

(1971) 01 CAL CK 0023
In the Calcutta High Court
Case No : Suit No. 1988 of 1952

Bansilal Madanlal

APPELLANT

Vs

East Bengal River Steam Service

RESPONDENT

Date of Decision : 08-01-1971

Acts Referred:

Carriers Act, 1865 — Section 10
Commercial Documents Evidence Act, 1939 — Section 3
Evidence Act, 1872 — Section 114, 16, 38, 45, 65
General Clauses Act, 1897 — Section 3(33), 3(55)

Citation : (1972) 2 ILR (Cal) 380

Hon'ble Judges : Deb, J

Bench : Single Bench

Judgement

Deb, J.—The Plaintiff is a partnership firm and the Defendant is a common carrier. The Plaintiff has claimed in this suit Rs. 54,574 as damages for non-delivery of 325 bales of jute weighing 1300 mds. entrusted to the Defendant on April 13, 1952, by Nimchand Sovachand, a joint Mitakshara Hindu family business of Dhubri, for carriage by the Defendant from Dhubri in its flat "Mahajan" under a bill of lading dated April 13, 1952, and for delivery to the Plaintiff at Cossipur Ghat at Calcutta.

2. Material averments made in the plaint are that the Plaintiff is the owner of those goods and by a letter of May 2, 1952, the Defendant informed the Plaintiff that the said flat caught fire at Kanudi near Chandpur in East Pakistan and by its letter of May 14, 1952, the Defendant further informed the Plaintiff that the goods in suit were destroyed or lost by the said fire and, without admitting the occurrence of the said fire including the alleged loss or destruction of those goods, the Plaintiff charged the Defendant and its servants and agents with, fraud, negligence, criminal act and misconduct for causing the said fire and for non-delivery of those goods and gave particulars of those charges in the plaint reserving its right to furnish further particulars after the documents were disclosed by the Defendant and inspection of those documents were completed.

3. The Defendant, without admitting the Plaintiff's ownership of those goods, took a defence under a term of the said bill of lading exonerating the Defendant from any liability for loss or damage caused to those goods by an act of God or due to an accidental fire and admitting that those goods were entrusted by Nimchand Sovachand to the Defendant for the said carriage and delivery to the Plaintiff pleaded that from April 15 to 27, 1952, the said flat was inspected by the Pakistan Land Customs Officer at Chilmari and those officers locked up and sealed six gangways and two doors of the flat thereby completely sealed up the deck and the holds of that flat where the said goods were "stacked with the result the said seals under the law of Pakistan and/or the official orders had to remain intact till the flat reached the Indian water. On April. 30, the flat reached the village Kanudi in East Pakistan which is four miles from Chandpur, and on May 1, between 12-30 and 1 p.m. there was a high wind and it was suddenly discovered that the jute bales were on fire. The agents and servants of the Defendant in the flat and its other agents of Chandpur and Narayanganj took all steps that were necessary and possible on their part and they tried to extinguish the said fire even with the aid and assistance of the Pakistan Fire Service of Chandpur and the local assistance that were available to them, but in spite of their best efforts the fire could not be extinguished till May 2, 1952. The Defendant, after denying the charges of fraud, negligence, criminal act and misconduct of its agents and servants, pleaded that those goods were consumed by the said fire which was an accidental fire or was the result of an act of God or due to self-combustion of jute bales and denied its liability in the matter.

4. The Learned Counsel Mr. J. C. Goho, appearing for the Defendant, did not raise any issue on the defence taken under the bill of lading frankly admitting that it was not available to the Defendant if the Defendant fail to disprove the negligence of its servants and agents though those goods were consumed and damaged by the said fire. The following issues raised by him were accepted by the Learned Counsel Mr. P. N. Sen, appearing for the Plaintiff, and were settled by me accordingly:

- (1) Upon what terms and conditions the Defendant agreed to carry the goods in suit ?
- (2) Was the Plaintiff the owner of the goods in suit as alleged in para. 3 of the plaint ?
- (3) Did the Defendant take all steps necessary and possible to extinguish the fire as alleged in para. 6 of the written statement ?
- (4) Did the fire break out owing to fraud, neglect, criminal act and/or want of care and skill or misconduct on the part of the Defendant, its agents and servants as alleged in para. 5 of the plaint ?
- (5) Was the fire the result of an act of God as stated in para. 9(a) of the written statement?

(6) Did the fire break out as a result of self-combustion as alleged in sub-para, (b) of para. 9 of the written statement ?

(7) Did the fire break out due to unforeseen accident as stated in para. 9(c)" of the written statement ?

(8) Did the Defendant take all reasonable care, and precaution as required by law as stated in para. 10 of the written statement ?

(9) Did the fire break out due to causes alleged in sub-paras, (a) to (k) of para. 5 of the plaint ?

(10) (a) Did the Plaintiff serve any notice u/s 10 of the Carriers Act ? (b) If so, is that notice valid ?

(11) Did the Plaintiff suffer any loss or damage and,- if so, in what sum ?

(12) To what relief, if any, "is the Plaintiff entitled ?

5. Mr. Duli Chand Jhavar, who is a nephew of some of the partners of the Plaintiff-firm, Mr. Chagan Lal, cousin of Nimchand of Nimchand Sovachand and an employee of Nimchand Sovachand, Mr. S. K. Mukherjee, an employee of Sinclair Murray (Pakistan) Ltd.," gave evidence for the Plaintiff and Mr. Sishir Kumar Basu, Mr. Usha Ranjan Dey, Mr. T. K. Basu Thakur, Mr. Aghor Kumar Bose and Rear Admiral Tarit Bhusan Bose gave evidence for the "Defendant.

Issue No. (7):

6. The original bill of lading was not produced by the Defendant though its terms were relied on in the written statement. ;A copy was, however, typed out and included by the Plaintiff in the brief of documents. Mr. Goho admitted the terms contained in this copy and the pages containing Jhose terms were tendered by consent of the parties, except the first page which Mr. Goho did not accept as correct due to some typographical mistakes and it was tendered in evidence of Mr. Jhavar. Those mistakes were pointed out by Mr. Aghor Kumar Bose, the Dhubri agent of the Defendant, and corrections made by him were recorded in his deposition. Mr. Goho then admitted the first page which was already tendered as said earlier. The bill of lading is admitted in the pleadings and it is also admitted by the pleadings that the goods in suit were entrusted by Nimchand Sovachand to the Defendant for carriage and delivery to the Plaintiff. No oral evidence is admissible either to contradict or to add any term and, accordingly, my answer to this issue is that the Defendant agreed to carry those goods on the terms and conditions contained in the bill of lading, copy of- which is included in Ex. A.

Issue No. (2):

7. It is admitted by the pleadings that Nimchand Sovachand were the consignors and the Plaintiff was the consignee and those goods were entrusted by the Defendant for carriage. Mr. Jiawar and Mr. Chagan Lal had said that Nimchand

Sovachand were the commission agents of the Plaintiff and as such commission agents they had entrusted those goods for and on behalf of the Plaintiff to the Defendant for carriage. Mr. Goho, without asking a single question in cross-examination to them on this point, had asked me to reject their evidence as Mr. Jhawar did not join the Plaintiff-firm until the end of May 1952 and as Nimchand was not called to give evidence in this suit. Mr. Goho did not even make any suggestion to them that Nimchand Sovachand were not the commission agents of the Plaintiff and in consigning those goods Nimchand Sovachand did not act as the agents of the Plaintiff. Mr. Chagan Lal further said that it was he who had personally entrusted those goods to the Defendant for carriage and in cross-examination all that it was suggested to him that he did not personally deliver those goods to the "Defendant, which was denied by Mr. Chagan Lal and he was not asked any further question on it. Aghor Babu had said that those goods were entrusted personally to him by Amar Chand, who was the father of Nimchand, and not by Mr. Chagan Lal, but this case was not even put to Mr. Chagan Lal in cross-examination. Aghor Babu further said that the original bill of lading was issued and signed by him, but faced with the copy of the bill of lading he came out with the truth by admitting that it was issued and signed not by him but by Mr. S. Kundu of the Defendant. He then said that the counterpart of the bill of lading was eaten up by white ants though he did not even care to ascertain it as admitted by him. Still Mr. Goho, relying on this evidence of Aghor Babu, had asked me to reject the evidence of Mr. Chagan Lal, but I, on the other hand, reject the evidence of Aghor Babu whose name does not appear anywhere, and Mr. Kundu did not even come to support him. Mr. Goho, further, said that he was unable to cross-examine Mr. Chagan Lal on these material facts and was not even in a position to put the essential case of the Defendant to him as he was not instructed that Aghor Babu would be giving evidence, but this suit appeared daily for a long time in the peremptory list until it was taken up, and the Defendant by not instructing Mr. Goho cannot make true the after-thought untrue evidence of Aghor Babu. No doubt, Mr. Jhawar was not in the picture until the end of May 1952, but Mr. Chagan Lal was at Dhubri and he has proved that Nimchand Sovachand were the agents of the Plaintiff and he, as an employee of those agents of the Plaintiff, had purchased those goods with the money advanced by the Plaintiff to- Nimchand Sovachand, and he had entrusted those very goods to the Defendant and I accept his evidence and hold that in consigning those goods Nimchand Sovachand acted as agents of the Plaintiff, who were the owners of those goods, and it was not Amar Chand but Mr. Chagan Lal who had delivered those goods to Mr. Kundu and not to Aghor Babu.

8. It was contended by Mr. Goho that as Mr. Jhawar had no personal knowledge of the entries in the books of accounts of the Plaintiff relating to the advances made by the Plaintiff to Nimchand Sovachand tendered in his evidence, it should be held that the ownership of those goods were not proved by the Plaintiff, but those entries are merely corroborative evidence and all that can be said is that Mr. Jhawar was unable to corroborate himself by those entries. But the entries in

the books of accounts do not by themselves prove ownership of any goods as they are merely corroborative evidence, and when no such corroboration is required at all in view of other materials on the record, the Court cannot ignore those materials for the purpose of holding that the owner has failed to prove his ownership of the goods merely because the witness is not in a position to corroborate himself by the entries in the books of accounts though tendered in evidence. The commercial relationship between the Plaintiff and Nimchand Sovachand as principal and agents, to my satisfaction, has been proved at least by Mr. Chagan Lai, who had further proved that he had purchased those goods with the money sent by the Plaintiff to Nimchand Sovachand and had delivered those very goods to the Defendant for carriage, I hold that the Plaintiff is the owner of those goods in suit. Moreover, Mr. Chagan Lal was not even cross-examined on this aspect of the case and I am bound by the decision of our Court of Appeal where it was held that when a counsel does not avail himself of the opportunity of cross-examining a witness on essential points said by the witness and does not even put his material case so far as it relates to that witness, the counsel is deemed to have accepted the evidence of that witness as true and correct and" this principle is the rule of essential justice and not a mere formality, in A.E.G. Carapiet Vs. A.Y. Derderian, and in Atul Chandra Lahiry Vs. Sonatan Daw, and, accordingly, my answer is "yes" to this issue.

9. Two additional facts and a point of law further strengthen my above answer to this issue. The first fact is that the Defendant appointed Sinclair Murray (Pakistan) Ltd. to salvage the cargoes of that flat and Mr. Goho had told me that the Defendant's case is that all other consignees whose goods were insured were paid by the Insurance companies and the goods in suit were not insured. Mr. Jhavar was not even cross-examined by Mr. Goho when Mr. Jhavar said that the goods in suit were not insured and Sinclair Murray & Company, who were the sister concern of the above Pakistan company, directly paid Rs. 4,285 and odd annas to the Plaintiff. It is to be noted here that Mr. Jhavar had personal knowledge about the payment as he had already joined the Plaintiff firm when this payment was received by the Plaintiff. The second fact is that in the letter of May 2, 1952, (included in Ex. A which was tendered by consent) the Defendant, inter alia, wrote to the Plaintiff that "you had" 325 bales of jute weighing 4 mds. each under the bill of lading dated April 13, 1952, "on board" the flat Mahajan and no one was called by the Defendant to get rid of this statement. Coming now to the point of law, it is well-established by the judgment of the Supreme Court in the Union of India (UOI) Vs. West Punjab Factories Ltd., and our Court of Appeal in Suklal Bros. v. H.K. Karvana AIR 1958 Cal. 730 that when the consignee is the principal and the consignor is the agent, it is the consignee who is the owner of the goods and as such owner he is entitled to maintain an action against the carrier.

Issues Nos. (3), (4), (5), (6), (7), (8) and (9):

10. All these issues were rolled up by the counsel for both parties at the time of

argument and, accordingly, I will deal with them together for convenience. I reject the defence "that the said fire was the result of an act of God" at the very outset as Mr. Goho was unable to point out any material on the record in support of this plea. His endeavour was, firstly, to show that the cause of fire was due to self-combustion in jute bales carried in that flat and, lastly, to establish that the fire broke out accidentally. Rear Admiral Bose, who is a disinterested witness, was called by the Defendant to substantiate the first plea, but in his experience of about 40 years he came across only once with a spontaneous combustion in jute bales which happened on an ocean-going vessel and "only about 10 or 20 bales had to be thrown out", but cases like total loss due to spontaneous combustion is not known to him (Q. 70). In answer to Qs. 25-26 he admitted that he was neither an expert in jute nor he had any training in any "jute line" and, accordingly, he is not a competent witness to speak on the subject. Still I will deal with his opinion relating to the circumstances under which spontaneous combustion in jute takes place. He said that "under some adverse conditions", that is, when the jute bales containing moisture are closed in holds of a flat during the hot season they get "heated due to hot sun and may gradually generate a kind of marsh gas and the jute bales coming in contact with each other due to "certain amount of jerking movements" caused by the "high waves" may result in self-ignition in jute bales, but there must be "a lot of high temperature" before reaching the "ignition point" and there must not be sufficient "air circulation over the cargoes" (Qs. 12, 13, 82, 92). In answer to Q. 45 he admitted that he did not "study the case", and before he could express any opinion on it he (Q. 24) must know "the condition of the cargo, how it was loaded and how it was carried". In answer to Qs. 22 and 26 he said that jute cargoes are not made "air tight or water tight" and in answer to Q. 86 he was unable to say what was the required temperature for self-ignition in jute and asked the cross-examining counsel to refer to an "ordinary Chemistry book".

11. Aghor Babu had said that 8 flats including "Mahajan" were loaded with jute bales at the same time by the porters under the supervision of the respective serangs and sukhani and he inspected the conditions of those jute bales at the time of their stacking from time to time every day for about two-and-half hours. He said that the flat "Mahajan" had a carrying capacity of 2,400 bales of jute and the total number of 3,398 bales were loaded in that flat including the goods in suit which is corroborated by Ex. G and in the first protest of the serang of the flat "Mahajan" where it was also stated that each of those bales were 4 mds. each in weight. The case of the Defendant is that the flat "Mahajan" was towed by steamer "Chaitanya" from Dhubri and on arrival at Chilmari the jute cargoes of that flat were inspected by the Pakistan Land Customs Officers from April 15 to 27, 1952. Now, that the jute cargoes of that flat were inspected by Aghor Babu, the serang and the sukhani at the time of loading there was a remote possibility of those jute bales containing sufficient percentage of moisture to generate marsh gas even if heated by hot sun provided, however, due care was taken by them at the time of inspection, and stacking. The fact that 3,398 bales

each weighing 4 mds. were loaded in the flat shows that there was sufficient space for air circulation over the cargoes, and if the stacking was properly done by them there was practically no chance of jute bales coming in contact with each other. Moreover, those bales were inspected by the Pakistan Land Customs Officers in the presence of serang and sukhani for a number of days and so the question of "any heat being generated in the jute bales" cannot arise at all, and even if any heat was at all generated in any bale, serang, sukhani and the crew ought to have taken proper care to eliminate the possibility of self-ignition by pouring water at least on the heated portion of the C.I. sheets of the roof of the flat and not even on the whole of the roof as stated by the Rear Admiral.

12. The Defendant's case is that 6 gangways and 2 doors of the flat "Mahajan" were locked and sealed by those Customs Officers on April 27, and this flat along with two other flats containing jute cargoes were towed by steamer "Sree Krishna" and left Chilmari on the very same day and reached Kanudi on April 30, and stayed there overnight. On May 1, at about 8-30 a.m. "Sree Krishna" left those 3 flats in the mid-stream of the river at a distance of about 100 yards from the bank of the river of the Kanudi side for fueling at Narayangunj. There is nothing on the record to show what was the temperature of weather between April 27 and 30, on the main river route by which these 3 flats came to Kanudi and in the same way no attempt was even made to prove that the weather was hot on May 1 at Kanudi. Notarial protests of serang are wholly useless as they do not speak on these material points.

13. Moreover, no evidence was adduced to show the actual condition of the cargoes and there is nothing on the record to show that the flat "Mahajan" was heated up by the sun. In these circumstances, it will be a mere conjecture to hold? that the cause of the fire was the self-combustion of jute bales. Two other flats loaded with jute bales were simultaneously towed with the flat "Mahajan" from April 27 to 30, by the same steamer and were anchored by the side of "Mahajan" on May 1, but no fire broke out in them and this fact also rules out any possibility of self-combustion of jute bales in the flat "Mahajan", and even if the said fire was due to self-ignition of jute bales in the flat, as contended by Mr. Goho, it must be held that the servants and the agents of the Defendant, who were in charge of that flat, did not (take due care not only at the time of inspection and stacking of jute bales in that flat to eliminate the possibility of definition but also they did not take any precautionary measures as suggested by the Rear Admiral by pouring water for cooling down the temperature of the flat. At least there is no evidence to show that such a precautionary measure was adopted by them.

14. Now to establish that it was an accidental fire Mr. Goho has relied on two notaries protests (contained in Ex. A) made by the serang of "Mahajan" on May 17 and June 23, 1952, who was not called to give evidence. Mr. Basu Thakur said that one of the directors of the Defendant¹ had written two letters dated March 18 and April 17, 1970, to the serang which were sent by Mr. Basu Thakur by

registered post to the address of the serang in East Pakistan which he came to know by consulting the file of the Defendant and those two letters were returned undelivered and tendered in his evidence. In these circumstances, I overrule the contention of Mr. Sen that an adverse inference should be drawn due to the absence of the serang from the witness-box. Mr. Goho contended that these, two notaries protests are admissible in evidence under Commercial Documents Evidence Act, 1939, read with the relevant provisions of the General Clauses Act, 1897, and according to him this serang was the "master" and the flat "Mahajan" was a "ship".

15. Section 3(a) of the Commercial Documents Evidence Act enjoins the Court to presume the valid execution of documents mentioned in Part I of the Schedule to the Act and to accept the statement contained therein as accurate. Item No. 11 of Part I of the Schedule to this Act is in these terms:

Protests made before a Notary Public or other duly authorised officials by the master of a ship relating to circumstances calculated to affect the liability of the ship-owner.

Section 3(55) of the General Clauses Act provides that:

"ship" shall include every description of vessel used in navigation not exclusively propelled by oars and Section 3(33) provides that "master" used with reference to a ship shall mean any person (except a pilot or a Harbour-master) having for the time being control or charge of the ship.

There is, however, no statutory or judicial definition of flats. They are invariably flat-bottomed dumb-boats without any mast or sails and are towed by a ship or a steamer and are generally used for carrying cargoes in shallow water. In an emergency, a flat may be pushed forward by - adopting the technique which is commonly called in Bengali lagi deoa, that is to say, by placing one end of long bamboo poles by the crew on the river-bed or On the banks of the river and then pushing the poles backward so that the flat may go forward and the flat is simultaneously towed with a jolly-boat which is propelled by oars by the crew of the flat.

16. Serang in his first protest had said that the flat "Mahajan" was pushed forward and was taken to the opposite bank of Kanudi but how it was done was not stated by him. Mr. S.K. Basu admitting that he had no personal knowledge as to how the flat was taken to the other side of the river had, however, said in answer to Qs. 384-386 that "Mahajan" was taken to the other bank with the help of anchor chain and capstan and by a process which the crew commonly call as arya and in describing this process he said that with the manipulation of the hal and pushing to and fro made the flat move slowly and slowly. He demonstrated this method in such a clumsy manner and with so much hesitancy that I have no doubt in my mind that he had no experience in these matters at all.

17. Capstan is used for weighing the anchor of a ship and it is also used for

hoisting heavy sails of a vessel. An anchor is made of heavy iron and one end of it is composed of a long shank with a ring which is fixed with an iron chain and the other end is composed of two upward flanks and they are fixed with barbs on each side. An anchor is used for holding a ship fixed in a particular spot by plunging the other end to the bottom of the sea or the river. And these two appliances cannot, in my opinion, be used at all for propelling a flat. Coming now, to the expression *hal* which is a Bengali term used by Mr. Basu, it is necessary to say here that it is attached to the tail-end of a flat or a boat used for controlling its direction. The lower part of the *hal* remains sub-merged in the water and its upper portion is fixed with a handle by manipulation of which the direction of the flat or the boat is controlled. Country boats can be moved forward by manipulating the *hal* to a short distance when it is near the bank, but by manipulating the *hal* alone even a small boat cannot be propelled when it is in the mid-stream. No flat can, however, be moved by the manipulation of its *hal*, not to speak of the flat "*Mahajan*" even when it is near the bank and I am unable to accept the opinion of Mr. Basu.

18. In villages the goods are often carried by country boats and they are not exclusively propelled by oars as sails are invariably used for their propelling but they cannot be called vessels or ships. The wording of Section 3(55) of the General Clauses Act are not at all happy and the flat "*Mahajan*" being a dumb-boat does not stand on a higher footing than that of a country boat though used in navigation and I hold that- the flat "*Mahajan*" was neither a ship nor a vessel within the meaning of those two expressions and these two protests of *serang* are not admissible in evidence as he cannot be called a "*master*" of the ship or a vessel. But still I will deal with his protests on the assumption that they are admissible -in evidence under the Commercial Documents Evidence Act and on the further assumption that this- *serang* was the "*master*" of the flat and this flat was a "*ship*".

19. In para. 7 of the first protest the *serang* wrote that- between hours 12-30 and 1 p.m. on the 1st day of May, 1952, I noticed smoke coming out from the inside of the front portion of my flat, and in para. 15 he wrote that-

I cannot assign any reason for the fire or its origin nor I suspect any foul play in this respect. and then in para. 2 of his second protest he made an improvement by writing that "a fire accidentally broke out on my flat". Relying on these statements Mr. Goho contended that it was an accidental fire as its origin was not known to the *serang* and the *serang* had said that it was an accidental fire. It is true that Section 3(a) of the Commercial Documents Evidence Act. leaves no choice for the Court but to accept those statements as accurate, and in so doing I hold that the *serang* did not know the cause of the fire and, according to. him, it was an accidental fire. But the *serang* spoke for himself and not for the eight or ten crew and the *sukhani* of that flat and he did not even say that *sukhani* and his crew even did not know the cause of the said fire. The *serang* had not doubt said that it was an accidental fire, but everybody knows that there must be a

cause for a fire and all those crew including sukhani were deliberately withheld from giving their account to this Court. It is against all principle of law to hold it to be an accidental fire merely because its cause was not told to the Court by the persons who were competent to throw light on it and I overrule the contention of Mr. Goho that it was an accidental fire though the serang might not know its cause. Jute may be a self-combustible commodity, but it is not highly inflammable and it takes along time to spread fire in jute bales and there was no possibility in this case of any lire escaping from the bank and coming in contact with the flat as it was moored in the mid-stream. But the possibility of fire sparks escaping from the "Sree Krishna" and coming in contact with the flat "Mahajan" cannot be eliminated specially in view of the fact that no fire broke out in two other flats which were anchored near the flat in suit.

20. Mr. Basu and Mr. Dey reached the flat long after the fire broke out and hey are wholly incompetent to say what the serang, sukhani and the crew did before their respective arrivals. Every common carrier is liable to the owner for non-delivery of the goods entrusted to him for carriage and under the Indian Carriers Act, 1865, the common carrier is to disprove his negligence and the negligence of his servants and agents in an action brought by the owner of the goods for loss or damages of the goods entrusted to the carrier for carriage when such loss or damage had arisen from the negligence of the carrier or any of his agents or servants. Non-delivery of the goods in suit is an admitted fact and the Defendant's case, is that those goods were lost and destroyed by the fire. Everybody knows that the goods are not necessarily consumed nor damaged merely because a fire had broken out, and so everybody knows that the goods can be saved from a fire if due care is taken to save them. The Plaintiff has charged the Defendant with negligence for causing the said fire and has further charged that the goods in suit, if lost or damaged, were solely due to the negligence of the Defendant and its servants and agents and, accordingly, the onus lies on the Defendant to disprove these charges. Serang in his protest has said that neither he nor his crew were negligent, but his statement is not alone sufficient to disprove his or their negligence. A person may say that he and his men are not negligent, but he must substantiate it by placing all relevant facts before the Court and it is then for the Court to ascertain from those facts whether he and his men were negligent or not. His protests do not show what he and his crew were doing after the steamer "Sri Krishna" left for fueling at 8.30 a.m. Two other flats were anchored near the flat "Mahajan" and in the same way those serangs did not say what the serangs, sukhani and crew of those two flats were doing, though all those flats belonged to the Defendant and were towed by the same steamer.

21. To bring home his contention that no negligence should be presumed due to an unexplained cause of the fire Mr. Goho placed strong reliance on H.P. Murarka and Company v. Union of India where a big fire broke out in a Railway goods shed at Shalimar belonging to the Union of India and the goods of Murarkas were destroyed by that fire. There a number of Railway- employees gave evidence,

and though they were unable to assign any cause of that fire, I have held that it was an accidental fire over which they had no control and presumption of negligence, if any, on their part for the unexplained cause of the fire, was rebutted by direct proof. They took all reasonable care for fighting the said fire from its detection and they made all efforts to save the goods and, though most of the goods were consumed by the fire, but they saved the goods in suit, which were not taken delivery of by Murarkas, though they were called upon to do so. There a number of leading decisions were discussed by me on the question of the Common Law liability for negligence and the burden of proving such negligence, and I will refer to some of those decisions here in view of the submissions made by Mr. Goho.

22. In *Choutmull Doogar and Ors. v. River Steam Navigation Company Ltd.* ILR Cal. 786 where jute bales belonging to the Doogars entrusted for carriage to the Defendant common carriers were destroyed by a fire which broke out on a flat belonging to the carrier-Defendant, and the cause of the said fire not being explained it was held by our Court of Appeal that the said fire itself was a per se evidence of negligence on the part of the employees of the Defendant who were in charge of that flat. On appeal to the Judicial Committee the judgment of our Court of Appeal was affirmed in *River Steam Navigation Company Ltd. v. Chouthmull* L.R. 26 LA. 1 and it was held by the Board that the occurrence of the fire without explanation as to its origin was evidence of negligence. In *Secretary of State for India in Council v. Ramdhan Das Dwarka Das* 57 C.W.N. 1109 (1112) after referring to Choutmull's case; Sir M. N. Mukherji J., who delivered the judgment (5) Unreported judgment of Deb J. dated February 26, 1969 in Suit No. 493 of 1965 of a Division Bench of this Court, has held that their Lordships of the Judicial Committee in Choutmull's case could not have meant that even though the Court is satisfied that there was due care on the part of the bailee, the bailee would be liable if he cannot account for the cause of the fire.

23. In *Woods v. Duncon* (1946) A.C. 401 a submarine belonging to the Royal Navy was sunk at the diving trial and when the submarine was subsequently raised it was found that the relevant bow-cap was Open, though Lt. Woods, before opening the rear door of the torpedo tube, read the indicator which indicated that the bow-cap was shut and asked one of the experienced Naval Officers who was in charge of the lever operating the bow-cap as to whether everything was right and receiving an affirmative reply, he opened the rear door of the torpedo tube with the result the said submarine met with that disaster. Lt. Woods was one of the fortunate survivors of that unfortunate incident and he gave evidence in the suit but was unable to explain how the bow-cap remained open at, the crucial time. He led all material facts before the Court and proved that he was not negligent and the House of Lords completely exonerated him from the charge of negligence though he was unable to explain the cause of that accident. When a man affirmatively proves that he is not negligent it will be against common sense and all cannons of the law to hold him liable for negligence merely because he is unable to explain the cause of the accident by

invoking the doctrine known as *res ipsa loquitur* is the underlying principle in the Secretary of State's case (Supra) and in Woods' case (9) as explained by me in Murarka's case (Supra). This doctrine was laid down by the Chief Justice Earle in Scott v. London and St. Katherine Dock Company Ltd. (1865) 3 H. & C. 596 (601) in the following terms:

Where the thing is shown to be under the management of the Defendant or his servants, and the accident is such as in the ordinary course of things, does not happen, if those who have been in the management use proper care, it affords reasonable evidence, in the absence of explanation by the Defendant, that the accident arose from want of care.

24. In the State of Punjab Vs. Modern Cultivators, Ladwa, the land belonging to the Defendant was flooded due to a breach in the canal belonging to the Defendant and at the trial the Defendant deliberately withheld all relevant documents which would have shown how the breach had occurred and what steps were taken to repair it. The trial Court inferred negligence against the Defendant due to non-production of those documents and the appeal filed by the Defendant was dismissed by the Supreme Court, Sarkar J. (as he then was) and Mudholkar J. upheld, in their separate judgments, the inference of the trial Court due to the non-production of those documents. Sarkar J. did not express any opinion on the question as to whether strict rule of liability for negligence laid down in Ryland v. Fletcher (1868) 3 H.L. 330 was applicable Or not, though Hidayatullah J. (as he then was), in his separate judgment, and Mudholkar J. were of opinion that the said rule was not applicable. Sarkar J. following the rule laid down by Earle C.J. further held that the Defendant was negligent in the following terms:

Furthermore, it seems to me that the rule of *res ipsa loquitur* applies to this case. The canal was admittedly in the management of the Defendant and canal banks are not breached if those in management take proper care. In such cases, the rule would apply and the breach itself would be *prima facie* proof of negligence (underline is for emphasis). See Scott v. London Dock Company, (1865) 3 H & C 596 (601). No doubt the Defendant can show that the breach was due to act of God or to act of a third party or any other thing, which would show that it had not been negligent, but it did not do so. It may be that the rule of *res ipsa loquitur* may not apply where it is known how the thing which caused the damage happened as was held in Barkway v. South Wales Transport Company Ltd. (1950) 1 All E.R. 392 . But that is not the case here. No reason has been advanced why the rule should not apply. Therefore, I think the first contention of the Defendant that there is no evidence of negligence must be rejected.

25. The Legislature, in its wisdom, has engrafted the Common Law Rule of strict liability in the Carriers Act, 1865, by making, it a statutory liability. This Act has placed the common carrier on a different footing from that of an ordinary bailee and by imputing negligence in the common carrier and his servants and agents

for loss and damages of the goods entrusted to him for carriage has enjoined him to disprove his and their negligence which can only be done by him and them by affirmatively showing that he and they took all reasonable precautions and care in eliminating the possibility of an occurrence of fire which might endanger the goods and even when the fire does break out also in showing that all possible steps and reasonable care were taken by him and them in saving the goods. This presumption of negligence on their part cannot be rebutted by merely showing that the cause of the fire was unknown to him or to his servants and agents and, if this be not the law, then the common carrier in every case will be able to get rid of his statutory liability by suppressing the cause of the fire. In the ordinary course of things a fire does not break out in jute bales in any flat if the serang and his crew who are in control of the flat take proper and due care and when such a fire breaks out and they do not come to explain their conduct, it must be held that their negligence is the cause of the fire.

26. Each case must be decided on its own facts and circumstances and the law applicable to it. The general principles of the Common Law followed by me in Murarka's case (Supra) cannot have any application in this case as the Carriers Act had no application in that case and the fact of that case was quite different from the facts of the present case. Here the flat was under the exclusive control of the serang, sukhani and 8 to 10 crew. When the fire broke out and most of the goods in that flat were either consumed or damaged by the fire and still the sukhani and these crew did not come to give their account and no materials were placed before the Court. On the other hand, no fire broke out in the other two flats which were anchored near the flat "Mahajan" and their serangs, sukhani and crew were not even called to give their version. This case cannot be distinguished on facts from the cases of the State of Punjab v. Modern Cultivators (Supra) and Chouthmull Doogar v. Rivers Stearn Navigation Company Ltd. (Supra) and the laws laid down by Sarkar J. and by our Court of Appeal are directly applicable in this case, and moreover Sir M. N. Mukherjea J. himself in Rivers Steam Navigation Co. Ltd. and Another Vs. Bisweswar Kundu, had said:

Under the Carriers Act the loss or damage of goods delivered for carriage to a common carrier is prima facie evidence of negligence and the burden to disprove negligence lies on the carrier; and loss from unknown cause is presumptive proof of negligence, Chouthmull v. Rivers Steam Navigation Company ILR Cal 786 affirmed on appeal by the Judicial Committee in the Rivers Steam Navigation Company v. Chouthmull 26 I.A. 1.

27. Not only the cause of the accident is not explained here but also its real cause is deliberately withheld from the Court by not calling the persons who were on that flat and two other flats and not a single witness of the Defendant has given any explanation as to why they were not called excepting that the serang of the flat "Mahajan" could not be called. Apart from the fact that the Defendant has miserably failed to disprove negligence of its employees who were in that flat at the time the fire broke out and the said fire itself is the evidence of negligence

on their part, I accept the contention of Mr. Sen and drawing adverse presumption against the Defendant for withholding material witnesses hold that the said fire broke out due to gross negligence on the part of those employees of the Defendant who were in the flat at the time the fire broke out in the same way as was done by their Lordships of the Supreme Court in the State of Punjab v. Modern Cultivators" case (Supra). It is true that under the Carriers Act the Defendant is also liable to disprove criminal acts of those employees, but it will not be proper for me in holding that the said fire was also caused due to any criminal act of those employees or by any misconduct amounting to a criminal act on their part. In these circumstances, I hold that the said fire broke out due to the negligence of the servants of the Defendant who were on the flat but they were not guilty of any criminal act.

28. The serang had written in his first protest that the fire was detected by smoke, but he did not say what he and his men were doing at or before that time and why they could not detect the smoke before he detected it. Detection of fire in its initial stages is of vital importance in every case because the belated detection, makes the fire out of control. No explanation was at all offered by the serang in his protests why it was not earlier detected by him and his men not to speak of by the serangs, sukhanis and crew of two other flats anchored nearby. Moreover, there is nothing on the record to show what was the nature of the fire at the time it was detected by him and his protests are wholly silent as to the volume of smoke seen by him. There is nothing on the record to show that these men took due care in detecting the fire at its early stage and I hold that the Defendant has failed to prove that its men took due care in detecting the fire at its initial stage.

29. The Defendant was regularly carrying goods by its flats from India through Pakistan and the Defendant knew that cargoes in the flat "Mahajan" would be inspected by the Pakistan Land Customs authorities at Chitmari and those officers would lock up and seal the gangways and doors of the flat. In these circumstances, it can reasonably be inferred that the Defendant knew that in the event of an occurrence of fire in the flat "Mahajan" it would be difficult for his employees to fight the fire effectively unless they were properly trained.

30. But not a single crew of the flat "Mahajan" had any knowledge in fighting a fire as disclosed in the evidence, and, though Mr. Dey and Mr. Basu have said that no serang nor, any sukhan.i was appointed by the Defendant unless they had some knowledge in fighting a fire, but I am unable to act on their evidence as they were not the appointing authorities nor they have any personal knowledge about it. Assuming, however, that the serang and sukhani of the flat "Mahajan" were appointed for having some knowledge in fire-fighting but there is nothing on the record to show when they were appointed. On the other hand, the materials on the record conclusively show that no training in fire-fighting was ever given to them after their appointment and in the same way no fire-fighting training was ever given to those crew. These facts conclusively belie the

Defendant's pleading that "it engaged proper capable and. efficient persons in charge of the said flat" in the written statement and further prove that the Defendant did not take any care whatever to meet such a situation by giving its employees even some ordinary training in fire-fighting not to speak of a special training when the doors and gangways of the flat were to be locked up and sealed".

31. In the written statement it-is also pleaded "that the said flat had proper fire-fighting appliances" and the serang in his first protest had written that his flat was "well-equipped" and was fitted with hose-pipes, but the materials on the record conclusively show that these statements are wholly misleading and are also deliberate distortion of facts as the flat "Mahajan" had only 6 to 7 buckets (Mr. Basu, Q. 381) and two small hand-driven double action stirrup pumps each fitted with two hose-pipes, one for drawing and the other for discharging the water (Mr. Basu, Q. 224, Mr. Dey, Qs. 88, 206, 207) and they were meant for cleaning the deck (Dey, Q. 81). These facts further show that the Defendant did not even take any care in making the said flat well-equipped with proper appliances in fighting a fire, and I reject this untrue plea of the Defendant including the misleading statements of the serang made in his protest.

32. The serang in his first protest had written that immediately on the detection of smoke: "I with the help of my crew commenced for taking measures for extinguishing the fire with the help of water from the river as also by means of hose-pipes fitted with my flat" (underlines are for emphasis). Two other flats were moored near the flat "Mahajan" but none of their serang nor their crew including the sukhani came to fight the fire, nor they supplied their similar primitive fire-fighting equipments to the crew of "Mahajan" which are borne out by the significant silence of the serang of "Mahajan" and his protest is solely confined to the part played by his own crew. These facts conclusively show that even in combating the said fire the crew of the other two flats remained as silent spectators and only the serang of flat "Mahajan" with his men poured water with those primitive equipments, to fight the said fire but how long they did so cannot be found out from the records at least before the arrival of Mr. Basu.

33. The serang in his first protest had written: "I reported about the incident to our office at Chandpur as well as at Narayangunj", but he remained completely silent in his two protests as to what the people of the Chandpur office of the Defendant did in this matter though it was only 4 miles from Kanudi and the Defendant in para. 6 of the written statement alleged that the agent in Chandpur took all steps that were necessary and possible on his part as a reasonable man of prudence and care to extinguish the said fire, but Mr. Basu had said that the Chandpur agent did not even come from Chandpur at all and, therefore, I reject this untrue plea. Evidence of Mr. Basu and Mr. Dey are wholly useless as to what the serang and his crew actually did in fighting the fire from its detection till about 10-30 p.m. when Mr. Basu arrived from Narayangunj on May 1 and Mr. Dey came at mid-night. It is true that the serang had written that he and his crew

started pouring water as soon as he detected the smoke and the fire could not be controlled due to stormy weather and high wind existing at the time, but this flat was completely covered up by C.I. sheets on the top and steel structures from all sides and 6 gangways and 2 doors were locked up and sealed by the Pakistan Land Customs Officers. High wind and stormy weather, spoken of by the serang, had no impact on the fire is borne out by the evidence of Mr. Basu where he had said that circumference of the fire was about 4 to 5 ft. when he reached the spot in answer to Court's Q. 371. This fact conclusively shows that it was a small fire when it was detected by the serang and with a little effort the fire could easily be extinguished in no time the moment it was detected by him. This fact further shows that no reliance can be placed on the protest of the serang because to cover up his negligence and the negligence of his men he took shelter under the alleged high wind and stormy weather which I completely reject.

34. The Defendant further pleaded that the local assistance was taken in fighting the fire at the earliest opportunity which is belied not only by the complete silence of the serang in his two protests but also he has categorically stated in his first report that the fire was fought only by him and his crew until the arrival of Mr. Basu with men in the "Bhagyakul". On this aspect of the case I reject the evidence of Mr. Basu. and Mr. Dey where they have said that the villagers also assisted in fighting the fire for the simple reason that they were not on the spot for about 10 and 2 hours respectively and, moreover, they have untruly said that the flat was anchored very close to the market at Kanudi and the villagers being afraid asked the serang to take "Mahajan" on the other bank whereas the serang had written that the fiat was anchored along with two other flats in the mid-stream at a distance of 100 yards from the bank.

35. The Defendant further pleaded that under the provision of law and the order of the Pakistan Government or its officers the said seals had to remain intact till the said flat reached the border between Pakistan and India in its journey towards Calcutta, and in his first protest the serang wrote that on May 2 the fire, services personnel from Chandpur came and broke the seals and unlocked the gangways of the flat, and in his second protest he changed it by saying that all the seals of the gangways and the doors except that of the door in the rear were broken by the Fire Brigade personnel and in accordance with the instructions and directions of the same personnel the locks of these gangways and the door in the front were opened by our people and with regard to the door in the rear of the flat this was badly dislocated due to the effects of the fire resulting in the displacement of its position and the Fire Brigade people and our crew taking advantage of the opening spaces created by the displaced d6or in the rear put the hose pipes in action through such spaces for the purpose of extinguishing "the fire.

He further wrote that he and his men did not either open or break the seals of the gangways and the two doors of the flat as incorrectly recorded by the Fire-Brigade officer in his statement in connection with the aforesaid fire.

36. Relying on the above pleadings about the alleged foreign law and the orders Mr. Goho contended that there was no negligence on the part of these employees of the Defendant for not opening those gangways and the doors for fighting the said fire, but the Defendant did not make any attempt u/s 45 of the Evidence Act, 1872 to prove the alleged law of Pakistan and the alleged orders referred to in the written statement and not even a book u/s 38 of the Evidence Act was produced to substantiate this plea, and I reject it in limine. Respective" opinions of the witnesses of the Defendant, relied upon by Mr. Goho, cannot be looked into as none of them are lawyers; not to speak of well-versed in the law of Pakistan, and I reject this unmeritorious contention of Mr. Goho. The matter, however, does not rest here. To cover up his gross negligence for not make any attempt to obtain permission, even if it required, for breaking open those gangways and two doors from the Narayanganj officer, Mr. Basu came out with the want of jurisdiction of those officers without even trying to meet them and I reject his evidence. The Chandpur agent who was only four miles from Kanudi did not even contact the Fire Service people and kept himself completely out of the picture.

37. Smoke was detected in a frontal part of the flat but the goods in suit were far off from that place as they were stacked in the middle portion of the flat as said by Aghore Babu and no attempt was even made by the employees of the Defendant to save those goods by removing them from the flat though the flat was taken to the other bank. The serang in his first protest has said that due to the fire all the paper and documents including invoices serang's goods register pay book and other relevant documents and all our personal belongings were completely burnt and lost and nothing could be saved.

And everyone knows that the very first reaction and instinct of a man by the sight of a fire is to make an attempt not only to pour water but also to save his own personal belongings. The fact that even the personal belongings of the serang and crew were consumed by the fire conclusively show that they were grossly negligent in detecting and fighting the fire. The serang in his first report had written that Mr. Basu arrived from Narayanganj at about 10-30 p.m. of May 1 with the steamer "Bhagyakul", but Mr. Basu even after such a long lapse of time was absolutely sure that he arrived at 9-30 p.m. According to the serang Mr. Dey arrived- by the steamer "Janardan" at midnight and Mr. Dey ultimately admitted that he arrived at midnight. They brought about 50 men with them but, excepting a few, none of them were trained in fire-fighting (Mr. Dey, Q. 113) and no additional fire-fighting equipments were brought by them (Mr. Dey, Q. 115). Mr. Basu had said that immediately on his arrival he took charge of the operation and, of course, he did so without any experience in the matter. He said that the power-driven pump of his steamer was put into action, but the fire was not a big nor a wild one" when he arrived and it could easily be extinguished with the powerful pump of "Bhagyakul" if due care was taken. He did not even care to break open the partition of the cabin which was not even sealed nor locked by the Customs Officers and the hatch of the flat not to speak of the gangways and

two doors for fighting the fire.

38. After the arrival of Mr. Dey, a similar pump of "Janardan" was put into action, but no attempt was made on that night to bring the Fire Brigade personnel from Chandpur. Before leaving Narayanganj these two witnesses did not even try to take the Fire Brigade people from Narayanganj with their fire engines. In the early morning of May 2, Mr. Basu left for Chandpur and after reaching there he did not even care to see the local Chandpur agent of the Defendant, as admitted by him, and wasted time by going from one door to the other for bringing the Fire Service people who came at midday with their fire engines and did their best, but it was too late for them and with the result most of the goods of the flat were either consumed by fire or were badly damaged by water due to submerging of the flat in the river by these Fire Service people to save the flat from a total loss.

39. The evidence on the record, without a shadow of doubt, shows that the Defendant has miserably failed to disprove the negligence of its agents and servants and, on the other hand, it is conclusively proved that they were grossly negligent in detecting and fighting the fire which broke out due to the negligence of those persons who were in the flat and all the employees of the Defendant had failed to take any care from beginning to the end to save the goods in suit. In the premises, my answer is "no" to Issues Nos. (3), (5), (6), (7) and (8) and, so far as negligence and misconduct in Issues Nos. (4) and (9) are concerned, it is "yes", but "no" to the criminal act and misconduct amounting to any criminal act.

Issue No. (10)(a) & (b):

40. Mr. Goho contended that as Mr. Jhawar was silent as to the service of notice u/s 10 of the Carriers Act, it should be held that no such notice was served on the Defendant, but the letter of May 8, 1952 in Ex. A written by the Plaintiff to the Defendant is an admitted document and Mr. Sen rightly contended that it is a notice u/s 10 of the Act. It is true that Mr. Jhawar did not say anything about this letter, but it is not for him but for the Court to say on its construction whether it is a notice or not. Mr. Goho frankly admitted that this letter is a valid notice u/s 10 of the Act and I am also of the same opinion and, accordingly, my answer is "yes" to these issues.

Issue No. (11):

41. Mr. Basu had said that on the instruction of his Calcutta head office he appointed M/s. Sinclair Murray (Pakistan) Ltd., the assessors and surveyors, to salvage the cargoes in the flat and he was personally present for sometime when this operation was actually been carried out but by this company and he had seen that most of the goods of the flat were either consumed by the fire or were damaged by water and practically nothing could be saved. He said that he did not see the lists of inventory of this company including their report and said that those documents might have been sent by this company to the Calcutta head office of the Defendant. This report with its annexures were not disclosed by-the

Defendant though this company was appointed by the Defendant. The Plaintiff had? disclosed a cycle styled copy of this report along with an enclosure and they bear the facsimile signature of Mr. D. Keiller, a director of this company. In Qs. 93-97, attention of Mr. Jhawar was drawn to this document and Mr. Jhawar said that he had received these documents in the usual course of business and they were tendered and marked Ex. G subject to objection of Mr. Goho and then Mr. S. K. Mukherjee was called by the Plaintiff, who said that he knew- the signature of Mr. Keiller and had proved his facsimile signatures on these two documents, Mr. Goho had contended that these documents should be rejected as Mr. Mukherjee had no personal knowledge about their contents, but I am unable to accept this contention. No subpoena can be issued against Mr. Keiller nor he can be examined on commission as no one can go to East Pakistan in view of the relationship between our country and the Pakistan Government and Mr. Goho himself had said so while giving an explanation for not examining the serang of the flat "Mahajan" on commission and had further said that no letter of request would Be made effective in Pakistan.

42. In Mobarik Ali Ahmed Vs. The State of Bombay, the Supreme Court has said that a document may be proved either by direct or by circumstantial evidence. So far as direct evidence is concerned, the facsimile signature of Ex. G was proved by Mr. Mukherjee, and so far as the circumstantial evidence is concerned it is proved by the fact that the Plaintiff had received about Rs. 4,285 from the sister concern of this company in India and have received these documents from the Pakistan company in the usual course of business and the case of the Defendant is that all other consignees were similarly paid through Insurance companies. Now, the intrinsic evidence spoken of by the Supreme Court is also present in this case as in this report it is written on disposal of the goods in Calcutta the net sale proceeds will" be apportioned and distributed by M/s. Sinclair Murray & Company Ltd., Calcutta.

This company was appointed by the Defendant as said by Mr. Basu and this company and its sister concern in India are well-known brokers, values, assessors and surveyors, and when this Pakistan company had sent the Plaintiff a cyclostyled copy of the report with the annexure relating to the Plaintiff's goods it can reasonably be presumed under ill us. (f) of Section 114 read with Section 16 of the Evidence Act that they had sent their original report to the Defendant with all annexures" apart from the evidence of Mr. Basu, and drawing this presumption I hold that this company had sent the original report with all its annexures to the Defendant. Moreover, it is to be noted here that Mr. Goho had also directly put the Defendant's case to Mr. Jhawar in Q. 245 by saying that and you know that claims of all other consignees have been paid by their respective Insurance companies which "substantially supports the above-quoted statements of this report. Exhibit G is also admissible u/s 65 read with Section 66(2) of the Evidence Act and, furthermore, Mr. Goho told me that except the documents disclosed by the Defendant all other documents which were in possession of the Defendant could not be produced due to such a long lapse of time which must

necessarily include the original report with its annexures and this statement of Mr. Goho brings this exhibit within the ambit of Section 66(5) of the Evidence Act and makes it admissible in evidence. I overrule the objection of Mr. Goho and hold that this exhibit is admissible in evidence. M/s. Sinclair Murray (Pakistan) Ltd, in their report (Ex. G), in relation- to the Plaintiff's goods have said, we assess the value of the cargo with which you are concerned as attached based on market price ruling on the date of the fire in Indian currency.

This annexure (part of Ex. G) bears the facsimile signature of Mr. Keiller and the following particulars regarding 325 bales of jute in suit are given by M/s. Sinclair Murray (Pakistan) Ltd.:

325 bales A/c M/s Banshilal Madanlal, 46 Strand Road, consignment not insured
Per Md.

Mark Bales Mds. Market Price (Ind.) Value

Top 12 48 Rs. 39 Rs. 1,872

Midds. 195 780 Rs. 37 Rs. 28,860

Bott. 108 472 Rs. 34 Rs. 16,048

325 1300 Rs. 46,780

43. It was not even suggested to Mr. Jhawar that the value of those goods, on the date of the fire, was not as stated by M/s. Sinclair Murray (Pakistan) Ltd. and no attempt was even made by the Defendant to show that the market rate and the value of these goods are lower than those given by M/s. Sinclair Murray (Pakistan) Ltd. in Ex. G. In other words, the Defendant had accepted the market price given by this company who were appointed by the Defendant and cannot get rid of the principles laid down by our Court of Appeal in Carapiel's case (Supra) and Atul Chandra's case (Supra) referred to above. The goods in suit were destroyed and damaged by the said fire as stated in the written statement. The Plaintiff has suffered loss and damages due to the negligence of the servants and agents of the Defendant for which the Defendant is answerable to the Plaintiff. I am not concerned with the value of those goods prevailing in Calcutta given by Mr. Jhawar but with the market price given by M/s. Sinclair Murray (Pakistan) Ltd. where the goods were destroyed and damaged by the said fire and I accept those rates given by them of that place. Accordingly, my answer to this issue is "yes" and the Plaintiff has suffered loss and damages in the sum of Rs. 46,780 in Indian currency.

Issue No. (12):

44. It is true that the Plaintiff has suffered loss and damages in the sum of Rs. 46,780 but having already received Rs. 4,285-10-9 from M/s. Sinclair Murray & Co. Company Ltd. the Plaintiff is entitled to Rs. 42,494-5-3 as damages from the Defendant.

45. The Plaintiff, has succeeded in this suit and there will be a decree in favour of the Plaintiff for Rs. 42,494-32 P. with interest at the rate of 6 % per annum from to-day until realisation from the Defendant. There will also be a decree for costs in favour of the Plaintiff against the Defendant. Certified for two counsel.