

(1968) 09 CAL CK 0004
In the Calcutta High Court
Case No : Suit No. 2278 of 1950

Khalil Adalkhah

APPELLANT

Vs

Great American Insurance Company

RESPONDENT

Date of Decision : 17-09-1968

Acts Referred:

Commercial Documents Evidence Act, 1939 — Section 2, 3(b)
Constitution of India, 1950 — Article 347, 348
Contract Act, 1872 — Section 229
Evidence Act, 1872 — Section 114, 32, 63

Citation : 73 CWN 279

Hon'ble Judges : S.C. Deb, J

Bench : Single Bench

Advocate : B.K. Ghose and Ajit K. Sarkar, for the Appellant; Somnath Chatterjee and Hirak K. Mitter, for the Respondent

Judgement

S.C. Deb, J.—The plaintiff is an Iranian subject and he is the proprietor of Adal Tea Company, Calcutta and he used to export tea to various countries in Middle East. In this suit he has claimed Rs. 46,200/- as the value of 246 cases of tea insured under five marine insurance policies issued by the defendant which is an American Company. B. N. Banerji, J. in the year 1966 heard the suit for several days and oral testimony of the plaintiff and his witness were concluded that while the defendant's witness Dharani Mohan Banerjee was under cross-examination His Lordship could not hear the suit any further. In May, 1968 I was requested by the learned counsel for both sides to take up the suit from the stage where it was left by Banerjee, J and before me cross-examination of Dharani Mohan Banerjee was concluded and thereafter the learned counsel for both sides took time to prepare themselves for argument.

2. On the 6th June, 1968 the plaintiff applied for amendment of the plaint and the learned counsel Mr. B. K. Ghosh appearing for the plaintiff expressly told me that if I allow such amendment no further evidence would be adduced by the plaintiff. I have already recorded this fact in my judgment allowing the said

application and also gave liberty to the defendant to adduce any additional evidence arising out of such amendment of the plaint but no further evidence was adduced.

3. In the plaint it is alleged that in or about September, 1947 the plaintiff despatched 246 cases of tea valued at Rs. 46,200/- from Calcutta to Port Said by S. S. "Express" and in order to protect himself against any loss he took out five policies all dated 5th September, 1947 from the defendant. The said goods were discharged at Port Said and thereafter the plaintiff arranged and got them transhipped and despatched from Fort Said to Khorramshahr by S. S. "Aldermain" and the defendant extended the benefits of the said policies to the said voyage by issuing five endorsements all dated 12th August, 1948 in respect of each of the said policies but the goods never reached Khorramshahr and were totally lost to the plaintiff and inspite of demand the defendant had wrongfully failed and neglected to pay the sum of Rs. 46,200/-being the value of the goods.

4. In the written statement the defendant admitted that the plaintiff despatched those goods from Calcutta Port Said and they were discharged at Port Said. The defendant further admitted that it issued those policies and endorsements but did not admit their non-arrival of goods at Khoramshahr and by way of alternative defence pleaded "if the said goods never reached Khorramshahr it was because they were discharged from S. S. "Aldermain" and landed at Bandarshahpur and the plaintiff failed and neglected to forward them from Bandarshahpur to Khorramshahr". The defendant further denied that the said goods or any one of them were totally or at all lost to the plaintiff or lost at all and pleaded in the alternative "if the said goods or any one of them are totally or at all lost such loss occurred after the expiration of the period of cover provided by the said policies." By way of further defence the defendant alleged that no notice or no proper notice of abandonment of the said goods was given by the plaintiff and assuming that the plaintiff had suffered loss caused by the operation of the risks insured against it being a condition of the policies that the defendant should have reasonably despatched in all circumstances within their control and the plaintiff having failed to act with reasonable despatch by not giving notice within a reasonable time was not entitled to recover anything under the said policies. Further defence in the written statement is that the plaint does not disclose any cause of action.

5. Issues Nos. 1 to 6 settled by Banerji, J. and the additional issue arising out of the amendment of the plaint settled by me are set out hereunder:

ISSUES

1. Did the plaintiff arrange and get the goods transhipped from Port Said to Khorramshahr as alleged in paragraph 4 of the plaint ?

2(a). Did the goods never reach Khorramshahr and were the goods totally lost to the plaintiff as alleged in paragraph 5 of the plaint ? If so, was it due to the plaintiff's failure to forward the goods from Bandarshahpur to Khorramshahr as

alleged in paragraph 6 of the written statement ?

(b). If so, was such loss covered by the Insurance Policies or did such loss occur within the period of cover provided by the policies?

3. Did the plaintiff give proper notice of abandonment of the said goods to the defendant ?

4. Did the plaintiff fail to act with reasonable despatch as alleged in paragraph 9 of the written statement ?

5. Does the plaint disclose any cause of action ?

6. To what relief, if any, is the plaintiff entitled Additional Issue Was the plaintiff owner of the consignment of tea and did the plaintiff continue to be so as alleged in paragraph 5A of the amended plaint ?

6. The steamship "Express" sailed from Calcutta on 2nd September 1947 carrying the goods in suit and the valued policies of Rs. 46,200/- containing the usual "Ware House to Ware House clause" and the words "Lost or not lost" were issued by the defendant on the 5th September 1947 covering the risks of loss or non-delivery of goods by perils of sea including fire.

7. At the very outset it is necessary to record here that at the time of argument the learned counsel for both the parties agreed that in the five "Endorsements" dated 12th August 1948 the words "as the cargo have been forwarded subsequently on 8th July 1948 from Port Said to Khorramshahr per S. S. Aldermain"" would not be treated as an admission on the part of the defendant that the goods were in fact loaded on board the vessel and in order to avoid future controversy, if any, under my direction the Court officer recorded this agreement in the minute book on 28th August 1968 in the presence of counsel for both parties.

8. In examination-in-chief (qq. 19, 28 to 32, 35, 41 & 160) the plaintiff said that the vessel "Express" reached Port Said on 24th September 1947 and after the arrival of the goods in that port the business in tea including import of tea was monopolised by the Government of Turkey and he was unable to sell them at Turkey. Thereafter he arranged for re-shipment of the said goods through his Port Said agent Missr Shipping Company from Port Said to Khorramshahr by S. S. "Aldermain" and in cross-examination (qq. 372 to 378) he admitted that at his request these five endorsements all dated 12th August 1948 were issued by the defendant.

9. In cross-examination (qq. 250 to 252 and 266) the plaintiff admitted that throughout the years 1948-49 he was in India and he did not personally make any arrangement for despatch of goods from Port Said but under his instruction Missr Shipping re-shipped them from Port Said to Khorramshahr. It was put to him (q. 267) that he had no personal knowledge as to the actual loading of the goods on board the vessel and in answer he said "surely I have. If you cannot

believe any of the documents of the agent of the Steamer Company, you must not believe anything. I have also the Customs receipt at Port Said which says that these 246 cases had been shipped and mark - 26 Adal - Turkey in transit Port Said by S. S. "Aldermain" - was there".

"Customs receipt" mentioned by him was neither disclosed nor sought to be proved in re-examination and in my opinion the oral testimony of the plaintiff as to its contents is wholly inadmissible in evidence.

10. In answer to qq. 282, 283 and 290 to 294, the plaintiff said that the goods should have reached Khorramshahr by September 1948 but he did not remember the date, the month or the year in which the goods left Port Said and further said that the goods might have left in the month of August but he could not say definitely when the said vessel left Port Said. In question 480 it was suggested to him that he did not himself make any arrangement to get the goods transhipped from Port Said to Khorramshahr and in reply he said "it was impossible for me to go to find it out as a businessman" and in answer to Court's question (481) he admitted that because of this impossibility he could not and did not do so.

11. From the oral testimony of the plaintiff it is clear that he did not personally arrange or got the goods transhipped from Port Said to Khorramshahr and he had no personal knowledge that the goods were in fact re-shipped from Port Said to Khorramshahr by Missr Shipping as he was in India throughout the years 1948-49.

12. The next question is whether there is any documentary evidence to support the plaintiff's case and in order to determine that question it is necessary to decide the admissibility of 4 bills of lading and few letters. I shall first come to the bills of lading which were not admitted in evidence by Banerji, J. and they show that they were initially marked as Ex. "D" but this Exhibit mark was struck out by the Court officer who wrote out "the documents Marked for identification by order of Court." Mr. Ghosh told me that he relied on the provisions contained in the Commercial Documents Evidence Act, 1939 before Banerji, J., but could not draw His Lordship's attention to item No. 18 in Part II of the Schedule to the said Act and hence these documents were not allowed to be exhibited in suit. Mr. Hirak Kumar Mitra, learned counsel appearing with Mr. Chatterjee for the defendant, on the other hand told me that Mr. Ghose relied on the said entry and the matter was fully considered by His Lordship and thereafter the Exhibit mark was struck out under His Lordship's order and these documents were kept on record for identification. It is to be noted that no judgment was delivered by Banerjee, J., but the fact remains that His Lordship did not allow them to be exhibited in suit.

13. On 12th February 1954 the defendant's then solicitors took out a Master's summons (Ex. Q) inter alia for an order to keep the suit out of the peremptory list for two months and an affidavit of Paritosh Mukherjee, since

deceased, a Court clerk of the said solicitors affirmed on 12th February 1954 (Ex. S) was used in support of the said summons. This Ex. S contains three letters written by Dharani Mohan Banerjee, an employee of the defendant and in course of cross-examination of Dharani Mohan before me on this Ex. S the learned counsel for the plaintiff tendered these 4 bills of lading as will appear from the following questions and answers:

250. In your letter you have referred to these bills of lading ? Yes, we have mentioned these bills of lading.

251. You have seen them before? I do not remember.

252. How can you quote the number? Might have got it through correspondence.

253. Don't guess-either you know it?-I don't remember it.

254. But these are bills of lading? -These are bills of lading. (Tendered-Exhibit R-Ct. documents tendered subject to objection of Mr. Chatterjee and the admissibility of these documents will be decided later on at the time of argument.)

14. Mr. Ghosh contended that Dharani Mohan had proved these bills of lading which I am unable to accept. In my opinion Dharani Mohan had merely identified these documents as "bills of lading. The signatures on these documents were not proved at all by him and no question was asked about the signature. In my opinion Dharani Mohan did not prove the execution of these documents at all.

15. The next contention of Mr. Ghosh was that I should override the discretion of Banerjee, J., and admit these documents under Commercial Documents Evidence Act, 1939 which I am unable to accept as I am not hearing the "appeal" from the order or judgment of Banerjee, J. Assuming however I have such a power still in my opinion I ought not to exercise my discretion in admitting these documents in evidence under Commercial Documents Evidence Act for the reasons given hereinafter.

16. The words "contents and conditions of contents, measurement, weight, gauge, brand, quality and value are unknown; any reference in these bills of lading to these particulars is for the purpose of calculating freight only" are imprinted and the words "weights and contents unknown" and "weight" and or measurement declared by shippers, but not checked by the carrier" are all inserted by rubber stamp in all these bills of lading. The plaintiff is neither the consignor nor the consignee of these bills of lading. These documents do not even unconditionally acknowledge the receipt of the "goods". Moreover the person who had signed these documents had expressly stated inter alia that the "contents, quality and conditions of the contents" were all "unknown" to him. Even the weight of the goods were not acknowledged or admitted by the signatory to these documents. These bills of lading are qualified bills of lading and they are not even prima facie evidence as to the receipt of goods as against the person who had signed them or against the owner of the vessel. Moreover,

on the reverse of each of these documents it appears that the consignor Missr Shipping endorsed them in favour of National Bank of India Ltd. or order and some one on behalf of National Bank of India Ltd. had re-endorsed these documents in favour of the plaintiff. No one had proved these endorsements and re-endorsements and although Banerjee, J., did not allow these documents to be tendered in evidence still the plaintiff did not take any step to prove these endorsements and re-endorsements. After the institution of the suit the plaintiff on several occasions went to Iran but did not make any attempt to examine on Commission or on Letters of Request the person who had signed these documents and the person who endorsed them on behalf of Missr Shipping Company. Moreover, the plaintiff did not even call any one from National Bank of India Limited to prove these endorsements and re-endorsements and the judgment of the Supreme Court in (1) Kashinath Sankarappa Wani Vs. New Akot Cotton Ginning and ; Pressing Co., Ltd., in which the Supreme Court admitted the copy of the balance sheet obtained u/s 3(b) of the Commercial Documents Evidence Act, 1939, is clearly distinguishable from the facts of this case.

17. There is no independent proof that the goods in suit were even entrusted or delivered by Missr Shipping to the Shipping Company or to the person who had signed these documents and in my opinion the conditions laid down in item No. 18 of Part II of Commercial Documents Act have not been satisfied as these bills of lading are wholly conditional in the sense that the person who had signed these documents had not even acknowledged the receipt of the goods.

18. The judgment of the Madras High Court in (2) Home Insurance Co. Ltd. and Another Vs. Ramnath and Co., Madras, , relied on by Mr. Ghosh has no application as in that case there was no dispute as to the admissibility of the bills of lading. Section 3 of our Bills of Lading Act and the corresponding English Act relied on by Mr. Ghosh have no application as the defendant is neither the master of the ship nor the agent of the Shipping Company.

19. The judgment of the Supreme Court in (3) J.V. Gokal and Co. (Private) Ltd. Vs. The Assistant Collector Sales-tax (Inspection) and Others, , relied on by Mr. Ghosh inter alia defines what a bill of lading is and does not deal with the mode of proof. Indian Carriage of Goods by Sea Act relied on by Mr. Ghosh has no application inasmuch as S. S. Aldermin did not carry the goods in suit from any port in India. (See section 2 of the Act and the judgment of the Supreme Court in (4) East and West Steamship Company v. S.K. Ramalingam, AIR 1960 SC 1958 at page 1062.

20. In the case of (5) New Chinese Antimony Company Limited v. Ocean Steamship Company Limited, (1917) 2 KB 664, where the bills of lading contained a clause in print, "weight, measurement, contents and value (except for the purpose of estimating freight) unknown" it was unanimously held by the Court of Appeal that these bills of lading were not even prima facie evidence of shipment of goods even against the shipping company. This case was expressly approved and relied on by the Board in (6) Attorney General of Ceylon v. Scindia

Steam Navigation Company, 1962 AC 60 at page 75.

21. In Scrutton on Charterparties and Bills of Lading (17th Edition), Article 20 at page 60 it is inter alia stated,-

Where the statement of the amount or quantity in the bill of lading is qualified by such words as weight or quantity unknown, the bill of lading is not even prima facie evidence against the ship owner of the amount or quantity shipped, and the onus is on the cargo-owner of proving what in fact was shipped.

22. As against the Insurance Company bills of lading have no evidential value "without authentication and some proof that the goods specified in it were actually shipped on board". (British Shipping Laws, Vol. 10, Marine Insurance by Arnould, Article 1267, henceforth to be referred to as Arnould) - "In case of goods, the loading of them on board must be properly proved, and for this purpose the bill of lading of itself is no evidence. There must be direct testimony of the actual shipment of the goods." (Arnould, Article 1270.)

23. The plaintiff had no personal knowledge about the contents of these 246 cases as is clear from his answer to qq. 397-400 where he said that Bhattacharjee and Company arranged the goods to be put into different cases and one Nanda Kumar Mazumdar supervised the said packings. In qq. 401 and 402 it was put to the plaintiff that he had no personal knowledge about the contents of the chests and in answer he merely relied on his practice in tea trading but did not give any answer to the said suggestion. Moreover, as the plaintiff was in India, he cannot give any direct testimony as to the actual existence of the goods in those chests after they were discharged at Port Said from the vessel S. S. Express and no one from Missr Shipping was called to prove the contents of the chests and their actual shipment from Port Said on board the vessel S. S. "Aldermin. For all these reasons I am unable to admit these bills of lading in evidence.

24. At the time of argument Mr. Ghosh sought to tender another set of bills of lading which I did not allow and as I observed that proper course for him was to apply for admission of additional evidence, by a Notice of Motion dated the 8th July 1968 supported by a petition affirmed on the same day the plaintiff inter alia prayed for an order that duplicate copies of the bills of lading be admitted in evidence. Other prayers of this application were not pressed and I indicated that instead of going into the admissibility of these documents in piecemeal I should deal with this application along with the main argument in suit. In the petition it is nowhere alleged that these documents were signed in the presence of the plaintiff nor there is any averment that the plaintiff knew the signature of the person who had signed and executed them. For the reasons I have already given in rejecting the bills of lading discussed above I also dismiss this application with costs.

25. Exhibits C, D and E were tendered and marked "subject to objection" and the question of admissibility of these documents were not decided by Banerjee, J. On

Ex. D which is a copy of a letter dated 5th January 1949, the plaintiff said that its contents were correct and it was written by him to Missr Shipping Company and "This letter" was posted by Md. Yunus, since deceased (qq. 167 to 174). He was not asked anything about the original of Ex. D and his evidence was confined to this particular copy. Assuming however that Md. Yunus posted the original letter, there is no evidence to show that Ex. D was the true copy of the original letter which was posted by Md. Yunus nor there is any evidence that Ex. D was made from or compared with that original. In my opinion, none of the conditions laid down in section 63 of the Evidence Act was complied with and Ex. D is not admissible in evidence and the judgment of this Court in (7) The Commissioner of Wakfs, West Bengal Vs. Khan Jah Shahib-Zada Syhd Kazim Alt Murza and Another, , relied on by Mr. Ghosh has no application. Moreover, in this letter the plaintiff wrote to Missr Shipping Company inter alia as follows:

We have this day received intimation from our agents in Khoramshahr that the goods have not yet arrived at that port and we shall be glad if you kindly ascertain and let us know the date and port of discharge.

26. From the language it is clear that the plaintiff had no personal knowledge regarding the whereabouts of the goods and his statement was based on certain informations which he received from his agent at Khoramshahr. Mr. Ghosh contended that the knowledge of the plaintiff's agent was the knowledge of the plaintiff and for this proposition he relied on section 229 of the Indian Contract Act and Bowstead on Agency 12th Edition, Article 107. In my opinion, section 299 of the Contract Act and the principles laid down in Bowstead have no application on the question of admissibility of evidence under the Evidence Act and I am unable to accept this contention of Mr. Ghosh. There is no "statement" by the agent as contemplated by Section 32 of the Evidence Act and the contents of this Exhibit are wholly hearsay and cannot be looked into. Moreover, the "agent" was not called to give evidence and the defendant did not get any opportunity to cross-examine this agent of the plaintiff to ascertain the truth of the alleged information as alleged in this letter and whether such information was in fact given by the said agent to the plaintiff. In my opinion, the statement contained in this letter cannot be used as evidence against the defendant at all. Assuming however, it can be used, in my opinion, it has no evidential value as against the defendant as will appear from the law on the subject discussed later on.

27. On Ex. E which is a copy of a letter dated 28th January, 1949 the plaintiff said that the contents of this exhibit were correct and it was written to Missr Shipping Co. of Port Said and was posted by Yunus (Q. 178 to 181). So far as this Exhibit is concerned, the plaintiff did not even say who wrote the original of this exhibit and the conditions laid down in Section 63 of the Evidence Act were not complied with. In this exhibit the plaintiff wrote "we have again received intimation that the goods have not yet reached Khorramshahr" and in his evidence said that he received this "intimation" from his agent in writing and that

writing was with his Solicitors (Q. 455 to 457). In my opinion, this exhibit is also inadmissible in evidence for the same reasons given in connection with Exhibit D.

28. On Ex. C which is a copy of letter dated 4th Feb. 1949 sent by M/s. Missr Shipping Co. to the plaintiff, the original whereof is addressed by Missr Shipping Company to L. Savon & Company Limited of Port Said the plaintiff said that in reply to a letter written by him to Missr Shipping Company he received this exhibit from Missr Shipping Company and this exhibit was signed by Mr. Bakri (Q. 86 to 89). In question 90 he was asked about some other letters and it is not clear to me on which letter he was giving evidence in questions 91 to 94 but assuming that he was giving answers on Ex. C, he said that the statements contained in Ex. C were correct. There is no evidence before me to show that the original of this letter was written to M/s L. Savon & Company Limited and similarly there is no proof that this exhibit is the copy of the said original letter written by Missr Shipping Company to L. Savon & Company Limited. There is no proof that Missr Shipping Company actually despatched this letter to L. Savon & Company Limited. The plaintiff is not the writer of this letter and his evidence about the correctness of the contents of this Ex. C cannot be accepted as he was in India throughout the years 1948-49. The conditions laid down in Section 63 of the Evidence Act were not also complied with and in my opinion, this Ex. C is not admissible in evidence excepting the signature of Mr. Bakri which the plaintiff had proved. Assuming however, that this document is admissible in evidence I will now discuss its evidential value relevant portion of which is set out hereunder:

246 CHESTS TEA SHIPPED PER S/S "ALDERMIN" on the 8/7/48 - BILLS OF LADING NOS. 1/4.

We have shipped the above goods to Khorramshahr per S. S. "Aldermin on the 8th July 1948 and regret to inform you that we are advised by Messrs. Adl. Co., the owners of the goods that the consignments have not yet arrived at Khorramshahr: We feel highly obliged if you will kindly let us know whether you have any news for the delay of the goods in question.

29. The writer of this letter was not called to prove the contents of this letter. There is no evidence that the writer personally loaded the goods on board the ship in view of the words "we have shipped". There is no evidence that these chests were opened by the writer at Port Said or he knew their contents. This Exhibit also shows that the writer had no personal knowledge about the whereabouts of the goods.

30. The plaintiff not only went to Iran immediately after the institution of the suit but also went there every two or three years. After the institution of the suit when he went to Iran he did not take any step to examine anyone of Missr Shipping Company or the agents of the Shipping company or his own agent at Khorramshahr either on Commission or on Letters of Requests and the defendant did not get any opportunity to cross-examine these persons.

Any party is entitled to cross-examine any other party or his witnesses, in the

same litigation, and no evidence affecting a party is admissible against that party unless the latter has had an opportunity of testing its truthfulness by cross-examination." (See Halsbury's Laws of England, Hailsham edition, Article 831, page 756, Vol. 13).

31. In (8) Allen v. Allen and Bell, (1894) PD 248 at page 253 Lord Justice Lopes held as follows:

It appears to us contrary to all rules of evidence, and opposed to natural justice, that the evidence of one party should be received as evidence against another party without the latter having an opportunity of testing its truthfulness by cross-examination.

32. In my opinion, the aforesaid writings contained in Ex. "C and the contents of Exts. D and E are not admissible in evidence as proof of facts alleged therein as against the defendant. (See (9) Firm Chunni Lal Mansa Ram Vs. Firm Sheo Prasad Banarsi Das,). Assuming, however, that. the contents of exhibit "C including the contents of Exts. D and E are relevant and they are admissible in evidence, in my opinion, they have no evidential value as against the defendant.

33. So far as Ex. "F" is concerned, Banerjee, J. excepting the signature of the writer, did not allow its contents to go in as the plaintiff was unable to prove their correctness and I shall leave it out of my consideration. In his letter dated 23rd March, 1949 included in Ex. A the plaintiff wrote to the defendant "we regret having to advise the receipt of information from the consignee that the consignment has not been delivered at destination". In his oral testimony the plaintiff did not say how he received the alleged information from the "consignee" and who was that "consignee". Bills of lading show that these chests were shipped by Missr Shipping Company and were to be delivered on the order of Missr Shipping Company. So far as Missr Shipping Company was concerned it had no personal knowledge about the non-arrival of the goods at Khorramshahr. The alleged "consignee" has not given any evidence and the statement quoted above in this exhibit is wholly inadmissible and I cannot act upon it and assuming it is admissible, in my opinion, they cannot be used against the defendant for the same reasons given in connection with Exts. C, D and E.

34. In reply to this letter dated 23rd March 1949 the defendant by its letter dated 9th April 1949 (contained in Ex. A) intimated to the plaintiff that it had noted the contents of the plaintiff's said letter. According to Mr. Ghosh the defendant by this letter had admitted that the goods were loaded at Port Said and they did not reach Khorramshahr which I am unable to accept. This letter was written "without prejudice" and the defendant neither admitted that the goods were loaded on board the vessel at Port Said nor it admitted about non-arrival of the goods at Khorramshahr as contended by Mr. Ghosh.

35. As enclosures to the letter dated 28th October 1949 (Ex. A and Ex. G) the plaintiff sent to the defendant a copy of a letter dated 3rd June 1949 written by his solicitor Messrs. B. N. Basu and Company to Messrs. L. Savon and Company

and a copy of a letter dated 15th May 1949 the original of which was supposed to have been written by African Eastern (Iran) Ltd. to Messrs. Sherkat Nassavi Villa of Khorramshahr. These three letters were disclosed by both the parties in their affidavits of documents. In answer to question 216 the plaintiff said that the statements contained in these three letters were correct and they were tendered and collectively marked as Ex. G although they were included in Ex. A.

36. Learned counsel Mr. Chatterjee contended that these two enclosures dated 3rd June 1949 and 15th May 1949 were not admissible in evidence and he was not precluded from contending as to their inadmissibility although no such objection was taken at the time they were tendered in evidence. These three letters are included in the brief of correspondence being item No. 26 of the index and are contained in Ex. A, on which it is written "documents indicated in index being numbers 1-5, 18, 21, 26-30 and 33 are all admitted and tendered by consent as exhibits, formal proof dispensed with, without any admission as to the truth or otherwise of the contents of the documents. The rests are not admitted." Under these circumstances it is no longer open to Mr. Chatterjee to contend that these two enclosures required formal proof as such proof was already dispensed with by consent of the parties before Banerjee, J.

37. The next contention of Mr. Chatterjee was that even though formal proof of these two enclosures were dispensed with still it was open to him to contend about the inadmissibility of their contents as the said right was expressly reserved by the words "without any admission as to the truth or otherwise of the contents of the documents", and disputing this contention Mr. Ghose relied on two decisions of this Court namely, (10) Abdul Samad v. Gunendra Krishna Roy, 82 IC 974 and (11) Dol Gobinda Das v. Makbul Sheikh, 61 CLJ 588 where it was held that neither at the appellate nor at the argument stage objection as to the mode of proof of documents could be taken for the first time. Here the parties themselves had dispensed with the mode of proof of these two enclosures and they formed part of Ex. A and the only question I am to decide is whether the contents of these two documents are proved to be true, and on this ground these two judgments have no application to the case before me. Enclosure dated 15th May 1949 is a copy of a letter dated 15th May 1949 original of which was written by Mr. T. A. Gardiner on behalf of African Eastern Limited to the plaintiff's agent Messrs. Sherkat Nassebi Villa of Khorramshahr and is set out hereunder:

Messrs. Sherkat Nassebi Villa, Khorramshahr.

Khorramshahr, 15th May, 1949.

Your Ref. No. 82.

Dear Sirs,

S. S. "Aldermin" V. 2 Bs/b. Nos. KI - 4 Port Said / K Shahr A. D. L. 26 -266 (sic) cases tea.

In reply to your letter of the 9th instant, we have to advise you that the above

parcels were discharged at Bandar Shahpur. Please present your documents to this office for delivery order. Yours faithfully, for African & Eastern (Iran) Ltd. Sd./- T. A. Gardiner as Agents.

38. In cross-examination (Q. 260) it was put to the plaintiff that "therefore, when you told my lord that the contents of the letter of the 15th of May, 1949 were correct, according to you, you relied on certain letters", and in answer he inter alia said : "I relied on the information which I received - I relied on the information which I receive in business, for everything". In answer to qq. 447 to 450 he said, as it was not his duty to go to Bandarshahpur, he did not go there and he had no desire to go to Bandarshahpur to explore the entire matter and further said that although he went to Khorramshahr from Calcutta, he did not go to Bandarshahpur because "that is also my own wish."

39. In my opinion, the plaintiff had no personal knowledge as to the truth of the contents of this enclosure dated the 15th May, 1949 and I am unable to accept his answer to q. 216 when he said that the contents of this letter are correct as he was in India throughout the years 1948 and 1949 and did not even go to Bandarshahpur at all. Coming now to the other enclosure, which is a copy of a letter dated the 3rd June, 1949, written by Messrs. B. N. Basu and Company to Messrs. L. Savon and Company in which although it was alleged that the plaintiff was informed by Messrs. Java Bengal Line that the goods were landed at Bandarshahpur still he did not call any one from Messrs. Java Bengal Line to prove the truth of such information and this allegation is not admissible in evidence. In q. 461 it was put to him "look at the Ex. G once again (shown). I am suggesting to you that you have no personal knowledge of any of the allegations contained in these three letters as to what happened to the goods ?" and in answer the plaintiff said "Yes, the goods had been reached Khorramshahr and I had my claim by letter dated 28.10.49 from the Insurance Company." It is for the plaintiff to prove that the statements contained in these two enclosures were true and he did not take any step to prove them inspite of the said suggestion and in my opinion the plaintiff cannot have any such personal knowledge as he was in India when these letters were written and he had failed to prove that the contents of these two enclosures are correct. Under these circumstances I hold that the plaintiff had failed to prove that he arranged or got the goods transhipped from Port Said to Khorramshahr.

40. This suit is liable to be dismissed in view of my above finding but still for the limited purpose of determining other question I shall proceed on the basis that the goods were despatched from Port Said for being delivered to Khorramshahr.

41. Mr. Ghosh relying on Exts. H, K & S and the alternative case made out in paragraph 6 of the written statement urged that the defendant had admitted that the goods were discharged at Bandarshahpur and accordingly I should hold that the goods did not reach Khorramshahr. In his letter dated the 28th October 1949, the plaintiff wrote to the defendant, "We shall be pleased if you will confirm whether we should take delivery of the goods at Bandarshahpur although

the goods were destined to Khorramshahr" In reply the defendant by its letter dated the 8th November 1949, (contained in Ex. A and independent Ex. H) requested the plaintiff to inform how he intended to forward the consignments to its destination. Instead of giving such information the plaintiff by his letter dated the 17th December 1949 (part of Ex. "A" and Ex. "J") wrote to the defendant "As desired we enclose herewith our claim bill for Rs. 46,200/-In reply to this letter the defendant by its letter dated 11/13th January 1950, (part of Ex. A and Ex. K) rejecting the plaintiff's claim stated "From a review of the claim file we note that the entire consignment has been discharged in full at Bandarshahpur instead of at Khorramshahr. Since the consignment has been discharged in full at Bandarshahpur and since our liability as per terms of the Insurance contract ceased and as soon as the goods were delivered to you at this port, we would suggest that you approach the agents of the vessel "Aldermin for your loss, if any, duly supported by the Lloyd's survey report."

42. In paragraph 5 of the plaint it is alleged "the said goods never reached Khorramshahr and were totally lost to the plaintiff". In paragraph 6 of the written statement it is alleged "with reference to paragraph 5 of the plaint it is not admitted that the said goods never reached Khorramshahr. Alternatively, if the said goods never reached Khorramshahr it was because they were discharged from S. S. "Aldermin" and landed at Bandarshahpur and the plaintiff failed and neglected to forward them from Bandarshahpur to Khorramshahr." In paragraph 7 of the written statement the defendant pleaded "it is denied that the said goods or anyone of them were totally or at all lost to the plaintiff or lost at all. Alternatively, if the said goods or anyone of them were totally or at all lost such loss occurred after the expiration of the period of cover provided by the said policies."

43. In paragraph 3 of the affidavit of Paritosh Mukherjee (Ex. S) it is stated that "the defendant contends that the goods were discharged in good condition at Bandarshahpur, a port in Iran and nothing is due and / or payable on the said policies to the plaintiff."

44. In Ex. S three letters were annexed first of which is dated 21st January 1954 written to Messrs. African and Eastern (Iran) Limited, Khorramshahr by the defendant is set out hereunder :

S. S. "ALDERMIN" V. 2 BS/L Nos. KI-4 Port Said/K :

SHAHR A.D.L. 28 - 246 Cases Tea.

We refer you to your letter of 15th May 1949 addressed to Messrs. Sherkat Nessebi Villa, Khorramshahr and wish to advise you that a suit has been filed against us by the assured here in Calcutta High Court. In order to certify that the goods were landed at Bandarshahpur kindly let us know the name of the witness who can give evidence to certify that the goods were landed at Bandarshahpur and also let us know in which court the witness can be examined.

Your prompt attention to this matter will be highly appreciated.

45. The second letter which is dated 29th January 1954 the defendant wrote to its the then Solicitors that the defendant had already written to the agents of the Steamship company asking them to inform in which court the witness could be examined. The last letter which is dated 4th February 1954 was written by the defendant to African and Asian (Iran) Limited of Khorramshahr is set out hereunder:

S.S. "ALDERMIN" V. 2 BS/L Nos. KI - 4 Port Said/KISHAHR. A.D.L. 28 - 246 Cases Tea.

We refer you to our letter of 21st January 1954 and wish to inform that our Solicitors have advised us that the Court directed to place the suit in the list of the 13th instant. It is therefore necessary that our application for issue of Letter of Request at Iran should be moved by that date Under the circumstances, We request that you kindly let us know immediately the name of the witness who can give evidence to certify that the goods were landed at Bander Shahpur and also let us know in which Court the witness can be examined.

46. Dharani Mohan was the writer of all these three letters and in answer to qq. 38 and 53 to 55 he said that from the letter of the plaintiff dated 28th October 1949 and the said two encloures the defendant came to know that the goods were landed at Bandarshahpur and on the basis of such information Ex. K dated 11/13th January 1950 was written. In cross-examination (q. 89) Dharani Mohan said that this Ex. K was written by Mr. Lance La Bianca who had gone to Japan. It was suggested to him that Mr. Bianca was still in Calcutta but it was denied by him. In answer to questions 104 to 111 he repeated that the defendant came to the conclusion that the goods were discharged at Bandar Shahpur on the basis of the information supplied by the plaintiff, and the papers contained in the "claim file" mentioned in Ex. K. were disclosed in the suit but the "file itself" was not disclosed. In question 112 it was suggested to him that the "file" might contain secret information from Bandar Shahpur to the effect that the goods were discharged there and in answer he said that the defendant's knowledge was solely based on information received from the plaintiff. In answer to question 113 he said that "file" might contain certain inter-branch correspondence of the defendant. In question 134 it was suggested to him that the draft of Ex. K was not written by him and in answer he repeated that the said draft was written by him but in answer to questions 339 and 340 he admitted that he did not remember whether he drafted this Ex. K. In question 135 it was put to him that the "file" contained information received by the defendant from independant sources and that is why this "file" was not disclosed and in reply he said that there was no such independent information. In answer to questions 342 to 345 he said that as the plaintiff did not give any answer to the defendant's enquiry as to how the plaintiff intended to forward the goods from Bandarshahpur to Khorramshahr, the defendant assumed that the goods were taken delivery of by the plaintiff at Bandarshahpur.

47. I do not accept that Ex. K was drafted by Dharani Mohan, as he himself had admitted that he did not remember whether in fact he drafted it or not but I accept his evidence that Mr. Bianca is not in Calcutta and he is in Japan for a long time.

48. Dharani Mohan said that Mr. Brown who had signed and verified the written statement was no longer in Calcutta and on the basis of informations supplied by the plaintiff that the goods were discharged at Bandarshahpur the defendant without making any independent enquiry assumed that the goods were so discharged at Bandarshahpur and as the plaintiff did not give any reply as to how he intended to forward the goods to its final destination the defendant further assumed that the plaintiff had failed and neglected to send the goods from Bandarshahpur to Khorramshahr (qq. 478-482 and 500 - 502).

49. On Ex. "S" Dharani Mohan (qq. 271, 280, 281 and 286) said that on the information received from the plaintiff that the goods were discharged at Bandarshahpur those letters were written to the agent of the steamer company to find out whether the goods were actually discharged at Bandarshahpur and whether any witness was available to certify that fact. I accept the evidence of Dharani Mohan to the effect that Mr. Brown is not in Calcutta and the defendant had no independent knowledge about the discharge of the goods at Bandarshahpur and those allegations were based on the informations supplied by the plaintiff. Moreover, if the defendant had personal knowledge or independent source of information about the discharge of goods at Bandarshahpur, Dharani Mohan could not have written in the letter dated 21st January, 1954 (annexed to Ex. S) addressed to African and Eastern (Iran) Limited, Khorramshahr to certify whether the goods were landed at Bandarshahpur and whether any witness was available to give evidence to certify that fact. Mr. Ghosh contended that the defendant must have made an independent enquiry otherwise how in the affidavit of Paritosh the words "in good condition" could be written as in none of the letters disclosed in the suit the words "in good condition" were written. I am unable to accept this contention of Mr. Ghosh, and in my opinion the insertion of the words "in good condition" by the Solicitors in Ex. S does not prove that the defendant made any independent enquiry or had independent knowledge about the discharge of the goods at Bandarshahpur. It is true Dharani Mohan in his evidence said that under his instruction this Ex. S was drafted by the Solicitor but it was not suggested to him that he went to Khorramshahr or to Bandarshahpur to ascertain whether the goods were in fact discharged at Bandarshahpur or they did not reach Khorramshahr.

50. In my opinion, the defendant's admission, if any, as to the alleged discharge of the goods at Bandar Shahpur was based on information received from the plaintiff. The plaintiff had no personal knowledge about the landing of the goods at Bandar Shahpur and was himself informed of the alleged discharge of goods by African and Eastern (Iran) Limited and Messrs. Java Bengal Line. Under these circumstances, the admissions, if any, are of no real evidential value and cannot

be used against the defendant who knows nothing about the alleged discharge of goods at Bandarshahpur and I cannot act upon such admission. (See (12) *Bulley v. Bulley*, 9 Ch. App. 747, 751 and (13) *Comtroller of Customs v. Western Lectric Company*, 1966 AC 367 at 371. Moreover, admissions, if any, of the defendant have to be taken as a whole and cannot be dissected so as to admit the part which is in favour of the plaintiff and to reject the other part which is against the plaintiff and the judgment of this Court in (14) *Nilmony v. Ramanoogra*, 7 WR 29 and (15) *Isan Chandra v. Haran*, 11 WR 525 relied on by Mr. Ghosh do not support his contention.

51. In (16) *Hanumant Vs. The State of Madhya Pradesh*, the Supreme Court laid down that the statements are to be taken as a whole and the admissions must be used either as a whole or not at all. If I accept the admission of the defendant I shall have to hold that "the goods were delivered" to the plaintiff at Bander Shahpur "in good condition" and if I do not accept this admission "there remains no material on the record from which any inference can be drawn" (this question is taken from the judgment of Supreme Court) that the goods were discharged at Bander Shahpur.

52. Mr. Ghosh contended that I should draw adverse inference against the defendant as Mr. Brown who verified the written statement, Mr. Bianca who wrote Exts. H and K, Mr. Puri who wrote Ex. P and Mr. Mador who in correspondence denied about receiving any letter from the plaintiff in 1948 were not called. It is to be noted that Dharani Mohan was not even suggested that these gentlemen went to Bandarshahpur or Khorramshahr to verify the correct state of affairs or they had personal knowledge about the whereabouts of the goods. Moreover, Mr. Brown and Bianca are not in India. Mr. Puri also left the service of the defendant. Ex. P. was disclosed on 28th May, 1968 and was tendered on 29th May 1968, i.e. on the last day of cross-examination of Dharani Mohan. Under these circumstances, I am unable to accept the suggestions of Mr. Ghosh that the defendant had deliberately withheld anyone of these gentlemen from the witness box.

53. I also do not accept the suggestion of Mr. Ghosh that the defendant had deliberately withheld documents contained in the "file". Dharani Mohan said that all material documents contained in the "file" were disclosed by the defendant and there was no secret information in the inter-branch correspondence of the defendant to the effect that the goods were discharged at Bandarshahpur. In cross-examination Mr. Ghosh did not even ask Mr. Dharani Mohan to produce those documents viz. the inter-branch correspondence of the defendant. It is also to be noted that the defendant had filed his affidavit of document and according to the defendant all material documents were disclosed. There is no cross-examination on this affidavit of documents by Mr. Ghosh.

54. Mr. Ghosh contended that I should draw adverse presumption u/s 114 illustration (g) of the Evidence Act against the defendant and infer that if those inter-branch correspondence of the defendant were produced they would have

proved the goods were in fact discharged at Bandershapur and the defendant had deliberately withheld them from the court. It is to be noted that the plaintiff himself did not disclose the correspondence between him and his Kharamshahr agents and also between him and his Port Said agents. If I am to draw any adverse inference against the defendant as suggested by Mr. Ghosh I will also have to draw adverse inference against the plaintiff. Both parties had filed their respective affidavits of documents long ago but they did not obtain any further order for discovery of documents against each other and no adverse inference can be taken against either of the parties as the adverse presumption against one will destroy the adverse presumption against the other and I shall proceed on the documents which are before the court subject to their admissibility and their evidential value.

55. Coming back to the oral testimony of the plaintiff as he, in answer to Q. 77 *inter alia*, said, "After we wrote that the goods had arrived at Kharamshahr" Mr. Ghosh submitted that the word "not" has been dropped out in between the words had and "arrived" due to the mistake while transcribing the deposition. Mr. Chatterjee, however, disputed this statement of Mr. Ghosh and under this circumstance I did not correct this answer and shall leave it out of my consideration. In answer to qq. 100,101, 115, 119, 154-156 the plaintiff said that on the 23rd June, 1950, he visited Khorramshahr and stayed there for three days and with the permission of the Customs authorities he went through the lists maintained by the Customs office but could not find his goods were entered in the lists and even up to the time of his departure the goods did not arrive there. In cross-examination (q. 302) he said that he went to Kharamshahr "to find out whether the goods had reached there or not, so that the Insurance Company would not say that goods had arrived at Khorramshahr". In answer to q. 322 he said, "I visited Iran every two years, 3 years. Last year I was there." In q. 326 he was asked "Did you find out whether the vessel had arrived there at Kharamshahr or not?" and in reply the plaintiff said "I do not know". In answer to qq. 328-329 he said that he went through the Customs' lists for two years which contained thousands of items and tea was one of those items. In qq. 331-332 he was asked again "You did not try to find out as to whether the vessel had in fact reached Kharamshahr or not?" and his answer was "I do not know". In answer to Q. 407 he said, "I have searched the list of the Customs-there was a certificate that goods had been arrived at Kharamshahr". According to Mr. Ghosh the word "not" was again not transcribed due to mistake in between the words "had" and "been" which was again disputed by Mr. Chatterjee and I will not consider this answer as an admission on the part of the plaintiff that the goods did arrive at Khorramshahr. In answer to Q. 408 and 413 he said that he did not take the copies of the "Cus torn lists" as he thought that they were not necessary. In qq. 433-437 it was suggested to him that in June, 1950, he went to Khorramshahr for the purpose of obtaining evidence and his answer was in the negative and he said that he went to see some of his clients, which completely contradicts his answer given in q. 302. In answer to q.438 he said that he did not

go to the Customs Office "incidentally" but he went there for "this purpose only". In answer to qq. 439-443 he said for 10 hours he went through the Customs' lists to find out whether his goods were entered there or not. In qq. 444 he was asked why he did not write a letter to the Customs authorities to confirm that the goods did not arrive at Khorramshahr and his answer was "Customs had nothing to do." In answer to q. 445 he said that the Customs authorities could only give the certificate.

56. I am to accept evidence of the plaintiff that he went to the office of the Customs authorities of Khorramshahr for searching the alleged lists. Assuming however he went through the Customs' lists for two years in 10 hours in which thousands of items were entered, in my opinion, it was not possible for him to find out the particular consignment in those lists and under these circumstances I cannot hold that the goods did not reach Khorramshahr. Moreover, in answer to qq. 263-264 the plaintiff admitted that he did not go to Port Said in the years 1948-49 and there is no evidence to show that the goods in suit were actually shipped from Port Said to Khorramshahr. There is no documentary evidence to establish that the plaintiff made any arrangement for transshipment of the goods from Port Said to Khorramshahr and even if I assume that the plaintiff instructed his Port Said agent to arrange for such shipment, there is no proof that the said agent carried out his instruction. After filing the suit the plaintiff not only went to Iran in 1950 but also he visited Iran every two or three years and as late as one year before giving evidence he went to Khorramshahr but did not take any step to examine any witness on Commission or on "Letters of request" to prove that the goods did not reach Khorramshahr and his instructions were actually carried out by his Port Said's agents and the goods were loaded on board the vessel "Aldermin". He also did not take any step to examine any witness at Khorramshahr to prove that the goods did not reach there. He did not take any step to prove that the goods were landed or discharged at Bandershaipur and the best evidence which were available to the plaintiff viz., the records of the Port authorities and the Customs authorities of Ports of Bandershaipur and Khorramshahr were not made available to the court. There cannot be any doubt that the Port Said and Iran are far off from this country but there is no evidence to show that the costs of Commission or examination of witnesses on Letters of Request would have been so excessive that such course could not have been adopted. In (17) A.L.S.K. Kadappa Chetti Vs. R.S.S.T. Thirupathi Chetti, a Division Bench of the Madras High Court held that a letter written by one Malayandi was not admissible in evidence as the plaintiff did not take any step to examine Malayandi on commission at Rangoon.

57. The suit is pending since 1950 and it was partly heard by Banerjee, J. in the year 1966. For about two years the suit is pending as a part-heard suit but no step whatsoever was taken to produce before the court the best evidence although the plaintiff had ample opportunity to do so. Not only I agree with the judgment of the Division Bench of the Madras High Court but also the plaintiff himself admitted that he did not make any attempt whatsoever to procure the

best available evidence as according to him "For a case there was no need of evidence to give." (Q. 434, 435).

58. In Q. 299 to 301, 307 to 311, 455 to 457 the plaintiff admitted that he was informed by his agent at Khorramshahr by correspondence that the goods did not reach Khorramshahr. These correspondence, he admitted, were in the possession of his Solicitor but they were not disclosed in the suit. He further admitted that his knowledge as to the non-arrival of the goods at Khorramshahr was based on the said correspondence with his agent of Khorramshahr. In course of trial these letters were not even disclosed and in re-examination they were not even put in. Moreover, in answer to q. 487 the plaintiff admitted "the goods came from Bandarshapur to the last destination," and in order to nullify its effect the whole answer has to be recast and mere insetion of the word "not" will not be sufficient.

59. Assuming that the contents of the copy of the letter dated 15th May, 1949 are true and have evidential value against the defendant it clearly shows that the plaintiff's agent was asked to present document for delivery order material portion of which is set out hereunder:

Dear Sir,

Khorramshahr 15th May, 1949 s.s. ""ALDERAMIN" V. 2 Bs/L Nos. KI-4 PORTSAID/K "SHAHR" A.D.L. 26, 246 Cases Tea.

In reply to your letter of the 9th instant, we have to advise you that the above parcels were discharged at Bandar Shahpour. Please present your documents to this office for Delivery Order.

60. The writer of this letter requested the plaintiff's agent to present "documents to this office for delivery order" which can only mean at the office of Khorramshahr as it was written from that place. It is further to be noted that in this letter it is nowhere stated that goods were lying at Bandarshahpur nor M/s Sherkat Nassebi Villa was to take delivery of the goods from Bandarshahpur.

61. Assuming that the contents of the copy of the letter dated 3rd June, 1949 of M/s. B. N. Basu & Co. written to M/s. L. Savon & Co. are true and they have evidential value against the defendant, it is to be noted that even in this letter it is nowhere alleged that the goods were not subsequently brought by the Shipping Company to Khorramshahr. It is further to be noted that in this letter non-arrival of the goods at Khorramshahr was qualified by the words "on the due date" and the plaintiff could not fulfil his contract with his own buyer due to such nondelivery of the goods "on the due date". Moreover, in qq. 102, 103 and 162 in examination-in-chief the plaintiff admitted that he never went to Bandarshahpur and had no idea whatsoever whether the goods were at all discharged at Bandardshahpur. In my opinion, the plaintiff has totally failed to prove that the goods never reached Khorramshahr.

62. The real controversies between the parties are whether goods in suit were

totally lost to the plaintiff, whether the plaintiff had abandoned them and if so, whether such abandonment was made within a reasonable time, whether any notice of abandonment was required to be given to the defendant and if required, whether such notice was given and if given, whether it was given within a reasonable time. Although I have already decided against the plaintiff on all the points discussed above but for the purpose of deciding these real controversies I shall proceed on the following assumptions viz.:

(a) that these 246 chests containing Indian Black Tea, under instructions of the plaintiff, were despatched by Missr Shipping Company from Port Said to Khorramshahr by S. S. "Aldermin";

(b) that bills of lading Exhibits C, D, E, F, G including those two enclosures; are all admissible in evidence; and their contents are true and correct and they can be used as evidence against the defendant;

(c) that the contents of all the documents in Exts. A and S so far as they are against the defendant are all correct and can be used as evidence against the defendant and the defendant had independent secret information that the goods were discharged at Bandarshahpur and had admitted that they were so discharged there;

(d) that oral testimony of Dharani Mohan should be accepted so far as they are in favour of the plaintiff and should be rejected so far as they are against the plaintiff and as if I have accepted all the contentions of Mr. Ghosh hereinbefore discussed.

63. It is necessary at this stage to record here that on the 29th August, 1968 learned counsel Mr. A. K. Sarkar appearing with Mr. Ghosh at the time of argument said that as the goods were black tea there was no possibility of any deterioration as to their qualities in course of delayed voyage from Port Said to Khorramshahr. Apart from the aforesaid statement it is also to be noted that there is no evidence whatsoever to show that the qualities of goods were at all deteriorated at the time when they were discharged at Bandarshahpur or they would have deteriorated if they were sent from Bandarshahpur to Khorramshahr. No case was made out in the plaint and there is no proof that the goods were at all damaged by the perils insured against or their qualities were deteriorated. Moreover, the existence of the goods in specie at Bandarshahpur is not disputed by the plaintiff and the argument of Mr. Ghosh proceeded on the basis that the goods were lost to the plaintiff as they were discharged at Bandarshahpur instead of Khorramshahr. It is also to be remembered that Bandarshahpur is an intermediate port between Port Said and Khorramshahr and the distance between Bandarshahpur and Khorramshahr is 175 K M. (Plaintiff's questions 53, 54 and 103).

64. Policies in suit were issued in 1947 expressly covering the goods during the voyage until they were discharged at the final warehouse at Khorramshahr. In (18) John Martin of London Ltd. v. Russel, (1960) 1 LLR, 554, similar policies

were issued and there the goods were discharged into a transit shed and were damaged by insects. It was contended on behalf of the Insurance Company that the transit shed was the final warehouse and as the consignor did not intend to send the goods to final warehouse the risk ceased on discharge of the goods at that shed. After rejecting the contention that the transit shed was the final warehouse. Pearson, J. at page 565 observed as follows:

The other suggestion that was made on behalf of the defendant was that the insurance cover ceases on discharge of the goods, if the consignee does not intend to send goods to a final warehouse; one may say that it is not an intention to send the good to a final warehouse entertained by the material person at the material time. In my view, that suggestion ought not to be accepted. First of all, it is not giving a reasonable businesslike meaning to the clause whose intention is relevant, and at what time is it to be ascertained, and how is it ascertained? There may be a change of intention from time to time; it might be a fluctuating intention; and of course the ownership of the goods and the identity of the goods for the purpose of the clause might be changed. There would be so to speak, a shifting cover, sometimes applied to the goods and sometimes not; and sometimes goods would be uncovered and sometimes covered, which to my mind is not a reasonable business-like interpretation. Secondly, there is this fact. On the wording of the clause it professes to cover the goods; it professes to say that the goods are covered from the commencement of the transit, until the goods are delivered to the "consignees" or other final warehouse. There is no expression of any condition that the goods are to be covered only so long as, according to the opinion of the material person at the material time, they are intended to go to a final warehouse. In my view, therefore, the insurer has failed to show that the insurance has come to an end, and the plaintiffs have succeeded in showing that the goods were covered by insurance at the time when the damage occurred.

65. The passages quoted above and relied upon by Mr. Ghosh do not support his contention that if the plaintiff had touched the goods at Bandarshahpur, the perils insured against would have come to an end at Bandarshahpur and the goods would have remained uncovered if they were forwarded by the plaintiff to their final destination.

66. This case expressly laid down that until the arrival of the goods at the final destination the goods remained covered and similarly, in the case before me the goods would have remained covered until they were finally discharged at the final warehouse as the policies in suit expressly provide that until the goods are discharged at the final warehouse, the risk covered by them would continue. Moreover, the policy further expressly provides that in case the contract of affreightment is terminated at a port or place other than the destination named in the policy in exercise of any liberty granted to the shipowner or charterer under the Contract of Affreightment, the insurance would continue and the goods would remain covered until they are sold or delivered at such port or place or if the

goods are not sold and are forwarded to the destination named in the policy or to any other destination until their arrival at the final warehouse.

67. Mr. Ghosh contended that the Contract of Affreightment means "contract to hire a ship to carry cargo" and for this proposition of law he relied on the meaning of the word "affreightment" at page 32 of Vol. 1 of Shorter Oxford Dictionary (Published in June 1961 by the Oxford University Press and The Caxton Publishing Company Limited) which I am unable to accept as in Halsbury's Laws of England (Hailsham Edition) Vol. 30, page 272, Art. 471 it is stated:

A contract for the carriage of goods in a ship is called in law a contract of affreightment. In practice such contracts are usually expressed in writing and most frequently in one or other of two types of document called respectively a charterparty and a bill of lading.

68. The policies in suit were Voyage" policies, that is to say the goods were held covered against the perils of sea from the time they left warehouse named in the policy and would remain so covered during the whole voyage until they were safely discharged at the final warehouse named in the policy. If in exercise of "liberty clause the goods were rightfully discharged by the shipping company at Bandershahpur the goods would have remained covered in terms of the policy but if they were discharged wrongfully at Bandershahpur not due to the perils of sea and not in exercise of the liberty clause, that would have amounted to a wrongful abandonment of the voyage and the defendant would have ipso facto been discharged from its liabilities for all subsequent losses. (See Halsbury's Laws of England (Hailsham Edn), Vol. 18, Arts. 347 and 348, pages 253 to 254).

69. By this voyage policy the defendant undertook to pay for all losses provided such losses were occasioned by perils of sea but not for the losses arising out of a wrongful breach of contract of affreightment on the part of the shipping company as the same can never be the perils of sea,

The term perils of the seas, as used in a marine policy, does not include every casualty which may happen to the subject matter of the insurance on the sea; it must be a peril of or due to the sea.

(See Article 421, page 298 of Halsbury's Laws of England, Vol. 18 (supra).

70. Even if due to the wrongful breach of contract of affreightment on the part of the shipping company by discharging the goods at Bandershahpur there was no abandonment of voyage in the sense it is used in Halsbury's Laws of England, still in my opinion, if the defendant would have touched the goods or would have forwarded them from Bandarshahpur to Khorramshahr the risks covered by the goods would have remained effective as they were expressly covered by the terms of the said policies. Moreover, if due to such wrongful breach of contract of affreightment on the part of the shipping company goods were wrongfully discharged at Bandarhahpur there would have been only a partial loss of voyage

not amounting to the total loss of goods and if the plaintiff had forwarded them from Bandarshahpur to Khorramshahr by other ship, the goods would have still remained covered for that voyage and the defendant would have been liable to pay to the plaintiff the additional cost of shipment or transshipment including the cost of loading at Bandarshahpur as partial loss of voyage.

71. In answer to qq. 151, 161, 228, 230, 261, 286, 345, 451 to 458, 483, 492 and 493 the plaintiff said that he was not bound to take delivery of the goods at Bandarshahpur or in America as the goods were to be discharged at Khorramshahr. The analogy given by him and supported by Mr. Ghose about taking delivery of the goods in America is wholly irrelevant as the distance between Bandarshahpur and Khorramshahr is only 175 KM. and this case made out by the plaintiff from the witness box is wholly afterthought as he himself by his letter dated 28th October 1949 specifically asked the defendant to confirm whether he should take delivery of the goods at Bandarshahpur.

72. According to Mr. Ghosh the plaintiff had no duty to take delivery of the goods at Bandarshahpur as the goods were insured up to the final destination named in the policy and as they were discharged at the intermediate port there was an actual total loss of goods to the plaintiff.

73. At the very outset it is necessary to say that the word "loss" in the Indian Carriage of Goods by Sea Act as interpreted by the Supreme Court in *East and West Steamship Company v. Ramalingam* (supra) relied on by Mr. Ghose cannot be taken into consideration or applied to in understanding the meaning of the word "loss" in Marine Insurance as is clear from paragraphs 20 and 21 of the said judgment. Moreover, in those three appeals the shipping company failed to deliver part of the goods and it was held by the Supreme Court that they were lost to the owners due to such non-delivery whereas in the case before me the plaintiff himself refused to take delivery of the goods and by his own refusal he cannot convert it into a nondelivery of goods resulting in a "loss" to him. In *Roux v. Salvador*, 3 Bing NC 266 - 43 Revised Reports 638 Lord Abinger laid down the law on the subject in the following terms:

The object of the policy is to obtain an indemnity for any loss that the assured may sustain by the goods being prevented by the perils of the sea from arriving in safety at the port of their destination. If, by reason of the perils insured against, the goods do not so arrive, the risk may in one sense be said to have terminated at the moment when the goods are finally separated from the vessel, whether, upon such an event, the loss is total or partial, no doubt, depends upon circumstances. But the existence of the goods, or any part of them, in specie, is neither a conclusive, nor, in many cases, a material circumstance to that question. If the goods are of an imperishable nature, if the assured become possessed or can have the control of them, if they have still an opportunity of sending them to their destination, the mere retardation of their arrival at their original port may be of no prejudice to them beyond the expense of re-shipment in another vessel. In such a case, the loss can be but a partial loss, and must be

so deemed, even though the assured should, for some real or supposed advantage to themselves, elect to sell the goods where they have been landed, instead of taking measures to transmit them to their original destination. But if the goods once damaged by the perils of the sea, and necessarily landed before the termination of the voyage, are by reason of that damage, in such a state, though the species be not utterly destroyed, that they cannot with safety be re-shipped into the same or any other vessel; if it be certain that, before the termination of the original voyage, the species itself would disappear, and the goods assume a new form, losing all their original character; if, though imperishable, they are in the hands of strangers not under the control of the assured; if by any circumstance over which he has no control they can never, or within no assignable period, be brought to their original destination; in any of these cases, the circumstance of their existing in specie at that forced termination of the risk, is of no importance. The loss is, in its nature, total to him who has no means of recovering his goods, whether his inability arises from their annihilation or from any other insuperable obstacle.

(See pages 643 and 644 of the Revised Reports, Vol. 43).

74. After discussing the foreign law on the subject Lord Abinger proceeded as follows:

It is, indeed, satisfactory to know that however the laws of foreign States upon this subject may vary from each other, or from our own, they are all directed to the common object of making the contract of insurance a contract of indemnity, and nothing more. Upon that principle is founded the whole doctrine of abandonment in our law, The underwriter engages, that the object of the assurance shall arrive in safety at its destined termination. If, in the progress of the voyage, it becomes totally destroyed or annihilated, or if it be placed, by reason of the perils against which he insures, in such a position, that it is wholly out of the power of the assured or of the underwriter to procure its arrival, he is bound by the very letter of his contract to pay the sum insured. But there are intermediate cases - there may be a capture, which, though prima facie a total loss, may be followed by a recapture, which would re-vest the property in the assured. There may be a forcible detention which may speedily terminate, or may last so long as to end in the impossibility of bringing the ship or the goods to their destination. There may be some other peril which renders the ship unnavigable, without any reasonable hope of repair, or by which the goods are partly lost, or so damaged, that they are not worth the expense of bringing them, or what remains of them, to their destination. In all these or any similar cases, if a prudent man not insured, would decline any further expense in prosecuting an adventure, the termination of which will probably never be successfully accomplished, a party insured may, for his own benefit, as well as that of the underwriter, treat the case as one of a total loss, and demand the full sum insured. But if he elects to do this, as the thing insured, or a portion of it still exists and is vested in him, the very principle of the indemnity requires that

he should make a cession of all his right to the recovery of it, and that too, within a reasonable time after he receives the intelligence of the accident, that the underwrite? may be entitled to all the benefit of what may still be of any value; and that he may, if he pleases, take measures, at his own cost, for realising or increasing that value. In all these cases, not only the thing assured or part of it is supposed to exist in specie, but there is a possibility, however remote, of its arriving at its destination, or at least of its value being in someway affected by the measures that may be adopted for the recovery or preservation of it. If the assured prefers the chance of any advantage that may result to him beyond the value insured, he is at liberty to do so; but then he must also abide the risk of the arrival of the thing insured in such a state as to entitle him to no more than a partial loss.

(See pages 649 to 650 of the Revised Reports, Vol. 43).

75. There is no evidence before me to show that by reason of the perils insured against the goods were discharged at Bandarshahpur or they were at all damaged by the perils insured against or were placed in such a position at Bandarshahpur that it was totally out of the power of the plaintiff of ever procuring their arrival at Khorramshahr. There is no evidence that by reason of the perils insured against, the plaintiff was permanently or irretrievably deprived of his control over the goods. There is no evidence that by reason of the perils insured against the plaintiff was permanently or irretrievably deprived of all hope or possibility of ever recovering possession of the goods from the Shipping company. There is no evidence that further prosecution of adventure up to Khorramshahr was not at all possible. There is no evidence that the goods were of perishable nature or "the species itself would" have disappeared or "the goods" would have assumed "a new form losing all the original character" if they were reshipped from Bandarshahpur to Khorramshahr. There is no evidence that goods could not have been brought from Bandarshahpur to Khorramshahr "within no assignable period" or that plaintiff had no means of recovering the goods due to any "insuperable obstacle". In his oral testimony which I have already referred to the plaintiff himself admitted the existence of the goods in specie at Bandarshahpur and by his letter dated 28th October 1949 he asked the defendant to confirm whether he should take delivery of the goods and in my opinion he had sufficient opportunity for sending the goods to their final destination and there is no evidence to show that the goods could not with safety be re-shipped by any other vessel. Under these circumstances, in my opinion the plaintiff had a duty to take delivery of the goods and had totally failed to prove that the goods were totally lost either in fact or in law and in dismissing further consideration on actual total loss of goods I will only set out the relevant portion of the judgment of Lord Campbell in (19) Lozeno v. Janson, (1859) 28 LJ QB 337 at page 343:

If, before action brought, the goods had been restored to the assured, or he had the means of getting possession, although, under such circumstances as ought

to have induced a prudent man to take possession of them, his claim could now only have been made for a partial loss. It is often held that if the ultimate consequences of the peril insured against is merely a loss of voyage or suspension or retardation of a mercantile adventure, although a notice of abandonment had been justifiably given, a total loss cannot be claimed.

Coming now first to law as to constructive total loss of goods in article 1081 Arnould stated as follows:

A constructive total loss in Insurance Law is that which entitles the assured to claim the whole amount of the insurance, on giving due notice of abandonment. The nature of a constructive total loss can best be understood by comparing it with an actual total loss. The latter is a total loss in law and in fact; the former is a total loss in law but not in fact, and must be converted by a properly notified abandonment, into a total loss in fact, to entitle the assured to claim a total loss against his insurers. A constructive total loss exists when the subject-matter insured is not in fact totally lost, but is likely to become so, from the improbability, impracticability or expense of repair or recovery. The doctrine is peculiar to marine insurance; there may for some purposes be a constructive total loss though there has been no insurance, but the expression has no other meaning than that which is given to it by the law of marine insurance. The doctrine appears to have been originated in cases of capture, to mitigate the great hardship that would be suffered by an assured whose ship was captured, if he must await the chance of her being recaptured before he could make a claim on his policy. It was, however, soon extended to losses of other kinds. Thus, generally speaking, that is a case of constructive total loss where the thing insured has been reduced to such a state, or placed in such a position, by the perils insured against, as to make its total destruction or annihilation, though not inevitable, yet highly probable or its arrival under the terms of the policy though not utterly hopeless, yet exceedingly doubtful. For instance, for the thing insured may not be absolutely destroyed or irretrievably lost, yet, in the language of Lord Abinger in *Roux v. Salvador*:

There may be a capture, which, though prima facie a total loss, may be followed by a recapture which would revert the property in the assured. There may be a forcible detention, which may speedily terminate, or may last so long as to end in the impossibility of bringing the ship or the goods to their destination. There may be some other peril which renders the ship unnavigable without any reasonable hope of repair; or by which the goods are partly lost, or so damaged that they are not worth the expense of bringing them or what remains of them, to their destination.

In Article 1132 Arnould stated-

It was settled law before the passing of the Marine Insurance Act of 1906, and as will appear shortly, still remains so that an insurance on goods is a contract to indemnify the assured for any loss he may sustain by his goods being prevented,

by the perils of the seas, from arriving in safety at their port of destination. If, therefore, the assured has given notice of abandonment at a time when the loss was total by the forcible dispossession of all control over his goods, he will not be precluded from afterwards recovering as for a total loss, by their being restored to him, before action brought, under circumstances which make it utterly hopeless for him ever or within any assignable period, to procure their arrival at their destined port. Loss of the voyage in this sense that is a practical and effective impossibility of ever sending the goods on to their port of destination, is, if caused by the perils insured against, a constructive total loss on goods though as we have already seen it would not be so on the ship. This complete hopelessness of ever bringing the adventure on the goods to a successful termination - this forced termination of the risk by the perils insured against - is carefully to be distinguished from that of mere temporary retardation of the voyage for the season which, as we shall see hereafter gives in itself no right of abandonment of goods except where, being perishable and damaged, it is impossible to send them on in the same or any other ship; therefore necessary to sell them at the port of casualty.

Under the heading "constructive total loss where commercially impossible to forward goods" Arnould in Article 1139 stated as follows:

The cases which we have been considering are cases where the cargo in question has sustained actual damage but where there has been a mere temporary loss of voyage. We have already seen that an insurance on goods for a voyage contemplates the arrival of the goods at their destination. It follows that there may be a constructive total loss of goods, although the goods themselves may have suffered little or no physical damage, and although they may be actually in the possession and under the control of their owner, and although there be no physical difficulty in forwarding them to their destination, if the expenses of doing so would be so great as to make it commercially impossible for the owner to do so. If, that is to say, perils insured against have occasioned such a condition of affairs, that the expense of forwarding the goods would exceed their arrived value, then, inasmuch as it would be absurd to require their owner to spend more money on them than they would ever be worth, he may recover for a constructive total loss.

76. Lack of evidence as to the actual total loss of goods which I have discussed above is equally applicable to the constructive total loss of goods and in addition thereto there is no evidence to show the goods were forwarded from Bandarshahpur to Khorramshahr the expenses for so doing would have exceeded the value of the goods and they were not worth the expenses for bringing them to their final destination. Contentions of Mr. Ghosh that if the plaintiff had to take delivery at Bandarshahpur a large sum of money by way of duties to the custom authorities would have to be paid and the expenses for recovering the said goods would have exceeded their value are not supported by any evidence whatsoever. Moreover, there is no evidence to show that the duty imposed by the custom

authorities at Bandarshahpur was higher than the duty imposed by the custom authorities at Khorramshahr and as both the ports are under the Iranian Government, I am unable to understand why the duties in those two ports would at all vary. Apart from that, these contentions of Mr. Ghosh were negated by the plaintiff himself, in answer to q. 454 where he said that he would have realised the custom duties and the import licence prices from the market if he had taken delivery of the goods at Bandarshahpur. There is no evidence to show that the expenses of forwarding the goods from Bandarshahpur to Khorramshahr would have been so great to make it a commercial impossibility or upon the ultimate arrival of the goods at Khorramshahr the expenses for forwarding the goods from Bandarshahpur to Khorramshahr would not have been the worth the value of the goods. Under these circumstances, the contention of Mr. Ghosh that the goods were totally lost to the plaintiff cannot be accepted and in my opinion the goods were never either in fact or in law totally or partially or at all lost to the plaintiff.

77. In view of my above finding the question of abandonment cannot arise in this case as "the question of abandonment only arises where there has been in fact a loss of the subject-matter insured, and the issue is whether that loss shall be partial or actual." Per Atkin, J. in (20) Associated Oil Carriers Limited v. Union Insurance Society of Canton Limited, (1917) 2 KB 184 at page 190 but still I shall discuss this point and record my findings as the parties have urged at length before me. The word abandonment" in Marine Insurance is used in three different senses :

1. "in relation to constructive total loss, it means the voluntary cession by the assured to the insurer of all that remains of the subject-matter insured, which must take place before a claim for a total loss can be made."
2. "it is sometimes used, colloquially, as equivalent to notice of abandonment."
3. "it is used in section 60 of the Marine Insurance Act, 1906 in the entirely different sense of abandoning physically or giving up for lost. Abandonment in this sense is normally decided on by the master, rarely by the assured, and may of course take place whether there is a contract of insurance or not. It is evident that abandonment, in section 60, cannot mean abandonment to underwriters, since as we have just seen, it is only when the insured property is a constructive total loss that the assured is entitled so to abandon it." (See Article 1084 of Arnould).

"For the rule that the assured, if he wishes to recover for a constructive total loss, must give due notice of abandonment, there are two grounds : "When the assured has once elected to treat the loss as a total loss, the underwriters can insist upon his abiding by the election, so as to enable them to take the benefit of any advantage which may arise from the thing insured. Therefore the object of notice is that he may tell the underwriters at once what he has done, and not keep it secret in his mind, to see if there will be a change of circumstances.

There is another reason : the thing in various ways may be profitably dealt with. Therefore the second reason for requiring notice of abandonment to be given to the underwriters is, that they may do, if they think fit, what in their opinion is best, and make the most they can out of that which is abandoned to them. The right of recovery, where the assured elects to claim for a total loss, is in effect founded on bargain between assured and insurer. Abandonment is the quid pro quo from the side of the assured, and must be made manifest by an overt act. (See Article 1086 of Arnould).

78. Lord Justice Brett in (21) *Kaltenbach v. Mackenzie*, (1878) 3 CPD 467 at page 471 held that "whenever there is a contract of indemnity and a claim under it for an absolute indemnity, there must be an abandonment on the part of the person claiming indemnity of all his rights in respect of that for which he receives indemnity."

According to Arnould-

An abandonment must operate not only as a transfer of the whole interest of the assured in the subject of the insurance, but it must be such as to effect that transfer absolutely and unconditionally. "Every abandonment", said Valin, "must be pure and simple and not conditional, otherwise it would not act as a transfer of ownership, which is of the very essence of abandonment". (See Article 1182 of Arnould).

79. If the goods subsist in specie and there is a chance of their recovery there must be an abandonment on the part of the assured in order to make it a constructive total loss of goods. The word "abandonment" is used here in the first two senses used by Arnould, viz. firstly, voluntary cession by the assured to the insurer of all that remains of the subject-matter insured and secondly, the notice of abandonment to the underwriter. If the assured wishes to abandon the goods he is bound to exercise his right of abandonment within a reasonable time from coming to know of the loss or damages which would entitle to him to abandon the subject-matter of insurance and must give unconditional notice of such abandonment to the underwriter within a reasonable time from the date of his knowledge. If the assured is guilty of delay or laches in abandoning the goods he is not entitled to claim for a total loss.

80. According to Mr. Ghosh the plaintiff had exercised his right of abandonment by letters dated 23rd March 1949 (Ex. A), 28th October 1949 (Ex. A and I) and 17th December 1949, (Ex. A and J) and also gave notice of such abandonment by these letters. Relevant portions of the letter dated 23rd March 1949 are set out hereunder :

Our Port Said agents had taken the matter up with the Shipping Company at their end and we enclose a copy of their reply for your perusal. In the meantime we have submitted our claim for the value of the consignment to the Shipping Company supported by a copy of Invoice and upon receipt of their reply we shall revert. It is understood in the event of the Shipping Company refusing to admit

the liability we shall be submitting our claim to you and we trust you will be prepared to settle the loss against the usual letter of subrogation.

81. This letter shows that the plaintiff retained his interest in the goods by submitting his claim to the Shipping company and it expressly stated that if the Shipping company refuses to admit their liability the plaintiff would then submit his claim to the defendant "to settle the loss against the usual letter of subrogation." In my opinion, even up to this time the plaintiff did not make any abandonment of his interests in the goods as he exercised his right of ownership over the goods by submitting his claim to the Shipping company. Similarly, in my opinion, the notice of abandonment, if any, contained in this letter being a conditional one is also wholly invalid.

82. By the letter dated 3rd June 1949 the plaintiff through his Solicitor claimed damages against the Shipping company which clearly shows that even at this point of time the plaintiff retained all his interests in the goods although he was informed of the discharge of the goods at Bandarshahpur by the agent of the Shipping company and by his own agent, Seharkat Nassevi Villa.

83. The relevant portion of the letter dated 28th October 1949 is set out hereunder:

We shall be pleased if you will confirm whether we should take delivery of the goods at Bandarshahpur although the goods are destined to Khorramshahr. To the interest of all concerned it would be better to have the goods surveyed first as we are afraid that due the nature of the goods and the time spent to trace them they might have suffered loss and will you please enlighten us on this point you wish us to take ?You will appreciate that it is not practicable for us to wait further for recovery of the amount from the carriers and we shall be obliged if you will settle our claim in full under letter of subrogation and you may then recover the amount from the carriers or by sale of the goods on your account.

84. This letter clearly shows that the plaintiff was himself asking the defendant to confirm whether he should take delivery of the goods at Bandarshahpur. Unless the plaintiff retained all his interests in the goods, in my opinion, he could not have written to the defendant to confirm about taking delivery of the goods at Bandarshahpur. This letter also shows that the plaintiff himself was suggesting that the goods should be surveyed. Unless the plaintiff retained his interest in the goods he could not, in my opinion, make such a suggestion.

85. According to Mr. Ghosh by the last paragraph of this letter the plaintiff had abandoned his interest in the goods which I am unable to accept. The last paragraph itself shows that the plaintiff was intimating to the defendant that "it is not practicable for him to wait further for recovery of the amount from the carriers." The claim he made against the carrier is contained in his letter dated 3rd June 1949 copy whereof was sent as enclosure to this letter hereinbefore stated. There the claim made by the plaintiff was loss and damage that he suffered due to non-fulfilment of his own contract with his purchaser and

according to this letter dated 29th October 1949 it was not practicable for the plaintiff to wait for this claim made by him against the shipping company. In my opinion, these two letters dated 3rd June, 1949 and 28th October 1949 should be read together and reading them together it is absolutely clear that he never abandoned his claim which he preferred against to shipping company and did not abandon his interest in the goods themselves. By these two letters it is also clear that the plaintiff asked the defendant to settle the claim which he preferred against the shipping company and for which he was prepared to give the defendant usual letter of subrogation. No doubt, the plaintiff in this letter dated 28th October 1949 asked the defendant to sell the goods on account of the defendant and if the same is read without their context, the contention of Mr. Ghosh may be justified but in my opinion, the same cannot be read de hors their context. The two paragraphs of this letter quoted above cannot stand together as by the first paragraph the plaintiff retained all his interests in the goods while on the other hand by the second paragraph he was abandoning (if at all) all his interests in the goods and both of them are destructive of each other. In my opinion, the defendant was not bound to accept the offer of the plaintiff which is not covered at all by terms of the policies. This letter also cannot be read as a notice of abandonment as contended by Mr. Ghosh as it does not contain any allegation that the goods were at all lost to the plaintiff. This letter can at best be read as an offer made by the plaintiff to the defendant to settle the plaintiff's claim which he preferred against the shipping company on usual letter of subrogation and upon such settlement and execution of the letter of subrogation the defendant would be entitled to sell the goods. Moreover, this letter being wholly a conditional one is invalid as a proper notice of abandonment. The relevant portion of the letter dated 17th December 1949 is set out hereunder:

as desired we enclose herewith our claim Bill for Rs. 46,200/-.

Please be good enough to remit the money as early as possible without any further delay. Any other documents which you may require will be forwarded on hearing from you.

86. This letter does not show that the plaintiff had abandoned his interest in the goods and by asking the defendant to remit the money does not mean that the plaintiff had in fact abandoned all his interests in the goods. The offer made in the last paragraph is also vague as it may mean any document which the defendant might require for satisfying itself as to whether the claim of the plaintiff was genuine or to ascertain its own liability under the policy and it may also mean, as contended by Mr. Ghosh, that the plaintiff was willing to send the letter of subrogation.

87. It is true that the notice of abandonment does not require the word "abandonment" should be used in it. But the letter must be read as a whole to find out whether it constitutes a notice of abandonment.

88. Assuming further that the plaintiff had abandoned all his interests in the

goods and had given proper notice of abandonment by the letters dated 28th October and 17th December abovementioned still in my opinion he cannot succeed. The law requires that the assured must not only abandon all his interests within a reasonable time but also give notice of such abandonment to the underwriter within a reasonable time from the date of his knowledge of the actual state of affairs which entitles him to make such abandonment. The policy expressly enjoins the plaintiff to act within a reasonable despatch. According to the plaintiff the goods should have been reached in September 1948 and in answer to question 308 he said that he came to know in March April 1949 that the goods did not reach Khorramshahr. Ex. D shows that on the 5th January 1949 the plaintiff received intimation from his agent that the goods did not arrive at Khorramshahr but he did not communicate this fact to the defendant. Ex. E dated 18th January 1949 shows that the plaintiff again received intimation that the goods did not reach Khorramshahr but he did not intimate this fact to the defendant. Ex. C shows that the Missr Shipping Company had no knowledge about the whereabouts of the goods and informed the plaintiff accordingly still the plaintiff did not intimate this fact to the defendant.

89. It is clear that the plaintiff had sufficient reliable knowledge about the non-arrival of the goods at Khorramshahr but still he did not abandon his interest in the goods. On the other hand as it appears from the letter dated 9th March 1949 (Ex. P) that the plaintiff by his letter dated 7th March 1949 requested the defendant to endorse the policies to cover the goods up to the city of Tebriz which the defendant did not agree. This Exhibit was tendered on behalf of the plaintiff at the time of cross-examination of Dharani Mohan as hereinbefore stated. This Exhibit conclusively shows that even on the 7th March 1949 the plaintiff did not make any abandonment of his interests and completely suppressed from the defendant that the goods did not reach Khorramshahr. As the defendant refused to extend the benefits up to the city of Tebriz, the plaintiff by his letter dt. 29th March 1949 for the first time informed the defendant that he had received information from the "consignee" that the consignment did not arrive at the destination. He further informed the defendant by this letter dated 29th March 1949 that in the meantime he had submitted his claim for the value of the consignment to the shipping company. When he submitted his claim against the shipping company it was not at all stated in this letter. From this letter it also does not appear the nature of claim he preferred against the shipping company. By the letter dated 15th May, 1949 (Ex. A and enclosure to G) the plaintiff came to know from the agents of the shipping company that the goods were discharged at Bandarshahpur and by his own letter dated the 3rd June 1949 the plaintiff preferred his claim against the shipping company as hereinbefore stated. In my opinion, immediately on the receipt of the letter dated 15th May 1949 the plaintiff, in any event, ought to have abandoned all his interests in the goods and having not done so he is not entitled to abandon the goods later on. Instead of making any abandonment of the goods the plaintiff elected to prefer his claim against the shipping company and he did not intimate

the defendant that the goods were discharged at Bandarshahpur. After preferring his further claim against the shipping company by his letter dated 3rd June 1949 the plaintiff did not immediately intimate this fact to the defendant. In between 15th May 1949 and 27th October 1949, the plaintiff completely suppressed from the defendant that the goods were discharged at Bandarshahpur and what steps he took against the shipping company to protect his own interest and also the interest of the defendant. Even, if the letter dated 28th October 1949 can be treated as a letter of abandonment, in my opinion, the plaintiff was guilty of gross negligence and did not give proper notice of abandonment within a reasonable time. The plaintiff himself has broken the express condition of the policy, viz. "it is a condition of the insurance that the assured shall act with reasonable despatch in all circumstances within their control" and, in my opinion, he did not give any notice of abandonment of his interests within a reasonable time and is not entitled to claim anything from the defendant.

90. Next contention of Mr. Ghosh was that as the insurance policies contained the words "lost or not lost", the plaintiff should succeed in the suit even the goods were not lost which I am unable to accept. When the vessels carrying the goods are at sea or in the foreign port and the consignee intends to effect the insurance these words "lost or not lost" are inserted in the insurance policy "as a matter of contract" as stated in Article 22 of Arnould which is set out below:

As policies may be effected on ships and goods believed to be in foreign ports or at sea, it being then uncertain whether they may not actually have been lost before the policy was effected these words, "lost or not lost", are inserted in every form of policy as a matter of course. Their effect is thus stated in Rule 1 of the Rules for the construction of the policy where the subject-matter is insured "lost or not lost" and the loss has occurred before the contract is concluded; the risk attaches unless, at such time the assured was aware of the loss and the insurer was not.

If indeed the loss, at the time of effecting the policy were known to the assured only, then on the plainest general principles the policy would be void; but no case has determined that an underwriter, who chooses to effect a policy with full knowledge that the loss has actually happened, may not be bound by it.

91. Last contention of Mr. Ghosh on this aspect of this case, was that as the bills of lading were in the hands of the plaintiff and the goods were not taken delivery of by him they were lost to the plaintiff. As I have already held that there was neither any actual total loss of the goods nor there were any circumstances justifying the plaintiff to treat these goods as constructive total loss to him, I am also unable to accept this contention of Mr. Ghosh. Moreover, there is no evidence that the alleged loss was proximately caused by the perils insured against. In fact, there is no evidence that the perils insured against did ever take place or the goods were lost to the plaintiff. Even if the goods were lost, in my opinion, the said loss was directly referable to the plaintiff's own acts and negligence by refusing to accept delivery of the goods from the shipping

company for which the defendant is not liable. (See Article 790, Arnould).

92. According to Mr. Ghosh the defendant mala fide led a trap by its letter dated 8th November 1949 written to the plaintiff in these terms:

Incidentally we shall be interested to learn how you intend to forward the consignment to its final destination.

93. I do not find any mala fide intention on the part of the defendant as this latter was written in reply to the letter dated 28th October 1949 where the plaintiff asked the defendant to confirm whether he should take delivery of the goods at Bandarshahpur.

94. Mr. Ghosh, for a number of days, strenuously urged that the defendant and three other American Insurance Companies were same companies in order to show that some letters written by the plaintiff in the year 1948 were received by the defendant. In my opinion, these letter sought to be proved before Banerjee, J. were wholly irrelevant for the purpose of determining the merits of the case as they relate to what happened prior to the issuing of policies and so is the argument of Mr. Ghosh. Similarly the oral testimony of plaintiff's witness Paritosh Das is wholly irrelevant and worthless and does not require any consideration.

95. After considering the evidence and the submissions of the parties my answer to the issues are as follows:

Issue No. 1. - No.

Issue No. 2A. - Assuming the plaintiff arranged and got the goods transhipped from Port Said to Khorramshahr he has failed to prove that the goods never reached Khorramshahr or they were totally lost to him as alleged in paragraph 5 of the plaint. Further, assuming that the goods were discharged at Bandarshahpur the plaintiff had not only failed to forward them from Bandarshahpur to Khorramshahr but also he had refused to accept the goods at Bandarshahpur and the question of loss to him can never arise and the goods in fact or in law were not lost to him. Issue No. 2B. - This question does not arise in view of my finding on other issues but assuming it arises my answer is in the negative.

Issue No. 3. - Same answer as in issue No. 2B.

Issue No. 4. - Yes.

Issue No. 5. - Liability of the underwriter under a contract of Marine Insurance for loss of goods arises when such loss is occasioned by the perils insured against during the currency of the policy. In the plaint there is no averment that during the currency of the policies or due to the perils insured against the goods were lost and alone on these two grounds, in my opinion, the plaint does not disclose any cause of action and my answer to this issue is in the negative.

It is not necessary for me to decide the further contentions of Mr. Chatterjee on

this issue and I shall only record them here. According to Mr. Chatterjee no date of loss of the goods is given and it is nowhere stated that the vessel carrying the goods sailed from Port Said and when the vessel should have reached Khorramshahr. According to Mr. Chatterjee the policies covered risks of loss and non-delivery of goods from Calcutta to Turkey with transshipment at Port Said and as the goods were not sent to Turkey and instead thereof they were forwarded to Khorramshahr by the plaintiff without any "knowledge of the defendant the contract of insurance automatically came to an end. Endorsement dated 12th August 1948 set out in paragraph 4 only revived "fire risks" and the words "all other terms and conditions remaining unchanged" in the endorsement are only referable to the "fire risk" and these endorsements did not cover the risks of loss and non-delivery of the goods due to the other causes and there is no averment that the goods were lost due to fire. Lastly, it is nowhere pleaded that the plaintiff exercised his right of abandonment or gave any notice of abandonment to the defendant which is the foundation of the cause of action for constructive total loss of goods.

Re : Additional Issue.-

Before Banerjee, J. the plaintiff's title to the goods was not in issue and his evidence on this point is not very clear. Leading questions were put to him in examination-in-chief without any objection being raised and they were not disallowed even by the Court. The word "consignee" in the letter dated 23rd March 1949 remained unexplained as the bills of lading do not show that they were endorsed in favour of the alleged "consignee" mentioned in that letter. At the time of moving the application for amendment of the plaint Mr. Ghosh expressly told me that no further evidence would be adduced by the plaintiff as to the ownership of the goods. Although I have some doubts as to the sufficiency of evidence led on behalf of the plaintiff but as Dharani Mohan in answer to questions 303 to 305 admitted that the plaintiff was the owner of the goods at the time the policies were issued my answer to this issue is in the affirmative.

Re: Issue No. 6. - The plaintiff is not entitled to any relief. This action fails and the suit is dismissed with costs. Certified for two Counsel.