Privy Council Appeal No. 48 of 1939
Bengal Appeal No. 28 of 1937

Messrs. T. & J. Brocklebank, Limited - - - - - - *Appellant*

v.

Noor Ahmode - - - - - - - - - - - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 18TH JULY, 1940

Present at the Hearing:
VISCOUNT MAUGHAM
LORD WRIGHT
SIR GEORGE RANKIN

[*Delivered by* LORD WRIGHT.]

This is an appeal from the amended decree of the High Court of Judicature at Fort William in Bengal (exercising its Appellate Civil Jurisdiction), dated the 25th January, 1938, allowing an appeal and cross-appeal from a judgment and decree of the Subordinate Judge of the Fourth Court, 24 Parganas at Alipore in Money Suit No. 96 of 1934 dated the 31st July, 1935.

The question for determination is whether or no the respondent is entitled to recover damages from the appellants in respect of an illness from which he suffered while, and since, serving as a lascar on board the appellants' steamship "Markhor" on a voyage from Calcutta to ports on the east coast of North America and the United Kingdom in and about the months of September and October, 1933.

The claim was for damages for the negligence of the Master or the Chief Steward of the "Markhor" or both of them for not taking proper steps to deal with the illness of the respondent. The action was originally brought not only against the appellants, but against the ship's agents at Calcutta, and also the Master and the Chief Steward. The action was brought in the Fourth Court of the Subordinate Judge at 24 Parganas at Alipore. In that Court the ship's agents were dismissed from the action, and so also were the Master and Chief Steward. But judgment was given against the appellants for Rs.1,500 for pain and suffering and special damage. The total claim had been for not only Rs.1,500 for pain and suffering and special damage, but a further Rs.19,000 for general damages. The Subordinate Judge dismissed that latter claim as adventitious and absurd. Before the High Court there were appeals and cross-appeals. The appeals against the Master and Chief Steward were not

proceeded with and these parties went out of the proceedings. The High Court upheld the judgment of the Subordinate Judge in so far as the Court held the appellants liable in damages, but did so on quite different grounds from those on which the Subordinate Judge gave his judgment. On the respondent's cross-appeal on damages the High Court held that the sum awarded by the Subordinate Judge was inadequate and increased the award to Rs.5,000.

The grounds of claim were originally twofold. But one of these grounds was negatived by both Courts below. It depended on an issue of fact and in their Lordships' opinion the concurrent finding of fact should stand. That ground of claim was based on the terms of the statutory articles of agreement under which the appellant agreed to serve on the "Markhor." One of the provisions of the articles was that the lascar crew (which included the respondent) should not serve between the 1st October in any one year and the 31st March in the next year on voyages to any port on the east coast of North America north of 38°N. latitude. The respondent claimed that that provision had been broken. The appellants' witnesses denied that any lascars (including the respondent) had worked in contravention of that provision. The Judges in both Courts accepted the evidence called on behalf of the appellants, which was supported by entries in the official log book. This ground of claim accordingly failed, and need not be further considered.

The other ground of complaint was that there had been a failure on the part of the Master and Chief Steward to exercise proper care in regard to the illness from which the respondent suffered during the voyage. The voyage on which the respondent was engaged was from Calcutta to Atlantic ports in North America. The respondent fell ill near Gibraltar, on or about the 18th September, 1933, with a bad cold. He did not do any further work on the vessel till he was discharged on the 3rd November, 1933, at Avonmouth, where the doctor diagnosed the illness from which he was suffering to be phthisis, and advised his removal to hospital. This was done. He was eventually after treatment sent back to India as a distressed seaman, where he was finally discharged. The medical officer at Avonmouth gave a certificate that the respondent was suffering from advanced phthisis. It is not disputed that the respondent's health has since been very bad.

After the respondent fell ill, the ship reached ports in America and England as follows:—

28th September	Boston.
2nd October	New York.
5th October	Philadelphia.
7th October	Baltimore.
10th October	Norfolk, Va.
11th October	Newport News.
14th October	New York.
16th October	Boston.
29th October	London.
30th October	Southampton.
3rd November	Avonmouth.

There was a serious variance between the respondent's account of what happened on the voyage and that given by the appellants' witnesses. But in substance the Judges in both Courts accepted the evidence of the witnesses called by the appellants, which may be thus summarised.

When the respondent fell ill, he was with the approval of the Master, given cough mixture by the Chief Steward, whose duty it was to administer medical attention to sick members of the crew. About the same time warm clothing was issued to all the deck lascars, including the respondent. When the ship reached Boston on the 28th September, 1933, there was a special muster of the crew for the United States quarantine authorities, and the respondent was examined by the Port Medical Officer, on whose advice he was put on a diet of eggs and milk, and was given medicine and codliver oil. At every subsequent port of call the respondent was examined by doctors habitually employed by the appellants. At Philadelphia and Norfolk the Master (according to his evidence) requested the doctors to have the respondent removed to hospital, but they each said that it was not a hospital case. Without the authority of a doctor the respondent could not be removed to a hospital on shore. On the second call at Boston the doctor gave the respondent enough codliver oil for the voyage to London, and at London the doctor who examined the respondent gave him turpentine liniment for massaging his throat and chest. There is a conflict of evidence as to whether there was a medical examination of the respondent at London. The Chief Steward deposed that there was, but the Master denied this. This last question cannot be regarded as very material, as it was only a very few days between the time when the ship was at London and her arrival at Avonmouth, where, as already stated, on the advice of the doctor who in accordance with the practice of the appellants examined the respondent, and who diagnosed phthisis he was removed to hospital.

The Subordinate Judge held the appellants responsible to the respondent in damages on the ground that the cause of the respondent's damage was the negligence of the doctors engaged by the appellants at the various ports of call in not diagnosing the respondent's condition as tubercular or indeed as anything worse than a common cold. But negligence on the part of these doctors was not pleaded as a cause of action, and no evidence was given on the point. Neither they nor the appellants had any opportunity of answering such a case. No evidence was given as to the relationship between the doctors at the various ports and the appellants. There is nothing in the evidence to justify the conclusion that the doctors were negligent or that even if they were negligent the appellants were responsible for that negligence. The High Court rightly reversed the finding of the Subordinate Judge on that point.

But the High Court held that the appellants were responsible for the negligence of the Master and Chief Steward which the Court found. The Court held that the

Master and Chief Steward had failed to take proper care of the respondent when they knew he had a bad cold. The High Court expressed their opinion in these words:—

> " . . . We have no hesitation in expressing our concurrence with the view indicated in the judgment of the Court below, that the Defendant No. 3 should have in view of the prolonged illness of the Plaintiff, suspected something serious with the Plaintiff, and to that has to be added that the negligence in this behalf was fully shared by the Chief Steward, whose duty was to look after the ailing crew on board the ship. In our judgment, the Chief Steward, charged with the duty of attending to complaints in cases of sickness, and the Master of the vessel, who by the very nature of things, exercised the functions of the owners of the ship when on high seas, for the purpose of looking after the health and safety of the crew employed on the ship, were careless and negligent in the matter of taking reasonable and proper care of the Plaintiff in his illness, which within the period of time from the 18th September to the 3rd November, 1933, had developed into an advanced case of phthisis. The Plaintiff, on account of the omission on the part of the servants of the Defendant No. 1 had been placed in a position of risk of life. If the life of the Plaintiff has been saved, he has according to medical evidence, been incapacitated from doing work for the rest of his life."

Their Lordships, after carefully considering the evidence, have found themselves unable to concur in this view.

There is a want of authority as to the precise extent of the duty of a shipowner in regard to the securing of the health and safety of the crew. But the responsibility of the owner in these respects is in general limited to the exercise of reasonable care, though a higher degree of responsibility may be imposed on him by statute, in which case the duty is generally imposed in mandatory terms. In *Couch* v. *Steel,* 3 E. & B. 402, the allegation was that the seaman had suffered in health, and become ill because of the unseaworthy and leaking condition of the ship, by reason of which he was continually wet and was compelled to undergo excessive and unreasonable labour. The seaman's claim was rejected. It could only, it was held, be maintained in the absence of proof of an express warranty or of knowledge or want of due care, if there was an implied warranty by the shipowner to the seaman that the ship was seaworthy. But the warranty of seaworthiness which is implied, where not excluded in marine insurance policies or bills of lading, is not, it was held in *Couch* v. *Steel* (*supra*) to be implied in agreements between shipowners and seamen, though it may be in some cases imposed by statute. But there was in that case a second count alleging that the plaintiff could not be cured of his illness because the shipowner, the defendant, had neglected to provide a proper supply of medicines suitable to diseases arising on sea voyages. That claim was based on a statutory obligation laid upon the defendant by section 18, 7 & 8 Vict. c. 112. This, it was held, was not an obligation which could be fulfilled by the exercise of care but was positive in its terms. The plaintiff was accordingly held entitled to recover on that count on proof that a proper supply had not in fact been pro-

vided. A similar provision is now contained in section 200 of the Merchant Shipping Act, 1894. There are also various other provisions in the Act dealing with medical attendance. Thus section 209 provides that a foreign-going ship is to carry a fully qualified medical practitioner if she has on board 100 persons or upwards. Again, section 458 puts on a shipowner an obligation which is to be deemed to be part of the agreement with the seamen that he should use all reasonable means to ensure that the ship is seaworthy when the voyage commences and to keep her seaworthy during the voyage. In the present case there is no claim that any of these statutory obligations have been infringed. The "Markhor" carried less than 100 persons. It is not suggested that she was unseaworthy in any respect, or that she was not equipped with medical stores or did not in any other respects satisfy the requirements of the Act. Section 34 of the Merchant Shipping Act, 1906, requires that all expenses of medical attendance and all expenses of medicines on the voyage are to be defrayed by the shipowner. There is no complaint on this head.

The ground on which the High Court held the appellants liable was for breach of their common law obligations which were for purposes of this case taken to be to require the exercise of due care in attending to and looking after the health of the seamen by themselves and their servants. The shipowners were not held to have been personally guilty of any neglect or default. No defects were found in the equipment of the vessel or in regard to the competence of the officers or to the system of working the ship. The negligence which was found was purely that of the Master and the Chief Steward, as stated in the passage just quoted from the judgment of the High Court. Their Lordships, after carefully considering the whole of the evidence, find themselves unable to concur in the judgment of the High Court. There was, in their opinion, no evidence which would justify a finding that the Master and Chief Steward or either of them were careless or negligent in the matter of taking reasonable and proper care of the respondent. On the contrary, their Lordships are of opinion that on the evidence the two officers did all that was possible for them to do under the circumstances. The only other thing that might have been done was to land the respondent and put him in hospital at one of the United States ports. But that could not have been done unless the terms of section 36 of the Merchant Shipping Act, 1906, were satisfied, that is that a certificate of the proper authority, who was, under section 49, in this case, the British Consular Officer, had been obtained, stating the cause of the seaman being left behind, as, for instance, unfitness or inability to proceed to sea. Furthermore, the Immigration Authorities in the United States would not allow a seaman to be landed at their ports unless for sufficient grounds. The evidence is that the Master, both at Philadelphia and Norfolk, requested the doctors who examined the respondent to have him removed to hospital, but they said that it was not a hospital case. All that the Master could do was to follow the directions of the different

medical men who examined the respondent at the different ports, and to supply him with the special diet, eggs and milk, and the special remedies, cod liver oil and liniment, which were prescribed. The respondent was off duty all the time after the 18th September, 1933. There is no reason to hold that the Master did not suspect that something serious was the matter with the respondent He did all that could be done on the ship. The difficulty was that the medical officers at the various ports would not certify that it was a hospital case. The Master and Chief Steward could not be held blameworthy for that.

There was no satisfactory medical evidence as to the general nature and symptoms of phthisis or as to the development of the disease in this case.

Their Lordships are of opinion that the claim fails and that the judgment of the High Court should be set aside because it has not been established that the Master and Chief Steward or either of them failed in their duty to the respondent.

This conclusion is sufficient to dispose of the case against the appellants but in the High Court the appellants raised a further defence based on the doctrine of common employment. It was said that even if the Master and Chief Steward were negligent, they were fellow servants of the respondent and hence the appellants were entitled to plead common employment as a defence. This question was first raised in the High Court. It was not raised either in the written statement filed in the suit, or at the hearing before the Subordinate Judge. As their Lordships understand the judgment of the High Court on this point, they were of opinion that as the decision of the question depended on evidence in the particular case, it could not be allowed to be argued in face of objections to that course made by the respondent. Their Lordships are not willing to overrule the discretion of the High Court on this point. There is also now the further and conclusive objection that as their Lordships have decided that the Master and Chief Steward were not guilty of negligence, the point would not in any event have been material.

Their Lordships might leave the matter there. But the High Court, though, it seems, without departing from their decision that the point was not open to the appellants, did go on to make some observations on the doctrine of common employment. Their Lordships do not think it proper in this case to examine in any detail this doctrine or its applicability in the law of India. But they will remark that if the law of England had applied, the shipowners could have raised a defence based on the doctrine of common employment to a claim by a seaman against them based on negligence of a fellow servant, including in that category the Master of the vessel. Such a claim was rejected on that ground by the House of Lords in *Hedley* v. *Pinkney and Son's Steamship Company* [1894] A.C. 222. Lord Herschell at p. 226, said:—

> "My Lords, it cannot be doubted that there was evidence of negligence on the part of the master of the vessel, but it is equally free from doubt that if he is to be regarded as the servant of the

owner engaged in a common employment with the seaman who lost his life, liability does not, in the existing state of the law, attach to the respondents. It was argued that the master of a vessel, although in some respects the servant of the shipowner, possesses in relation to the crew powers and duties independent of him, and that the law which exempts a master from liability to his servant for the negligence of another servant engaged in a common employment with him did not apply in such a case.

"The only authority cited for this proposition was a case of *Ramsay* v. *Quinn*, in the Court of Common Pleas (Ireland) 8 Ir. Rep. C.L. 322. But in view of the judgment of this House in *Wilson* v. *Merry*, Law Rep. I H.L., Sc. 326, which was recently considered in the case of *Johnson* v. *Lindsay*, [1891] A.C. 371, I do not think it is possible to give effect to the contention of the appellant."

The House then went on to consider an alternative claim based not on negligence but on a breach of the statutory obligation of the shipowner to provide a seaworthy ship. That claim did not depend on negligence in the ordinary sense and the doctrine of common employment did not apply. But it failed because the House held that the ship was not in fact unseaworthy. There has recently been in the House of Lords a discussion of the doctrine in *Radcliffe* v. *Ribble Motor Services, Ltd.* [1939] A.C. 215, where it was held that the basis of the doctrine was the implied contract by the servant to accept the risk of his fellow servants' negligence (see Lord Atkin at p. 227), and that if the contract was to be implied the servants must be engaged in common work, that is, work which necessarily and naturally or in the normal course involves juxtaposition, local or causal, of the fellow employees, and exposure to the risk of the negligence of the one affecting the other. It was held in *Radcliffe's* case (*supra*) that this condition was not fulfilled. But *Hedley's* case (*supra*) shows that difference in grade and responsibility does not exclude the doctrine, so long as the nexus exists. Similarly in *Wilson* v. *Merry*, L.R. I, H.L. (Sc.) 326, it was held that there was common employment between a miner and a works manager of the mine.

But there is a serious question whether the doctrine of common employment is part of the law of India. It has been severely criticised in England by many high judicial authorities, as, for instance, in *Radcliffe's* case, *Wilsons & Clyde Coal Co.* v. *English* [1938] A.C.57, and in many other judgments. It has indeed in England only been made endurable by reason of legislative measures. Thus the Employers Liability Act, 1880, established exceptions to its application, though with restrictions as to mode of procedure and amount of damages recoverable which made the Act unsatisfactory. Later there came the series of Workmen's Compensation Acts commencing with that of 1897 which have given the workman rights against his employer in the nature of insurance against the risk of injury arising out of and in the course of his employment apart from negligence. These measures have made the doctrine of common employment less objectionable in England. In addition the doctrine does not apply to

claims by workmen for injuries caused by breaches of statutory duties imposed for their protection or for breach of duties personal to the employer. Questions have been raised whether a doctrine so unsatisfactory both as to its policy and as to its practical results ought to be followed at all or at any rate without qualifications by the Indian Courts as a part of the law of India, particularly when in England it has been qualified and largely abrogated by legislation which has no counterpart in India. Thus in *Secretary of State* v. *Rukhmini Bai,* A.I.R. 1937, Nag. 354, Stone C.J., in the Nagpur High Court, refused to apply it. It may further be observed that the fiction of an implied contract has always been regarded as difficult, but it becomes even more difficult to accept in the case of a workman like a lascar. But their Lordships do not desire to discuss or express any opinion upon this important question since it does not arise in this case. It must be left for full discussion in some case in which it is material and has been fully argued.

In the result they are of opinion that the appeal should be allowed, the judgments below should be set aside and judgment should be entered for the appellants.

They will humbly so advise His Majesty.

In the circumstances there will be no order respecting costs either in the Courts below or of this appeal.

(25352) Wt. 8017—49 170 8/40 P. St. G. 338

In the Privy Council

MESSRS. T. & J. BROCKLEBANK, LIMITED

v.

NOOR AHMODE

DELIVERED BY LORD WRIGHT

Printed by HIS MAJESTY'S STATIONERY OFFICE PRESS
Pocock Street, S.E.1.

1940