APPELLATE CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, and Mr. Justice Geidt.

1903
July 1.

INDIA GENERAL STEAM NAVIGATION COMPANY
v.
JAGAT CHANDRA KUNDU AND OTHERS.*

Ship—Collision—Negligence—Wrongful act—Side-lights, want of—Navigation.

Where one ship by gross negligence, *viz.*, by not carrying any lights, placed another ship in a position of extreme danger, and in the moment of emergency the *serang* of the latter gave an order to "starboard" instead of to "port the helm," which resulted in a collision:—

Held, that under the circumstances the latter ship was not guilty of such negligence as would make her responsible for the collision.

The Bywell Castle (1) and *The Owners of the "Tasmania" v. Smith* (2) referred to.

APPEAL by the defendants, the India General Steam Navigation Company, Limited.

This appeal arose out of an action brought by the plaintiffs to recover damages or compensation for loss of cargo resulting from the collision between a sailing vessel, *Cabul*, and a steamer, *Thrush*. The allegation of the plaintiffs was that on the 29th July 1896, they made over 4,000 maunds of salt to Fakir Mahomed Sowdagar and others, defendants Nos. 2 to 12, to be carried in their brig *Cabul*, from Chittagong to Naraingunge, and delivered at that place to the plaintiffs' order; that the brig *Cabul* while on its journey from Chittagong to Naraingunge, with the salt, collided with the S.S. *Thrush*, belonging to the India General Steam Navigation Company, Limited, which was coming from Naraingunge on the evening of the 8th August 1896, at a place near Jhapta Char in the river Megna. That, on account of this collision a large hole having been caused on the side of the brig, water rushed in and washed away the salt; that as the loss was occasioned either

* Appeal from Original Decree No. 68 of 1901, against the decree of Mohim Chandra Ghose, Subordinate Judge of Dacca, dated Dec. 22, 1900.

(1) (1879) 4. P. D. 219. (2) (1890) 15 App. Cas. 223.

through the fault or negligence of the men in charge of the brig or of the steamer *Thrush*, or through the fault or neglect of the men in charge of and working in both the vessels, they (the plaintiffs) claimed damages or compensation from both sets of defendants either jointly or severally. Rupees 4,000 was claimed by the plaintiffs on account of the price of the salt, Rs. 360 as the freight paid, and Rs. 1,000 as the probable profit which the plaintiffs could have made by selling the salt.

The defence of the India General Steam Navigation Company mainly was that they were not liable to any damages, inasmuch as the brigmen were at fault, and that the collision was brought about for want of the brigmen's want of skill, and for negligence in not having side-lights as prescribed by the rules of navigation. The Sowdagar defendants denied their liability, on the ground that the collision was due to the fault and negligence of the men in charge of and working in the steamer *Thrush*.

The Subordinate Judge of Dacca, although he found that the sailing vessel *Cabul* had no side-lights, yet held that both the vessels were at fault, and decreed the plaintiffs' suit against both sets of defendants.

Mr. A. M. Dunne (*Mr. G. B. Macnair*, *Mr. C. T. Geddes* and *Dr. Ashutosh Mookerjee* with him) for the appellants. The men of the steamer *Thrush* took all necessary precautions that they could under the circumstances of the case. There was no negligence on their part. Even admitting the *serang* gave an order to 'starboard' instead of to 'port the helm' it was not expected that he would be able to keep perfect nerve and presence of mind, having been placed in extreme danger. The observations of the Master of the Rolls in the case of the *Bywell Castle* (1) are applicable to this case. The same view was taken in the case of the *Owners of the Ship "Tasmania"* v. *Smith* (2). The Lower Court having found that the brig had no side-lights it was wrong to hold the steamer *Thrush* liable, there being no negligence on her part.

Babu Lal Mohan Das (*Babu Akshoy Kumar Banerjee* with him) for the plaintiffs-respondent. It is a rule in cases of collision

(1) (1879) 4. P. D. 219, 226. (2) (1890) 15 App. Cas. 223.

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between a steamer and a sailing ship, that although the latter may have been guilty of negligence or may not have observed the general steering and sailing regulations, yet the steamer will be held culpable if it appears it was in her power to have avoided the collision: see *William Inman* v. *Reck* (1). In the case of *Ookerda Poonsey* v. *The Steam-ship "Savitri"* (2) both the vessels were held to blame for the collision, and both the owners were held jointly liable. In this case as it appears from the evidence of the *serang* of the steamer *Thrush* that the order given was to "starboard" instead of to "port the helm" which would have been the proper order. That being so, both the vessels were to be held responsible for the collision.

MACLEAN C.J. There are two appeals in this suit, and I will deal with the appeal of the India General Steam Navigation Company, Limited, in the first instance, for that is by far the more important.

The suit is one by a firm of merchants at Chittagong against the Company I have named, and certain other defendants whom I will call the Sowdagar defendants. The claim was for a sum of five or six thousand rupees under the following circumstances:—

On the 29th of July 1896, the plaintiffs, at Chittagong, shipped on board a sailing brig, called the *Cabul*, 4,000 maunds of non-duty-paid salt, the brig belonging to the Sowdagar defendants, to be conveyed to Naraingunge. They paid by way of freight Rs. 360. The brig proceeded on her voyage to Naraingunge, and in the river Meghna collided with a steamer called the *Thrush* (belonging to the defendant Company) on the evening of the 8th of August at about 7 or 8 o'clock. The result of the collision was that a large hole was made on the port-side of the brig, with the ultimate result that the salt was destroyed. The plaintiffs are now suing both the Company and the Sowdagar defendants for the recovery of the value of the salt. They claim Rs. 4,000 as the value of the salt, Rs. 1,000 for the loss of profits, and Rs. 360 for the freight which they paid.

(1) (1868) L. R. 2. P. C. A. 25, 30. (2) (1886) I. L. R. 10 Bom. 408.

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In the appeal I am dealing with, all we have to consider is whether there was any negligence on the part of the Company.

The steamer was proceeding down the river at the rate of about 8 or 9 miles an hour, and, undoubtedly, had all her lights up; for it is admitted, in the evidence of the first witness called for the plaintiff, that the brig saw the lights of the steamer some three or four miles away. The brig was apparently making her way up the river on the left bank, and it is quite clear upon the evidence, and it was so found by the Court below, that the brig had no lights.

Before the plaintiffs can recover from the defendant Company, they must make out that there was negligence on the part of the Company. That is a question to be determined upon the evidence, and, upon the evidence, I think the conclusion of the Court below, that there was negligence on the part of the steamer is not well founded.

The evidence for the plaintiffs, so far as this point is concerned, was that of the *serang* of the brig, whom the plaintiffs called, and the *serang* of the steamer whom they also called.

The *serang* of the brig naturally tried to make out that the vessel had her lights up; but, as I have said, I do not think that case has been substantiated. As regards the collision itself, what he says is that they saw the steamer at a distance of 3 or 4 miles away. "The wind not being strong, our vessel" (the brig) "was proceeding slowly. I saw before the collision had taken place that the Company's steamer was coming from north towards the south. I could not understand at what distance from the banks was the Company's steamer coming. At last when it came near I saw that it was coming in front. From a distance of 200 or 250 cubits, I saw that the Company's steamer was coming in front. Then we shouted loud and blew the horn. When it lay at a distance of 10 or 12 cubits, we turned the helm from behind the vessel, and we turned it so that the prow of the vessel might go towards the bank. After the turning, the prow of the vessel proceeded towards the bank. My vessel was not saved; the steamer came and cut open my vessel at a distance of 5 or 6 cubits from the helm, towards the front." He also says: "The prow of the Company's steamer came and struck and cut my vessel. It cut on

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the left side of our vessel." Pausing here for a moment, it was the duty of the steamer, as between the steamer and the sailing vessel, to keep clear of the latter, if it could; but as the ship had no lights up, it is shown that those on the steamer did not see the brig until they were quite upon her. In the evidence of this witness there is nothing to show that the steamer was guilty of any negligence.

I pass to the evidence of the *serang* of the steamer whom the plaintiffs thought fit to call; and the important part of his evidence is that which I am about to read:—"I was on the upper deck when the collision took place. I was where the helm is worked. The brig *Cabul* was coming from south to north. From a distance of 50 or 60 cubits we saw something like a jungle. There was no light. It did not appear to us to be a vessel. I told some one to whistle and I told the person who was with me "*dao-sookani.*" By *dao-sookani* the vessel goes to the right. I stopped the engine and steered back. I stopped the engine and gave directions 'to back her,' and as this was being done the collision took place. When the collision took place, I did not see any light in the brig *Cabul*. It was after the collision that I saw one white light in that vessel." Later on he says: "The collision did not take place with force, but gently, because we backed our steamer and the engine was moving backward, but the steamer was moving forward. Before we stopped that night, we were going at a speed of 7 or 8 miles an hour." Later on he says: "If it be said *sookani-dao*, the wheel of the helm has to be turned to the right, and in that case the head of the steamer goes to the right. If we are to turn to the left, it is said "*ujao-sookan.*" When I stopped her I said *dao-sookan* and when I backed her I directed to keep the *sookan* in the middle." I suppose he means that he gave directions to keep the helm steady.

This is all the evidence adduced against the Company by the plaintiffs, and it comes to this. When the steamer was almost upon the brig, the brig having no lights, they saw something that looked like a jungle. The *serang* did what I understood the learned pleader for the plaintiffs to say he ought to have done. He at once signalled to the engine room to stop and to go astern, and he directed the helmsman to port the helm. Of course, after

she had been directed to go astern, there would still be much way on the steamer, which would carry her on some distance.

It is said the order was right, but it was given too late; but the plaintiff's evidence shews that there is no foundation for this. It seems to me upon that evidence that the serang did all that it was possible under the circumstances to do. He did all that could reasonably be expected of him, placed so suddenly in a serious emergency.

Upon this evidence, the Company might have asked the Court below to hold that there was no evidence of negligence on their part. It is true that a witness of the name of Salgadu says that he saw lights on the brig. His evidence is very unsatisfactory, and I am perfectly satisfied that from the place where he was standing on the steamer, he could not see the brig at all.

However, the defendant Company went into evidence, and, it is upon that of the helmsman of the steamer that the Judge in the Court below has found negligence against the steamer.

Before I deal with that evidence, I will deal with that of Mr. Goertz, a mariner and a travelling agent of the Company. He gives this account of what took place: "Shortly before arrival at Sytenal, something was ahead of us. That something appeared like a fog, at a distance of not more than 200 or 300 feet. The fog turned out eventually to be a brig coming from the south. Immediately I saw the fog, I told the *serang* to port his helm. By that expression I mean to turn the wheel towards the right which would cause the steamer's head to go towards the right hand also. The *serang* of the vessel telegraphed the order to put the engine full speed astern. That was done at the same time my order was carried out. Not more than one minute after the orders were carried out (as far as I remember) the collision took place. We heard no noise, nothing from the brig before the collision, while the the steamer whistled several times, between the time we saw the fog, and the collision took place. During the whole of this time I was on the upper fore-deck watching everything that happened. I saw no lights whatever on the brig, until the time we struck. If there had been lights on the brig, I would have seen them some time before" Later on he says: "The engine, though reversed, the steamer was going

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ahead." Then later on he says, in his cross-examination on behalf of the plaintiffs: "When I saw the black mass I shouted out the order *dao-sookan*, not referring to any particular person, and simultaneously the *serang* telegraphed to stop the engine and reversed them, and there was a response from the engine-workers. The order I shouted out was carried out, and to my hearing no separate order was given by the *serang*." No doubt the *serang* says that he gave the order too, but it does not follow in the least that his statement is inconsistent with what this witness says. There is a uniformity of statement that the precise order given was to port the helm, to stop the engine and to go astern, and it was carried out. Later on he says: "I saw the man *sookani* to turn the wheel to the right," the effect of which would be to port the helm.

Now if the matter stood there, I think there can be no question that under the emergency of the moment, the proper orders were given. If the case stood on that evidence, it seems perfectly clear that there was no negligence on the part of the steamer.

I now come to the evidence of the helmsman. He says: "Then it was dark night and we went along and we saw something like a jungle. The *serang* ordered the *khalasi* to whistle and the *khalasi* whistled. Then at a distance of 20 or 25 cubits, something like a vessel and white sail were seen, and then the *serang* gave the order to stop her. Then the *serang* backed and told me to go to the left. When backed, the steamer was going forward. When the steamer is backed and the *sookani* goes to the left, the prow of the steamer goes to the right. Although backed, the steamer was still going forward. When the steamer was going slowly forward and the brig was coming, the collision took place. The brig was coming from the south to the north. The brig was before in front of us, and by the collision taking place, it went to the left. There was no light in that brig." Then in his cross-examination for the defendants, he says: "When it was backed, the *serang* said, turn the wheel to the left. Then I turned the wheel of the steamer to the left." Later on he says: "I turned the wheel by order of the *serang*. The order was given as usual *sookan-ujao* and the order to the contrary is *sookan dao*." It was urged for the appellant Company that this statement of his

"when it was backed" refers not to the immediate moment when the order was given by the *serang* to the engine room, to stop and to go astern, but to some later period, perhaps after the collision, when the steamer was backing to get clear of the brig. The proper order no doubt would have been to port the helm; and the Court below finds the steamer guilty of negligence on the ground that on this man's evidence the order was given to starboard the helm. There has been a suit between the owners of the brig and the owners of the steamer, the owners of the brig, as I understand, charging the steamer with negligence in respect of this collision. We have been told that that suit resulted in favour of the Company. In that suit this helmsman gave evidence and, in some way which I am unable to account for, his deposition has been admitted as evidence in the present case. In that deposition he undoubtedly said that the *serang's* orders were to port the helm, which is consistent with what the *serang* and Mr. Goertz say. I do not rely upon this deposition. It is unfortunate that, there being this deposition, he was not asked in his re-examination some question as to what he had said in the previous suit.

To my mind the brig was entirely in fault for having no lights. But even if in the moment of emergency the *serang* gave an order to starboard instead of to port the helm, it seems to me, that, having regard to the fact that the accident in its inception must be taken to be attributable to the gross negligence of the brig in carrying no lights, the observations of the late Master of the Rolls in the case of the *Bywell Castle* (1) in which observations Lord Herschell, when Lord Chancellor, concurred [see *The Tasmania* (2)] would apply to the circumstances of the case now under enquiry. "I am clearly of opinion that when one ship by her wrongful act suddenly puts another ship into a difficulty of this kind, we cannot expect the same amount of skill as we should under other circumstances. Any Court ought to make the very greatest allowance for a captain or pilot suddenly put into such difficult circumstances, and the Court ought not in fairness and justice to him to require perfect nerve and presence of mind enabling him to do the best thing possible." The evidence

(1) (1879) 4. P. D. 219, 226. (2) (1890) 15 App. Cas. 223, 226.

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however, to my mind, establishes that the order given was to port and not to starboard the helm.

On these grounds the appeal must succeed and the suit as against the Company must be dismissed with costs, including the cost of this appeal, to be paid by the plaintiffs to the defendant Company.

GEIDT J. I concur.

Appeal allowed.

S. C. G.

CIVIL RULE.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, and Mr. Justice Stevens.

IN RE PURNA CHANDRA DUTT.*

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Jan. 26.

Professional Misconduct—Appropriation of client's money by Pleader—Legal Practitioners' Act (XVIII of 1879.) s. 13.

A pleader, by virtue of a power-of-attorney given to him by his client, drew out a certain decretal amount from Court, and applied the same to his own purpose. When the client asked for the money, the pleader promised to pay at at a subsequent date. On that date the amount was not paid, but he gave a promissory note to his client for the sum. Ultimately the client had to bring an action for the money:—

Held, that such conduct on the part of the pleader was grossly improper in the discharge of his professional duties within the meaning of s. 13 of the Legal Practitioners'. Act.

In the matter of a Solicitor (1) dissented from.

RULE under s. 13 of the Legal Practitioners' Act (XVIII of 1879).

Messrs. J. B. Picton & Co. brought a suit and obtained a decree in the Court of Small Causes, Calcutta, against one Bhoot Nath Majumdar for Rs. 1,657-6. Babu Purna Chandra Dutt was

* Civil Rule No. 3605 of 1902.

(1) (1895) 11 T. L. R. 169.