

(1903) 07 CAL CK 0001
In the Calcutta High Court

India General Steam Navigation Company	APPELLANT
Vs	
Jagat Chandra Kundu and Others	RESPONDENT

Date of Decision : 01-07-1903

Acts Referred:

Citation : (1904) ILR (Cal) 36

Hon'ble Judges : Francis W. Maclean, C.J.;Geidt, J

Bench : Division Bench

Judgement

Francis W. Maclean, C.J.—There are two appeals in this suit, and I will deal with the appeal of the India General Steam Navigation Company, Limited, in the first instance, for that is by far the more important.

2. The suit is one by a firm of merchants at Chittagong against the Company I have named, and certain other defendants whom I will call the Sowdagar defendants. The claim was for a sum of five or six thousand rupees under the following circumstances:

On the 29th of July 1896, the plaintiffs, at Chittagong, shipped on board a sailing brig, called the Cabul, 4,000 maunds of non-duty-paid salt, the brig belonging to the Sowdagar defendants, to be conveyed to Naraingunge. They paid by way of freight Rs. 360. The brig proceeded on her voyage to Naraingunge, and in the river Meghna collided with a steamer called the Thrush (belonging to the defendant Company) on the evening of the 8th of August at about 7 or 8 o'clock. The result of the collision was that a large hole was made on the port-side of the brig, with the ultimate result that the salt was destroyed. The plaintiffs are now suing both the Company and the Sowdagar defendants for the recovery of the value of the salt. They claim Rs. 4,000 as the value of the salt, Rs. 1,000 for the loss of profits, and Rs. 360 for the freight which they paid.

3. In the appeal I am dealing with, all we have to consider is whether there was any negligence on the part of the Company.

4. The steamer was proceeding down the river at the "rate of about 8 or 9 miles

an hour, and, undoubtedly, had all "her lights J up; for it is admitted, in the evidence of the first witness called for the plaintiff, that the brig saw the lights of the steamer some three or four miles away. The brig was apparently making her way up the river on the left bank, and it is quite clear upon the evidence, and it was so found by the Court below, that the brig had no lights. Before the plaintiffs can recover from the defendant Company, they must make out that there was negligence on the part of the Company. That is a question to be determined upon the evidence, and, upon the evidence, I think the conclusion of the Court below, that there was negligence on the part of the steamer is not well founded.

5. The evidence for the plaintiffs, so far as this point is concerned, was that of the serang of the brig, whom the plaintiffs called, and the serang of the steamer whom they also called.

6. The serang of the brig naturally tried to make out that the vessel had her lights up; but, as I have said I do not think that case has been substantiated. As regards the collision itself, what he says is that they saw the steamer at a distance of 3 or 4 miles away. "The wind not being strong, our vessel" (the brig) "was proceeding slowly. I saw before the collision had taken place that the Company's steamer was coming from north towards the south. I could not understand at what distance from the banks was the Company's steamer coming. At last when it came near I saw that it was coming in front. From a distance of 200 or 250 cubits I saw that the Company's steamer was coming in front. Then we shouted loud and. blew the horn. When it lay at a distance of 10 or 12 cubits, we turned the helm from behind the vessel, and we turned it so that the prow of the vessel might go towards the bank. After the turning, the prow of the vessel proceeded towards the bank. My vessel was not saved; the steamer came and cut open my vessel at a distance of 5 or 6 cubits from the helm, towards the front." He also says: "The prow of the Company's steamer came and struck and cut my vessel. It cut on the left side of our vessel." Pausing here for a moment, it was the duty of the steamer, as between the steamer and the sailing vessel, to keep clear of the latter, if it could; but as the ship had no lights up, it is shown that those on the steamer did not see the brig until they were quite upon her. In the evidence of this witness there is nothing to show that the steamer was guilty of any negligence.

7. I pass to the evidence of the serang of the steamer whom the plaintiffs thought fit to call; and the important part of his evidence is that which I am about to read: "I was on the upper deck when the collision took place. I was where the helm is, worked. The brig Cabul was coming from south to north. From a distance of 50 or 60 cubits we saw something like a jungle. There was no light. It did not appear to us to be a vessel. I told some one to whistle and I told the person who was with me "dao-sookani." By dao-sookani the vessel goes to the right. I stopped the engine and steered back. I stopped the engine and gave directions "to-back her," and as this was being done the collision took place. When the collision took place, I did not see any light in the brig Cabul. It was

after the collision that I saw one white light in that vessel." Later on he says: "The collision did not take place with force, but gently, because we backed our steamer and the engine was moving backward, but the steamer was moving forward. Before we stopped that night, we were going at a speed of 7 or 8 miles an hour." Later on he says : "If it be said sookani-dco, the wheel of the helm has to be turned to the right, and in that case the head of the steamer goes to the right. If we are to turn to the left, it is said "ujao-sookan." When I stopped her I said dao-sookan and when I backed her I directed to keep the sookan in the middle." I suppose he means that he gave directions to keep the helm steady.

8. This is all the evidence adduced against the Company by the plaintiffs, and it comes to this. When the steamer was almost upon the brig, the brig having no lights, they saw something that looked like a jungle. The serang did what I understood the learned pleader for the plaintiffs to say he ought to have done. He at once signaled to the engine room to stop and to go astern, and he directed the helmsman to port the helm. Of course, after she had been directed to go astern, there would" still be much way on the steamer, which would carry her on some distance.

9. It is said the order was right, but it was given too late; but the plaintiff's evidence shows that there is no foundation for this. It seems to me upon that evidence that the serang did all that it was possible under the circumstances to do. He did all that could reasonably be expected of him, placed so suddenly in a serious emergency.

10. Upon this evidence, the Company might have asked the Court below to hold that there was no evidence of negligence on their part. It is true that a witness of the name of Salgadu says that he saw lights on the brig. His evidence is very unsatisfactory, and I am perfectly satisfied that from the place where he was standing on the steamer, he could not see the brig at all.

11. However, the defendant Company went into evidence, and, it is upon that of the helmsman of the steamer that the Judge in the Court below has found negligence against the steamer.

12. Before I deal with that evidence, I will deal with that of Mr. Goertz, a mariner and a travelling agent of the Company. He gives this account of what took place: "Shortly before arrival at Sytenal, something was ahead of us. That something appeared like a fog, at a distance of not more than 200 or 300 feet. The fog turned out eventually to be a brig coming from the south. Immediately I saw the fog, I told the serang to port his helm. By that expression-1 mean to turn the wheel towards the right which would cause the steamers head to go towards the right hand also. The serang of the vessel telegraphed the order to put the engine full speed astern. That was done at the same time my order was carried out. Not more than one minute after the orders were carried out (as far as I remember) the collision took place. We heard no noise, nothing from the brig before the collision, while the steamer whistled several times, between the time we saw the

fog, and the collision took place. During the whole of this time I was on the upper fore-deck watching everything that happened. I saw no lights whatever on the brig, until the time we struck. If there had been lights on the brig, I would have seen them some time before" Later on he says: "The engine, though reversed, the steamer was going ahead." Then later on he says, in his cross-examination on behalf of the plaintiffs: "When I saw the black mass I shouted out the order *dao-sookan*, not referring to any particular person, and simultaneously the *serang* telegraphed to stop the engine and reversed them, and there was a response from the engine-workers. The order I shouted out was carried out, and to my hearing no separate order was given by the *wrung*." No doubt the *serang* says that he gave the order too, but it does not follow in the least that his statement is inconsistent with what this witness says. There is a uniformity of statement that the precise order given was to port the helm, to stop the engine and to go astern, and it was carried out. Later on he says: "I saw the man *sookani* to turn the wheel to the right," the effect of which would be to port the helm.

13. Now if the matter stood there, I think there can be no question that under the emergency of the moment, the proper orders were given. If the case stood on that evidence, it seems perfectly clear that there was no negligence on the part of the steamer.

14. I now come to the evidence of the helmsman. He says: "Then it was dark night and we went along and we saw something like a jungle. The *serang* ordered the *khaiasi* to whistle and the *khaiasi* whistled. Then at a distance of 20 or 25 cubits, something like a vessel and white sail were seen, and then the *serang* gave the order to stop her. Then the *serang* backed and told me to go to the left. When backed, the steamer was going forward. When the steamer is backed and the *sookani* goes to the left, the prow of the steamer goes to the right. Although backed, the steamer was still going forward. When the steamer was going slowly forward and the brig was coming, the collision took place. The brig was coming from the south to the north. The brig was before in front of us, and by the collision taking place, it went to the left. There was no light in that brig." Then in his cross-examination for the defendants, he says: "When it was backed, the *serang* said, turn the wheel to the left. Then I turned the wheel of the steamer to the left." Later on he says: "I turned the wheel by order of the *Serang*. The order was given as usual *sookan-ujao* and the order to the contrary is *sookan-dao*." It was urged for the appellant Company that this statement of his "when it was backed" refers not to the immediate moment when the order was given by the *serang* to the engine room, to stop and to go astern, but to some later period, perhaps after the collision, when the steamer was backing to get clear of the brig. The proper order no doubt would have been to port the helm; and the Court below finds the steamer guilty, of negligence on the ground that on this man's evidence the order was given to starboard the helm. There has been a suit between the owners of the brig and the owners of the steamer, the owners of the brig, as I understand, charging the steamer with negligence in

respect, of this collision. We have been told that that suit resulted in favour of the Company. In that suit this helmsman gave evidence and, in some way which I am unable to account for, his deposition has been admitted as evidence in the present case. In that deposition he undoubtedly said that the serang's orders were to port the helm, which is consistent with what the serang and Mr. Goertz say. I do not rely upon this deposition. It is unfortunate that, there being this deposition, he was not asked in his re-examination some question as to what he had said in the Previous suit.

15. To my mind the brig was entirely in fault for having no lights. But even if in the moment of emergency the serang gave an order to starboard instead of to port the helm, it seems to me, that, having regard to the fact that the accident in its inception must be taken to be attributable to the gross negligence of the brig in carrying no lights, the observations of the late Master of the Rolls in the case of the *Bywell Castle* (1879) 4 P.D. 219, 226 in which observations Lord Herschell, when Lord Chancellor, concurred see *The Tasmania* (1890) 15 App. Cas. 223, 226 would apply to the circumstances of the case now under enquiry. "I am clearly of opinion that when one ship by her wrongful act suddenly puts another ship into a difficulty of this kind, we cannot expect the same amount of skill as we should under other circumstances. Any Court ought to make the very greatest allowance for a captain or pilot suddenly put into such difficult circumstances, and the Court ought not in fairness and justice to him to require perfect nerve and presence of mind enabling him to do the best thing possible." The evidence however, to my mind, establishes that the order given was to port and not to starboard the helm.

16. On these grounds the appeal must succeed and the suit as against the Company must be dismissed with costs, including the cost of this appeal, to be paid by the plaintiffs to the defendant Company.