

SUPREME COURT OF NIGERIA

20TH APRIL, 2001. SC.90/1999

**CORAM:- A. G. KARIBI-WHYTE, I. L. KUTIGI,
E. O. OGWUEGBU, O. ACHIKE, S. O. UWAIFO, JJSC.**

1. BOOTHIA MARITIME INC. APPELLANTS
2. GLOBAL TRANSPORTE OCEANICO S.A. INC
3. NIGERIA PORTS AUTHORITY
AND
FAREAST MERCANTILE CO. LTD. RESPONDENT

APPEALS - Remark by court - A mere passing remark - Should not be appealable - But should be ignored (H 2)

DEMURRER - Evidence - Is not to be introduced or looked at - In a demurrer proceeding - Only statement of claim should be considered (H 1)

LOCUS STANDI - Actions - Bill of lading - Act of transfer of bill of lading to a clearing agent - Cannot divest the plaintiff of the right to sue - For loss of some of the goods (H 4)

LOCUS STANDI - Demurrer proceedings - Agency - Where there is no evidence that the plaintiff principal » Has divested itself of the right to sue - The action will not be struck out for want of locus (H3)

PROPERTY LAW - Bill of lading - Passing of property in the goods - Cannot be presumed by mere delivery of the bill of lading - To the clearing agent (H 5)

FACTS

Plaintiff/respondent became the indorsee of a bill of lading No. 224 for goods totalling 66 pallets of uncoated bond paper. The said

goods were conveyed on board 1st defendant's vessel that was due to arrive Apapa Lagos on 9/10/90 from London. On arrival, plaintiff passed all the relevant shipping document including the bill of lading No.224 to its clearing agent, Musina Nigeria Ltd. In the clearing process a short delivery of 12 pallets of the said goods was discovered. Despite repeated demands to make good this short delivery, the defendants failed to do so hence this action for the sum of N100,000.00 being special and general damages for the loss of and/or non-delivery by the defendants as common carriers and bailees for reward for short-delivery of 12 out of 66 pallets of uncoated Bond Paper carried on board the defendants' vessel.

Rather than answer the plaintiffs statement of claim by filing the defendants' statement of defence, the 1st defendant, as applicant by motion on notice to which it attached a copy of the bill of lading No.224 by way of demurrer proceedings, prayed the High Court to dismiss and or strike out the plaintiff's action. This was on the ground that the plaintiff not having been named as either the consignee or endorsee of the relevant bill of lading on which their claim is based and or if so named, having endorsed the same to another party has no locus standi to institute or maintain this action. The learned trial judge granted the motion as prayed. Dissatisfied, the plaintiff appealed to the Court of Appeal which allowed the appeal. The defendant has now appealed to the Supreme Court raising 3 issues.

ISSUES FOR DETERMINATION

"1. Whether an affidavit is mandatorily required in support of a demurrer application under Order 27 of the Federal High Court (Civil Procedure) Rules, 1976 (supra), and did the non-filing of such an affidavit by the Appellants herein preclude the trial and Lower Courts from looking at the document (Bill of Lading) pleaded by the Respondent in their Statement of Claim in the determination of the demurrer application? (Ground 1) "

2. "Whether Order 33 of the Federal High Court (Civil Procedure) Rules aforesaid (particularly Rules 4 & 20 thereof) is applicable to demurrer applications brought under Order 27 of the

Federal High Court (Civil Procedure) Rules (supra) so as to require the filing of a Supporting affidavit by the Appellant and whether failure to file such an affidavit is an incurable fundamental defect? Ground” 2 & 3”.

3. *“Whether the Applicant in the demurrer proceedings needed to have established by evidence the passing of property other than rely on the contents of the Statement of Claim and/or the document (Bill of Lading) pleaded by the Respondent therein?”*

HELD (Unanimously dismissing the appeal per lead Judgment of ACHIKE JSC)

Demurrer - Evidence

1. In the result, I find the authorities of *Day v. William Hill (Park Lane) C Ltd.* (supra), *B.G.C.C. V. C.M.I.S.* (supra), *Lawal v. G.B. Ollivant and Seatrade v. Fiogret* (1987-1990) 3 N.S.C. 453 wholly unhelpful in an application under Order 27 regarding whether the trial court, which is enjoined to look at the plaintiff’s statement of claim only can, because a document, i.e. a bill of lading, is pleaded and forms part of the statement of claim, also becomes perfectly entitled to look at the said bill of lading, rather than merely look at the averments in the statement of claim in relation to the said bill of lading. To go the whole hog and look at the bill of lading itself is to brazenly introduce facts or evidence and thereby act in defiance of the Rules of Court; this cannot be tolerated and must be roundly condemned.

In the result I turn in an affirmative answer to Issue No.1 and hold that the lower court was right in declining to give effect to the bill of lading. (p. 1118 D)

Appeals - Remark by court

2. In my judgment, the mere passing remark made in the leading judgment of Onalaja, JCA should not be appealable and should be completely ignored. Accordingly, Issue No.2 based on grounds 2 and 3 of the Grounds of Appeal is struck out. (p. 1119 C)

Demurrer proceedings - Agency

3. Indeed, it will be startling, if not absurd, that the law will, without more, allow an agent of a principal to arrogate to himself more claim of right to the goods in his possession to the chagrin of the principal by the mere fact or for a specified reason that he (the agent) has come in possession of the principal's bill of lading of which he (the principal) is the undoubted indorsee thereof. It is, therefore, my candid view that the defendants, in the absence of any evidence are checkmated in their bid to strike out/or dismiss the plaintiff's action on the ground of lack of standing to institute the action, there being no satisfactory averment in the statement of claim that the plaintiff had completely divested itself of the right to do so. In other words, the demurrer proceedings ought to fail. (p. 1 126 C)

Locus standi - Actions

4. Suppose the clearing agents, Musina (Nig) Ltd., as contended by the defendants/appellants, were indorsees of the bill of lading by mere act of transfer of that shipping document to them by the plaintiff, would this be enough also to transfer the property in the goods to them so as to completely divest the plaintiff of the right to sue for the loss of some of the goods comprised in the bill of lading? Surely, this will depend on the legal effect of the mere transfer or even the mere indorsement on the bill of lading. The weight of judicial authorities in this regard makes it abundantly clear that such legal effect, must, at the end of the day, depend on what can be gleaned from the parties' intention. (p. 1126 F)

Property law - Bill of lading

5. In the final analysis and having regard to the various principles and legal authorities considered above, and especially the lucid averments in the statement of claim, the trial court should have been wary to decide in limine by way of demurrer proceedings the serious question of whether the property in the goods passed, without more by mere delivery or passing over of the bill of lading by the indorsee to his clearing agent. Obviously, it will be premature without sufficient proof of the intention of the parties to rush to the conclusion that such mere delivery of the bill of lading has the devastating effect to rob the respondent of the locus standi to sue, placing reliance on the said bill

of lading. Therefore, I accept the decision of the lower court as correct. I hold that there is no merit whatsoever in this appeal, accordingly, I dismiss it. (p. 1128 F)

NOTABLE POINTS OF INTEREST

ACHIKE JSC

1. Passing of property vide bill of lading- Depends on giving of value

Obviously, the passing of the property in the goods depends on whether the consignee or indorsee gave value for the bill of lading to the person who got it from the consignor of the cargo. Therefore, to deny the plaintiff/respondent the right to sue on the bill of lading which the defendants/appellants contend has been vested in the Musina (Nig) Ltd., as indorsee, a prima facie right to sue must be established in favour of Musina (Nig) Ltd. by proving that it gave value for the bill of lading to the Savannah Bank of Nigeria Ltd. (the consignees) who got it from the consignors of the goods. (p. 1127 H)

OGWUEGBU JSC

2. Demurrer proceedings - Can easily be harmful

Demurrer being a beneficial tool in the hands of a proficient lawyer can easily be harmful. The defendants have employed it to short-circuit the action. There is therefore need for some degree of caution in employing the procedure. It has its disadvantages and unfortunately, the plaintiff without any fault on its part, is made to carry the burden of a delay of over ten years before the merits of his claim will be gone into and when the exchange rate of the Naira has hit the rocks. (p. 1134 H)

REPRESENTATION

Oluwafemi Atoyebi Esq. for the appellants
Respondent not represented.

CASES REFERRED TO

B.G.C.C. v. C M.I.S. (1962) 2 ANLR 563,
572

Lawal v. G.B.O. (1972) A.N.L.R. 217,218

Seatrade v. Fiogret (1987-1990) 3 N.S.C.C.

453

Day v. William Hill (park lane) Ltd. (1949) 1 ALL E.R 219,221

B Newsom & anor v. Thomson & anor (1805) ALL E.R. (Rep) 226 at p.230 R

Nigerbras Shipping Line Ltd. & anor v. Aluminium Extrusion Industries Ltd. (1994) 4 NWLR (pt.341) 773

C Fadare v. Attorney-General of Ojo State (1982) 4 SC.1

Brawal Shipping Ltd. v. F. I. Onwadike Co. Ltd. (2000) **11** NWLR. (PT.678) 387

Federal Capital Development Authority v. Naibi (1990) 3 NWLR (pt. 138) 270

D Williams v. Williams (1995) 2 NWLR (pt.375) 1

STATUTES REFERRED TO

Federal High Court (Civil Procedure) Rules, 1976 Order 27 Evidence

E Act S.86 H

LEAD JUDGMENT BY ACHIKE JSC

The plaintiff claims against the three defendants jointly and
F severally for the sum of N100,000.00 being special and general damages for the loss of and/or non-delivery by the defendants as common carriers and **bailees** for reward for short-delivery of 12 out of 66 pallets of uncoated Bond Paper carried on board the defendants' vessel. The said goods were consigned to the order of the plaintiff, as
G the endorsee thereof on the bill of lading No.224 Ex M/V *Kapetan Leonidas*", arriving at the Tin Can Island Port Apapa, Lagos on 9/10/90. The bill of lading covering the consignment was issued by the 2nd defendant, Global Transporte Oceanico SA Inc. in favour of Savannah Bank of Nigeria Ltd who, in consideration for value received,
H endorsed it to the plaintiff. On arrival of the vessel "*Kapetan Leonidas*" at the Tin Can Island Port on 9/10/90, the plaintiff over all the necessary shipping documents, including the aforesaid bill of lading No.224,

to its clearing agent Musina Nigeria Ltd., with the instructions to perform the necessary Customs formalities and settle the duty to the Board of Customs & Excise.

In the process of clearing the goods, the said bill of lading was given by the said Musina Nigeria Ltd. to the 3rd defendant, Nigerian Ports Authority who made a release order of the said goods to it (the clearing agent.) It was at this juncture that the short-delivery was noticed. Thereupon, the plaintiff brought this action for damages for the short-delivered 12 pallets, having filed its writ of summons with the Statement of Claim, both dated 3/10/91.

Rather than answer the plaintiff's statement of claim by filing the defendants' statement of defence, the 1st defendant, as applicant, by motion on notice to which it attached a copy of the bill of lading No.224, i.e. by way of demurrer proceedings under Order 27 of the Federal High Court (Civil Procedure) Rules, 1976 Cap.134, Laws of the Federation of Nigeria 1990, prayed the High Court to dismiss and/or strike out the plaintiffs/respondent's action on the grounds that the plaintiff, not having been named as either the consignee or endorsee of the relevant bill of lading on which their claim herein is based and/or if so named, having endorsed the same to another party, has no locus standi to institute or maintain this action as presently constituted.

The learned trial judge took arguments on the said demurrer application and in a considered Ruling delivered on 30/7/92, he granted the motion as prayed.

Dissatisfied, the plaintiff appealed to the Court of Appeal. In a considered judgment, the Court of Appeal allowed the appeal.

Next was the turn of the defendants to appeal to this Court as appellants. The respondent neither filed a brief nor was it represented at the oral hearing.

From the four grounds of appeal filed by the appellants, they identified the following issues for determination, namely,

"1. Whether an affidavit is mandatorily required in support of a demurrer application under Order 27 of the Federal High Court

(Civil Procedure) Rules, 1976 (supra), and did the non-filing of such an affidavit by the Appellants herein preclude the trial and Lower Courts from looking at the document (Bill of Lading) pleaded by the Respondent in their Statement of Claim in the determination of the demurrer application? (Ground 1)”.

2. *“Whether Order 33 of the Federal High Court (Civil Procedure) Rules aforesaid (particularly Rules 4 & 20 thereof) is applicable to demurrer applications brought under Order 27 of the Federal High Court (Civil Procedure) Rules (supra) so as to require the filing of a Supporting affidavit by the Appellant and whether failure to file such an affidavit is an incurable fundamental defect?. Grounds 2 & 3)”.*

3. *“Whether the Applicant in the demurrer proceedings needed to have established by evidence the passing of property other than rely on the contents of the Statement of Claim and/or the document (Bill of Lading) pleaded by the Respondent therein?”.*

At the oral hearing, Mr. Oluwafemi Atoyebi, learned counsel for the appellants submits that Rule 1 of Order 27 forbids any question of fact being raised at the proceedings, while Rule 2 also forbids leading evidence in respects of any fact and discussion of question of fact. He stresses that the applicant is deemed to have admitted all the facts averred by the plaintiff in his statement of claim. Counsel argues that the make-up of the statement of claim comprises facts as alleged by the plaintiff, which includes the averment on the bill of lading. He however says that the demurrer procedure does not include the statement of defence. It is his submission that the plaintiff has not made a case to be entitled to judgment and this explains why he has approached the court, at this stage, by the demurrer proceedings rather than attempt to answer the plaintiff’s claim conventionally by filling the statement of defence. In effect, counsel submits that the plaintiff has no locus standi to maintain the action as he has passed the bill of lading to a third party. He calls the Court’s attention to the recent decision of this Court in *Brawal Shipping (Nig) Ltd v F.I. Onwadike Co. Ltd & Anor*, Suit No. SC 133/1997 of 30th June, 2000 but submits that the decision in this case dealt with an issue not prop-

erly before it and so was a mere obiter. In contrast, counsel says that the bill of lading was pleaded in the instant case and therefore, eh submits that the appellants are entitled to rely on it.

Counsel also made a brief submission on Issue 2 which seeks to enquire whether order 33 of Federal High Court (Civil Procedure) Rules, particularly Rules 4 and 20 thereof, are applicable to demurrer applications brought under Order 27 of the Federal High Court (Civil Procedure) Rules. He submits that the two orders apply to two different situations. He further differentiates between the two Orders on the basis that while Order 33(1) provides that the application can be filed at any stage of the proceedings, under Order 27 the demurrer proceedings would be appropriate when only the Statement of Claim alone has been filed. He finally submits that the lower courts were wrong in holding, as they did, that the two Orders are similar.

Finally, counsel urged us to allow the appeal and strike out the case against the appellants.

In the appellants' brief their learned counsel made further amplifications on Issues 1 and 2 while Issue 3 was accorded a detailed treatment.

I shall now consider the three issues seriatim and in the sequence they were discussed by the learned appellants' counsel in their brief. And for purposes of emphasis, each issue will be set out appropriately.

Issue No.1

“Whether an affidavit is mandatorily required in support of a demurrer application under Order 27 of the Federal High Court (Civil Procedure) Rules, 1976 Cap 134 Laws of the Federation of Nigeria, 1990, and did the non-filing of such an affidavit by the appellants herein preclude the trial and Lower Courts from looking at the document (Bill of Lading) pleaded by the Respondents in their Statement of Claim in the determination of the demurrer application?”

A proper resolution of this issue calls for a close scrutiny of the provisions of Order 27 of the Federal High Court (Civil Procedure) Rules 1976, Cap.134 Laws of the Federation, 1990 (hereinafter sim-

ply referred to as “*Order 27*”). I shall now reproduce the provisions of *Order 27*. They run as follows:

B “1. *Where a Defendant conceives that he has a good legal or equitable defence to the suit, so that even if the allegations of the plaintiff were admitted or established, yet the Plaintiff would not be entitled to any decree against the Defendant, he may raise this defence by a motion that the suit be dismissed without any answer upon questions of fact being required from him.*

C “2. *For the purposes of such an application, the Defendant shall be taken as admitting the truth of the Plaintiff’s allegations, and no evidence respecting matters of fact, and no discussion of questions of fact, shall be allowed.*

D “3. *The Court, on hearing the application, shall either dismiss the suit or order the Defendant to answer the Plaintiff’s allegations of fact, and shall make such order as to costs as the Court deems just.*”

The above provisions are otherwise usually referred to as provisions relating to demurrer or procedure. The gravamen of counsel’s submission is that by virtue of Rules 1 and 2 of *Order 27* there is no contemplation of filing of an affidavit. For the proper understanding of the procedural law contemplated by application relating to demurrer, it must be borne in mind that by Rules 1 and 2 of *Order 27* as amplified by a maze of judicial authorities relating to these two Rules, that it is now trite that in demurrer proceedings the only relevant and competent document that the trial court is obliged to look at is the plaintiff’s statement of claim. This, of necessity, must be so because the combined effect of Rules 1 and 2, forbids the defendant to answer upon questions of fact, or embark on discussion of questions of fact because the defendant will be deemed to have admitted the truth of the plaintiff’s allegations as set out in the statement of claim. Such a defendant is precluded from filing an affidavit because the content of an affidavit, necessarily, by the rules governing such a document, must contain statements of facts and circumstances to which the deponent deposes: see section 86 of the Evidence Act.

So far, learned appellants’ counsel is in agreement that ordi-

narily and for the purposes of the demurrer application it will be contrary to the express provisions of Rules 1 and 2 for a defendant to file and annex a supporting affidavit in a demurrer application as this will undermine the very essence of such procedure. Counsel however makes a fine point of distinction to the effect that by pleading the bill of lading, he submits that the implication is that the bill of lading has become incorporated into the statement of claim and makes it part of the statement of claim so that for all intents and purposes the bill of lading and the statement of claim should be looked at together as one document, *“the former being an extension of the latter”*; he calls in aid the authorities of this Court: B.G.C.C. v. C.M.I.S. (1962) 2 ANLR 563, 572, Lawal v. G.B.O 91972) A.N.L.R. 217, 218 and Seatrade v Fiogret (1987-1990) 3 N.S.C.C. 453, as well as the English authority of Day v William Hill (Park Lane) Ltd. (1949) 1 All E.R. 219, 221. B
C
D

It goes without saying that the decision of the court may be authority for one or more things, that is to say, that the decision may have a ratio decidendi or rationes decidendi. Examining first the English authority of Day v William Hill (Park Lane) Ltd. (supra) which learned counsel strongly submits has received approval not only of the Court of Appeal but even this Court. I am of opinion that its first ratio, to wit, E
F

“if documents were referred to in a pleading, they became part of the pleading, and it was open to the court to look at them without the necessity for any affidavit exhibiting them”

is unquestionably a good authority that has been acted upon under our law; see Banque Genevoise de Commerce et de Credit v Ga Mar Di Isola Spetsai Ltd (No.2) (1962) Vol.1 All N.L.R 570 and for brevity referred to as B.G. C.C v C.M.I.S (No. 2) 91962) 1 All NLR 570 at p.576 and Lawal v.G.B. Ollivant (Nig) Ltd (1972) 1 All NLR (Part H 1) 207, at pp. 212-214. G

It is important to place the case under consideration in its proper perspective. First this is an application by demurrer. Again, it is clear

from the demurrer proceedings by which the appellant approached the trial court that the bill of lading, rightly in my view, was simply referred to in the plaintiff's statement of claim. In fact, no affidavit would have been permissible or tolerated if one was sought to be
B tendered or annexed to the motion paper because this would offend Rules 1 and 2 of Order 27 which expressly forbid such fact or evidence and discussion of questions of fact.

Relying on all the authorities cited by learned counsel in his submission under Issue No.1, he finally submitted that "in determin-
C ing an application under Order 27 aforesaid, the trial court is only entitled to look at the Plaintiff's Statement of Claim alone, and since the Bill of Lading pleaded is deemed to have become part of that statement of claim, the Court is perfectly entitled to look at it". With
D respect to learned counsel, this authorities cited seek to illustrate the principle that if a document is referred to in a pleading it becomes part of the pleading so that the court can look at the averments in the pleadings in relation to that document. This, I accept, without the
E slightest hesitation. But to deliberately submit that where the court is prohibited by Rules of court, as under order 27, to look at other documents, it would however look at that document if it is simply pleaded in the statement of claim – because by reason of its being so
F pleaded it becomes incorporated into the statement of claim and the court becomes perfectly entitled to look at the said document is to deliberately mislead the court by a fallacious deduction from the judicial authorities cited and relied upon. Surely, if the rule of court forbids looking at any other document save the statement of claim, it
G will be tendentious and mischievous to submit that by mere pleading another document in the statement of claim, such as a bill of lading, the court would automatically be entitled to look at the bill of lading, a forbidden document. Counsel, as an officer of the court, cannot
H advance such strange and mischievous submission whose only virtue is to mislead the court and score a Pyrrhic victory at the great expense of bringing the law to ridicule.

In the result, I find the authorities of Day v William Hill (Park

Lane) Ltd. (supra), B.G.C.C. V. C.M.I.S. (supra), Lawal v. G.B. Ollivant and Seatrade v Fiogret (1987-1990) 3 N.S.C. 453 wholly unhelpful in an application under Order 27 regarding whether the trial court, which is enjoined to look at the plaintiff's statement of claim only can, because a document, i.e. a bill of lading, is pleaded and forms part of the statement of claim, also becomes perfectly entitled to look at the said bill of lading, rather than merely look at the averments in the statement of claim in relation to the said bill of lading. To go the whole hog and look at the bill of lading itself is to brazenly introduce facts or evidence and thereby act in defiance of the Rules of Court; this cannot be tolerated and must be roundly condemned.

In the result I turn in an affirmative answer to Issue No.1 and hold that the lower court was right in declining to give effect to the bill of lading.

Issue No.2

"Whether Order 33 of the Federal High Court (Civil Procedure) Rules aforesaid (particularly Rules 4 & 20 thereof) is applicable to demurrer applications brought under Order 27 of the Federal High Court (Civil Procedure) Rules, Cap 134 laws of the Federation of Nigeria, 1990 so as to require the filing of a supporting affidavit by the appellant and whether failure to file such an affidavit is an incurable fundamental defect?"

Learned counsel for the appellants, after saying that he adopts his argument on Issue No.1 in support of that issue, quickly came to a conclusion, and with no ado, that Order 33 (Rules 4 & 20) is distinct from demurrer applications under Order 27.

While I agree that the operations of Order 27 and Order 33 deal with two distinct situations, I find it an utterly arid exercise to embark on such investigation in the circumstances of this case. To what extent such investigation will affect the real issue on appeal between the parties herein is extremely difficult to appreciate. In my judgment, the mere passing remark made in the leading judgment of Onalaja, JCA should not be appealable and should be completely ignored. Accordingly, Issue No.2 based on grounds 2 and 3 of the

Grounds of Appeal is struck out.

Issue No.

*“Whether the Applicant in the demurrer proceedings needed to have established by evidence the passing of property other than
B rely on the content of the Statement of Claim and/or the document
(Bill of Lading) pleaded by the Respondent therein?”*

After indicating that he relies on his submissions in respect of
Issues Nos. 1 and 2 to support the third issue, learned appellants’
C counsel also reiterates his submission that the trial judge could only
be bound to look at the statement of claim and such other docu-
ments as may have been pleaded in the statement of claim. Against
the backdrop of this submission, counsel further submits that the Court
of Appeal cannot be correct in holding that it was necessary to prove
D the passing of property upon an endorsement of the bill of lading by
evidence and that the onus was on the applicant in demurrer pro-
ceedings to establish the passing of property. He further contends
that proving by evidence as held by the lower court is expressly pro-
E hibited in a demurrer proceeding under Order 27 Rule 2. Counsel
further submits that since the plaintiff/respondent was the party who
averred that it was the consignee/endorsee of the relevant bill of lad-
ing, the onus was on it to prove this which they have failed to do.
F Finally, counsel submits that it was the duty of the trial court in the
circumstances to look at the statement of claim and the bill of lading
and to interpret the bill of lading and give it its true legal effect not-
withstanding any word employed by the plaintiff/respondent in its
statement of claim to describe this position. This, according to coun-
G sel, is a desirable thing to do, because had the lower court properly
adverted its mind to this, it would have discovered that the respon-
dent had further endorsed the bill of lading to Musina Nig. Ltd., its
clearing agent, and therefore there was no longer any right in the
H respondent thereafter to sue, as it did, relying on the relevant bill of
lading.

He accordingly urges that this issue be resolved in favour of
the appellants and therefore to allow the appeal.

It may be observed that much of what I had earlier said with reference to Issue No.1 is applicable to this issue. It seems to me that it is now appropriate at this juncture to have a close look at the statement of claim. The relevant averments of the statement of claim for the purposes of this appeal and the issues raised therein are paragraphs 1-13, 17-19 and are reproduced hereunder:

"1. The plaintiff is a company carrying on business in Lagos with an office at No.64, Balogun Street, Lagos Nigeria.

2. The 1st defendant is shipping company, a common carrier and bailees for reward resident abroad in Greece and the owners of the vessel M/V "KAPETABLEONIDAS".

3. The 2nd defendant is a shipping company, a common carrier and bailees for reward resident abroad and the co-owners/characters of the vessel M/V "KAPETAN LEONIDAS", and carries on business here in Nigeria through their agent resident within the jurisdiction MESSRS COMET SHIPPING AGENCIES (NIG) LTD of 18/20, Commercial Road, Apapa, Lagos.

4. The 3rd defendant is a statutory corporation, a warehouseman and bailee for reward entrusted with the custody and delivery of goods consigned to the plaintiff through the Tin Can Island Port, Apapa, Lagos, Nigeria.

5. By a valued invoice dated 3/9/90 received by the plaintiff, the plaintiff was advised by KUMANTI LIMITED of London to expect a total consignment of 43.610 metric tons of uncoated bond paper superwhite in sheets packed in 66 pallets.

6. By a Bill of lading No.224 issued by the 2nd defendant but received by the plaintiff as the endorsee of SAVANNAH BANK OF NIGERIA LIMITED, the 2nd defendant confirmed the shipment to the order of Savannah Bank of Nigeria Ltd. On board the 1st defendant's vessel M/V "KAPETAN LEONIDAS" of a total consignment of 43.610 metric tons of uncoated bond paper packed in 66 pallets.

7. The plaintiff for value received necessary endorsement and delivery to it from Savannah Bank of Nigeria Ltd. of the goods covered pursuant to the Bill of lading 224 shipped on board the 1st

defendant's vessel M/V 'KAPETAN LEONIDAS'.

8. The Plaintiff received oral notification from the 2nd defendant's agent that the 1st defendant's vessel M/V 'KAPETAN LEONIDAS' will arrive the Tin Can Island Port, Apapa, Lagos on 9/10/90.

B 9. On the arrival of the vessel "KAPETAN LEONIDAS" At the
Tin Can Island Port of 9/10/90, the plaintiff passed all necessary ship-
ping documents to its clearing agent Musina Nigeria Limited with in-
structions to perform all customs formalities and to pay necessary
C duty to the Board of Customs formalities and to pay the necessary
duty to the Board of Customs formalities and to pay the necessary
duty to the Board of Customs and Excise, the plaintiff will at the
hearing found on the Customs Bill of Entry with the attachments No.
1003061 of 22/10/90 for N57,805.80 being the value of duty paid
D by the plaintiff on the consignment of 66 pallets shipped on board
the 1st defendant's vessel M/V 'KAPETAN LEONIDAS'.

10. The plaintiff's agent Musina Nigeria Limited called at the
office of the 2nd defendant's agent to obtain delivery of the plaintiff's
E consignment and in the process surrendered to the 2nd defendant's
agent the plaintiff's original endorsed Bill of Lading No.224 against
their necessary release order.

11. The 2nd defendant agent's release order directed the
F plaintiff's agent to the 3rd defendant to obtain the plaintiff's consign-
ment from the said 3rd defendant.

12. The plaintiff's agent paid handling charges to the 3rd De-
fendant and called on the 3rd defendant for the delivery of the
plaintiff's consignment, but the 3rd defendant only delivered to the
G plaintiff through its agent, Musina (Nig) Limited a total of 54 pallets
uncoated bond paper out of 66 pallets leaving a balance of 12 pallets
undelivered. The plaintiff will at the trial found on 3, photo copies of
the 3rd defendant's Road Talley Sheet No. B/0171/0075 covering a
H total of 54 pallets out of 66 pallets delivered through the plaintiff's
agent.

13. The plaintiff by itself and through its agent searched through
the ports for the balance of 12 pallets bond paper all without success

and the plaintiff's agent consequently applied for an Extra Service Request from the 3rd Defendant on payment for their services and will at the trial found on the N.P.A. Request for Extra Services Serial No. TCIP/Ext/1286 dated 6/11/90 together with the receipt No. LAG/TCIP/03321 dated 6/11/90 for their full terms and effect.

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17. The defendants have refused and/or neglected to settle the plaintiff for the loss of 12 pallets uncoated bond paper suffered on board the defendants vessel despite the repeated demands made.

18. And/or in the alternative, the plaintiff claim against the Defendants their servants and/or their agents negligence for the loss suffered by the plaintiff pursuant to the shipment on board the defendants vessel of 66 pallets of uncoated bond paper received in apparent good order and condition and as follows:-

PARTICULARS OF NEGLIGENCE

(a) Fact of loss and/or non-delivery by the defendants of 12 pallets of uncoated bond paper part of the plaintiff's consignment of 66 pallets of uncoated bond paper received in apparent good order and condition.

(b) No security of adequate security were taken by the defendant their servants or their agents to guard the plaintiff cargoes in the custody and control of the defendant.

(c) The plaintiff will rely on the said loss of 12 pallets uncoated bond paper as evidence of negligence against the defendants.

19. WHEREUPON, the plaintiff claim against the defendants special and general damages for the breach of the contract of carriage resulting in the loss suffered by the plaintiff as per the writ of summons and as follows:-

PARTICULARS OF DAMAGES

SPECIAL DAMAGES:-

GENERAL DAMAGES (1) To C.I.F. value of 12 pallets uncoated bond paper short-delivered by the defendants valued

(2) To proportionate value of duty paid by the plaintiff on the short-received 12 pallets of uncoated bond paper valued

Total = N70,067.63

B
N11.245.85

N18,686.52

N100,000.00

C At the risk of being repetitive but for purposes of emphasis and clarity, I wish to say that the summary of the above lengthy averments in the statement of claim is that the plaintiff, for consideration given, it became the endorsee of the Savannah Bank of Nigeria Ltd. for goods totalling 66 pallets of uncoated bond paper covered by a D bill of lading No.224 and the said goods were conveyed on board 1st defendant's vessel that was due to arrive Apapa, Lagos on 9/10/90 from London. On arrival, plaintiff passed all the relevant shipping documents, including the bill of lading No.224, to its agents, Musina E Nigeria Ltd. whereupon a short-delivered of 12 pallets of the said goods was discovered. Despite repeated demands to make good this short-delivery the defendants failed to do so hence this action for the value of the short-delivered goods.

F It is beyond question that on the above facts elicited from the statement of claim that the goods as shipped and covered by the bill of lading No.224 belonged to the plaintiff (herein respondent). But the narrow issue that calls for resolution is whether on the undisputed facts that the plaintiff having passed the relevant shipping documents, including the bill of lading No. 224, would still have the locus G standi to maintain the present action against the defendants for the short-delivered goods. One bears in mind that the defendants had questioned the plaintiff's locus standing by a demurrer procedure. H That approach undoubtedly, was justifiable in law upon the tacit understanding as earlier pointed out, that in such contest the defendants would be deemed to have accepted all the facts averred in the paragraphs of the statement of claim as true.

Now the question, as earlier stated, is whether the defendants have satisfactorily made out a case that by reason of the plaintiff's delivery of all the relevant shipping documents, including the bill of lading, that the plaintiff divested itself of the right to sue the defendants for the short-delivered goods? This, to my mind, brings to focus the legal role of a bill of lading. One of the three vital functions of bill of lading, indeed, which is relevant to this appeal, is that it is a document of title to the goods specified in it in the sense that where the owner of the goods indorses the bill of lading in favour of a purchaser for value and transfers same to him, the owner of the goods transfers the property in the goods to the purchaser; the purchaser may then be referred to as the 'transferee', 'consignee' or 'indorsee' of the bill of lading as the case may be, while the bill of lading is said to have been negotiated. It is important to underscore the fact that while a bill of lading is a negotiable or an assignable document of title to the goods it is however NOT a negotiable instrument under the Bills of Exchange Act, because, unlike a bill of exchange, the bona fide holder of a bill of lading for value cannot acquire a better title than the transferor possesses; see Okay Achike, Commercial Law in Nigeria (1985 ed.) p.284.

This brings us straightaway to the question whether or not the plaintiff by delivering the bill of lading to its clearing agents lost its standing to sue on the bill. In other words, was there an indorsement of the bill of lading whereby the bill of lading was negotiated with the intention of passing the property in the goods to the person to whom it was indorsed? Generally, there are three types of indorsement. First is the "*special indorsement*" i.e. where there is a specified person named in the bill of lading. E.g where X bought goods from the owner or shipper, D, the following indorsement may be made on the bill of lading:

"Deliver to X or order, (signed D.)"

second, if X simply writes his name on the back of the said bill of lading, this is called an "*indorsement in blank*". The effect of indorsement in blank is that it changes, i.e. converts, the "*order*" bill of

lading to a “bearer” bill of lading so that a holder of the bill of lading indorsed in blank will transfer title in the goods effectively by mere delivery and without specifically mentioning the name was specified in the bill of lading.

B Thirdly, there may be the “restricted indorsement”. This arises where the holder of a bill of lading in blank, restricts the indorsement and in turn reconverts, it to an “order” bill of lading. Thus where, as in our example, X sold the goods to T, he could indorse the bill of lading at the back “X” which makes the bill of lading a “bearer” bill; C but if after the signature of “X” (at the back) the name of the buyer is written over the signature, this becomes a restricted indorsement whereby the “bearer” bill of lading is reconverted to an “order” bill of lading. It may be further noted that an indorsement to “D only” D after his signature equally illustrates an example of restricted indorsement.

While it will be wrong for any one, including the court, to speculate on the content of the aforesaid bill of lading No.224, the plaintiff E however stated lucidly, particularly in paragraphs 6, 7 and 9 of its statement of claim that it was the indorsee for value of the bill of lading No.224 which covered the goods shipped, the said bill of lading having been indorsed to it by the Savannah Bank of Nigeria Ltd. Paragraph 9 clearly confirmed that the plaintiff gave its agent Musina F Nigeria Ltd. the relevant shipping documents, including the bill of lading No. 224 for purposes of clearing the goods covered by the said bill. Permit me to reiterate that both the defendants and the two lower courts, by the time-honoured rules of demurrer procedure G that had earlier been highlighted, are bound to accept all the averments of fact stated in the plaintiff’s statement of claim as true. One of those averments is that Musina (Nig) Ltd was engaged as a clearing agent for the plaintiff with instructions to perform all customs formalities but there was no allegation in the statement of claim of any customary or conventional indorsement by the plaintiff on the front or back of the bill of lading constituting the clearing agent an indorsee of the bill of lading. In other words, this Court accepts as true the aver-

ment that the bill of lading No.224 was delivered to Musina (Nig) Ltd. simply as a clearing agent of the plaintiff and not as an indorsee thereof. Therefore, any view to the contrary must be fully established by the party who so asserts; unquestionably, it must be the defendant's applicants now the demurrers. But such proof would be procedurally unattainable and would be manifestly absurd to embark upon because Order 27 Rules 1 and 2 expressly prohibit 'answer upon questions of fact being required from the defendants' or 'evidence respecting matters of fact' and 'discussion of questions of fact'. Of course, the choice of demurrer procedure application to determine the plaintiff's action in limine is that of the defendants and the burden is therefore on them to establish, by way of motion and to the satisfaction of the court, that the plaintiff was lacking in standing to prosecute his claim at that stage of the trial.

Indeed, it will be startling, if not absurd, that the law will, without more, allow an agent of a principal to arrogate to himself more claim of right to the goods in his possession to the chagrin of the principal by the mere fact or for a specified reason that he (the agent) has come in possession of the principal's bill of lading of which he (the principal) is the undoubted indorsee thereof. It is, therefore, my candid view that the defendants, in the absence of any evidence are checkmated in their bid to strike out/or dismiss the plaintiff's action on the ground of lack of standing to institute the action, thereby being no satisfactory averment in the statement of claim that the plaintiff had completely divested itself of the right to do so. In other words, the demurrer proceedings ought to fail.

There is an aspect of the case that remains to be considered. Suppose the clearing agents, Musina (Nig) Ltd., as contended by the defendants/appellants, were indorsees of the bill of lading by mere act of transfer of that shipping document to them by the plaintiff, would this be enough also to transfer the property in the goods to them so as to completely divest the plaintiff of the right to sue for the loss of some of the goods comprised in the bill of lading? Surely, this will depend on the legal effect of the mere transfer or even the mere

indorsement on the bill of lading. The weight of judicial authorities in this regard makes it abundantly clear that such legal effect, must, at the end of the day, depend on what can be gleaned from the parties' intention. Thus in the old case of *Newsom & Anor v Thornton & Anor* (1805) All E.R. (Rep) 226 at p.230, Ellenborough, C.J. put it tersely and lucidly as follows:

"A bill of lading, indeed, shall pass the property upon a bona fide endorsement and delivery, where it is intended so to operate, in the same manner as a direct delivery of the goods themselves would do, it so intended." (Emphasis is mine)

the need to accord protection to consignees and indorsees of bills of lading against the baseless and adverse claims of persons who, without more, come in possession of these legal documents could not be over-emphasised. In England, such protection was established by the enactment of the Bills of Lading Act, 1855. The effect of the Act is to assign the contract of afreightment to the assignee of the bill of lading and who in turn takes the property in the goods. This is the effect of the provisions of section 1 of the Act. Interestingly, the provisions of that section have now been incorporated verbatim into our law as section 375(1) of the Merchant Shipping Act, Cap 224, Laws of the Federation of Nigeria, 1990 and states as follows:

"Every consignee of goods named in a bill of lading, and every endorsee of a bill to whom the property in the goods therein mentioned shall pass upon by reason of such consignment or endorsement shall have transferred to and vested in him all right 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."

It is crystal clear from the above provisions that it is not every consignee or indorsee of a bill of lading who may have a right to sue on it, but only a consignee or indorsee to whom the property in the goods mentioned therein shall pass upon by reason of such consignment or indorsement because, at that juncture, he would have transferred to and vested in him the right to sue and the reciprocity of the corresponding liabilities relating to such goods. Obviously, the pass-

ing of the property in the goods depends on whether the consignee or indorsee gave value for the bill of lading to the person who got it from the consignor of the cargo. Therefore, to deny the plaintiff/respondent the right to sue on the bill of lading which the defendants/appellants contend has been vested in the Musina (Nig) Ltd., B as indorsee, a prima facie right to sue must be established in favour of Musina (Nig) Ltd. by proving that it gave value for the bill of lading to the Savannah Bank of Nigeria Ltd. (the consignees) who got it from the consignors of the goods.

The facts of this case are not dissimilar from those of Nigerbras C Shipping Line Ltd. & Anor v Aluminium Extrusion Industries Ltd (1994) 4 NWLR (Pt.341) 733, a decision of the Court of Appeal which the lower court relied on in deciding in favour of the respondent herein in that the appellants herein, who asserted that the property D in the goods passed to Musina (Nig) Ltd., and who had the duty to prove the truth thereof, failed to do so. Finally, I find the recent decision of this Court in Brawal Shipping (Nigeria) Limited v F. J. Onwadike Co. Limited & Anor 2000 11 NWLR (Pt. 678) 387, which E in many respects are similar to the facts of the present appeal, illuminating. In the leading judgment of the Court, Uwaifo, JSC opined:

“... The property in the goods passes not by the mere assignment F and delivery of the bill of lading but by the contract between the assignor and the assignee, or otherwise between the consignor and the consignee, or indorser and indorsee by which it is intended that the property should pass”.

I respectfully endorse this statement.

In the final analysis and having regard to the various principles G and legal authorities considered above, and especially the lucid averments in the statement of claim, the trial court should have been wary to decide in limine by way of demurrer proceedings the serious H question of whether the property in the goods passed, without more by mere delivery or passing over of the bill of lading by the indorsee to his clearing agent. Obviously, it will be premature without sufficient proof of the intention of the parties to rush to the conclusion

that such mere delivery of the bill of lading has the devastating effect to rob the respondent of the locus standi to sue, placing reliance on the said bill of lading. Therefore, I accept the decision of the lower court as correct. I hold that there is no merit whatsoever in this

B appeal, accordingly, I dismiss it.

The case is remitted to the trial court before another judge of the same jurisdiction for the respondents to answer to the Statement of Claim. This case commenced its arduous journey to this Court about 10 years ago; with the order I have just made, the case, as it were, is back to square one. The Hon. Chief Judge of the Federal C High Court should direct the hearing of the case with dispatch.

The respondents kept aloof to this appeal, neither having filed a brief of argument nor participated at the oral hearing. Accordingly, D I make no order as to costs.

KARIBI-WHYTE JSC

E I have read the judgment of my learned brother Achike, JSC in this appeal. I agree entirely with his reasoning and conclusion in this appeal.

The principles enshrined in Order 27 rr.1-3 of the former Federal High Court Rules 1976 is very clear and well settled. It is that F where a defendant relies on the allegations in the statement of claim for an application to dismiss the suit that no cause of action has been made out, he need not rely on any evidence for such application. The Applicant is regarded as having admitted the facts pleaded in the statement of claim as true. See *Fadare v Attorney-General of Ojo State* 91982) 4 SC.1; *Brawal Shipping Ltd., v. F. I. Onwadike Co. Ltd* G (2000) 11 NWLR (pt. 678) 387.

The contention of the Appellant is that the Bill of lading referred to in the statement of claim should be admitted as part of the statement of claim and should be taken into account in considering the application.

I agree with the reasoning in the leading judgment of my learned

brother Achike JSC, that *“if the rule of court forbids looking at any other document save the statement of claim, it will be tendentious and mischievous to submit that mere pleading another document in the statement of claim, such as a bill of lading, the court would automatically be entitled to look at the bill of lading, a forbidden document.”* B

There is no doubt that to look at the Bill of lading is to introduce facts or evidence and thereby act in violation of Order 27 rr.1 and 2 relied upon for the application. Accordingly the Court below was right in declining to give effect to the Bill of Lading. C

For the above reason and the fuller reasons in the judgment of my learned brother Achike JSC, I find no merit in this appeal, which I hereby also dismiss.

I also agree with the order remitting the case to the trial Court before another judge of the same jurisdiction for the Respondents to answer the statement of claim. D

There shall be no Order for costs in this appeal.

E

KUTIGI JSC

I read in advance the judgment just delivered by my learned brother Achike, JSC I agree with his reasoning and conclusions. The appeal is on all fours with the case of BRAWAL SHIPPING (NIG) LTD VS ONWADIKE CO. LTD (2000) 11 NWLR (PT678) 387 which binds us. The appeal is therefore dismissed with no order as to costs. I endorse the consequential orders contained therein. F

G

OGWUEGBU JSC

I have had the privilege of reading the draft judgment of my learned brother Achike, JSC I agree with his reasoning and conclusion that the appeal fails and should be dismissed.

The facts of the case have been fully set in the leading judgment and I do not intend to repeat them except in so far as are

necessary for my consideration of the appeal.

This appeal arose from a motion on notice filed in the Federal High Court, Lagos Division by the 1st defendant praying that court for an order:

B *‘to dismiss and/or strike out this action on the grounds that the Plaintiff not having been named as either the consignee or endorsee of the relevant Bill of Lading on which their claim herein is based, and/or if so named; having endorsed the same to another party, has no locus standi to institute and/or maintain this action as presently*
C *constituted,...’*

The application was brought pursuant to Order 27 of the Federal High Court (Civil Procedure) Rules, 1976 which makes provision for demurrer proceedings. Rules 1, 2 and 3 of the said order are
D relevant to the application and they state as follows:-

“1. Where a Defendant conceives that he has a good legal or equitable defence to the suit, so that even if the allegations of the plaintiff were admitted or established, yet the Plaintiff would not be
E *entitled to any decree against the Defendant, he may raise this defence by a motion that the suit be dismissed without any answer upon questions of fact being required from him.*

2. For the purposes of such an application, the Defendant shall
F *be taken as admitting the truth of the Plaintiff’s allegations, and no evidence respecting matters of fact, and no discussion of questions of fact, shall be allowed.*

3. The Court, on hearing the application, shall either dismiss the suit or order the Defendant to answer the Plaintiff’s allegations of
G *fact, and shall make such order as to costs as the Court deems just”.*

In demurrer proceedings under the Rules, Rule 1 postulates that the plaintiff should have filed a statement of claim, otherwise, there will be no basis for the defendant to conceive that he has a
H good legal or equitable defence to the suit. Therefore, as a general rule the application cannot be brought before the plaintiff files his statement of claim but must be filed before the filing of the statement of defence.

In an application under Order 27, the filing of an affidavit in support of the demurrer is unacceptable as it is a written statement of facts on oath sworn or affirmed before some one who has authority to administer it. In civil proceedings parties may agree that their case

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