

(1982) 12 CAL CK 0015
In the Calcutta High Court
Case No : A.F.O.D. No. 197 of 1967

The Great India Trading Co. Pvt. Ltd.

APPELLANT

Vs

The Angus Co. Ltd. and Another

RESPONDENT

Date of Decision : 14-12-1982

Acts Referred:

Bills of Lading Act, 1856 — Section 1, 2, 3
Carriers Act, 1865 — Section 10, 8
Evidence Act, 1872 — Section 110

Citation : AIR 1983 Cal 408

Hon'ble Judges : S.C. Ghose, C.J.; R.N. Pyne, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

S.C. Ghosh, C.J.—This is an appeal directed against a judgment and decree passed by Mr. Justice A. N. Ray on July 19, 20 and 21, 1966. By and under the said decree, the learned Judge passed a decree in favour of the plaintiff respondents for the sum of Rupees 50,437.80 P. In view of the fact that the Great American Insurance Company had paid the amount already to the respondent No. 1, decree was made payable to the Great American Insurance Company. The respondent No. 1 carries on business under the name and style of "Duffs Mills Agency". The appellant carries on business under the name and style of Great India Trading Company. The appellant was and is a common carrier of goods by inland navigation. On or about Oct. 5, 1961, the appellant as such common carrier received and accepted at Gauhati in the State of Assam 377 bales of raw jute each bale weighing 150 kilograms the property of respondent No. 1 on board. The appellant's barge bearing No. A/ 5214? was to be towed by a steamer to be safely and securely carried to Calcutta and there to be delivered to the respondent No. 1 in its said business or order. As and by way of evidence of the said contract of carriage the appellant duly issued bill of lading bearing No. R/7226 dt Oct. 5, 1961. The respondent No. 1 subsequently ordered the appellant to deliver the said goods to Titagarh Jute Mills No. 1. At all material

times, the respondent No. 1 in its said business was the owner of the said goods. In breach of its duties as such common carrier and or its duties as carrier for reward, the appellant failed and/ or neglected to safely and securely carry the said goods or to deliver the same or any of them to the said Titagarh Jute Mills No. 1 or to the respondent No. 1. The respondent No. 2 by a marine insurance policy dt. 6th Oct., 1961 insured the said goods against risks mentioned in the policy. The respondent No. 2 paid to the respondent No. 1 in terms of the policy the sum of Rs. 82,674/- being the loss suffered by the respondent No. 1 by reason of the aforesaid non-delivery. The respondent No. 1's case is that it has been deprived of the goods, lost their value and suffered damages for the sum of Rs. 82,674/- being the value of the said goods. The appellant in the written statement alleged that the bill of lading was at owner's risk and that the appellant in the forwarding note dt. 29th Sept., 1961 made no admission regarding the weight, quality, quantity, contents and value of the goods shipped and in the bill of lading the shipper's weight and declaration was accepted by the appellant without prejudice.

2. The appellant's further defence is that the goods were carried under 3 special contract namely that the appellant was not responsible for the loss or of any damage to goods arising from an act of God, strandings, grounding, collision, snags or accident or dangers of the rivers, canals, locks or navigation or for any loss or damage however occurring to any property towed to the appellant for carriage except such as notwithstanding any contract to the contrary the appellant would be liable for under the express provision of any act in force for the time being. The third defence is that under a special contract dt. 29th Sept. 1961 no claim in respect of the contract shall be valid unless in writing and delivered at the office of the appellant in Calcutta within 4 weeks from the date of any default, loss or damage in respect of which such claim arises. The 4th defence is that the forwarding note dt 29th Sept., 1961 provided that in event of any of the terms of the forwarding note conflicting or appearing to conflict with the terms of any other agreement between the shippers and the appellant, the terms of the forwarding note or such agreement would prevail at option of the defendant. In to far as there may be no conflict or appearance of conflict between either of the said two terms mentioned hereinabove and any of the terms of the said bill of lading, the appellant has exercised the option in favour of the said two terms being paramount. The next defence is that the goods were lost in the circumstances alleged in para 7 of the written statement and that the loss arises from an act of God and or grounding or collision or snags or accident or dangers of the rivers or navigation. The next defence is that the towing vessel Rampuria was under the supervision and control of the pilot appointed by the Government of Pakistan and/or appropriate authorities controlling the rivers and that the appellant is not responsible or liable for the loss of the goods or damages to the respondent No. 1. The further defence is that if and in so far as the sinking of the boat was caused by any error or judgment on the part of the pilot Sarang or any other person controlling or directing man oeuvre of the

towing vessel or the boat, the appellant is not responsible for the loss of the goods. Finally it is alleged that inasmuch as neither of the respondents delivered any claim in writing at the office of the appellant at Calcutta within 4 weeks of 10th Oct., 1961 being (the) date when the boat or the carriage sank at Khulna, the suit is not maintainable and the claims are not valid under the terms or condition of the forwarding note on which the appellant opted and opts to rely. Various issues were raised at the trial. The main contention raised by the appellant was that the respondent No. 1 was not the owner of the goods at all material times. Punam Chand Jain deposes about the ownership of goods. According to his evidence respondent No. 1 was the owner of the goods at all material times. Reference may be made to the question 17 to 50 (in chief) pages 14 to 17 of the Paper Book, questions 127 to 136, questions 205 to 215 and questions 250 to 258 (in cross-examination), pages 26 and 27, 34-35 and 40 of the Paper Book. There was no cross-examination on the point of ownership by the appellant's counsel.

3. Then Brajmohan Mantri of the firm of Jute Distributors who are the purchasing agent of Duffs Mills Agency deposes about the ownership of the goods. He says in questions 24 and 25 (in chief) page 59 that the Duffs Mills Agencies are the owners of the goods. In question 31 at page 60 he says that in the bill of lading the jute was diverted to Titagarh Jute Mill, In cross-examination in answer to questions 124 to 150 he says about the direction for diversion of the goods. Again in cross-examination questions 215 to 220 page 82-83 he says Titagarh Jute Mills No. 1 is a name of a jetty. Reference also may be made to the questions 224 to 234 at pages 83-85. The appellant's counsel is merely fishing for information. The appellant's witness Chandraj Kochar contends about change of ownership on the basis of the diversion note in Ext. C. It is the common case that the plaintiff No. 1 was not the owner of the goods when the same was despatched on board the ship M. V. Rampuria and or the barges attached to it belonging to the appellant. The bill of lading also says that the respondent No. 1 consigned the goods to self or to its agent at Calcutta. The respondent No. 1 thereby regained the possession and reserved the right of disposal of the goods at the completion of the voyage. In the circumstances aforesaid, the burden of proving that the respondent No. 1 is not the owner is on the appellant. See Section 110 of the Evidence Act. *Sukul Brothers v. H. K. Kavrana* AIR 1958 Cal 730 *Commissioners for the Port of Calcutta Vs. General Trading Corporation Ltd. and Another*, . The appellant's contention that the property in the goods did pass to Titagarh Jute Factory Company Limited during transit is erroneous because of the following reasons:

(a) There is no endorsement on the bill of lading to such effect (see Ext. C, page 324) See *Scrutton on Charter Party and Bill of Lading*, 18th Edn., Article 91 page 181.

(b) Words of the alleged endorsement not sufficient to pass property. (Kochar questions 89 to 91 page 102 Questions 129 to 131 page 107). Reference in this

connection may be made to *Lewis v. Mkee* (1868) 4 Ex Ch 58, where it was held that the words in the endorsement "Delivered to W and K or order looking to them for all freight, dead freight and demurrage without recourse to us" considered to be not endorsement to pass property.

(c) Further there is no legal entity called Titagarh Jute Mill Company No. 1. (Brajomohan Mantri Questions 215 to 220 page 82-83).

(d) The bill of lading is not transferable on the face of it because the goods are to be delivered to the respondent No. 1 or his agent at Calcutta. If bill of lading does not appear to be transferable where it requires the goods to be specified, therein to be delivered to a named person ordering to a reference to his order or assignees (sic).

(e) The respondent No. 1 shipped the goods and by the bill of lading the goods are deliverable to self or to the respondent No. 1's agent. The respondent No. 1 is prima facie deemed to have reserved the right of disposal of the goods. (Section 25 of the Sale of Goods Act).

(f) The appellant has not tendered any contract between the plaintiff and the Titagarh Jute Factory Company Limited or any other reliable piece of evidence to show that there was a valid contract for sale between the respondent No. 1 and the Titagarh Jute Factory Company Limited or that property in the goods passed to the latter company.

4. The Goods Forwarding Note Ext. B and the bill of lading Ext. C both show that the consignor was Duffs Mills Agency. The endorsement in the bill of lading was made by the Manager of the appellant and it shows that goods were diverted to Titagarh Jute Mill No. 1. There is no endorsement of the consignor that the goods were assigned to any particular company. It will appear from the letter dt. 23rd November 1961 being Ext. 3 that Titagarh Jute Mill No. 1 disowned any interest in the goods. There is no evidence that the Ext. 14, the cheque for Rs. 3264.25 p. was paid in respect of the identical goods. The appellant? has not disclosed books to show as to on what account and in respect of what goods the said sum represented by Ext. 14 was paid. Ext. 3 the bill of lading does not show any endorsement whereby the property in the goods has passed from Duffs Mills Agency or Angus Jute Company to any one else. We are unable to hold that there has been any transfer of goods either by delivery or by endorsement. We are therefore of the opinion that the ownership of the goods at all material times remained vested in the respondent

5. Ext. P, the invoice shows that Duffs Mills Agency has deterred to jute distributors. The invoice of the goods is not in the name of Titagarh Jute Mills. It appears from the invoice that 377 bales of jute were despatched from Now gang to Titagarh Jute Mill No. 1. Ext. M and Ext N are the bills or invoices made by Duffs Mills Agencies to the appellant claiming the value of 377 bales of jute consigned from Now gang to Titagarh Jute Mill. These invoices do not show that the buyer was Titagarh Jute Mill.

6. Next contention of Mr. Sen was that the goods were agreed to be carried on terms and conditions stated in paragraph 3 of the written statement and that the goods were accepted by the appellant in terms of the special contract contained in the Goods Forwarding Note as stated in paragraph 6 of the written statement. The allegations in paragraph 3 of the written statement are that the terms of carriage would appear from the bill of lading and the Goods Forwarding Note and further that the shippers' "weight and declaration accepted without prejudice and goods were carried at owner's risk". The appellant's allegation was that the appellant made no admission regarding weight, quality, quantity, contents and value of the goods shipped and further that the goods were carried at owner's risk and therefore the appellant was not liable for any loss. According to the terms and conditions in the Goods Forwarding Note there was a special contract which provided that the appellant would not be responsible for loss or damage to goods arising from act of God strandings, groundings, snags or accident or dangers of the rivers, canals, locks or navigation and then "no claim in respect of this contract shall be valid unless in writing and delivered at the office of the defendant at Calcutta within 4 weeks from the date of any default, loss or damages in respect of which such claim arises." The Goods Forwarding Note further provided that in the event of any terms of the Forwarding Note conflicting with the terms of any other claim between the shippers and the appellant the terms of the Forwarding Note would prevail at the option of the appellant and that the appellant exercised the option, in favour of the terms of the Goods Forwarding Note. The Goods Forwarding Note is dated 29th September, 1961 and is marked as Ext. B. The bill of lading is dated 15th October, 1961 and is marked Ext. C. The appellant relies on Clauses 16 and 17 of Ext. B. The said clauses are set out hereunder:

"16. No claim in respect of this contract shall be valid unless in writing and delivered at the office of the service in Calcutta within 4 weeks from the date of any default, loss or damage in respect of which such claim arises.

17. In the event of any of the terms of this forwarding note conflicting or appearing to conflict with the terms of any other agreement between the shipper and the service, the terms of these forwarding note or of such agreement shall prevail at the option of the service." Reference may be made also to Clauses 17 and 19 of the bill of lading Ext. C. They are set out hereunder :

"Clause 17: No claim of any kind whatsoever in respect of this contract shall be valid unless in writing and delivered at the Office of the Company (Carrier) in Calcutta within six months from the date of any default, loss or damage in respect of which such claim arises Clause 19 : In the event of any of these conditions conflicting or appearing to conflict with the terms of any other agreement between the shipper and the Company it shall be at the option of the Company to determine whether these conditions or the terms of such other agreements shall prevail."

The language of the Clause 17 of the Goods Forwarding Note is the same as of

Clause 19 of the bill of lading being Ext. C, with this difference only that whereas Clause 17 of the Ext. says terms, Clause 19 of the Ext. C says conditions. It is urged by Mr. Sen on behalf of the appellant that Ext. B is a special contract signed by various agents of the owner. It was urged that Clause 16 in the Ext. B was and is a condition precedent but not cause of action and was a condition of reduction of liability of the carrier. It is stated in Welford Otterbarry's Fire Insurance 4th Edition at p. 114 that the non-fulfilment of a stipulation which is not a condition precedent does not absolve the insurer from liability on the policy, however greatly they may have been prejudiced thereby. But it is competent to the parties to make any stipulation in the policy whether positive or negative an express condition precedent either to the validity of the policy itself or to the liability of the insurer thereunder. In the instant case, according to the appellant, notice for claim was not given within the 4 weeks as stipulated in Clause 16 of Ext. B. Thus the respondent No. 1's claim stood absolved. Whether condition as to the giving of notice within the required time is condition precedent or not is not free from doubt. It depends upon the intention of the parties, upon the language of the condition and upon the consequence of breach of the condition. Whether the condition is actually called, in that policy a condition precedent or a warranty or whether the policy declares that its fulfilment shall be the basis of the essence of the contract or that its non-fulfilment shall render the policy null and void or of no effect or shall disentitle the assured from recovering, the intention of the parties is clearly shown and the condition must be construed as a condition precedent, if it is capable of being so construed. The intention of the parties is equally clear where the condition in question is one of a series of conditions which are expressly declared to be conditions precedent. To constitute a condition a condition precedent it is not necessary that the condition should be expressly declared on the face of it to be a condition precedent because no precise form of words is required. It will depend upon the intention of the parties. Three tests have been laid down for ascertaining the intention of the parties. First, a condition relating to matters which clearly go to the root of the contract or which is essential to the acceptance of liability on the part of the insurers must be construed as a condition precedent. (See *Barnard v. Faber* (1898) 1 QBD 340). Secondly, where from the nature of the matters with which the condition deals, it is clear that the insurers cannot be taken to have contracted on the footing that its non-fulfilment on the part of the assured shall be visited by damages only the condition must be considered as a condition precedent). Thirdly, conditions which are not expressly made conditions precedent and which are not by reason of the matter to which they relate in the nature of conditions precedent are not to be construed as conditions precedent (See *Stoneham v. Ocean Rly. General Accident Insurance Co.* (1887) 19 QBD 237). In that case a condition which required notice of accident within 7 days was held not to be a condition precedent. In the present case loss occurred on 10th October, 1961 as far as the appellant is concerned. Reliance has been placed on Ext. 6 which was a report lodged by S. K. Hakim in support of contemporaneous record of loss happening on 10th October, 1961. The appellant

also relied on Ext. 8 which was a certificate given by the Police Authorities and the certificate mentioned 10th October, 1961 as the date of accident. Reliance was also placed by the appellant on Exts. 11 and 12 namely two telegrams showing 10th October, 1961 as the date of the telegram and the loss of the barge. The loss occurred in the following way :

7. On the morning of 10th October, 1961 at about 10 A. M. in the vicinity of Khulna town the said towing vessel Rampuria took a half round turn to un-boat the pilot near Pilot Ghat, But subsequently, the said pilot was not un-boated. The said vessel was again navigated to take another half round turn in order to reach Customs Ghat. While the said vessel was moving from its left to the right for the second half round the current of the river was so violent that it made the said vessel drift south-wards before it could complete turning. As a result of such drifting, the said boat which was attached to the said vessel collided with B. K. Barge number 6432 which was lying anchored along with few other boats opposite to the Railway Ghat and thus resulted in completely breaking and tearing of ropes by which the said boat was fastened to the said vessel and causing a big crack in the cargo hole of the said boat and the said boat having been detached from the said vessel drifted southward along with the current of the river. Water rushed into the boat from the crack and within a few minutes the said boat with the said cargo sank down in the river after drifting to a distance of half a mile from the spot of incidence.

8. The respondent No. 1 gave notice of claim on 14th Nov., 1961. It is the contention of the appellant therefore that there is non-fulfilment of Clause 16 and the contention on behalf of the appellant is that the Clause 16 is a condition precedent, the non-fulfilment of which absolves the appellant from liability. Under Clause 17 of the bill of lading being Ext. C notice was to be given within 6 months of the accident, whereas under Clause 16 of the Ext. B notice was to be given within 4 weeks of the date of loss. It was contended on behalf of the appellant that Clause 17 of the bill of lading was inoperative inasmuch as Clause 17 of the Goods Forwarding Note gave the appellant the option to allow the Goods Forwarding Note to prevail over any other agreement when the Goods Forwarding Note was in conflict with any other agreement. Clause 17 of the Goods Forwarding Note provides that in the event of terms of Forwarding Note conflicting or appearing to conflict with the terms of any other agreement (sic). It would appear in Scrutton on Charter Party, 16th Edition at page 191 that after the shipment of goods under a contract of affreightment, the bill of lading where there is no charter, constitutes most important evidence of the contract of affreightment. The bill of lading is signed by the carrier or its agent and is delivered to the shippers and such consignment does not give rise to any new contract but only gives precision which has been previously made. A bill of lading is a receipt for goods shipped on board a ship signed by the person who contracts to carry them stating the terms on which the goods are delivered to and received by the ship. The bill of lading is not a contract for that has been made before the bill of lading was signed and delivered, but it is excellent

evidence of the terms of the contract. The signature and delivery of the bill of lading evidences the contract of carriage between the parties. A contract of carriage is constituted at different stages. First the shipper sends or forwards the goods. There is consignment of the goods in accordance with the Forwarding Note. The goods are later accepted on board the ship in exchange of a mate's receipt. The mate's receipt is exchanged for the bill of lading. It cannot be said that each constitutes a separate contract. Each is an integral part of one indivisible contract of carriage which is evidenced at different stages by different documents. The term "no other agreement" in Clause 16 in the Goods Forwarding Note means a different agreement from that of the contract of carriage. Moreover, Clause 17 in the Goods Forwarding Notes contemplates, in our opinion, a prior agreement. Therefore Clause 17 of the Goods Forwarding Note lays down first that there is to be no conflict between the contract of carriage and any other agreement between the same parties. Secondly that other agreement has to be an agreement other than the agreement for contract of carriage and thirdly the agreement has to be a prior one which will be prior in point of time to the contract of carriage. It is only in that case Clause 17 will come into operation. In order to apply Clause 16 of the Goods Forwarding Note there has to be exercise of option. The appellant has stated in the written statement that that option under Clause 17 of the Forwarding Note has been exercised. Neither the documentary evidence nor the oral evidence adduced on behalf of the appellant shows any exercise of option. There must be an overt act of exercise of option. Here there is none. Neither has there been any evidence of communication of that option to the respondent No. 1. Thus, in our opinion, there has been waiver of Clause 16 of the Goods Forwarding Note that clause does not prevail over Clause 17 of the bill of lading. Moreover Clause 16 of the Goods Forwarding Note offends against Sections 8 and 10 of the Carriers Act and therefore is void. Section 10 is offended by reducing the period of limitation and Section 8 is offended by wiping out the liability. Reference in this connection may be made to the case of *Rivers Steam Navigation v. Biseswar* reported in AIR 1928 Cal 371.

9. Moreover the liability of the common carrier is not founded upon contract but upon exercise of public employment for reward. Clause 16 of the Goods Forwarding Note states that no claim in respect of this contract shall be valid. The bill of lading is a part of the contract of affreightment. The common carrier has liability also on the bill of lading. The respondent No. 1 in our opinion cannot be non-suited by Clause 16 of the Goods Forwarding Note. We come next to the question of breach of duty on the part of the appellant or whether there was any negligence on the part of the appellant. It has been urged on behalf of the appellant that the ship and the barge were both seaworthy on the basis of evidence on record. The appellant's witness Kochar spoke of certificate of the vessel as also of the qualification of the Master and of the certificate of the Master. It was stated that the Master had a first class competency certificate and that the Master plied on the route for several years. The appellant's witness

Mohiuddin was in the engine room. The other witness Sk. Hakim was the majhi of the barge on the portside and Sk. Mohammad was on the second deck. No witness from the bridge was called. The pilot was also not called. No explanation has been given why this evidence was not available. The log book and the engine book have not been produced. Sk. Mohammad said that the books were seized by the police. But Kochar did not corroborate his statements. The non-production of the log book and the engine book raises an inference against the appellant that if the same had been produced that would have gone against the appellant. The appellant, in our opinion, has to show how the accident happened namely, first what happened, secondly what was the cause of the happening and thirdly whether the cause was one which could not be avoided. The oral evidence on behalf of the appellant was that the ship was coming from Assam and that it came to Khulna. There the ship had to go to Pilot Ghat to unboat the pilot. The ship took a turn to the left to reach Pilot Ghat. Though the ship went to the Pilot Ghat to unboat the pilot, the pilot could not leave the ship. When the ship went to the Pilot Ghat, the star board side was on the Pilot Ghat. The ship took a turn to the left and at that time, the Master, according to Mohiuddin, directed Mohiuddin who was in the engine room of Rampuria to slow down the Portside engine and put it at a stop and thereafter the Master asked him to drive to reverse and thereafter the vessel stood near the Pilot Ghat at about a distance of 20 feet. Mohiuddin said that thereafter both the engines were working in the forward direction at full speed and an attempt was made for turning the vessel. But the vessel could not be fully turned and thereafter the vessel went forward for about 30 to 40 feet from the Pilot Ghat and could not complete the turn as it was proceeding backward at an angle. Mohiuddin said that both engines were running at a speed of 7 to 8 miles per hour. Current in the river, according to Mohiuddin, was violent and the vessel could not be completely turned and could not become straight. So the vessel was turned for reaching Customs Ghat. It was proceeding at an angle. Mohiuddin in the engine room heard a loud sound. Thereafter Mohiuddin in about 5 or 7 minutes" time saw a boat on the Dortsides detached from the vessel and it was floating with the current. Then Mohiuddin received instruction from the Master for stopping the engine.

10. Sk. Hakim who was the majhi on the barge said that near the Railway Ghat at Khulna, the vessel took a turn and the vessel stopped at Pilot Ghat. The vessel was facing the direction to which the current was flowing. The vessel was at an approximate distance of 30 feet of the Pilot Ghat. The vessel stopped for about 10 to 15 minutes. Then, it proceeded against the current and covered a distance of about 40 feet against the current proceeding ahead. The vessel took a turn towards the Pilot Ghat. Thereafter taking its turn the vessel was moving against the current and took a turn in mid stream and the current was strong. The vessel was moving fast at an angle. There was wind. There was B. K. Barge and the pontoon. Sk. Hakim's barge was facing Rampuria and his barge was moving along with the vessel Rampuria in the current. Thereafter when the accident was about to take place, Sk. Hakim put something like a ball in between the pontoon

and the barge in order to avert the accident, but the accident could not be avoided and the barge sank.

10A. Sk. Mohammad who worked as Tindal on the ship said that the vessel was turned and stopped at Pilot Ghat for 3 to 7 minutes. But nobody alighted there and then an order was made for turning the ship again. But the ship could not be turned. It was proceeding forward. There was a strong current and the vessel drifted to a little distance. There was B. K. Barge lying anchored. Sk. Mohammad said that the barge was towed by vessel Rampuria by its port-side and behind. The pilot hit against B. K. Barge and as a result the ropes were completely torn off and the vessel gradually drifted to the bank and it stopped there. Sk. Mohammad also said that the barge collided against the pontoon and both the barge and the pontoon drifted away. Certain facts came out of the evidence of the witness. The alleged accident occurred at about 10 A.M. in the month of October. The vessel took a turn to go to the Steamer Ghat. Anchor was not cast before the impact. The anchor was cast after the collision. If current was strong and if the Master was experienced as he was these things should have been foreseen. In the case of collision in the daylight between a ship under way and another which lying anchored, the burden is upon the former to show that she was not in fault, (See *Indus* (1886) 12 PD 46). In the present case there was no reason given as to why the vessel could not be turned along the direction of the current. If in turning round from Steamer Ghat, the current was along down the stream, one would expect that the vessel would be aided by the current to take its round to the left. The evidence on the contrary is that the vessel Rampuria instead of taking turn to the left went ahead towards the Customs Ghat which is on the opposite bank of the Pilot Ghat. If the ship was at an angle and if it could not be turned left, the ship should have been turned right. The anchor should have been anchored before the collision. Where a vessel under stream raises down a ship at her moorings in broad daylight, that fact is by itself prima facie the evidence of fault. In the present case Sk. Hakim in his evidence said that barge and the pontoon were different and there was no mention of the pontoon either in Ext. 6 or in the protest before the Notary Public. Sk. Mohammad on the other hand said that the barge and pontoon were the same and he said that the pontoon was lying at Ramnagar. Ramnagar is on the same side of the bank as the Pilot Ghat. There is no explanation as to why the barge could hit the pontoon. The appellant has failed to prove as what the accident was or what was its cause or whether it could not be avoided. By reason of the premises we are of the opinion that the negligence on the part of the appellant has been proved and the appellant has not been able to disprove it.

11. For all the reasons stated hereinbefore we are of the opinion that the appeal has no merit and is dismissed with costs.

R.N. Pyne, J.

12. I agree.