officials. After discharge of the cargo all the surveyors inspected the carrying vessel's tanks and issued Dry Tank Certificate and Discharge Certificate confirming that there was no cargo left in the carrying vessel's tanks. The tanks were found to be empty and dry and on arrival Ullage Survey was conducted and as per Ullage Survey reports (Ref: NA/LBBL/ COURAGE/96/01 dated 14.01.1996) the quantity of tallow found was 2655.783 and 1993.322 metric tons of Tallow. The further case of these defendant Nos. 1 and 2/Appellants is that the carrier is entitled to 1% ocean allowance in carrying oil and such kind of cargo as per provisions of law and intentional trade and parties and the Customs Authority of Bangladesh also allow 1% ocean allowance and hence these defendant Nos. 1 and 2/Appellants are not in any way liable for the alleged shortage. According to them the suit is liable to be dismissed and as per Ullage Survey report there was no shortage, as alleged, in the suit.

In support of his contention Mr. Ohiullah cited decisions reported in 1990 BCR 194, 61 DLR 801, 5 BLC 579, 9 BLC 218, 14 BLC 83, 15 BLC 737, 19 BLC 344. In the aforesaid decisions, it has been held that in the event of conflict between 2 (two) reports, one by Ullage Survey and the other by shore tank survey Ullage Survey report must prevail over the shore tank survey report. In this case on arrival, Ullage Survey was conducted and as per Ullage Survey

report the quantity of tallow that found was 2655.783 and 1993. 322. So, as per Ullage Survey report there was no shortage, as alleged, in the suit. The decisions cited by the appellant get support from it. In the aforesaid decisions it has been held that the Ullage Survey must prevail over shore tank survey. In such view of the matter, there has been no such short delivery of cargo, and therefore, the assessment of the compensation in the present case was not made in accordance with law, and the Court below passed the judgment and decreed the suit erroneously and hence, the same is liable to be set aside.

It is at this juncture, we are of the view that the assessment of the compensation in the present case was not made in accordance with the law. The trial Court, in a very slipshod manner, passed the judgment and decree erroneously, and as such, it is liable to be set aside.

For the reasons stated above and having regard to the facts and circumstances of the case and position of law, practice and principles laid down in the aforementioned decisions, we find merit substance in this appeal.

In the result, the First Appeal is allowed without any order as to costs.

The impugned judgment and decree dated 10.06.1999 and 15.06.1999 respectively, passed by the learned Subordinate Judge, 3<sup>rd</sup> Court, Chattogram in Money Suit No. 55 of 1996, are thus set aside.

Send down the lower Court records with a copy of this judgment to the Court below at once.

Jesmin Ara Begum, J:  
I agree.