

(1998) 08 MAD CK 0143
In the Madras High Court
Case No : C.S. No. 720 of 1985

Supreme Paper Mills Ltd., Calcutta

APPELLANT

Vs

Owners and other persons interested in the motor vessel
'ARABELLA' now berthed at the port of Madras and another

RESPONDENT

Date of Decision : 06-08-1998

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 20
Colonial Courts of Admiralty (India) Act, 1891 — Section 2
Constitution of India, 1950 — Article 225, 226
Contract Act, 1872 — Section 23, 28
Government of India Act, 1935 — Section 220, 223

Citation : AIR 1999 Mad 118 : (1998) 3 CTC 85 : (1998) 3 LW 582

Hon'ble Judges : S. Thangaraj, J

Bench : Single Bench

Advocate : Mr. Raghunathan for M/s. Nataraj, Rao, Ragu and Sundaram, for the Appellant; Mr. R. Murari, for the Respondent

Judgement

1. The plaintiff has filed the suit for recovery of sum of Rs.9,35,267 with 18% interest per annum on the said sum.

2. The main averments founds in the plaint are as follows:

The plaintiff Supreme Paper Mills Ltd., Calcutta, placed orders for the supply of bleached soft wood sulphite pulp from one M/s. Georgia Pacific International Corporation, U.S.A. for 4,480 bales weighing about 1016 M.T. under four different bills. The consignment was loaded on board the 1st defendant vessel at Bellin Gha, Washington, U.S.A. on 3.8.85 covered by the respective Bills of Lading of the same date. The C.I.F. value of the entire consignment amounted to Rs.42,86,999.44. The Bills of lading on liner terms were issued in the name of the 2nd defendant Charterers of the 1st defendant vessel. After the consignment was loaded on board the 1st defendant vessel and the Bills of Lading issued, the documents were transferred to the plaintiff and the plaintiff became the owner of the Cargo, entitling them to take delivery of the same and the consideration for

the consignment was paid to the suppliers. The 1st defendant vessel arrived at the Port of Calcutta on 20.10.1985 and the agents of the defendants on or about 24.10.1985 informed the plaintiff that since the vessel had not yet been given a berth, they would discharge the cargo overside the vessel at sea and the cost of such discharge should be borne by the plaintiff. The defendants also threatened that the ship would proceed to Madras and discharge the Cargo there and treat the contract of carriage as fulfilled at that point. The plaintiff by letter dated 25.10.1985 pointed out that the agreement was to carry the goods upto the Port of Calcutta and under no such circumstances should the cargo be diverted to Madras. However on 1.11.1985 it was informed that the 1st defendant vessel had proceeded to the Port of Madras and was discharging the cargo at the said Port and would treat the contract as fulfilled with such discharge. Though the plaintiff informed the defendants that such discharge would be in breach of contract and the defendants be liable for all damages arising out of such breach the 1st defendant vessel has discharged the cargo at Madras on 4.11.1985. When the contract of carriage refers to the port of discharge as Calcutta/Haldia, the defendants ought to have discharged the cargo as undertaken. Clause 6 of the Bill of Lading clearly states that the carrier shall carry the goods to the port of destination and should the goods be carried beyond the port of destination, the carrier shall tranship or re-ship the goods at the carrier's expense. Hence such transhipment or reshipment charges should be borne by the defendants. On account of the breach committed by the defendants, the plaintiff suffers expenses to a total sum of Rs.9,35,267 and the defendants are jointly and severally liable to pay the amount to the plaintiff. Hence the Suit.

3. The main averments found in the written statement filed by the 1st defendant are as follows:

(a) As per clause (3) of the liner terms any dispute arising under the four bills of lading dated 3.8.1985 issued by the 2nd defendant in favour of one M/s. Georgia Pacific International Corporation who in turn have endorsed the Bills of Lading in favour of the plaintiff, any dispute arising under those bills of lading shall be decided in the country where the carrier has its principal place of business and the law of such country shall apply except as provided elsewhere therein. Clause (2) of the Bill of Lading provides that the Hague Rules contained in the International convention for the unification of certain rules relating to Bill of Lading shall apply to the contract. As per Article (1)(a) of the Hague Rules as amended by the Brussels protocol in 1968 a carrier has been defined as to include the owner or the charterer who enters into a contract of carriage with a shipper. Clause 17 of the Bill of Lading deals with the identity of the carrier contemplates someone other than the owner being adjudged to be the carrier. The 2nd defendant are the time-trip charterer of the vessel m.v. "ARABELLA" have entered into a contract of carriage with the shipper and is thus the carrier within the meaning of the Hague Rules which are applicable to the present Bill of Lading. Even if the 1st defendant are construed to be the carrier, the Suit should have been filed in Canada; wherein the 1st defendant has it's principal place of

business and this Court has no jurisdiction to try the suit and the suit should be dismissed on this ground alone.

(b) The vessel "m.v. ARABELLA" arrived at the Port of Calcutta on 20.10.1985, as there was a go slow strike by the dock workers at Calcutta Port and also as there was no immediate prospect of berthing space being made available for the vessel to the discharged of it's cargo, the 2nd defendant Charterer offered overside delivery of the cargo on the condition that the plaintiff bears the cost of such overside delivery. The plaintiff was willing to bear only 50% of the expenses and in view of the stalemate, the 2nd defendant instructed the master of the vessel to sail to the Port of Madras. Clauses 8 and 64 of the charter party provide that under the orders and directions the Master is to conform to the charterers or their representatives/agents", instructions. The plaintiff obtained delivery of cargo from the vessel at Madras without any demur or protest. As per Clause 16 of the Bill of Lading, the Master and the carrier have the liberty in case of, inter-alia, labour troubles, strikes labour obstructions etc. any of which on board or on shore to discharge the cargo at the port of loading or any other safe and convenient port. The other provisions under clause 16(c)(d) and (f) also given such right to discharge the cargo. In view of the over-riding provisions of clause 16 the plaintiff cannot seek recourse to the provisions of clause 6. Therefore the suit of the plaintiff against the 1st defendant is liable to be dismissed.

4. The main averments found in the written statement filed by the 2nd defendant are as follows:

(a) The 2nd defendant being the time charterer of the vessel from the 1st defendant and having issued the Bill of Lading is a carrier within the scope of Article 1(a) of the Hague Rules. As the 2nd defendant have their principal place of business in Canada, the competent Court in that country alone shall have the jurisdiction to try the Suit. As the plaintiff has admitted the jurisdiction clause contained in the Bill of Lading, this suit is not maintainable before this Hon"ble Court and liable to be dismissed in limine.

(b) As there was strike in Port of Calcutta, as per Clause 16 (c)(d) and (f) the cargo was rightly discharged at the Port of Madras which was the next safe and convenient Port. As the plaintiff has obtained the delivery order, it would constitute delivery of cargo to the plaintiff and so the plaintiff is estopped from making a claim on the 2nd defendant for the alleged breach of contract. The plaintiff has no right to arrest the subject vessel in as much as discharge of the cargo at the Port of Madras was pursuant to Clause 16 of the Bill of Lading. By the wrongful arrest of the vessel, the 2nd defendant have suffered loss amounting to Rs.37,256.25 U.S.Dollars and the 2nd defendant reserves their right to claim against the plaintiff.

5. The 2nd defendant did not participate in the trial and was set ex parte.

6. The following issues were framed:

1. Whether this Court has no jurisdiction to try the suit?
2. Whether the first defendant had committed breach of the contract with regard to the place of discharge of the cargo and whether the second defendant was responsible for it?
3. Whether the plaintiff is entitled to the amount claimed?
4. To what relief the plaintiff is entitled to?

7. Issue No. 1: This Court has framed the issue in such a way shifting the burden of proof that this Court has no jurisdiction on the defendants. The defendants have mainly relied upon Clause 3 of the agreement which says-

"Jurisdiction - Any dispute arising under this Bill of Lading Shall be decided in the country where the carrier has his principal place of business, and the law of such country shall apply except as provided elsewhere herein."

To prove the question of jurisdiction, parties have relied upon certain decisions of the Supreme Court and this Court. While considering those decisions it has to be said that the plaintiff has relied upon two grounds regarding the jurisdiction of this Court.

- (1) The admiralty jurisdiction of the Madras High Court.
- (2) The balance of convenience and the exigencies of justice.

Their Lordship of the Supreme Court in *M.V. Elisabeth and Others Vs. Harwan Investment and Trading Pvt. Ltd.*, Hanoekar House, Swatontapeth, Vasco-De-Gama, Goa, have traced the history of jurisdiction of the High Courts in India especially the admiralty jurisdiction of the High Court of Judicature at Madras. The main question which arose in that case was the question of jurisdiction as regards the lack of admiralty jurisdiction of any Court in Andhra Pradesh. Their Lordships while dealing with the admiralty jurisdiction of the Andhra Pradesh High Court, which was bifurcated from the High Court of judicature at Madras, in para- 11 held

(a) " The powers of the Madras High Court are traceable to the Admiralty Court Act, 1861 (24 & 25 Victoria c. 104) by reason of the Letters Patent of 1865 read with the Colonial Courts of Admiralty Act, 1890 and the Colonial Courts of Admiralty (India) Act, 1891. By the last two Acts, the Madras High Court was invested with the same admiralty jurisdiction as was vested in the High Court of England. The Letters Patent of 1865 declared that the High Court of Madras would and continue to be a Court of record and that it would exercise ordinary, original and civil jurisdiction within its local limits to try and determine suits. The Government of India Act, 1915 declared that all the High Courts established by letters patent were Courts of record and had such original and appellate jurisdiction including admiralty jurisdiction as had been vested in them by Letters Patent. The Government of India Act, 1935 declared that "every High Court shall be a court of record" and that its jurisdiction, the law administered by it and the

powers of the judges were the same as immediately before the commencement of Part 111 of that Act (Sections 220 and 223)."

In Para-24

"By Act 16 of 1891, certain Courts in British India were declared to be Colonial Courts of Admiralty. The High Courts of Judicature at Fort William in Bengal, at Madras and at Bombay were three of the six Courts declared to be Colonial Courts of Admiralty.

(b) While considering the jurisdiction of the High Courts Having admiralty jurisdiction, Their Lordships held-

"Merchant ships of different nationalities travel from port to port carrying goods or passengers. They incur liabilities in the course of their voyage and they subject themselves to the jurisdiction of foreign States when they enter the waters of those States. They are liable to be arrested for the enforcement of maritime claims, or seized in execution or satisfaction of judgments in legal actions arising out of collisions, salvage, loss of life or personal injury, loss of or damage to goods and the like. They are liable to be detained or confiscated by the authorities of foreign States for violating their customs, the regulations, safety measures, rules of the road, health regulations, and for other causes. The coastal State may exercise its criminal jurisdiction on board the vessel for the purpose of arrest or investigation in connection with certain serious crimes. In the course of an international voyage, a vessel thus subjects itself to the public and private laws of various countries. A ship travelling from port to port stays very briefly in any one port. A plaintiff seeking to enforce his maritime claim against a foreign ship has no effective remedy once it has sailed away and if the foreign owner has neither property nor residence within jurisdiction. The plaintiff may therefore detain the ship by obtaining an order of attachment whenever it is feared that the ship is likely to ship out of jurisdiction, thus leaving the plaintiff without any security."

(c) while upholding the jurisdiction of the High Courts in India in para-67 it was held-

"The High Courts in India are superior courts of record. They have original and appellate jurisdiction. They have inherent and plenary powers. Unless expressly or impliedly barred, and subject to the appellate or discretionary jurisdiction of this Court, the High Courts have unlimited jurisdiction, including the jurisdiction to determine their own powers."

(d) When dealing with the principles of international law recognised by the nations it was further held-

"These principles of international law, as generally recognised by nations, leave no doubt that, subject to the local laws regulating the competence of courts, all foreign ships lying within the waters of a State, including waters in ports, harbours, roadsteads, and the territorial waters, subject themselves to the

jurisdiction of the local authorities in respect of maritime claims and they are liable to be arrested for the enforcement of such claims."

(e) While deciding the question of whether it was an action in rem or an action in personam, the Supreme Court held-

"The admiralty jurisdiction of the High Court is dependent on the presence of the foreign ship in Indian waters and founded on the arrest of that ship. The jurisdiction can be assumed by the concerned High Court, whether or not the defendant resides or carries on business, or the cause of action arose wholly or in part, within the local limits of the jurisdiction of the High Court, and the owner of the ship has entered appearance and furnished security to the satisfaction of the High Court for the release of the ship, the proceedings continue as a personal action."

(f) As the Courts in our country are established under the Constitution of India in the concurring judgment it was held-

"Under it Art. 225 preserved the jurisdiction, including inherent jurisdiction, which existed on the date the Constitution came into force and Art. 226 enlarged it by making it not only a custodian of fundamental rights of a citizen but as repository of power to reach its arms to do justice. A citizen carrying on business which is a fundamental right cannot be rendered helpless on premise that the jurisdiction of High Courts stood frozen either under statute of England or any custom or practice prevailing there or the High court of England cannot exercise the jurisdiction."

(g) Finally while considering the rights of the individual citizens of an independent republic in the concurring judgment it was held-

"A citizen of a colonial State may not but a citizen of an independent republic cannot be left high and dry. The construction of law has to be in consonance with sovereignty of a State."

Nothing more is necessary to decide the independent jurisdiction of the Indian High Courts. The view expressed by Their Lordships in this decision overwhelmingly support the jurisdiction conferred on the High Courts in India. The High Court of Madras, which was conferred with the admiralty jurisdiction, has the power to decide actions against the foreign ships while they were within the territorial limits of Indian Ports. The Courts in Indian established under the Constitution of India enjoy much more original powers than the Colonial Courts and the construction of law should be in consonance with sovereignty of the State and the rights conferred on the citizens of India. So the jurisdiction of this High Court especially the admiralty jurisdiction which is being decided in the instant case, this Court under the Constitution of India, has all the powers to deal with the actions filed against any foreign ships while they were in the Indian Ports.

(h) The arguments advanced on the side of the 1st defendant by relying upon

Clause 3 of the Bill of Lading that the dispute shall be decided in the country where the carrier has its principal place of business viz. Canada may be also dismissed on the other ground.

(i) The 1st defendant has relied upon certain decisions. One among the decisions relied on by him is A.B.C. Laminart Pvt. Ltd. and Another Vs. A.P. Agencies, Salem, where in Their Lordships while dealing the question of jurisdiction have held-

"If under the law several Courts would have jurisdiction and the parties have agreed to submit to one of these jurisdictions and not to other or others of them it cannot be said that there is total ouster of jurisdiction. In other words, where the parties to a contract agreed to submit the disputes arising from it to a particular jurisdiction which would otherwise also be a proper jurisdiction under the law their agreement to the extent they agreed not to submit to other jurisdictions cannot be said to be void as against public policy. If on the other hand the jurisdiction they agreed to submit to would not otherwise be proper jurisdiction to decide disputes arising out of the contract it must be declared void being against public policy.

In para-18

"Thus it is now a settled principle that where there may be two or more competent Courts which can entertain a suit consequent upon a part of the cause of action having arisen there within, if the parties to the contract agreed to vest jurisdiction in one such court to try the dispute which might arise as between themselves the agreement would be valid. If such a contract is clear, unambiguous and explicit and not vague it is not hit by Ss.23 and 28 of the Contract Act. This cannot be understood as parties contracting against the Statute. Mercantile Law and practice permit such agreements."

In the instant case it has been stated that the country where the carrier has its principal place of business shall have the jurisdiction to decide the dispute. However, there is no ouster of jurisdiction in respect of other Courts. Though the word "shall" is applied in Clause 3 of the Bill of Lading as there was no specific ouster of any other jurisdiction and as already held by the Apex Court in M.V. Elisabeth and Others Vs. Harwan Investment and Trading Pvt. Ltd., Hanoekar House, Swatontapeth, Vasco-De-Gama, Goa, regarding the admiralty jurisdiction of this Court, there cannot be any ouster of jurisdiction by this Court as the discharge was effected in the Port of Madras. Further it was held in the said decision in para- 22-

"In the clause "any dispute arising out of this sale shall be subject to Kaira jurisdiction" ex facie we do not find exclusive words like "exclusive", "alone", "only" and the like. Can the maxim "expressio unius est exclusio alterius" be applied under the facts and circumstances of the case? The order of confirmation is of no assistance. The other general terms and conditions are also not indicative of exclusion of other jurisdictions. Under the facts and circumstances

of the case we hold that while connecting factor with Kaira jurisdiction was ensured by fixing the situs of the contract within Kaira, other jurisdictions having connecting factors were not clearly unambiguously and explicitly excluded. That being the position it could not be said that the jurisdiction of the Court at Salem which Court otherwise had jurisdiction under law through connecting factor of delivery of goods thereat was expressly excluded."

When the Apex Court has clearly laid down that though the Clause any dispute arising out of this sale shall be subject to Kaira jurisdiction the other jurisdictions having connecting factors were not clearly, unambiguously and explicitly excluded, the Court at Salem had jurisdiction under law. Likewise when Clause 3 in the Bill of Lading has not excluded clearly, unambiguously and explicitly, the jurisdiction of this is not barred.

In *M/s. Patel Roadways Limited, Bombay Vs. M/s. Prasad Trading Company*, there was a clause regarding the jurisdiction, if any dispute has arisen the principal place of business will have the jurisdiction.

(j) The Apex Court while going through the clear intendment of the Explanation, at page 1519, held-

"The clear intendment of the Explanation, however, is that, where the corporation has a subordinate office in the place where the cause of action arises, it cannot be heard to say that it cannot be used there because it does not carry on business at that place. It would be a great hardship if, inspite of the corporation having a subordinate office at the place where the cause of action arises (with which in all probability the plaintiff has had dealings), such plaintiff is to be compelled to travel to the place where the corporation has an its principal place. That place should be convenient to the plaintiff; and since the corporation has office at such place, it will also be under no disadvantage. Thus the explanation provides an alternative locus for the corporation's place of business, not an additional one."

The ruling mentioning of this decision cannot go in favour of the 1st defendant herein. The discharge has been effected in the Port of Madras and this Suit was filed when the ship M.V."ARABELLA" was berthed in Port of Madras. Therefore the Court in Madras has jurisdiction to try the dispute in the instant case.

(k) When both the decisions cited by the 1st defendant are not in their favour, it is worthwhile to consider a decision of this court in *Black Sea State Steamship Line Vs. Minerals and Meta's Trading Corporation of India Ltd.*, it was held-

"The parties who make their choice of the Tribunal should normally be bound by their contract. That should especially be the case as to the contract. But it seems to me that enforcement by the Indian Courts of the choice of a foreign tribunal cannot be ruled as imperative; but it should depend on the balance of convenience in particular circumstances and the exigencies of justice.

While Courts are certainly expected to use their discretion judicially and on

proper grounds keeping in view, the balance of convenience and the ends of justice, the exercise cannot be guided by the prospect of the danger apprehended by Cheshire. The consideration is more from the stand point of justice than to ignore the necessity to hold the parties to the contract as to the forum for adjudication."

After considering Cheshire's Private International Law, 6th edition, page 222 and other English decisions, this Court held as above.

(1) When we extract the meaning conveyed by these two decisions in *M.V. Elisabeth and Others Vs. Harwan Investment and Trading Pvt. Ltd.*, *Hanoekar House, Swatontapeth, Vasco-De-Gama, Goa*, and *Black Sea State Steamship Line Vs. Minerals and Meta's Trading Corporation of India Ltd.*, , this Court under its own admiralty jurisdiction as well as a Court established under the Constitution of India and the jurisdiction conferred on this Court under Article 225 and 226 of the Constitution of India and their construction of law has to be in consonance with the sovereignty of a State. It should be held that this Court has jurisdiction to decide the case on hand. The decision of this Court in *Black Sea State Steamship Line Vs. Minerals and Meta's Trading Corporation of India Ltd.*, further strengthens the view that the jurisdiction should depend on the balance of convenience in particular circumstances and the exigencies of justice. Apart from that the facts of this case that the discharge was effected in Port of Madras and the Suit has been filed at the time when the ship was berthed in the Port of Madras would amply support the jurisdiction of this Court. Therefore this issue is answered that this Court has jurisdiction to try the present Suit.

8. Issue No.2 m.v "ARABELLA" reached Port of Calcutta on 20.10.1985. As there was a go-slow strike in the Port, the concerned Official in m.v. "ARABELLA" sent a Telex message to the plaintiff Supreme Paper Mills Limited and the Plaintiff has accepted over-side discharge in Calcutta. Arabella sent a message to the plaintiff and to the principals M/s. B C Line, Vancouver on 24.10.1985 at 1502 Hrs. In the said message it was also informed that if such advices were not followed, as per Clauses 15 and 16 of the Bill of Lading, m.v. ARABELLA will immediately proceed to Madras where the cargo will be discharged and in the said message it was informed to the plaintiff that they must give a positive reply by 17.00 Hrs. on 24.10.1985. It seems from the said message, marked as Ex.P.5, that a telephonic advice was also sent to the plaintiff earlier. The plaintiff has sent a reply on 25.10.1985 itself stating that as per the agreement the goods had to be discharged at Calcutta Port and under no circumstances it should be diverted to Madras and the plaintiff would not accept the discharge of Cargo at Madras Port and it was further emphasised that the present circumstances does not warrant such a diversion and discharge at Madras. In the said letter Ex.p.6. the plaintiff was also agreeable for a over-side discharge in Calcutta provided the defendants agreed to bear 50% of the cost of all expenses that will arise and further requested that cargo may be discharged at K.P. or N.S. docks to enable the plaintiff to take delivery from any one of those sheds. For that, Ex.P.7, message

was given informing the plaintiff that m.v. Arabella has been despatched to Madras for discharge of Cargo and to contract their agents in Madras M/s. Shaw Wallace for collection information.

(b) There was no positive evidence regarding the kind of strike which was taking place at the time when the ship m.v. ARABELLA reached Calcutta Port. However, the plaintiff in their letter, Ex.p.6, requested over-side discharge for which they were agreeable to bear 50% the cost or to discharge the cargo at K.P.or N.S.docks. There is no evidence on the side of the defendants that they were unable to do the over-side discharge or the discharge at K.P.or N.S.docks. If there were reasonable grounds for the defendants to show their inability to have a over-side discharge or the discharge at K.P. or NSdocks, then one can understand the ship sailing towards Madras for the discharge of the cargo. The defendants have not given any reply for the letter Ex.P.6. However, five days have been passed between 25.10.1985 the date of Ex.P.6 and the message Ex.P.7. dated 30.10.85. Thought the defendants have waited for five days, there is no explanation on their side that they were unable to give an over-side discharge or discharge at K.P. or N.S. docks. Merely by looking at the dates, it cannot be said that though the defendants have waited for five days they were unable to give overside discharge or discharge in K.P. or N.S. docks.

(c) D.W. 1 examined on the side of the defendants did not give any explanation regarding the 1st defendants inability to give such discharge and in fact D.W.1 is the Branch Manager of U.K.P.& I club at Madras and he had no personal knowledge about what had happened in Calcutta. In his evidence he has clearly admitted that excepting the report given by his counterpart in Calcutta he did not have any personal knowledge about the strike that went on in Calcutta. There is also no acceptable evidence regarding the strike that went on at Calcutta Port which made the 1st defendant unable to discharge the cargo at Calcutta Port or through other means as requested by the plaintiff. The contract was to discharge the cargo at Calcutta Port and not at the Madras Port. By looking into the evidence available on record, it can be said that the defendants have committed breach of contract by not discharging the cargo at Calcutta Port.

(d) It was pointed out on the side of the defendant that as per clause 16 in the event of any happenings which prevents the discharge as per the contract, the carrier had no other go except to discharge the cargo at Madras Port.

Clause 16 deals with Government directions, war, Epidemics, Ice, Strikes, etc. The relevant sub-clauses are (c) and (d) and they are as follows:-

"(c) Should it appear that epidemics, quarantine, ice - labour troubles labour obstructions, strikes, lock-outs, any of which on board or on shore-difficulties in loading or discharging would prevent the vessel from leaving the port of loading or reaching or entering the port of discharge or there discharging in the usual manner and leaving again, all of which safely and without delay, the Master may discharge the cargo at port of loading or any other safe and convenient port.

(d) The discharge under the provisions of this clause of any cargo for which a Bill of lading has been issued shall be deemed due fulfilment of the contract. If in connection with the exercise of any liberty under this clause any extra expenses are incurred, they shall be paid by the Merchant in addition to the freight, together with return freight if any and a reasonable compensation for any extra services rendered to the goods."

The reason stated by the defendants for not discharging the cargo at Calcutta Port was go-slow strike. By showing clause 16(c) it was argued that the defendants were not responsible for not discharging the cargo at Calcutta Port. The reason assigned by the defendants can be accepted provided there is acceptable evidence to show that there was strike or go-slow strike at Calcutta Port. As per Ex.P.6 the plaintiff has asked the defendants to give over-side discharge or discharge at K.P. or N.S. docks. There is no explanation on the side of the defendants as to why they were unable to discharge the cargo as requested by the plaintiff.

(e) As already stated D.W.1 who was in Madras is not a competent witness to speak about the facts of the strike and other events which had taken place at Calcutta Port. In these circumstances though the Master of the ship had the power of directing the ship towards Madras, there is no acceptable evidence to show that he had used his powers on proper grounds. Therefore clause 16(c) will not come to the rescue of the defendants. In the circumstances of the case clause 16(d) also cannot be taken in favour of the defendants.

(f) P.W.1 A.K. Mukherjee has clearly stated about the facts as to what had happened in Calcutta. From his evidence it can be concluded that the authorities of the ship m.v. ARABELLA had taken the decision of sailing the ship to Madras Port. The 1st defendant had an opportunity to cross-examine P.W.1 and nothing favourable on this point has been elicited from P.W.1. From the evidence of P.W.1 it can be said that m.v. ARABELLA though anchored in Calcutta for ten days had sailed towards Madras without proper reasons. The reason for the said decision taken by the authorities of m.v. ARABELLA has not been proved to the satisfaction of the court. The defendants 1 and 2 are jointly and severally liable for such breach committed by the 1st defendant.

This issue is answered accordingly.

9. Issue No.3: As the Cargo was discharged in the Madras Port, the plaintiff company, who are having it's factory near Calcutta, were forced to the necessity of taking the goods from Madras Port to the factory. For retransportation of the goods from Madras to Calcutta, the plaintiff has claimed at the rate of Rs.800 per M.T. and for the total 1016 M.T. Rs.8,12,400 towards clearing agent's charges and commission at Madras Rs.35,000 towards excess Port dues, crantage etc. at Madras and over charges at Calcutta Rs.20,000 and towards additional insurance coverage Rs.42,867 total sum of Rs.9,35,267.

(b) Exs.P.8 to P.12 are the bills issued by A.M. Ahamed and Co., shipping,

clearing and forwarding agents towards clearing of the consignment and for connected charges. Exs.P.13 to P.15 are the receipts issued by Bhagavati Roadways for transporting the wood pulp bales from Madras to the plaintiff's factory near Calcutta. All these receipts have been cancelled as paid. Ex .P. 18 is the xerox copy of the receipt issued by M/s. Bhagawati Roadways for a total sum of Rs.8,55,980. However the plaintiff has claimed only Rs.8,12,400. The claim made by the plaintiff is covered by the documents marked as Exs.P.8 to P.18. The fact remains that the cargo which have to be discharged at Calcutta had been taken to Madras Port where it was discharged and the plaintiff was put to the necessity of taking those cargo known as wood pulp bales to their factory near Calcutta by road. The ship had reached the Calcutta Port and thereafter diverted to Madras. In both the ports the plaintiff in order to clear the cargo had to spend the amounts to the authorities concerned and the agents. Therefore the claim made by the plaintiff is proper and since due to the breach of agreement committed by the defendants herein the defendants are liable to pay the said claim of Rs.9,35,267.

This issue is answered accordingly

10. Issue No.4: The 1st defendant is the owner of the vessel m.v. ARABELLA in which the cargo was brought from the Port of Bellingham, Washington, U.S.A. to Calcutta/Haldia. The 2nd defendant is the charterer of the 1st defendant vessel and the Bill of lading were issued by the 2nd defendant for the transport of cargo from Washington, U.S.A. to Calcutta. The 2nd defendant has filed the written statement and thereafter absented and therefore was set ex parte. The liability of the defendants are joint and several. Hence the decree for sum of Rs.9,35,267 with 18% interest is passed against the defendants 1 and 2.

In the result, the suit is decreed for Rs.9,35,267 with interest thereon at 18% per annum from the date of the plaint till the date of realisation and with costs.