Privy Council Appeal No. 137 *of* 1916.

Dwarkanath Raimohan Chaudhuri and Another - - - - - - *Appellants,*

v.

The Rivers Steam Navigation Company (Limited) - - - - - - *Respondents,*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 18TH DECEMBER, 1917.

Present at the Hearing:

VISCOUNT HALDANE.
LORD SHAW.
SIR JOHN EDGE.
MR. AMEER ALI.
SIR WALTER PHILLIMORE, BART.

[*Delivered by* SIR WALTER PHILLIMORE, BART.]

These are consolidated appeals in two actions brought in the High Court of Judicature of Calcutta. The appellants are the plaintiffs.

They brought their action in respect of two parcels of jute laden on board the flat "Jattrapore" for carriage from Bera to Ruthtolla Ghat at Calcutta, on the terms of certain bills of lading, and they sued in respect of a loss of the jute by fire. The general outline of the facts in the case is as follows:—

The flat proceeded to her destination at Ruthtolla Ghat; but when she reached her discharging berth the consignees were not ready to take delivery.

There was a dispute upon this subject in the Courts below, the plaintiffs complaining that they had been prevented from taking delivery. But this issue was found against them, and the decision on this point has not been questioned before this Board.

The flat with other cargo on board was then taken further down the Hooghly, and ultimately moored head and stern to two buoys, near a wharf called Nintollah Ghat. She was moored with head up river outside another flat called the "Coleroon," which was fast to the same buoys. There were other flats further in shore. She had been in this position two or three days when a fire broke out on board the "Coleroon," in the early morning of the 16th December, 1912. The fire spread to the "Jattrapore," and, though the latter was ultimately got clear and towed away down river, so much mischief had been done that the greater part of the jute in question was destroyed.

In these circumstances the several plaintiffs sued the defendant Company for that the Company had not delivered the goods in accordance with the bill of lading, and alternatively for not taking care of the goods and saving them from the fire.

As the contract of carriage had been terminated by the arrival of the flat at the wharf at which delivery should have been taken, and by the neglect of the plaintiffs to take delivery in due course, the liability of the defendent Company under the bills of lading had ceased, and its responsibility thereafter was that of an ordinary bailee. The limits of this responsibility are defined in the following sections of the Indian Contract Act of 1872 :—

"151. In all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality, and value as the goods bailed.

"152. The bailee, in the absence of any special contract, is not responsible for the loss, destruction, or deterioration of the thing bailed if he has taken the amount of care of it described in section 151."

The "Jattrapore" at the time of the fire was moored alongside the "Coleroon," as already stated. The nature of her moorings was as follows: She had a wire hawser out from one bow with an eye made at the end which was thrown over a bitt. The hawser was taken to the buoy, passed through a ring there, and led back to the other bow. There it was made fast by coiling it in a figure-of-eight over two bitts. There was a similar attachment with another wire hawser to the stern; and there were breast fastenings to the "Coleroon." Whether these latter were composed of wire or of ordinary rope is not quite certain. The balance of the evidence seems to be that they were of rope, and this would be the more probable state of things.

At the time of the fire the tide was flood, and the flat would therefore be straining at her stern moorings. The "Coleroon" had similar head and stern moorings. The fire broke out in the early morning on the 16th December, as already stated. It was discovered by the watchman on board

the "Jattrapore" at 3·30 A.M., and no point was made that he did not discover it as soon as he should have done. He called up the serang, or native commander; and the rest of the crew awoke. The head moorings were at once cast off. It is said that certain steps were taken towards casting off the stern moorings, but that they were not successful. It is also said that an order was given for some of the sailors to undo the breast fastenings, which, for some reason, was not executed. The breast fastenings were, according to his evidence, ultimately burnt away. It appears that the pumps were put on to play on the fire. After a time the watchman and some of the crew got ashore in the jolly boat; but the serang and others remained on board the flat until Mr. Ravenscroft, the transport officer of the defendant Company, and Captain Huey, another servant of the Company, arrived with tugs and a steam-launch about 5.45 A.M.

One end of the stern moorings was then released by Ravenscroft and Huey; but as the hawser then jammed in the ring of the buoy the other end had to be cut with an axe. Then the flat was towed away. All this time the fire was continuing.

In these circumstances the plaintiffs maintain that there was negligence on the part of those on board the flat in not getting the stern moorings and breast fastenings cast off at once, so that the flat might have drifted clear with the tide. This, as they contend, could have been done in time to prevent the fire from reaching the cargo on board her.

At the trial, the learned Judge (Mr. Justice Chitty) took this view, and found against the defendant Company for the full amount of the loss, which was to be ascertained by a reference. On appeal the Chief Justice and Mr. Justice Woodroffe took the contrary view, and came to the conclusion "that the defendant Company took as much care of the jute as a man of ordinary prudence would, under similar circumstances, have taken of his own goods of the same bulk, quality, and value."

The weight to be attached to the judgment of the learned Judge of first instance, who saw the witnesses, is a good deal lessened by reason of his having apparently thrown the burden of proof on the wrong party. He states that it was, in his opinion, incumbent upon the defendant Company to satisfy him that they had taken such care of these goods as a man of ordinary prudence would take of his own goods. This, in their Lordships' view, is not a correct statement oj the law.

It is true that under the Law of Evidence Act of 1872, section 106, "when any fact is especially within the knowledge of any person, the burden of proving that fact is on him"; and it was therefore right that the defendant Company should call the material witnesses who were on the spot, as it seems to have done. But this provision of the law of evidence does not discharge the plaintiffs from proving the want of due diligence, or (expressing it otherwise) the negligence, of the servants of the defendant Company.

It may be for the Company to lay the materials before the Court; but it remains for the plaintiffs to satisfy the Court that the true inference from those materials is that the servants of the defendant Company have not shown due care, skill, and nerve.

Before applying themselves to a close examination of the facts and such disputed points in the evidence as require more minute consideration, their Lordships desire to observe that good sense and the policy of the law impose some limit upon the amount of care, skill, and nerve which are required of a person in a position of duty, who has to encounter a sudden emergency. There have been many expressions of judicial opinion upon this subject, particularly in cases dealing with ships and navigation, where emergencies often arise with great suddenness. For this purpose their Lordships would select the case of "The Bywell Castle." (L. R., 4, P.D., p. 219.)

In that case, which was one of collision, the emergency was brought about by the previous wrongful manœuvre of the vessel whose owners were complaining. But this makes no difference; the question was, What is to be required of a man who finds himself in a sudden emergency, however that emergency has been brought about? In the Court of Appeal each of the Lords Justices expressed himself in different language, but to the same effect. In a moment of extreme peril and difficulty you are not to expect perfect presence of mind, accurate judgment, and promptitude. If a man is suddenly put in an extremely difficult position and a wrong order is given by him, it ought not in the circumstances to be attributed to him as a thing done with such want of nerve and skill as to amount to negligence. If in a sudden emergency a man does something which he might, as he knew the circumstances, reasonably think proper, he is not to be held guilty of negligence, because, upon review of the facts, it can be seen that the course he had adopted was not in fact the best.

Here the question turns on the fact that the stern moorings were not released by the serang, nor until Ravenscroft and Huey arrived. There might also have been some point as to the breast fastenings; but, as it is clear that, supposing them to have been cast off, the tide would have pinned the "Jattrapore" against the "Coleroon" as long as her stern moorings held, and as these breast fastenings were either already burnt away before Ravenscroft arrived, or were severed by him *uno flatu* with the release of the stern moorings, any negligence—if there were any in respect to these breast fastenings—had no effect upon the ultimate loss.

Now as regards the stern moorings. The watchman gives some evidence which their Lordships were asked by counsel for the appellants to disregard, because he apparently confused stem and stern; but inasmuch as it does not appear that he was a sailor man, and as there is apparently not much difference between stem and stern in these flats, their Lordships think that it is a fair view of his evidence that, when he speaks of the fore part of the

flat, he means that part which was stemming the tide. So construed, his evidence is to the effect that after casting off the wire hawser at the stem, the serang proceeded to the stern and endeavoured to cut the wire hawser at this end, but failed to do so.

The evidence of the serang is that he tried to lift the eye of the hawser from off the bitt, and that he could not do so by reason of the strain upon it. This, as the flat was riding by it to the tide, is not at all improbable. The real point made against him is that he did not attempt to lift the coil in the figure-of-eight off the bitts on the other side.

The learned Judge of first instance thought that it must have been easily removable, because when the other people arrived they found no difficulty in lifting the coil off. But it is to be remembered, first, that the tide may—and probably would by this time—have become of less force; and, secondly, that they probably had the tugs fast who could tow the vessel up towards the buoy and relieve the strain. It is not to be inferred from the fact that Ravenscroft and Huey were able jointly to free this end when they came on board, that the serang with such assistance as he might reasonably expect to get from his crew could have done so at an earlier period.

If his story be accepted that he had tried to cast off the other end and then endeavoured to cut it with an axe, he, at any rate, made some attempt. Whether or not it should have occurred to him in the emergency, with the fire rapidly gaining ground, to try and lift off the figure-of-eight, and whether or not he could reasonably have got sufficient assistance to do so, is a matter of some doubt. He was no poltroon: he and some of the crew stayed on board till the tugs came up. He took the precaution of setting the pumps going and keeping them going, and it would take several of the crew to work these pumps.

The learned Judge of first instance said that he he did not believe that the serang made any attempt to deal with the stern moorings; but he says this because he is of opinion that if the serang had tried, he could have released them without difficulty. Why, if that were so, the man remaining on board his flat in close proximity to the fire, should not have taken for his own sake, if for no other reason, such an easy step, the learned Judge does not seem to have considered. Nor does he seem to have weighed the difficulties created by the strain of the tide.

He thinks that there is a contradiction between the evidence of the serang and that of the European officers, because they speak to a jamming at the buoy, and he speaks to a jamming at the bitts. But the two accounts may well stand together; and this leads their Lordships to observe that there is a further difficulty in the plaintiffs' way.

What happened when the European officers came on board is that, after they had cast off the figure-of-eight, the hawser did not, as was expected, draw through the ring of the buoy,

but for some reason, whether connected with the moorings of the other flat or flats, or by reason of some kink in the wire, jammed in the ring of the buoy, so that the only thing to be done was to free it also at the other end, where the eye was over the bitts. This was done by cutting with an axe. Be it observed that the idea of lifting off the eye was evidently regarded as still impracticable.

Now, how came it that it could be cut by an axe when the serang, if he speaks truth, had tried and failed? An explanation is offered. One of the tugs was towing hard at the other end, and a great strain was brought upon the hawser, which naturally thereupon yielded sooner to the axe.

There is therefore no reason for discrediting the evidence of the serang by the light of subsequent events; and, if his evidence be trustworthy, the most that can be said is that he failed to appreciate the comparative facility with which he could have cast off the figure-of-eight.

The learned Judges in the Court of Appeal saw no difficulty in accepting his evidence. It is possible that in one passage in their judgment there may be confusion between the difficulty of freeing the hawser from the bitts and the difficulty of getting it to pass through the ring; but, except in this point, their judgment in favour of the defendant Company is not open to criticism.

As the hawser jammed in the ring when the figure-of-eight was cast off, the flat still remained fast; and as there is no reason to suppose that this jamming was produced by anything subsequent to the fire, if the serang had tried and succeeded in casting off the figure-of-eight, the hawser would have jammed then, and the flat would still have remained fast, and the mischief would have been done just the same.

Therefore, even supposing that negligence were to be attributed to the serang in respect of his not casting off the figure-of-eight, and their Lordships are not prepared to go so far, the plaintiffs would still fail, because the loss was not due to that act of negligence.

There is a further point with which the Court of Appeal dealt, the learned Judges being of opinion that, supposing all the moorings to have been cast off, it was by no means shown that the "Jattrapore" would, having regard to the set of the tide and the position of the buoy and the moorings of the other flat, with which she might become entangled, have drifted away and got clear, or at any rate got clear before the fire had time to catch her. If this were so, any negligence in respect of the moorings would be immaterial.

Their Lordships feel it unnecessary to pronounce upon this point, because, for the reasons already stated, they agree with the Court of Appeal that the several plaintiffs have failed to prove negligence. Their Lordships will therefore humbly recommend His Majesty that these appeals should be dismissed with costs.

In the Privy Council.

DWARKANATH RAIMOHAN CHAUDHURI AND ANOTHER.

v.

THE RIVERS STEAM NAVIGATION COMPANY (LIMITED).

DELIVERED BY

SIR WALTER PHILLIMORE, BART.

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