
(1919) 05 CAL CK 0060
In the Calcutta High Court

The Dekhari Tea Coy, LD.

APPELLANT

Vs

The Assam Bengal Railway Company, LD.

RESPONDENT

Date of Decision : 18-05-1919

Acts Referred:

Carriers Act, 1865 — Section 8, 9
Evidence Act, 1872 — Section 106

Citation : 57 Ind. Cas. 406

Hon'ble Judges : Rankin, J

Bench : Single Bench

Judgement

Rankin, J.—This action has as against the Assam Bengal Railway Company, Limited (the first defendants), been dismissed by consent, and it proceeds against the India General Navigation and Railway-Company, Limited, as the only remaining defendants. I shall refer to these two companies as the railway company and the steamship company respectively.

2. The line of the railway company runs from Assam to Chittagong, and consignments of tea from Assam for shipment at the port of Chittagong are ordinarily carried over this line by the railway company itself without recourse to any other companies or systems of transport. A section of this line, south of Lumding, is known as the hill section and is subject at times to a breakdown. In July 1913 for a very short time this hill section was out of action. On this occasion the breach continued for so short a time that it is not certain whether the arrangements then made for dealing with the Assam traffic during this emergency were ever acted on in 1913, but arrangements were made by which the railway company was to take the goods over their own line to Gauhati, from thence to the steamship company who would carry them by river to Chandpur and there hand them back again to the railway company, who would transport them by rail to Chittagong. In June 1915 the hill section again was ab agendo. The previous arrangement was re called and renewed, and the Assam consignments to Chittagong for shipment were carried under this arrangement for no less than two years--till July 1917.

3. The arrangement was made in July 1913 between the railway and the steamship company by a short and hurried correspondence which is in evidence. It was renewed for the emergency of 1915 by a letter dated 11th June 1915.

4. The plaintiffs' claim is for damages for the loss of 95 chests of tea, being part of a consignment of 343 abests which on or about 11th November 1915 were delivered by the plaintiff to the railway company at its Station Bordubi Road (Assam) for the purpose of transport to Chittagong for shipment to England. These goods were taken by rail to Gauhati and put on board the steamship company's flat "Cauvery" for carriage by river to Chandpur under the arrangement above described. On the 21st December 1915 while this vessel was still lying at Gauhati and before the process of loading had been completed, a fire broke out on board at about 6-15 in the evening. The vessel was gutted and 96 of the plaintiffs' chests of tea destroyed.

5. As I understand the plaintiffs' case, it may be put in four counts or propositions:

(1) That the goods were on board under a contract to carry safely from Gauhati to Chandpur made between the plaintiffs (owners of the goods) and the steamship company as a common carrier.

(2) That apart from any privity of contract between these parties, the steamship company as a common carrier is liable to the plaintiffs (owners of the goods) as an insurer by the custom of the realm of England, which custom has been received in India [Irrawaddy Flotilla Company v. Bhagwandas 18 C. 620 : 18 I.A. 121 : 15 Ind. Jur. 403 & 512 : 6 Sar. P.C.J. 40 : 9 Ind. Dec. (N.S.) 413].

(3) That apart from any privity of contract, the steamship company as a common carrier is liable to the plaintiffs as owners of the goods by virtue of Section 8 of the Carriers Act (III of 1865), that is, upon the footing of negligence to be presumed u/s 9.

(4) That apart from any privity of contract and apart from any rule of law as to common carriers, the steamship company is liable to the plaintiffs in tort by reason that the loss was caused by the negligence of the steamship company.

6. The defendants' case is that there was one entire contract for the carriage of these goods from Bordubi Road to Chittagong. That this contract was made between the plaintiffs and the railway company. That under the emergency arrangement above described the steamship company was a sub contractor and had no contract with any one except the railway company, and that in these circumstances it was not a common carrier for this purpose. As regards the 3rd and 4th counts above mentioned, the defendants object that they were not raised by the pleadings and that these causes of action "Became barred in December 1917. That in any event upon the 4th count the plaintiffs must allege with particularity and must prove affirmatively that the fire was caused by the active negligence or misfeasance of the steamship company.

7. I will first deal with the question of pleading which arises upon what I have called the 3rd and 4th counts. The action was brought in December 1916 as an action against alternative defendants. The plaint is, I think, drawn upon the principle that it is sufficient to state the facts relied upon without so framing the narrative as to commit the Pleader to any definite view as to the precise technical nature of his cause of action. Among the facts so pleaded in paragraphs 9 and 10 is that the goods were destroyed by reason of the negligence (paragraph 10 adds and unlawful acts") of the steamship company. No summons for particulars was taken out though pleadings were closed in April 1917. Nor was the plaintiffs' pleading attacked in any other mode. In these circumstances I refused to put down the meaning of paragraph 9 of the plaint by referring it solely to the allegation of a contract made in paragraph 8, but for the defendants' benefit I made the plaintiffs plead more carefully. The plaintiffs called no witnesses and when their case was closed, I allowed the amendment to be found in their amended petition of 29th April 1919. I gave the steamship company an adjournment to consider whether they wanted time to call further evidence, and in the end they said that they did not. In these circumstances I think no question of limitation arises. I also think no question as to particulars arises : first, because none were applied for before trial; and secondly, because the facts upon which the plaintiffs were relying, and indeed their whole case, were before the defendants when I gave them the chance to call further evidence.

8. The plaint nowhere purported to state the nature of the alleged contract with the steamship company, and the words "common carrier" did not appear. From paragraph 8 it may be dimly perceived that contract for "safe" carriage was in the Plaintiff's mind; "to carry safely" and "to carry carefully" are, or ought to be, well distinguished terms of art. Prima facie tea carried from Gauhati to Chandpur would in the case of this steamship company be received by them as common carriers. Indeed if the contract in this case was with the plaintiffs, it is not pretended that it was other than that of a common carrier. I allowed an amendment to make this matter clearer. Mr. Sircar's real objection was to my entertaining any case apart from contract and I think paragraphs 9 and 10, as they originally stood, made it both wrong and rash for the steamship company to assume that no case of tort was within the pleadings. This is a pure question of legal form and I see no element of surprise or injustice to prevent me deciding according to the rights of the parties.

9. Now on the first point in the case, I am of opinion that there was no contract between the plaintiffs and the steamship company. I think the plaintiffs made one contract--and only one--a contract with the railway company that the goods should be carried all the way to Chittagong in consideration of one single and entire reward to the railway company in that behalf. The arrangement between the companies in 1913 was an emergency arrangement to enable the railway company to continue to do, for its Assam customers, what it ordinarily did by its own hands. The goods when put on board at Gauhati had not finally left the railway company's line: they were to be given back to the railway at Chandpur

and carried by rail to Chittagong. The railway receipt given to the plaintiffs is the "local booking " form of receipt, which in normal times would be given for the all land transport from Bordubi Road to Chittagong. The freight is not split up as in a "through invoice" form among the different carriers. All that is done with reference to the altered circumstances is, that at the top, a note is made in writing "Booked as par sender's request for shipment via Gauhati and Chandpur." This note and the notice put into Railway Company's Goods Tariff may, I think, be considered together. The notice states the breakdown on the hill section and adds " all traffic to and from stations in Upper Assam north of Mupa must be routed via Gauhati." Apart from any desire to make a change in the old contractual basis so far as parties were concerned, the railway company was obliged to give such notice to its customers. The difference of route alone might disentitle the company to the protection afforded by its special contracts [Mullet v. Great Eastern Railway Company (1890) 1 Q.B. 300 : 69 L.T.Q.B 256 : 47 W.R. 334 : 80 L.T. 53 : 15 T.L.R. 137. 1. The difference of method might invalidate insurances or render them inadequate. Goods for export might miss their ship if the new route to Chittagong took a longer time than the old. To give a general notice in its tariff and a specific notice on each railway receipt was an elementary necessity upon any view of the new arrangement. Whether I look at the form of the notice or at the form of the adapted railway receipt fairly taken as a whole, I think the railway company has conspicuously refrained from inviting senders to make a new type of contract or a different number of contracts or to contract with other parties.

10. The facts here seem to me to be distinctly stronger than those in any of the leading cases which were decided with reference to contracts by railway companies to carry to places that were on other companies' lines [Muschamp v. Lancaster and Preston Junction Railway Co. (1841) 8 M. & W. 421 : 2 Railw. Cas. 607 : 5 Jur. 656 10 L.J. Ex 4. O 58 R.R. 758 : 151 E.R. 1 02, Scotthorn v. South Staffordshire Railway Co. (1853) 8 Ex 341 : 22 L.J. Ex 121 : 7 Railw. Cas 80 : 7 Jur 214 : 1 W.R 154 : 20 L.T. (O.S.) 225 : 91 R.R. 527, Bristol and Exeter Railway Co. v. Collins (1859) 7 H.L.C. 194 : 29 L.J. Ex 41 : 5 Jur. (N.S.) 1367 1 5 R.R. 106 : 1 E.R. 78] or to carry to a point beyond their own lines which involved transport by water [Wilby v. West Cornwall Railway Co. (1858) 2 H & N. 706 : 27 L.J. Ex. 181 : 4 Jur. (N.S.) 284 : 6 W.R. 225 : 30 L.T. (O.S.) 261 : 115 R.R. 754 : 157 E.R. 290].

11. Subject to any written documents, it is a question of fact for a Jury to say whether there was one contract or more than one. The basis, however, of the above decisions is that it would be a strained and improbable inference to hold that a sender on an ordinary "through booking" transaction enters into a series of contracts with carriers 1, 2 and 3 making each carrier except the last his agent to make a further contract or treating him as the next carrier's agent to make a further contract with the sender. If it be said that though there is an entire contract with the first carrier for the whole journey, yet there may also be a contract with each of the other carriers for their own part of the transit, this no

doubt is true. But as an inference it is still more elaborately improbable. It involves a contract and a parallel series of other contracts. This series has to be operated either by each carrier being treated as the sender's agent to contract with the next, which involves a doubtful scheme for the transmission of authority : or else by each carrier being treated as having made the previous one (or perhaps the first one) his agent to contract on his behalf, while himself being the previous carrier's agent to perform. Again this latter view is possible and in some cases it is right. Such a position is a quasi-partnership and is illustrated by *Gill V. Manchester Sheffield and Lincolnshire Railway Co.* (1873) 8 Q.B. 86 : 42 L.J.Q.B. 89 : 28 L.T. 587 : 21 W.R. 525 and *Great Indian Peninsula Railway Company v. Radhakisan Khushaldas* 5 B. 371 : 5 Ind. Jur. 646 : 3 Ind. Dec. (N.S.) 244. It has been put in argument that where for their mutual advantage two companies are in the habit of handling through traffic for a reward to be divided in proportions, there is in substance a quasi-partnership and each is the agent of the other to contract. I do not agree. Mutual advantage is the presupposition in every contract and not the less so that it is often vitiated by mistake or sadly falsified by events. It is not of itself a principle of confusion which obliterates the distinction between a sub-contract to perform and an agent's or partner's authority to contract. The case of *Foulkes v. Metropolitan District Railway Co.* (1880) 5 C.P.D. 157 : 49 L.J.C.P. 361 : 12 L.T. 345 : 28 W.R. 526, if the facts be considered, is no authority for any proposition so wide. It was a case where the defendant railway carried for the whole journey by their own rolling stock partly over their own line and partly over another as to which they had running powers. There was a body of evidence as to the relationship between the companies and the position of the booking clerk who issued the ticket. It was not a case of carriage by successive companies over their own lines.

12. In the present case the proportion of freight, which the steamship company in 1913 bargained for with the railway, was defined by reference to the proportion which it ordinarily received for the journey from Gauhati to Calcutta. For a good many years goods had been received by each company for "through booking" to places served by the other. The emergency contract was that the steamship company should get as much for carrying to Chandpur as it usually got for carrying to Calcutta, which is nearly twice the distance by water. I do not think that this measurement of the freight by mixture of analogy and contrast entitles me to regard the old and the new course of business as the same for the purpose now in hand, but in any case I see nothing in the former to take these companies out of *Muschamp's case* (1841) 8 M. W. 421 : 2 Railw. Cas. 607 : 5 Jur. 656, 10 L.J. Ex 460 58 R.R. 758 : 151 E.R. 102. The latter is I think well within it. So far as the emergency arrangement is concerned, I think it may be described with precision in the words of *Watson, B.*, when advising the House of Lords in *Bristol's case* (1859) 7 H.L.C. 194 : 29 L.J. Ex 41 : 5 Jur. (N.S.) 1367 15 R.R. 106 : 1 E.R. 78 as "a general contract existing between the two companies whereby one became Sub-contractor to the other."

13. Now so far as regards the 2nd way of stating the plaintiffs' case as given

above, I am not satisfied that in the absence of any privity of contract the plaintiff can apart from the Carriers Act (III of 1865)--recover against the steamship company as an insurer by reason that it is a common carrier. Such an action may be laid in tort and founded on the custom of the realm or it may be laid in contract, but the question is whether the custom of the realm makes the carrier responsible as an insurer to one who has not by himself or his agent delivered the goods to be carried. I do not say that it does not, but the cases cited to me do not convince me [Bretherton v. Wood (1821) 3 Br. & B. 54 : 6 Moore 141 : 9 Price 408 : 23 R.R. 556 : 129 E.R. 1203, Pozzi v. Shipton (1838) 8 A. & E. 963 : 1 P. & D. 14 : 8 L.J. (N.S.) Q. B. 1 : 1 W.W. & H. 624 : 47 R.R. 802 : 112 E.R. 1106, Marshall v. York Newcastle and Dewick Railway Co. (1851) 11 C.B. 655 : 21 L.J.C.P. 34 : 16 Jur. 124 : 18 L.T. 94 : 87 R.R. 742 : 138 E.R. 632 and Austin v. Great Western Railway Co. (13)]. Of these only Bretherton's case (1821) 3 Br. B. 54 : 6 Moore 141 : 9 Price 408 : 23 R.R. 556 : 129 E.R. 1203 and Marshall's case (1851) 11 C.B. 655 : 21 L.J.C.P. 34 : 16 Jur. 124 : 18 L.T. 94 : 87 R.R. 742 : 138 E.R. 632 are decisions as to goods; the others are personal injury cases. As a matter of pleading, it is clear that trespass on the case will lie for breach of a duty which arises out of a relationship which itself arises out of a contract, provided that the duty is no more than the ordinary common law duty of the defendant in the course of a public avocation, e g., as carrier, surgeon or attorney [Boorman v. Brown (1842) 3 Q.B. 511 : 2 G & D. 793 : 11 L.J. Ex. 437 : 61 R.R. 287 : 114 E.R. 603, Turner v. Stallibrass (1898) 1 Q.B. 56 : 67 L.J.Q.B. 52 : 77 L.T. 482 : 46 W.R. 81]. Such a relationship and the corresponding duty may arise in respect of a person who was not a party to the contract, as where A employs a surgeon to attend B and B is injured by the surgeon's want of reasonable care. B clearly has an action on the case, though not in assumpsit. As to goods the law will presume when it can that the carrier's contract is with the owner [Dutton v. Solomonson (1803) 3 B. & P. 582 : 127 E. R. 314.], but where this is not the case, it might be carrying the logic a step beyond authority to hold that the carrier is responsible as an insurer to the owner as such, in addition to his clear liability to the person who employed him to carry.

14. However this may be, the Indian Carriers Act, 1865, when compared carefully with the English Act of 1830, does, I think, purport and intend to make a common carrier liable to the owner of the goods as such, though not as an insurer. This English Act is very carefully worded, it refers to the person or persons sending or delivering the goods (sections 1 and 2) as the party entitled to recover damages in respect of such loss (section 7). Section 8 of the Indian Act was undoubtedly drawn with Section 8 of the English Act before the draftsman. The changes are conspicuous and intentional. The English Act says that nothing in that Act shall protect the carriers from liability for loss or injury to goods arising from felonious acts of the carrier's servants. The Indian Act says that notwithstanding anything in that Act contained every common carrier shall be liable to the owner where the loss has arisen from the negligence or criminal act of the carrier or any of his agents or servants. The Indian section not only

puts negligence and crime on the same footing; the whole structure of the clause is different; it affirms or creates a liability and gives the benefit of it to the owner. The English section makes the carrier in no case liable where he was not liable before. There can be, I think, no doubt that the clause of the Indian Act must be taken to mean advisedly what it says: "The person entitled to recover in respect of such loss" is the phrase taken from the English Act and used" in Section 5 by the Indian Legislature when that phrase is adequate to the intention. The word "owner" in Section 8 is the product of a reforming zeal which found the corresponding English section to stand in need of drastic alteration. It is introduced by Section 5, though the corresponding Section 5 of the English Act carefully uses the phrase "any other parties" and Section 7 of the Railway and Canal Traffic Act, 1854, (to which Section 5 of the Indian Act is also indebted) is equally careful. Both Section 5 and Section 8 of the Indian Act are clear examples of the Legislature intentionally rushing in where lawyers fear to tread--by no means an unwise proceeding in some cases.

15. I think, therefore, that I must decide whether the steamship company was a common carrier within the definition of the Indian Act. It is a company "engaged in the business of transporting for hire property from place to place by inland navigation for all persons indiscriminately" and the only question is whether, because it was doing this particular set of journeys for the railway company by a special flotilla which was devoted for the time to this purpose only and which was making a through run to Chandpur, it was departing from its usual business and engaging in a different type of business, i.e., the business of a sub contractor for the railway in such special sense as takes it quoad these journeys out of the avocation of a common carrier. On the whole I think it was not. As I read the correspondence in 1913, the railway company in the emergency appealed to the steamship company to carry in the exercise of their public and ordinary profession. Can you take Chittagong tea from Gauhati to Chandpur and what charge per chest?" (July 2nd 1913). "We can clear teas wire probable space required" (July 3rd 1913). "Space probably 4,000 chests" (July 4th 1913). "Six annas not attractive as necessary place special block" (July 4th 1913). "Place block Gauhati immediately tea required Chittagong not later 15th inst." (15th July 1903). That is the gist of the correspondence apart from the fixing of the reward. To settle the amount of the reward in advance and by agreement was an ordinary incident in the business of a common carrier before the days of railways and is not a special contract which takes the carrier out of the usual liability. Clearly enough the size of the aggregate consignment and the fact that much of it would be for shipment made special provision necessary. This, however, is not exacted by the railway. It is pointed out by the steamship company but, as I think, it is not made the basis of the contract in such a way as to show that the steamship company is entering upon a new business or departing from its usual avocation to become a special sub contractor in any novel sense.

16. On these findings I have to apply to the facts of this case sections 8 and 9 of the Carriers Act. On this footing the cases show that the steamship company has

to exonerate itself from responsibility for the loss [Choutmull Doogar v. Rivers Steam Navigation Co. 24 C. 786 : 1 C.W.N. 201 : 12 Ind. Dec. (N.s.) 1193, Rivers Steam Navigation Company v. Choutmull Doogar 26 C. 398 : 26 I.A. 1 : 3 C.W.N. 145 : 13 Ind. Dec. (N.S.) 857, Hirji v. B.B. & C.I. Railway Company 25 Ind. Cas. 241 : 39 B. 191 : 16 Bom. L.R. 467].

17. There is no nicety about the question by reason of the fact that the steamship company have made neither attempt nor pretense of doing so. The only possible question as to the evidence called by the plaintiffs is whether it is sufficient by itself affirmatively to establish negligence.

18. As regards the fourth count, which is a claim in tort and independently of any question as to common earners, once the question of pleading has been determined, I think that the cases of Foulkes v. Metropolitan District Railway Co. (1880) 5 C.P.D. 157 : 49 L.J.C.P. 361 : 12 L. T. 345 : 28 W.R. 526 and Hooper v. L. & N.W. Ry. (1881) 50 L.J.Q.B. 103 : 43 L.T. 570 : 29 W. R. 241 : 45 J.P. 223 reduce this to a question of fact, viz, whether the plaintiffs can establish a failure of the ordinary obligation to take due and reasonable care. These cases and others show that the distinction between non-feasance and misfeasance is of no service to the steamship company here [Kelly v. Metropolitan Ry. Co. (1895) 1 Q.B. 944 : 64 L.J.Q.B. 568 : 14 R. 417 : 72 L.T. 551 : 43 W.R. 497 : 59 J.P. 437, Meux v. Great Eastern Railway Co. (1895) 2 Q.B. 387 : 64 L.J.Q.B. 657 : 14 R. 620 : 73 L.T. 247 : 43 W.R. 680 : 59 J.P. 66. Upon this basis Section 106 of the Evidence Act has to be applied. It has been made clear by the Privy Council that when the defendants do by the facts before the Court, the plaintiff still has to discharge the onus of proving negligence [Dwarkanath Raimohan Chawdhuri v. Rivers Steam Navigation Co. 46 Ind. Cas. 319 : 27 C.L.J. 615 : 23 M.L.T. 376 : 8 L.W. 4 : (1918) M.W.N. 435 : 20 Bom. L.R. 735 (P.C.)] by satisfying the Court that negligence is the true inference from the facts so proved. What the position in when the defendants do not lay the facts before the Court is not stated in their Lordships' judgment. Section 106 of the Evidence Act requires to be very carefully considered before it is relied upon. Section 106 has apparently some into this code from certain cases decided in England which will be found collected in Taylor's Book on Evidence. My own view is that so far as England is concerned, there is not, and never was, any such general principle of evidence as is laid down in Section 106 of the Indian Evidence Act. I think that those cases, if they are looked to, will really show that there is no occasion for any such principle in the interests of justice; but at any rate in the case of Elkin v. Janson (1845) 14 L.J. Ex. 201 : 13 M. & W. 655 : 9 Jur. 353 : 153 E.R. 274 : 67 R.R. 771 Baron Alderson put in a clear and precise way the method of treating such a position under the ordinary Rules as regards onus. Now in this case I do not want to rely on any interpretation of Section 105 beyond what I consider to be an interpretation that is consistent with what Baron Alderson says in Elkin v. Janson (1845) 14 L.J. Ex. 201 : 13 M. & W. 655 : 9 Jur. 353 : 153 E.R. 274 : 67 R.R. 771. I think myself that the broader principle was really intended to apply only to negative averments and that it is unnecessary as a special principle even as

regards this. Still, sitting here I have to apply Section 106 and to give it what I consider to be its fair meaning. It seems to me that without wiping it out from the Evidence Act altogether, it must at all events mean as much as Baron Alderson laid down in the case which I have referred to. I am quite satisfied that if I take the evidence of negligence which has been adduced by the plaintiffs, and view that in the light of this further fact, treated as mere matter of evidence, that the defendants have not laid the materials before the Court, there can be no question that the plaintiffs have discharged the onus of proof. Indeed I will go further. I think that, apart from that special principle, there is sufficient in the evidence adduced by the plaintiffs to make it incumbent upon the defendants to make some defence upon the facts. The facts appear from two documents (Exhibits E and F). I will, for this purpose, disregard Exhibit C, as I am doubtful whether that is evidence against the steamship company at all; if it is, then there are various discrepancies between Exhibit C and the other Exhibits that would go some way to assist the plaintiffs, but I do not think Exhibit C is evidence against the steamship company, and I disregard it. What then are the facts? It is quite clear here that I have far more than the bald fact that a fire broke out upon the flat. The first thing is that it broke out either at 18 15 standard or at 18 30, there or thereabouts, on the 21st December 1915, and I imagine that I am entitled to take judicial notice that at that time of the year, and at that time of the evening, the sun would not be beating down upon these cases in such a way as to cause them suddenly to burst out in flame. It appears further that the fire started when all hands were aft. There had been a tally dispute about one chest, and apparently the whole occupation of the railway and steamship companies' employees was to make another and better check. It seems according to Exhibit F that the fire was first noticed, not by any watchmen, but by a railway coolie, and before the pumps could get going, the once was blazing. It appears that the stack of canes was on deck piled against the forward bulkhead, that the flames ran the whole length in a few moments, and that the men were unable to reach the pumps, or at least to work the pumps, as the flames rose immediately.

19. Now, I cannot help thinking that if these canes were so very inflammable as Exhibit E and Exhibit F would seem to show, it was a bad mistake to distribute them over the deck in such a way that the pumps could not be employed at them. It seems to me too that if the canes were so very inflammable, some special precautions as to watchman ought to have been made; and that prima facie, the watchman, doing his duty, would have seen this before it caught the eye of a railway coolie. I have no evidence as to the direction of the wind. There seem to have been other vessels apparently in more or less close proximity, but the defendants can make no use of this as a defence: With inflammable stuff on deck I do not think it reasonable to put a vessel in proximity to other vessels without taking special care as regards that matter. I think that upon ordinary principles of law, the plaintiffs' evidence is sufficient, if not exactly ample, to call upon the defendants to reply, but in any case if I add, as I am entitled to do u/s 105--if I add as a fact which is of evidential value--that defendants being under a

duty to lay the materials before the Court have laid no materials before the Court, I think the plaintiff has made out his case. This is a case where the steamship company undoubtedly held an enquiry. I have been told that it is not the custom that any note should be made of depositions taken on that enquiry. To a case where all the witnesses are brought before the Court, I should not be disposed to quarrel with the steamship company for thinking that such an enquiry can properly be made in such a way that it is not merely the making of materials for an opponent. The Rules as to discovery provide a proper privilege for proper cases. But when the parties come into Court, and no evidence is adduced by the defendants, the course adopted by the defendants in this case does not improve their position. Fires cannot always be explained, but an atmosphere of mystery, when carefully preserved, becomes stale quickly and is easily laden with suspicion.

20. In my view there must be judgment for the plaintiff. As I understand the amount of damage is likely to be agreed or referred, it will be sufficient for the present that I shall give judgment for the plaintiff with the costs of the action. I adjourn the matter in order that the damages may be mentioned to me at a later stage.

Issues.

1. Were the goods delivered to the railway company for carriage upon a contract between the plaintiff company and the railway company for the carriage thereof for the entire journey to Chittagong?

Yes.

2. (a) Did the railway company enter into an agreement with the plaintiff in respect of the said goods on behalf of the steamer company? (b) If so, had the railway company authority to do so?

(a) No.

3. At the time of the fire were the goods on board the steamer company's flat in pursuance of any and if so, what contract between the plaintiff company and the steamer company?

No.

4. If not, is the plaintiff company entitled to maintain this action against the steamer company?

Yes.

5. Were the goods lost by reason of the negligence of the steamer company ?

Yes.