PETITIONER:
BRITISH INDIA STEAM NAVIGATION CO., LTD.

Vs.

RESPONDENT:
SHANMUGHAVILAS CASHEW INDUSTRIES AND ORS.

DATE OF JUDGMENT13/03/1990

BENCH:
SAIKIA, K.N. (J)
BENCH:
SAIKIA, K.N. (J)
SAWANT, P.B.

CITATION:
1990 SCR (1) 884 1990 SCC (3) 481
JT 1990 (1) 528 1990 SCALE (1)462

ACT:
Indian Bill of Lading Act, 1856: Bill of Lading--Negotiation of Contract of affreightment need not be expressed in writing; agreed jurisdiction of a court and choice of law binding on the parties; no submission to the jurisdiction of another court if appearance only to protest.
The Indian Carriage of Goods by Sea Act, 1925 Contract of affreightment--' Voyage charterparty' 'time charterparty'; responsibility of the charterer vis-a-vis the owner to be ascertained from the charterparty and the bill of lading.

HEADNOTE:
The first respondent, M/s Shanmughavilas Cashew Industries, shipped 4445 bags of raw cashewnuts from East Africa to Cochin in the vessel Steliosm chartered by the appellant M/s British India Steam Navigation Co. Ltd., incorporated in England, pursuant to a contract of affreightment evidenced by three bills of lading. But only 3712 bags were delivered at Cochin, there being thus short landing of 733 bags.
The first respondent sued the appellant in the Court of the Subordinate Judge, Cochin, seeking damages. The Subordinate Judge decreed the suit with interest. The appellant's appeal to the High Court failed.
In the courts below the main contentions of the appellant were that it was a mere charterer of the vessel; that there was a charterpar? executed between the first respondent and the agent of the owner in London; that as per clause 3 of the bill of lading the Court at Cochin had no jurisdiction and only English Courts had jurisdiction; and that as per the charterparty and clause 4 of the bill of lading the remedy of the first respondent, if any, was against the' owner who alone was liable and not against the appellant charterer of the vessel.
The first respondent had denied that the appellant was only a charterer and not liable for the shortage. It had also denied that only English Courts had jurisdiction in the matter.
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Before this Court, on behalf of the appellant it was submitted that the appellant was an English company registered in England carrying on business in England, and it did not carry on any business in India; as the carrier under

clause 3 of the bill of lading, only the appellant had an option either to sue or be sued in England, or in Cochin, which was a port of destination, but the shipper had no option to sue at Cochin; in its written statement it was clearly stated that it had appeared under protest and without prejudice to the contention regarding jurisdiction which contention it had also pressed at the time of the argument, and, therefore, it could not be said to have submitted to the jurisdiction of Cochin court as it never made any submission or raised any objection as to the fact of short landing; and that the High Court has held clause 3 of the bill of lading to be bad on two erroneous grounds, namely, that it offends section 28 of the Contract Act and that it gives an unfair advantage to the carrier which advantage is not given to the consignee.

Allowing the appeal and remanding the case to the trial Court it was,

HELD: (1) A bill of lading is the symbol of the goods, and the right to possess these passes to the transferee of the bill of lading, and the right to sue passes with it.]893C]

Sewell v. Burdick, [1884] 10 App. Cases 74 (85, 104), referred to.

(2) A bill of lading is intended to provide for the rights and liabilities of the parties arising out of the contract of affreightment. If a consignee claims the goods under a bill of lading, he is bound by its terms. [904C]

(3) The property in the cargo passes to the consignee or the endorsee of the bill of lading but the contract whereunder the consignment or endorsement is made has always to be taken into consideration. Thus the consignee or endorsee gets only such rights as its consignor or endorser had in respect of the goods mentioned in the bill of lading. [904C-D]

(4) The jurisdiction of the Court may be decided upon the parties themselves on the basis of various connecting factors, and the parties should be bound by the jurisdiction clause to which they have agreed unless there is some strong reason to the contrary. [897B; 899F]

(5) The first respondent is the consignee and holder of the bills of
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lading and ex facie should be bound by clause 3 thereof in regard to jurisdiction. 1892A]

(6) If clause 3 of the bills of lading is held to be binding on the first respondent the choice of law by the parties would also be binding. [892C]

(7) In the event of the English Court alone having the jurisdic-
ion, the application of Indian statutes and the jurisdiction of the Indian court would be, to that extent, inapplicable. [892D]

(8) There may, however, be submission to the jurisdiction of an Indian Court by litigating in India. [896E]

Sirdar Gurdyal Singh v. Rajah of Faridkote, [1894] AC 670 (684), referred to.

(9) The question of jurisdiction in this case ought not to have been determined by the High Court on the basis of the provisions of section 28 of the Indian Contract Act in the absence of a specific provision making it applicable to transactions in international trade. [895F]

(10) Where the negotiation of a bill of lading is by the person who had a right to sue on it, mere possession of it does not enable the holder to sue any person who was not liable under it and not to sue another who was liable under

it, to make good the claim. He cannot also sue at a place not intended by the parties when intention has been expressed. [893E-F]

(11) Although a defendant who appears and contests the case on its merits will be held to have submitted to the jurisdiction, an appearance merely to protest that the court does not have jurisdiction will not constitute submission, even if the defendant also seeks stay of proceedings pending the outcome of proceedings abroad. [896F-G]

Williams & Glyn's Bank PLC v. Astro Dinamico Compania Naviera S.A. & Anr. The Weekly Law Reports Vol. (1) 1984-438 and Rein v. Stain, [1892] 66 LT 469, referred to.

(12) In the instant case, in the Memo. of appeal before the lower appellate court no specific ground as to jurisdiction was taken though there were grounds on non-maintainability of the suit. Even in the Special Leave Petition before this Court no ground of lack of jurisdiction of the courts below has been taken. The appellant has, therefore, to be

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held to have either waived the objection as to jurisdiction or to have submitted to the jurisdiction, in the facts and circumstances of the case. The defence that the suit was not maintainable in the absence of the owner of the ship could in a sense be said to have been on the merits of the case. [899B-C]

13) Clause 3 of the bills of lading also contains the selection of law made by the parties. The contract is governed by English law and disputes are to be determined according to English Law. [8991]

(14) As the law has been chosen, the proper law will be the domestic law of England and the proper law must be the law at the time when the contract is made, throughout the life of the contract, and there cannot be a "floating" proper law. [900D]

Gienar v. Meyer, [1796] 2 Hy BI 603; Rex v. International Trustee for the Protection of Bondholders AG, [1937] AG 500 (529); Vita Food Products Inc. v. Unus Shipping Co. Ltd., [1939] AC 277 (289-90); James Miller & Partners Ltd. v. Whirworth Street Estates (Manchester) Ltd., [1970] AC 583 (603); Mackendar v. Feldia AG, [1966] 3 All E.R. 847; Compagnie d'Armement Maritime SA v. Compagnie Tunisienne de Navigation SA, [1971] AC 572: [1970] 3 All E.R. 71 and Acrow (Automation) Ltd. v. Rex Chainbelt Inc., [1971] 3 All E.R. 1175, referred to.

(15) The bill of lading is not the contract of affreightment, for that has been made before the bill of lading was signed and delivered, but it evidences the terms of that contract. [901B]

(16) If certain clauses of the charterparty are referred to in the bill of lading those should be referred to in specific terms so as to bind the shipper and the consignee. A general reference may not be sufficient under all circumstances. [902E]

T.W. Thomas & Co. Ltd. v. Portsea Steamship Co. Ltd., [1912] AC 1; Vita Food Products, Incorporated v. Unus Shipping Co. Ltd., [1939] AC 277 and Rex. v. International Trustee for the Protection of Bondholders, [1937] AC 500, referred to.

(17) For the purpose of ascertaining the responsibility of a charterer in respect of the cargo shipped and landed, it would be necessary to know not only the stipulations between the shipper i.e. the owner of the cargo and the charterer evidenced by the bill of lading, but

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also those between the charterer and the owner of the ship. If the charter is by way of demise the problem would be simple inasmuch as the bill of lading will be purely between the shipper and the charterer. In cases of a 'voyage charter' or a 'time charter' one has to find out the actual terms of the charter to ascertain whether they operated as charter by demise or made the charterer only as an agent of the ship owner, and if so to what extent so as to ascertain the extent of privity established between the shipper and the ship owner as stipulated in the bill of lading. [905G-H; 906A]

(18) Whether a charterparty operates as a demise or not depends on the stipulations of the charterparty. The principal test is whether the master is the employee of the owner or of the charterer. [906G]

(19) It cannot be said that the bill of lading is not conclusive evidence of its terms and the person executing it is not necessarily bound by all its stipulations, unless he repudiates them on the ground that, as he did not know, and could not reasonably be expected to know, of their existence, his assent to them is not to be inferred from his acceptance of the bill of lading without objection. [907D]

(20) Where there is a charterparty, the bill of lading is prima facie, as between the ship owner and an indorsee, the contract on which the goods are carried. This is so when the indorsee is ignorant of the terms of the charterparty, and may be so even if he knows of them. As between the ship owner and the charterer the bill of lading may in some cases have the effect of modifying the contract as contained in the charterparty, although, in general, the charterparty will prevail and the bill of lading will operate solely as an acknowledgement of receipt. [907E-F]

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 764 (N) of 1975.

From the Judgment and Decree dated 30.11.1973 of the Kerala High Court in A.S. No. 365 of 1969.

R.F. Nariman, Mrs. A.K. Verma and D.N. Mishra for the Appellant.

Ramamurthi (Not Present) for the Respondents.

The Judgment of the Court was delivered by

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K.N. SAIKIA, J. The first respondent M/s. Shanmughavilas Cashew Industries, QuiIon purchased from East Africa 350 tons of raw cashewnuts which were shipped in the vessel SS Steliosm chartered by the appellant M/s. British India Steam Navigation Co. Ltd., incorporated in England, pursuant to a contract of affreightment evidenced by 3 bills of lading issued to the shipper for the 3 loads of cashewnuts. Out of 4445 bags containing the nuts carried in the said vessel only 37 12 bags were delivered at Cochin, there being thus short landing of 733 bags.

The first respondent sued the appellant in suit No. O.S. 18/1965 in the Court of the Subordinate Judge, Cochin seeking damages for the shortage of 733 bags of raw cashewnuts amounting to Rs.44,438.03. The suit having been decreed with interest @ 6% per annum from 17.7. 1964, for the sum total of Rs.46,659.93, the appellant preferred therefrom appeal A.S. No. 365 of 1969 in the High Court of Kerala which was pleased by its Judgments and decree dated 16.8. 1973 and 30.11. 1973, to dismiss the appeal and affirm that of the Subordinate Judge. Aggrieved, the appellant has preferred

this appeal by special leave.

In the courts below the main contentions of the appellant, inter alia, were that it was a mere chatterer of the vessel which was owned by S. Matas & Compnay c/o Lucas Matas & Sons, Piraeus, Greece; that there was a charterparty executed between the first respondent and M/s. Victorial Steamship Company as agents of the said owner of the vessel in London on 27.1. 1964; that as per clause 3 of the bill of lading the court at Cochin had no jurisdiction and only English courts had jurisdiction; and that as per the charterparty and clause 4 of the bill of lading the reined.? of the first respondent, if any, was against the owner who alone was liable and not against the appellant charterer of the vessel. Exhibit D 1 is the photostate copy of the charterparty concluded in London on 27.1. 1964 and Exhibit P 1 to P3 are the 3 bills of lading in the transaction. The first respondent denied that the appellant was only a charterer and not liable for the shortage. It also denied that only English Courts had jurisdiction in the matter.

Mr. R.F. Nariman the learned counsel for the appellant first submits that the appellant is an English company registered in England carrying on business in England, and it does not carry on any business in India. It is submitted, as the carrier under clause 3 of the bill of lading, only the appellant has an option either to sue or be sued in England, or in Cochin, which is a port of destination but the shipper

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had no option to sue at Cochin. In its written statement it was clearly stated that it had appeared under protest and without prejudice to the contention regarding jurisdiction which contention it had also pressed at the time of the argument, and, therefore, it could not be said to have submitted to the jurisdiction of Cochin court; and it never made any submission or raised any objection as to the fact of short landing. According to counsel the High Court has held clause 3 of the bill of lading to be bad on two erroneous grounds, namely, that it offends section 28 of the Contract Act and that it gives an unfair advantage to the carrier which advantage is not given to the consignee. Section 28, according to counsel, is not applicable and clause 3 was not bad on the ground of having given an unfair advantage to the carrier in giving him the option to sue or be sued either in England or at the port of destination and that even if it was bad, only the offending portion could be struck off, the rest of the clause would still be applicable and only the English court would have jurisdiction.

Records show that in the written statement the appellant as defendant in para B stated that the contract evidenced by the bills of lading was governed by English law and the parties had agreed that the disputes were to be determined in England according to English law to the exclusion of the jurisdiction of the courts of any other country and that the institution of the suit at Cochin was in violation of that agreement, and hence the Court had no jurisdiction to try the suit and the plaint should be returned for presentation to proper court.

In the Replication filed by the plaintiff it was said:

"The objection regarding jurisdiction raised in clause B of written statement is not tenable. The cause of action for the suit has arisen within the local limits of the jurisdiction of this Court. The defendant is also residing and carrying on business within this court’s jurisdiction. It is now well settled that the parties cannot be consent confer or oust the jurisdiction of a Court. The plaintiffs deny the

agreement mentioned in clause B and no agreement can oust the jurisdiction of the Court when the Court possesses the jurisdiction."

Issue No. 1 was: "Whether the suit is properly filed in this Court?" The trial court in its judgment dated 29.3. 1968 held:

"This issue has been considered by this Court on 28.2. 1966

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and it has been found that this Court has jurisdiction to try the suit. The said finding has been confirmed by the Hon'ble High Court on 6.4.1967 in C.R.P. 977/66."

That judgment is not before us. In the memo of appeal to the High Court apart from the general grounds that the judgment and decree of the Court below were wrong in law and fact; that the Court below should have held that the suit was not maintainable in law and should have finally dismissed the suit as the owners of the vessel 'Steliosm' a necessary party, as he alone was liable, was not impleaded and proceeded against, no specific ground about jurisdiction was taken and consequently we do not find any direct discussion on the point in the High Court judgments.

Even so, this being a question of jurisdiction going to the root of the matter we allowed the appellant to make his submissions. The appellant's submission that the courts at Cochin had no jurisdiction is based on clause 3 of the Bills of Lading which reads as follows:

"3. JURISDICTION: The contract evidence by this bill of lading shall be governed by English law and disputes determined in England or, at the option of the Carrier, at the port of destination according to English law to the exclusion of the jurisdiction of the Courts of any other country."

If the above clause was binding on the first respondent, without anything more, there could be no doubt that the suit claim arising out of the contract of affreightment evidenced by the bills of lading will have to be determined in England or, at the option of the carrier, that is the appellant, at the port of destination, that is, Cochin, to the exclusion of the jurisdiction of the courts of any other country. Is the first respondent bound by this clause of the Bill of Lading?

Clause 29 of both the bills of lading Exhibit P 1 and P2 runs as follows:

"Finally in Accepting This Bill of lading. The shipper, Consignee, and Owner of the goods, and the Holders of this Bill of Lading, expressly accept and agree to all its stipulations, exceptions, and conditions whether written, printed, stamped or incorporated, as fully as if they were all signed by such Shipper, Consignee, Owner or Holder."

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The first respondent is the consignee and holder of the bills of lading and ex facie should be bound by this clause. No doubt the bills of lading were issued to the shipper from whom it was received by the first respondent. There is no evidence to show that the shipper has repudiated the stipulations in the bills of lading in any manner. Under these circumstances would it be open to the first respondent to repudiate clause 3 of the bills of lading?

It is a settled principle of Private International Law governing bills of lading that the consignee or an endorsee thereof derives the same rights and title in respect of the goods covered by the bill of lading as the shipper thereof had. For the purpose of jurisdiction the action of the first respondent is an action in personam in Private International Law. An action in personam is an action brought against a

person to compel him to do a particular thing. If clause 3 of the bills of lading is held to be binding on the first respondent the choice of law by the parties would also be binding. English courts would perhaps use their own Private International Law to decide the dispute. In the event of the English Court alone having the jurisdiction, the application of Indian statutes and the jurisdiction of the Indian courts would be, to that extent, inapplicable.

Until the Bills of Lading Act, 1855 was passed in England the endorsement of a Bill of Lading would not affect the contract evidenced in it, and the endorsee could not sue or be sued on such contract, though he was the person really interested in goods, the subject of the contract. By section 1 of the Bills of Lading Act, 1855, in England "every consignee of goods named in a Bill of Lading, and every endorsee of a Bill of Lading to whom the property of goods shall pass, upon or by reason of such consignment or endorsement shall have transferred to and vested in him all rights of suit and be subject to the same liabilities in respect of such goods as if the contract contained in the Bills of Lading had been made with himself." In Sewell v. Burdick, [1884] 10 App. Cas. 74 (85, 104) it is held that section 1 is to be given effect in any proceeding in the English Court regardless of the proper law governing the transfer of the bill of lading. The property passes by reason of consignment or endorsement and the right to sue passes with it. The consignee or endorsee may lose his right or liability under the Act by such further endorsement of the bill of lading as divests him of the property. Such a vesting of rights and liabilities on endorsement of a bill of lading does not in any way affect the shipowners' rights against the original shippers or owners of the goods for the freight or the shipper's rights under the bill of fading or the liability
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Of the consignee or indorsee by reason of his being such consignee or indorsee or of his receiving the goods in consequence of such consignment or endorsement, or any right of stoppage in transit.

The Indian Bill of Lading Act, 1856 was based on the English Bills of Lading Act, 1855 (18 and 19 Vict. C. 111) (Act IX of 1856). Under section 1 of the Indian Bills of Lading Act, 1856 also every consignee of goods named in a bill of lading and every endorsee of a bill of lading to whom the property in goods therein mentioned shall pass, upon or by reason of such consignment or endorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself.

The bill of lading is the symbol of the goods, and the right to possess those passes to the transferee of the bill of lading. In other words, its transfer is symbolic of the transfer of the goods themselves and until the goods have been delivered, the delivery of the duly endorsed bill of lading operates as between the transferor or transferee, and all who claim through them, as a physical delivery of the goods would do. The bill of lading is a negotiable instrument in the sense of carrying with it the right to demand and have possession of the goods described in it. It also carries with it the rights and liabilities under the contract, where the property in the goods also is transferred. However, a bill of lading is not a negotiable instrument in the strict sense of the transferee deriving better title than the transferor. The transferee of a bill of lading gets no better title than the transferor himself had. Mere pos-

session of the bill of lading does not enable the holder to sue a person at a place where the tranferor himself could not have done. Where the negotiation of a bill of lading is by the person who had a right to sue on it, mere possession of it does not enable the holder to sue any person who was not liable under it and not to sue another who was liable under it to make good the claim. He cannot also sue at a place not intended by the parties when intention has been expressed.

It would also be relevant to consider whether English courts would be likely to entertain the instant suit if instituted in England in terms of the bills of lading so that the first respondent is not likely to be without a remedy.

Dicey & Morris in the Conflict of Laws 1 1th Ed. have given the following general principles as to jurisdiction in actions in personam:

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"Rule 28, Sub-rule 4: The court may assume jurisdiction if, in the action begun by the writ, the claim is brought to enforce, rescind, dissolve, annul or otherwise affect a contract, or to recover damages or obtain other relief in respect of the breach of a contract, being (in either case) a contract which

(i) was made in England, or

(ii) was made by or through an agent trading or residing in England on behalf of a principal trading or residing out of England, or

(iii) is by its terms or by implication governed by English law, or

(iv) contains a term to the effect that the court shall have jurisdiction to hear and determine any action in respect of the contract."

Rule 34 deals with jurisdiction clauses and it says:

"(1) Where a contract provides that all disputes between the parties are to be referred to the jurisdiction of the English courts, the court normally has jurisdiction to hear and determine any action in respect thereof.

(2) Subject to clause (3) of this Rule, where a contract provides that all disputes between the parties are to be referred to the exclusive jurisdiction of a foreign tribunal, the English court will stay proceedings (or, as the case may be, refuse to give leave to serve the writ out of the jurisdiction) instituted in England in breach of such agreement, unless the plaintiff proves that it is just and proper to allow them to continue.

(3) Where the case falls within the scope of the 1968 Convention, unless the defendant submits to the jurisdiction, the court has no jurisdiction to determine a dispute.

(a) if one or more of the parties is domiciled in a Contracting State and the parties have agreed in accordance with Article 17 of the 1968 Convention

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that the courts of a Contracting State other than the United Kingdom are to have jurisdiction to settle any such dispute; or

(b) if none of the parties is domiciled in a Contracting State and the parties have agreed in accordance with Article 17 of the 1968 Convention that the courts of a Contracting State other than the United Kingdom are to have jurisdiction to settle any such dispute and the courts chosen have not declined jurisdiction."

According to the authors the parties to a contract in international trade or commerce may agree in advance on the forum which is to have jurisdiction to determine disputes

which may arise between them. The chosen court may be a court in the country of one or both the parties, or it may be a neutral forum. The jurisdiction clause may provide for a submission to the courts of a particular country, or to a court identified by a formula in a printed standard form, such as a bill of lading referring disputes to the courts of the carrier's principal place of business. It is a question of interpretation, governed by the proper law of the contract, whether a jurisdiction clause is exclusive or non-exclusive, or whether the claim which is the subject matter of the action fails within its terms. If there is no express choice of the proper law of the con.tract, the law of the country of the chosen court will usually, but not invariably, be the proper law.

It is accordingly unlikely that the first respondent would be without any remedy if the terms of clause 3 of the bills of lading are faithfully observed.

The question of jurisdiction in this case ought not ,to be determined by the High Court on the basis of the provisions of s. 28 of the Indian Contract Act in the absence of a specific provision making it applicable to transactions in international trade. The effective operation of statutes of a country in relation to foreigners and foreign property, including ships, is subject to limitations..In general, a statute extends territorially, unless the contrary is stated, throughout the country and will extend to the territorial waters, and such places as intention to that effect is shown. A statute extends to all persons within the country if that intention is shown. The Indian Parliament therefore has no authority to legislate for foreign vessels or foreigners in them on the high seas. Thus a foreign ship on the high seas, or her foreign owners or their agents in a foreign country, are not deprived of
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rights by our statutory enactment expressed in general terms unless it provides that a foreign ship entering an Indian port or territorial waters and thus coming within the territorial jurisdiction is to be covered. If the Parliament legislates in terms which extend to foreign ships or foreigners beyond the territorial limits of its jurisdiction, the Indian court is of course bound to give effect to such enactment. However, no such provision has been referred to in the impugned judgments. Without anything more Indian statutes are ineffective against foreign property and foreigners outside the jurisdiction.

The Privy Council in Sirdar Gurdyal Singh v. Rajah of Faridkote, [1894] AC 670 (684) decided that no territorial legislation can give jurisdiction in personal action which any foreign court should recognize against absent foreigners owing no allegiance or obedience .to the power which so legislates. Lore Selborne said: "In a personal action to which none of these causes of jurisdiction apply, a decree pronounced in absentem by a foreign court, to the jurisdiction of which the defendant has not in any way submitted himself, is by international law an absolute nullity. He is under no obligation of any kind to obey it; and it must be regarded as a mere nullity by the courts of every nation except (when authorised by special local legislation) in the country of the forum by which it was pronounced." There may however be submission to the .jurisdiction of an Indian court by litigating in India. The question then is what would amount to submission to jurisdiction.

Cheshire & North's Private International Law 11th Ed., on submission to jurisdiction says: "Despite the fundamental principle that the court cannot entertain an action against

a defendant who is absent from England, it has long been recognised that an absent defendant may confer jurisdiction on the court by submitting to it. This may be done in a variety of ways, such as by the defendant acknowledging service before actual service of the writ, or instructing a solicitor to accept service on his behalf; Commencing an action as a plaintiff will give the court jurisdiction over a counter claim. Although a defendant who appears and contests the case on its merits will be held to have submitted to the jurisdiction, an appearance merely to protest that the court does not have jurisdiction will not constitute submission, even if I the defendant also seeks a stay of proceedings pending the outcome of proceedings abroad." The authors go on to say that any person may contract, either expressly or impliedly, to submit to the jurisdiction of a court to which he would not otherwise be subject. In case of an international contract it is common practice for the parties, to agree that
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any dispute arising between them shall be settled by the courts of another country even though both the parties are not resident of that country. In such a case having consented to the jurisdiction one cannot afterwards contest the binding effect of the judgment. The defendant out of the jurisdiction of the country may be deemed to have been served by service on his agent within the jurisdiction. However, parties cannot by submission confer jurisdiction on the court to entertain proceedings beyond its authority.

The jurisdiction of the court may be decided upon by the parties themselves on basis of various connecting factors.

Wastlake says in his Treatise on Private International Law, at page 5: "The principal grounds for selecting a particular national jurisdiction in which to bring an action are that the subject of the action, if a thing, is situate, if a contract, was made, or was to be performed, if a delict, was committed, within the territory: hence the forum situs, or rei sitae, contractus, delicti, the two latter of which are classed together as the forum special obligationis. Or that the jurisdiction is that in which all the claims relating to a certain thing or group of things ought to be adjudicated on together, the forum concursus, or that to which the defendant is personally subject, the forum rei."

In the instant case the appellant submits that as defendant it appeared before the Indian court to protest its jurisdiction and put forth its defences subject to that protest. The appellant, it has been stated in para 2 of the judgment under appeal, dated 30.4.1973, had not filed any objection to the findings as to damages. Did it then amount to submitting to the jurisdiction of the Indian court in which the shipper or the first respondent had no right to sue?

In Williams & Glyn’s Bank PLC v. Astro Dinamico Compania Naviera S.A. & Anr., The Weekly Law Reports Vol. (1) 1984-438, where the plaintiff-bank sought to enforce its securities against the defendants by instituting proceedings in England in reliance of clause 7 of the guarantees, whereby each of the defendants were expressed to submit irrevocably to the jurisdiction of the English courts. The respondents (defendants) made an application disputing the jurisdiction of the English courts and had also simultaneously applied for stay of the action. It was contended on behalf of the appellants (plaintiffs) that the respondents (defendants) either had waived any objection to the jurisdiction because they had taken a step in the action by applying for a stay

or that they would waive any objection if they persisted with
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their application in priority to disputing the jurisdiction. Lord Fraser observed that it would surely be quite unrealistic to say that the respondents had waived their objection to the jurisdiction by applying for a stay as an alternative in the very summons in which they applied for an order giving effect to their objection to the jurisdiction. That the summons made it abundantly clear that they were objecting and the fact that they asked for a decision upon their objection to be postponed until the outcome of the Greek proceedings was known, was not in any way inconsistent with maintaining their objection. There was no reason in principle or in common sense why the respondents should not be entitled to say: "We object to the jurisdiction of the English courts, but we ask for the proceedings necessary to decide that and the other issues to be stayed pending the decision of the proceedings in Greece." Reference was made to Rein v. Stein, [1892] 66 LT 469, where it was said at page 471: "It seems to me that, in order to establish a waiver, you must show that the party alleged to have waived his objection has taken some step which is only necessary or only useful if the objection has been actually waived, or if the objection has never been entertained at all." In Dulles' Settlement (No.2) (1951) Ch. 842; the question was whether a father, who was an American resident outside England, had submitted to the jurisdiction of the English courts in a dispute about payment of maintenance to his child in England. He had been represented by counsel in the English court, who argued that he was not subject to their jurisdiction. Denning LJ (as he then was) said at page 850:
"I cannot see how anyone can fairly say that a man has voluntarily submitted to the jurisdiction of a court, when he has all the time been vigorously protesting that it has no jurisdiction. If he does nothing and lets judgment go against him in default of appearance, he clearly does not submit to the jurisdiction. What difference in principle does it make, if he does not merely do nothing, but actually goes to the court and protests that it has no jurisdiction? I can see no distinction at all."

The judgment of the court of appeal which held that the application for a stay involved assumption that the court had jurisdiction to entertain the action and therefore the question of jurisdiction must be decided first, was set aside in appeal, and the appeal therefrom was dismissed by the House of Lords.
In the instant case the question is of initial jurisdiction on the
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basis of claues 3 of the bills of lading. We have to ask the question whether the shipper could or could not have the right to sue at Cochin under the bills of lading. If he could not have done so, the appellant's appearance to protest about jurisdiction would not cure that defect of jurisdiction. However, we find that in the Memo. of appeal before the lower appellate court no specific ground as to jurisdiction was taken through there were grounds on non-maintainability of the suit. Even in the Special Leave Petition before this Court no ground of lack of jurisdiction of the courts below has been taken. We are, therefore, of the view that the appellant has to be held to have either waived the objection as to jurisdiction or to have submitted to the jurisdiction in the facts and circumstances of the case. The defence that the suit was not maintainable in the absence of

the owner of the ship could in a sense be said to have been on the merits of the case. The submission as to lack of jurisdiction is, therefore, rejected.

Clause 3 of the bills of lading also contains the selection of law made by the parties. The contract is governed by English law and disputes are to be determined according to English Law. Is the selection of law binding? In Cheshire & North's Private International Law 1 th Ed., page 495,, while discussing about the interpretation of contracts the authors say: "When the stage has been reached where an obligation, formally and essentially valid and binding on parties of full capacity, has been created, then in the further matters that may require the intervention of the Court, there is, speaking generally, no reason in principle why the parties should not be free to select the governing law." The express choice of law made by parties obviates need for interpretation.

In the absence of an express choice the question of the proper law of contract would arise. The parties to a contract should be bound by the jurisdiction clause to which they have agreed unless there is some strong reason to the contrary.

Dicey & Morris in the Conflict of Laws formulate the following rule on proper law of contract as Rule 180:

"The term "Proper law of a contract" means the system of law by which the parties intended the contract to be governed, or, where their intention is neither expressed nor to be inferred from the circumstances, the system of law with which the transaction has its closest and most real connection."

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Sub-rule 1:

"When the intention of the parties to a contract, as to the law governing the contract, is expressed in words, this expressed intention, in general, determines the proper law of the contract."

Sub-rule 2:

"When the intention of the parties to a contract with regard to the law governing the contract is not expressed in words, their intention is to be inferred from the terms and nature of the contract, and from the general circumstances of the case, and such inferred intention determines the proper law of the contract ."

There can, therefore, be no doubt that the instant contract of affreightment evidenced by the bills of lading will be governed by English law. As the law has been chosen, the proper law will be the domestic law of England and the proper law must be the law at the time when the contract is made throughout the life of the contract and there cannot be a "floating" proper law. It has been recognised since Gienar v. Meyer, [1796] 2 Hy B 1608, that the the time of making the contract the parties may expressly select the law by which it is to be governed and they may declare their common intention by a simple statement that the contract shall be governed by the .law of a particular country. This has been settled by a long line of decisions, as 'Rex v. International Trustee for the Protection of Bondholders AG, [1937] AC 500 (529); Vita Food Products Inc. v. Unus Shipping Co. Ltd., [1939] AC 277 (289-90); James Miller and Partners Ltd. v. Whitworth Street Estates (Manchester) Ltd., [1970] AC 583 (603); Mackender v. Feldia AG, [1966] 3 All E.R. 847; Compagnie d' Armement Maritime SA v. Compagnie Tunisienne de Navigation SA, [1971] AC 572: [1970] 3 All E.R. 71 and Acrow (Automation) Ltd. v. Rex Chainbelt Inc., [1971] 3 All E.R. 1175.

It is true that in English law there are certain limitations on freedom to choose the governing law. The choice must be bona fide and legal, and not against public policy. It may not be permissible to choose a wholly unconnected law which is not otherwise a proper law of contract. English courts, it has been said, should, and do, have a residual power to strike down for good reasons, choice of law clauses, totally unconnected with the contract. Where there is no express
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choice of the proper law, it is open to Court to determine whether there is an implied or inferred choice of law in the parties contract.

The next question to be decided is whether the appellant would be liable for the suit claim. This would naturally depend on the contract of affreightment. It is an accepted principle that the bill of lading is not the contract of affreightment, for that has been made before the bill of lading was signed and delivered, but it evidences the terms of that contract. The bill of lading serves as a receipt and also as a document of tittle and may be transferred by endorsement and delivery. Article III(3) of the Hague Rules says that a bill of lading is prima facie evidence of the receipt by the carrier of the goods described therein. The Hamburg Rules define a bill of lading under Article 1(7) as follows:

"Bill of lading" means a document which evidences a contract of carriage by sea and the taking over or loading of the goods by the carrier, and by which the carrier undertakes to deliver the goods against surrender of the document. A provision in the document that the goods are to be delivered to the order of a named person, or to order, or to bearer, constitutes such an undertaking."

The Hague Rules say that after the goods are taken into his charge, the carrier or his agent shall issue to the shipper, if he so demands, a bill of lading, showing among other things the particulars of the goods.

The contract of affreightment need not necessarily be expressed in writing. The bill of lading is evidence of the terms of the contract which can also be ascertained from the charterparty where one exists. Dr. Justice T. Kochu Thommen in his book of Bills of Lading in International Law and Practice at page 25 writes:

"As between the shipowner and the shipper, the bill of lading is not conclusive evidence of the terms of the contract and parties to the contract are entitled to prove that the stipulations in the bill of lading are at variance with the agreed terms of the contract, as expressed or evidenced in other documents. In practice, however, the terms of the bill of lading govern the contractual relations between the shipowner and the shipper, and the booking note generally states that the carrier's regular forms of bill of lading shall
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be used and all the terms thereof shall form part of the contract. The bill of lading assumes the character of conclusive evidence once it has passed into the hands of a consignee or indorsee and evidence may not be given which varies or contradicts it. The position is, however, different when the ship is under charter and stipulations in the charterparty are expressly and clearly incorporated in the bill of lading. In such a case the bill of lading, even after it has passed in to the hands of a consignee or indorsee, has to be read subject to the charterparty stipulations. In the hands of a charterer, the bill of lading is

only a receipt and the charterparty is the governing document as far as the shipowner' and the charterer are concerned."

Apart from the question of the charterparty having been proved or not according to law the question in the instant case is whether clause 4 of the charterparty as to responsibility of the shipowner in respect of the goods carried would form part of or be incorporated in the bills of lading. How far the charterparty clauses laying down the responsibility and liabilities between the charterer and the shipowner can be attributed to the consignee under the bill of lading? It is an accepted principle that if certain clauses of the charterparty are referred to in the bill of lading those should be referred to in specific terms so as to bind the shipper and the consignee. A general reference may not be sufficient under all circumstances. Thus in T.W. Thomas & Co. Ltd. v. Portsea Steamship Co. Ltd., [1912] AC 1 in the bill of lading there was also a marginal clause in writing as follows:

"Deck load at shipper's risk, and all other terms and conditions and exceptions of charter to be as per charterparty, including negligence clause."

The question was whether the arbitration clause in the charter˜ party was incorporated by the reference in the bill of lading. Lord Loreburn L.C. answering this question whether an arbitration clause found in the charterparty was applicable to the contract evidenced by the bill of lading, and to disputes arising between the shipowners and the holders of the bill of lading under that document, replied in the negative. Lord Atkinson observed that when it was sought to introduce into a document like a bill of lading--a negotiable instrument--a clause such as the arbitration clause, not germane to the receipt, carriage, or delivery of the cargo or the payment of freight, the proper subject matters with which the bill of lading is conversant, that should

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be done by distinct and specific words, and not by such general words as those written in the margin of the bill of lading in that case.

In Vita Food Products, Incorporated v. Unus Shipping Co. Ltd., [1939] A.C. 277, the bill of lading set out in detail the terms and conditions of the contract "which are hereby mutually agreed upon as follows". Clause 7 contained a general exemption in respect of the goods carried from liability for all damage capable of being covered by insurance and from liability above a certain value per package unless a special declaration was made. The same clause also provided that "these contracts have been governed by English Law." While determining what was the proper law of the contract the Privy Council held that the expressed words of the bill of lading must receive effect with the result that the contract was governed by English Law. It was said: "It is now well settled that by English Law (and the law of Nova Scotia is the same) the proper law of the contract is the law which the parties intended to apply. That intention is objectively ascertained, and, if not expressed, will be presumed from the terms of the contract and the relevant surrounding circumstances." In that case the goods were shipped in Newfoundland under bills of lading which did not contain the statement required by section 3 of the Carriage of Goods by Sea Act, 1932 which incorporated the Hague rules subject to certain modifications but the bill of lading contained a general clause that the contracts "shall be governed by English Law" and applying that law the Shipowner

was held to be within the exceptions which exempted him from liability. In Rex v.International Trustee for the protection of Bondholders, [1937] AC 500, it was held that the intention of the parties would be ascertained from what is expressed in the contract, which will be conclusive. Repelling the contention that the transaction which was one relating to the carriage on a Nova Scotian ship of goods from Newfoundland to New York between residents in those countries, contained nothing to connect it in any way with English law, and that choice could not be seriously taken, their Lordships held that connection with English law was not as a matter of principle essential.

The Indian Bills of Lading Act, 1856, which is based on the Bills of Lading Act of 1855 of England in its preamble says:

"Whereas by the custom of merchants a bill of lading of goods being transferable by endorsement, the property in the goods may thereby pass to the indorsee, but nevertheless all rights in respect of the contract contained in the bill of lading continue in the original shipper or owner, and it is 904
expedient that such rights should pass with the property."

Section 1 of the Act provides that fights under bills of lading are to vest in consignee or endorsee. It says: "Every consignee of goods named in a bill of lading and every endorsee of a bill of lading to whom the property in the goods therein mentioned shall pass, upon or by reason of such consignment or endorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself." Thus a bill of lading is intended to provide for the rights and liabilities of the parties arising out of the contract of affreightment. If the consignee claims the goods under a bill of lading he is bound by its terms. The property in the cargo passes to the consignee or the endorsee of the bill of lading but the contract whereunder the consignment or endorsement is made has always to be taken into consideration. Thus the consignee or an endorsee gets only such rights as its consignor or endorser had in respect of the goods mentioned in the bill of lading. This is in conformity with Private International law applicable to the case.

The Indian Carriage of Goods by Sea Act, 1925 (Act XXVI of 1925) is an Act to amend the law with respect to carriage of goods by sea. It was passed after accepting the recommendations of the International Conference on maritime Law held at Brussels in October, 1922 and accepting the rules contained in the Draft Convention held at Brussels meeting in October, 1923 amending the rules to give the rules the force of law with a view to establish the responsibilities, liabilities, rights and amenities attaching to carriers on the bills of lading. But the Rules of the act are not applicable to this case.

The High Court rejected the contention of the appellant that it could not be made personally liable for claim on the grounds that the bills of lading were issued in the printed forms of the appellant company bearing its name at the top and that beyond what appeared at the bottom over the signature and seal, there was nothing at all to indicate that the appellant company was issuing the bills of lading for and on behalf of any owners of the vessel. However, the conditions printed on the reverse of the bills of lading itself could not have been avoided. Clause 4 Agency Clause said:

"If the vessel is not owned by or chartered by demise to the company or Line by whom this bill of lading is issued (as

may be the case notwithstanding anything that appears to
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the contrary) this bill of lading shall take effect only as a contract with the owner or demise chatterers as the case may be as principal made through the agency of the said company or Line who act solely as agents and shall be under no personal liability whatsoever in respect thereon."

This clause ex facie establishes a privity of contract between the owner or demise charterer of the vessel on the one hand and the shipper to whom the bill of lading has been issued by the appellant company as the charterer otherwise than by demise. The High Court construed this clause to be one relieving or lessening the carrier's liability without considering whether it was otherwise than as provided in the Rules under the Carriage of Goods Act, 1924 of England.
In Halsbury's Laws of England 4th edn. Vol. 43, para 401, it is said.

"A contract for the carnage of goods in a ship is called in law a contract of affreightment. In practice these contracts are usually written and most frequently are expressed in one or other of two types of document called respectively a charterparty and a bill of lading." In para 402 we read that a contract by charterparty is a contract by which an entire ship or some principal part of her is let to a merchant, called 'the charterer', for the conveyance of goods on a determined voyage to one or more places, or until the expiration of a specified period. In the first case it is called a "voyage charterparty", and in the second a "time charterparty". Such a contract may operate as a demise of the ship herself, to which the services of the master and the crew may or may not be added, or it may confer on the charterer nothing more than the right to have his goods conveyed by a particular ship, and, as subsidiary to it, to have the use of the ship and the services of the master and crew.

Thus for the purposes of ascertaining the responsibility of a charterer in respect of the cargo shipped and landed, it would be necessary to know not only the stipulations between the shipper i.e. the owner of the cargo and the charterer, evidenced by the bill of lading and also those between the charterer and the owner of the ship. If the charter is by way of demise the problem would be simple inasmuch as the bill of lading will be purely between the shipper and the charterer. In cases of a 'voyage charter' or a 'time charter' one has to find out the actual terms of the charter to ascertain whether they operated as charter by demise or made the charterer only as an agent
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of the shipowner and if so to what extent so as to ascertain the extent of privity established between the shipper, and the shipowner as stipulated in the bill of lading.

Charterparties by way of demise, says Halsbury, at para 403, are of two kinds: "(1) charter without master or crew, or "bareboat charter", where the hull is the subject matter of the charterparty and (2) charter with master and crew, under which the ship passes to the charterer in a state fit for the purposes of mercantile adventure. In both cases the charterer becomes for the time being the owner of the ship; the master and crew are, or become to all intents and purposes, his employees, and through them the possession of the ship is in him. The owner, on the other hand, has divested himself of all control either over the ship or over the master and crew, his sole fight being to receive the stipulated hire and to take back the ship when the charterparty comes to an end. During the currency of the charterparty,

therefore, the owner is under no liability to third persons whose goods may have been conveyed upon the demised ship or who may have done work or supplied stores for her, and those persons must look only to the charterer who has taken his place."

In para 404 Halsbury said:

"Although a charterparty which does not operate as a demise confers on the charterer the temporary right to have his goods loaded and conveyed in the ship, the ownership remains in the original owner, and through the master and crew, who continue to be his employees, the possession of the ship also remains in him. Therefore, the existence of the charterparty does not necessarily divest the owner of liability to third persons whose goods may have been conveyed on the ship, nor does it deprive him of his rights as Owners."

Whether a charterparty operates as a demise or not depends on the stipulations of the charterparty. The principal test is whether the master is the employee of the owner or of the charterer. In other words where the master becomes the employee of the charterer or continues to be the owner's employee. Where the charterparty is by way of demise, the charterer may employ the ship in carrying either his own goods or those of others. Where the charterparty does not operate as a demise, the charterer's right vis-a-vis the owner depends upon the terms of the contract. "The contract of carnage is personal to the

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charterer, and he cannot call upon the shipowner to undertake liabilities to third persons or transfer to third persons his own liabilities to the shipowner unless the contract so provides." A charterparty has to be construed so as to give effect, as far as possible, to the intention of the parties as expressed in the written contract. The stipulations of charterparty may be incorporated in a bill of lading so that they are thereby binding on the parties. It is an accepted principle that when stipulations of the charterparty are expressly incorporated, they become terms of the contract contained in the bill of lading, and they can be enforced by or against the shipper, consignee or endorsee. The effect of a bill of lading depends upon the circumstances of the particular case, of which the most important is the position of the shipper and of the holder. Where there is a bill of lading relating to the goods, the terms of the contract on which the goods are carried are prima facie to be ascertained from the bill of lading. However, if a shipper chose to receive a bill of lading in a certain from without protest he should ordinarily be bound by it. Thus, it cannot be said that the bill of lading is not conclusive evidence of its terms and the person executing it is not necessarily bound by all its stipulations, unless he repudiates them on the ground that, as he did not know, and could not reasonably be expected to know, of their existence, his assent to them is not to be inferred from his acceptance of the bill of lading without objection. Where there is a charterparty, the bill of lading is prima facie, as between the shipowner and an indorsee, the contract on which the goods are carried. This is so when the indorsee is ignorant of the terms of the charterparty, and may be so even if he knows of them. As between the shipowner and the charterer the bill of lading may in some cases have the effect of modifying the contract as contained in the charterparty, although, in general, the charterparty will prevail and the bill of lading will operate solely as an acknowledgement of receipt.

In the instant case we find from Exts. P 1 to P3 that

the following has been prominently printed just below the signature 'For the Master and Owners' in the bills of lading. SEE CONDITIONS OF CARRIAGE AND OTHER CONDITIONS OF REVERSE. It can not therefore be said that the shipper, whose knowledge will be attributed to the first respondent did not know of the conditions of carriage printed on the reverse , there being no other conditions printed elsewhere in the bills of lading.

None of the parties having repudiated the bills of lading in this case, the High Court ought not to have accepted the submission of .the first respondent that clause 4 of the bills of lading offended the provisions of the Carriage of Goods by Sea Act, 1924 and therefore bad.

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The Carriage of Goods by Sea Act, of 1924 of England was on the Hague Rules which were amended by Brussels protocol 1968 which is now embodied in the Carriage of Goods by Sea Act 1971 which came into force in 1977. The Indian Carriage of Goods by Sea Act 1925 (Act XXVI of 1925) which is an Act to amend the law with respect to the carriage of goods by sea was passed after the International Conference on Maritime Law held at Brussels in October 1922 and Brussels meeting in October 1923. Under Section 2 of that Act which deals with application of rules it is provided: "Subject to the provisions of this Act, the rules set out in the Schedule (hereinafter referred to as "the Rules") shall have the effect in relation to and in connection with the carriage of goods by sea in ships carrying goods from any port in India to any other port whether in or outside India." To apply the Rules to a case, the port of origin has to be an Indian Port. Unless the starting point or the port of loading is a port in India the Rules are inapplicable. These Rules have no application when goods are not carried from any Indian port. As in the instant case goods were shipped in Africa and carried to Cochin, this Act obviously was not applicable.

There is nothing to show that the charterparty was by way of demise. Pacta dant legem contractui--the stipulations of parties constitute the law of the contract. Agreements give the law to the contract. Clause 4 having been a stipulation in the contract evidenced by the bills of lading the parties could not resile therefrom. It is not clear whether the English Carriage of goods by Sea Act, 1924 or the Indian Carriage of Goods Act 1925 was applied by the High Court. The Articles and the Rules referred to are to be found in the Schedule to the Indian Act the Rules whereunder were not applicable to the facts of the case. The dispute could not have been decided partly according to municipal law and partly according to English law. The English law was not proved before the court according to law.

The result is that this appeal must succeed. We accordingly allow this appeal, set aside the impugned judgments and remand the case to the trial court for disposal according to law after giving opportunity to the parties to amend their pleadings and adduce additional evidence, if they are so advised, in light of the observations made hereinabove. In the facts and circumstances of the case we make no order as to costs.

R.S.S. Appeal allowed.

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