APPELLATE CIVIL.

Before Mr. Justice Ramesam and Mr. Justice Jackson.

1924, January 24.

ESUFALI MAHAMMEDBHOY ALLIBHOY AND 2 OTHERS (PLAINTIFFS), APPELLANTS

v.

A. K. THAHA UMMAL AND 4 OTHERS (DEFENDANTS 2 TO 6), RESPONDENTS.*

Ship—Goods entrusted for carriage, damaged during voyage—Suit for damages—Onus of proof—Perils of the sea—Negligence.

In a suit for damage caused to the plaintiff's goods entrusted for carriage by the defendant's ship, it is for the defendant to plead and prove "perils of the sea." If he makes out a *prima facie* case, the plaintiff can rebut it by proving defendant's negligence; *The Glendarroch* [1894] Prob., 226, followed.

The mere fact that the accident might have been avoided by greater foresight does not prove negligence.

APPEAL against the decree of K. S. KOTHANDARAMA AYYAR, Acting Subordinate Judge of Tuticorin, in Original Suit No. 6 of 1918.

The facts are given in the judgment.

The plaintiffs, whose suit for damages was dismissed, preferred this appeal.

T. R. Venkatarama Sastri and *K. S. Sankara Ayyar* for appellants.

S. Srinivasa Ayyangar with *K. V. Sesha Ayyangar* and *K. R. Rangasami Ayyangar* for respondents.

The JUDGMENT of the Court was delivered by

RAMESAM, J.

RAMESAM, J.—This is a suit for damages to plaintiffs' goods consigned on defendants' schooner *Sahul Hameed*. The schooner left Colombo on 25th August 1917 and arrived at Tutieorin on 28th August with 250

* Appeal No. 63 of 1921.

cases of safety matches entrusted by plaintiff to the master. The goods were landed on the 30th in a damaged condition. On a certificate of survey (Exhibit C) by Secretary of the Local Chamber of Commerce, the goods were sold by auction on 30th October 1917 (Exhibit G) and realized Rs. 3,142 (Exhibit D). The market value is alleged to be Rs. 31,750. The suit is for the difference.

Exhibit II is the bill of lading issued by the defendants' agent. It contains the usual exemption clause—

"The act of God, King's enemies, fire and all and every other dangers, accidents of the seas, rivers and navigation of whatever nature or kind so ever excepted."

Though there has been considerable argument on the question of burden of proof and several cases have been cited before us, the matter seems to be clearly settled in the present state of authorities. It is for the defendant to plead and prove "perils of the sea." If he makes out a *prima facie* case, the plaintiff can rebut it by proving defendants' negligence. (See the judgment of Court of Appeal in *The Glendarroch*(1). ESHER, M.R., at page 232, explains certain expressions of Lord HERSCHELL in *Wilson Sons & Co.* v. *Owners of cargo per the Xantho*(2). See also *Norway (Owners of the)* v. *Ashburner*(3). Scrutton on Charter Parties (10th Edition), article 79, note 1 and article 83, note at page 298, Carver on Carriage by Sea, section 87.)

We have therefore to see what the facts alleged and proved are. The defendants claim that the damage to the goods was on account of a peril of the sea, i.e., that there was a strong wind on the night of the 29th and the ship was driven away from the place where she anchored at first towards the south. The wind then changed its

(1) [1894] Prob., 226. (2) (1887) 12 App. Cas., 503.
(3) (1865) 3 Moore N.S., 245; 16 E.R., 92.

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direction with the result that the schooner swung round and sat on her anchor causing a hole on her portside. The vessel stranded and at 6 a.m. there was 5 feet of water in the hold. The cases of safety matches were damaged by the sea water. The plaintiff denies any change in the position of the ship and alleges negligence on the part of the Master in anchoring in shallow water.

Before discussing the evidence on these allegations, I may observe that the Subordinate Judge found on the second issue that the liability of the defendants as carriers continued till the 30th and on the ninth issue he found against their allegation that the Master was ready and anxious to deliver the goods on the 29th. It is on this footing that the appeal has been argued before us.

I will now discuss the evidence as to what happened on the 28th and 29th.

First.—The weather on the 29th. P.W. 1 says that no signal of high and violent wind was given on that day. But this evidence is useless as it is proved by D.W. 1, the Port Officer, that no observation was taken during night. The extract from the log book (Exhibit K) also shows that no entries were made for the night. D.W. 1 says that he recollects that the weather on the 29th was unsettled. We see no reason to reject this evidence. D.W. 3, the owner of another schooner *M.S. Hydrose* which was also anchored in the harbour that night—(See Exhibit IX. This is also admitted by P.W. 2)—says that there was high wind. D.W. 4 who was tandal of that schooner says there were violent winds from 2 a.m. up to 3 or 3-30 a.m. But D.W. 5 says that there was not strong wind but only average wind. On the whole, it seems to me that there was some rough weather in the night though it is possible D.W. 4 was exaggerating. It might not have amounted to a storm or a cyclone.

The next question is where did the schooner first anchor and did it move to another place further south on account of the wind. The coast here runs from north to south. A little to the south of the port and harbour there is an island called Hare Island on which there is a lighthouse. During night, lights were prohibited as the war was then going on. On account of the island the contours of equal depth near it recede towards the east and further from the coast. The form of the coast is as shown below . . . (Vide any map with sea depths.)

If a ship, anchoring due east of the port at a proper depth, drifts towards the south, parallel to the coast, the water would be getting shallower on account of the nearness of the island.

On the 30th the ship was found in 7 feet of water (ebb). This is conceded by all the witnesses (vide also Exhibit E). According to P.W. 2 she was then 2 or 3 miles away from the pier and the other schooner was about half a mile to the north in 10 or 12 feet of water. He was not asked as to where the ship anchored on the 28th—a curious omission—nor was P.W. 4 questioned on this matter. P.W. 1 says that she was standing on the 28th at a point one mile from the beach. The distance given by P.W. 1 for the 28th and that by P.W. 2 for the 30th suggest that the ship changed its situation. The evidence for plaintiffs throws no further light either way. D.W. 3 says that the suit schooner was east of his own schooner (which it may be remarked was in 10 feet or 12 feet of water according to P.W. 2) by half a mile. To the same effect is D.W. 4, but his evidence is not intelligible being too briefly recorded. D.W. 3 says that she had moved on the morning of the 30th quarter furlong off. D.W. 5 says that the ship had moved about 4 or 5 furlongs towards the shore on the southern side. D.W. 6 says that it had moved half a mile from its

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original place which must have been at 9 feet (ebb). He also says that it was 2 or 2½ miles away from the shore on the 28th and that he noticed its changed situation with reference to a buoy quarter mile off. He appears to be disinterested and his evidence seems to me the most reliable. Taking all this evidence I am inclined to think that the other schooner was 1½ miles east of the port probably in 10 feet high water or 8 feet (ebb); the suit schooner was half a mile further east, i.e., 2 miles from the shore and that she must have been in 9 feet (ebb). It may be that D.W. 2 slightly exaggerated when he said he anchored in 12 feet (high water) in Exhibit III. The place where the schooners were anchored was the usual place for them. Here it must be remembered that the difference in the tonnage between the two schooners is only 14 tons (Exhibit IX) and half a mile towards the east is a proper distance between the two. The draught of the suit schooner aft is 7 feet (Exhibit X) and it is unlikely that on the 28th it anchored in 7 feet of water (ebb). It must have moved towards the south parallel to the coast thus getting into shallow water. A slight gale causing such change or even a wreck in the native craft is not uncommon (see also D.W. 5). The only difficulty in the case is caused by the reports of D.W. 1—Exhibit X and Exhibit N—where he expresses his opinion that, from the beginning, she must have been in 7 feet of water. I have already observed that this is unlikely. His first report (Exhibit N, dated 4th September 1917) shows that the holding ground where the ship was said to have been first anchored was not good. He then says that the evidence is not conclusive so far as the vessel's dragging of the anchor is concerned. Probably he had not all the evidence we now have before us and his conclusion is therefore not decisive. He repeated it in the second

report (Exhibit X, dated 8th September 1917). The learned vakil for the appellant drew our attention to Exhibit V—a protest made by the Master on the 30th August. This is in English, a language not known to the Master. That he relied on a change of situation on the 4th September appears from Exhibit N and he mentioned it expressly in his later protest (Exhibit III, dated 7th September 1917). It may be that the scribe of Exhibit V omitted part of what was mentioned to him. Anyhow it must have been prepared in a hurry and the omission of the change in the position of the vessel in that document is not conclusive (in the face of the other evidence) to show that the explanation of the master was an afterthought of the 4th September. I have not relied on the evidence of D.W. 2 as it may be said to be interested. I therefore find that the ship dragged its anchor and moved towards the south from its original position (8 feet ebb and 10 feet flow) to the later position (7 feet ebb). If it was fully loaded, 8 feet (ebb) of water could not be enough, but with its actual load, it was sufficient. (See D.W. 5.)

The next question is whether the facts so proved amount to a peril of the sea. If the vessel had anchored from the beginning in 7 feet of water one may say it was sheer carelessness but on the facts proved it cannot be described as negligence. It may be that if the vessel had anchored in deeper water further off towards the east, it would not have stranded even if it drifted towards the south on account of the wind. The mere fact that the accident might have been avoided by greater foresight does not make it negligence. The difference between ordinary perils and extraordinary perils suggested in Story on Bailments (section 512) has not been accepted by the authorities (Carver, section 87). The peril need not be extraordinary in the sense that the cause must be

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uncommon. It is true that negligence does not save the defendants' liability [WILLIS, J., in *Grill* v. *General Iron Screw Collier Co.*(1)]. But if reasonable care is taken, the perils of the sea, while not including the effects of mere ordinary wear and tear, will include the consequences of any kind of accident ending in damage by sea water (Abbot on Merchant Shipping, page 612, citing *Fletcher* v. *Inglis*(2), Scrutton, article 83, *Corcoran* v. *Gurney*(3), *Laurie* v. *Douglas*(4), *The Thrunscoe*(5), *The Catharine Chalmers*(6). *Bishop* v. *Pentland*(7) where a rope broke, *Merchants Trading Co.* v. *Universal Marine Co.* (LUSH, J.) unreported but cited in *Dudgeon* v *Pembroke*(8).

In *Amies* v. *Stevens*(9) a sudden gust of wind was held to make all the difference. On the question of what is a proximate cause the latest decision in *Leyland Shipping Company* v. *Norwich Union Fire Insurance Society*(10) especially the judgment of Lord SHAW of Dunfermline may be referred to.

The appellants pointed out that while the other schooner had 3 or 4 anchors (P.W. 3), it does not appear that the suit schooner had more than one. I do not think this matters. She had 15 fathoms of cable (Exhibit N). The crew had put out more chain to prevent the dragging but without success (Exhibit X). Some of the cases relied on by the learned vakil for the appellants *Davis* v. *Garrett*(11) and *James Morrison & Co., Limited* v. *Shaw Savill and Albion Company, Limited*(12) are cases

(1) (1866) 1 C.P., 600. (2) (1819) 2 B. & Ald., 315.
(3) (1853) 1 E. & B., 456.
(4) (1846) 15 M. & W., 746; 153 E.R., 1052.
(5) [1897] Prob., 301. (6) (1875) 32 L.T.N.S., 847.
(7) (1827) 7 B. & C., 219; 108 E.R., 705.
(8) (1874) 9 Q.B., 581, at p. 596. (9) (1874) 1 Strange, 127; 93 E.R., 428.
(10) [1918] A.C., 350. (11) (1830) 6 Bing., 716; 130 E.R., 1456.
(12) [1916] 2 K.B., 783.

of deviation. In *Joseph Travers & Sons, Limited* v. *Cooper* (1) clear negligence in leaving the barge unattended at night was proved and then it was for the defendant to show that the loss was not caused by the negligence. Negligence was also proved in *Price & Co.* v. *Union Lighterage Company*(2) and in *Polemis and Furness, Withy & Co., In re*(3). *Steinman & Co.* v. *Angier Line*(4) was a case of theft by the men in ship's service. The cases of *The City of Peking*(5) and *The President Lincoln*(6) are cases of collision and negligence where negligence was held to be the initial cause. In *Lennard's Carrying Company, Limited* v. *Asiatic Petroleum Company, Limited*(7) the vessel was unseaworthy and the owners did not discharge the onus that lay on them.

We think the defendants have not been guilty of negligence and have proved a peril of the sea. In view of this finding we have not heard arguments on the question of damages.

The appeal must be dismissed with costs.

N.R.

(1) [1915] 1 K.B., 73.
(2) [1903] 1 K.B., 750; on appeal [1904] 1 K.B., 412.
(3) [1921] 3 K.B., 560.
(4) [1891] 1 Q.B., 619.
(5) (1888) 14 App. Cas., 40.
(6) [1911] Prob., 248.
(7) [1915] A.C., 705.