Rungta Sons Private Ltd. and Another Vs The Owners, Masters and Parties Interested in S.S. ''Edison Mariner'' and Another

Court: Calcutta High Court

Date of Decision: March 21, 1961

Acts Referred: Civil Procedure Code, 1908 (CPC) â€" Section 1, 2(2), 20, 21
Constitution of India, 1950 â€" Article 225, 86, 93
Government of India Act, 1915 â€" Section 106
Government of India Act, 1935 â€" Section 18(2), 2(3)(a), 223, 46, 6
Sales of Goods Act, 1930 â€" Section 19, 2, 2(8), 20, 21

Citation: 66 CWN 1083

Hon'ble Judges: G.K. Mitter, J

Bench: Single Bench

Advocate: A.C. Mitra, R.C. Deb, S.N. Shoroff and A.K. Ghose, for the Appellant;B. Das, S. Ghose and T. Base (Jr.), for the Respondent

Final Decision: Dismissed

Judgement

G.K. Mitter, J.
The main question involved in this suit is one of jurisdiction of this court to entertain it. The defendants are two in number,

the first defendant being described as the owners, masters and parties interested in s. s. ''Edison Mariner''. The second defendant is Jugometal

TRG Republike 3 Beograd in Jugoslavia. There are two plaintiffs, the first being Rungta Sons Private Limited, a company carrying on business in

the town of Calcutta: the second plaintiff Madan Gopal Rungta is a director of the first plaintiff. The case laid in the plaint is as follows:

(A) The first plaintiff entered into a contract for sale to the second defendant of 10,000 Long Tons of Iron Ore (Magnetite) 10 p.c. more or less

depending on charter party conditions at buyer''s option on terms and conditions contained in a written document annexed to the plaint and marked

''A''. The main terms of the contract are as under:

(a) Shipment during February / June, 1957;

(b) payment to be made under an irrevocable, divisible and transferable letter of credit opened by the buyer in favour of the seller with a validity of

60 days (to be extended, if necessary), following the date of the opening of the credit, in English pounds with a first class bank of India. Letter of

credit to be opened by the end of December 1956 covering 100 p.c. of the goods value based on 65 p.c. Fe. content. Provisional payment under

the letter of credit to be made against the following documents:

Full set bills of lading to order Jugometal Beograd, notifying the forwarding agent appointed by Jugometal Beograd. Provisional invoice, at the rate

of 95 per cent. of the goods'' value, on basis of the weight and fore analysis results shown in the certificate issued by Surveillance, after deducting

the total moisture from the gross weight and computing the value of the dry net weight. Surveillance''s certificate on the preliminary sampling

determined weights, preliminary moisture determination and fore-analysis.

Copy of cable of Jugometal advising forwarding of goods. Final settlement to be made on the basis of dry weight determined at the discharge of

goods at the percentage of Fe. content determined on the basis of exchange of analysis.

(B) The second defendant opened a letter of credit on or about February 12, 1957 for Ã¯Â¿Â½ 21250 through the United Commercial Bank Ltd.,

Calcutta, in favour of the plaintiff representing the value of 5000 tons of iron ore. The plaintiff effected shipment of 3510 Long Tons of ore by s. s.

''Alriadah'' on or about March 4, 1957 leaving a balance of 6490 tons to be shipped and utilised the letter of credit to the extent of Ã¯Â¿Â½

15,168.2s.2d. being the value of 3510 tons of iron ore shipped as aforesaid.

(C) By exchange of cables between the plaintiff and the second defendant in Yugoslavia it was agreed that the balance of the goods were to be

shipped by s. s. ''Edison Mariner'' chartered for the purpose by the second defendant by July 10, 1957 from the Port of Calcutta. The plaintiff

received a copy of the charter party sent by the second defendant on June 11, 1957 on or about July, 22, 1957. The charter party provided inter

alia, that the steamer would load at Calcutta as much cargo as her master would consider proper but not more than the steamer could take to safe

draft for navigating in the Hooghly and the balance of the cargo would be loaded in the Port of Madras.

(D) The Steamship ''Edison Mariner'' arrived at the Port of Calcutta on or about June 13, 1957 but was not ready to load iron ore until June 25,

1957. At the request of the Master of the said steamship and the charterer''s agents the plaintiffs shipped 7037 long tons of the said goods on

board the said steamship between June 25, 1957 and July 16, 1957.

(E) On account of the inability of the Master of the steamship to put her alongside a loading berth in the Port of Calcutta, the steamer was moored

midstream at West Buoy, King George''s Docks, Kidderpore and goods were put on board on the said steamship midstream by employing lorries

and country boats by reason whereof the plaintiff had to incur additional expenditure amounting to Rs. 45,000/-. The plaintiffs never intended to

incur the said expenses gratuitously and having had the benefit thereof the second defendant is liable to pay the same to the plaintiffs.

(F) By cable dated July 17, 1957 the plaintiff informed the second defendant at Beograd of having shipped the goods by the said steamer under

the letter of credit and requested the second defendant to increase the quantity under the contract to the quantity shipped as also to increase the

amount of the letter of credit to the price of the goods shipped and to amend the shipping date to July 17, 1957 in the letter of credit as promised

by the second defendant and as the second defendant was obliged to do under the terms of the contract. By cable dated July 19, 1957 received

by the plaintiff in Calcutta on July 20, 1957, the second defendant acceded to all the requests of the plaintiff contained in the aforesaid cable dated

July 17, 1957 and informed the plaintiff that it had instructed the bank to increase the credit and requested the plaintiff to ask the bank to mail

documents by the first plane.

(G) On or about July 24, 1957 the plaintiff No. 1 was informed by the United Commercial Bank Ltd., bankers of the second defendant, that the

latter had not amended the letter of credit nor the shipping date with the result that the plaintiff was unable to operate Flag. on the said letter of

credit although the plaintiff No. 1 was ready and willing to deliver all necessary shipping documents under the agreement to the bank against

payment by the bank of the plaintiff"s dues.

(H) In the belief that the defendants would pay the price of the goods shipped the plaintiffs caused the bills of lading relating to the goods to be

made out in the name of the second defendant The said bill of lading are still In possession of the plaintiff and the parties never intended that the

property in the goods would pass to the buyer before the payment of the price of the goods in terms of the contract.

(I) S. S. "Edison Mariner" left the Port of Calcutta on July 18, 1957 with the plaintiff"s goods bound for the Port of Madras.

(J) In breach of its obligations under the contract the second defendant failed and neglected to arrange for payment of the plaintiff"s dues and

threatened to remove the goods in the said steamer from the Port of Madras and the Republic of India without paying the value thereof unless the

said steamship and cargo were immediately arrested by or under the orders of this court.

(K) The first defendant was the authorised representative and agent of the second defendant in the matter of taking delivery of the cargo and

carriage of the same under the charter party and had acted as such.

(L) The steamship "Edison Mariner" was a vessel sailing under U. S.

2. The owner of the said steamship was not domiciled in India nor was the ship registered in this country. The second defendant had no place of

business in India nor had it any agents in India or any other assets in India.

3. On the above allegations along with the averments made in paragraph 16 of the plaint that the second defendant owed to the plaintiff the sum of

Rs. 4,50,880.80nP. made up of two items, namely, the price of the goods shipped at the contract rate Rs. 4,05,880, 80 nP. and lorry and boat

hire amounting to Rs. 45,000/-, the plaintiff asked for a decree for the said total sum against the defendants and the steamship with her cargo,

tackle, apparel, furniture and freight as also for the arrest of the steamship or the said cargo and detention thereof until security was given to the

extent of the plaintiff"s claim and costs and/or unloading of the said cargo at Madras. Further prayers were for sale of the steamship with her cargo

etc. and payment of the sale proceeds to the plaintiffs and enquiry as to damages and decree for such amount as might be found due.

4. The plaint was admitted by this court on July 25, 1957. On the same day, on an ex parte application of the plaintiffs, an order was made for the

arrests and detention of the said steamship at the Port of Madras until the cargo of iron carried therein were discharged or other arrangements

made or security given in respect of the plaintiff"s claim. Pursuant to the said order the steamship was arrested and detained in the Port of Madras.

On August 10, 1957 the second defendant entered appearance in the suit through Messrs. Orr, Dignam & Co. The said appearance was not

under protest of any kind. On August 12, 1957 the second defendant deposited with the Registrar of this court the sum of Rs. 4,50,880,80 nP. as

security for obtaining the release of the said steamship and an order was made that the said steamship and her cargo be released from arrest and

the Registrar should hold the same until the final disposal of the suit. Thereafter the ship with her cargo were released from detention. On

September 4 1957 the second defendant made an application to this Court that the suit be dismissed on the ground that this Court had no

jurisdiction to entertain or try it. The allegations in support of this were inter alia:

(a) The cause of action alleged in the plaint was not one in respect of which the admiralty jurisdiction of the Court could be invoked.

(b) The steamship was lying at the port of Madras when the suit was filed and the order of arrest was made. This Court had no jurisdiction to

entertain the suit for the arrest of the ship lying at Madras.

(c) The steamship was a vessel sailing under U. S. Flag. The owner of the steamship was not domiciled in India and the steamship was not

registered in India.

(d) The second defendant had not at any time any place of business or residence in India.

5. The first defendant did not enter appearance in this suit and the second defendant filed its written statement on November 16, 1957. On January

6, 1958 Bachawat, J. directed that certain preliminary issues including an issue as to whether the suit was maintainable in the Admiralty jurisdiction

of this court should be tried. When the matter appeared on my list in February 1959 it was agreed on all hands that the issue as to jurisdiction was

the most vital one and there being little dispute with regard to the other issues I directed that entire suit should be heard. Thereafter the plaintiff

made an application for amendment of the plaint which was allowed by Ray, J. As a result of this the following new paragraph 17A was inserted in

the plaint after paragraph 17.

The plaintiffs requested the agents and Master of the said steamship on or about July 24, 1957 and July 25, 1957 that the said steamship should

not leave the Port of Madras until the payment in respect of the goods shipped as aforesaid by them and/or any of them per the said steamship was

made by the defendant No. 2 to the plaintiffs or any of them in terms of the said contract and that they should not remove the said steamship from

the Port of Madras without unloading the said goods shipped by the plaintiffs and/or any of them as aforesaid. The said agents and master of the

said steamship have failed and neglected and/or refused to comply with the said requests.

6. By its Written Statement the second defendant pleads:

(a) that the plaintiffs shipped only 3110 tons of iron ore per s.s. ''Alriadah'' and as such Ã¯Â¿Â½ 926/19/7 was paid to them;

(b) by exchange of cables between the plaintiff No. 1 and the second defendant there was an agreement to ship the balance of the goods by July

10, 1957 and the letter of credit was extended accordingly.

(c) S. S. ''Edison Mariner'' was ready to receive the goods on June 24, 1957. The defendant does not admit that 7037 Long Tons of iron ore

were shipped on board the said steamer or that the goods were shipped in performance of or in terms of the contract. The loading took place

between June 26, 1957 and July 17, 1957;

(d) the contract provided that lay days would start counting 24 hours after tender of notice of readiness whether the vessel was berthed or moored

(at such a spot where according to port usages and possibilities loading of ore could take place). The price of the ore was calculated on the basis

''F.O.B. Calcutta trimmed'' so that loading was entirely the responsibility of the plaintiff No. 1. The defendant denies that any extra expenditure as

mentioned in the plaint was incurred or that the defendant is in any way liable to pay the same. The entire loading did not take place midstream.

(e) The defendant never agreed to amend the shipping date. The bills of loading were issued on a date subsequent to the agreed shipment date and

as such they were not in terms of the contract.

(f) The plaintiff No. 1 is not entitled to claim the price of the goods. The said plaintiff never tendered to the defendant or its agents the goods or the

documents of title relating thereto in terms of the contract.

(g) The first defendant never acted as the authorised representative or agent of the second defendant in the matter of taking delivery of the cargo or

carriage of the same.

(h) The second defendant is a non-resident foreign concern and has no place of business in India, the court has no jurisdiction to try the suit against

the defendant.

(i) The alleged cause of action of the plaintiff is not one in respect of which the admiralty jurisdiction of the court can be invoked.

7. The following issues were settled for determination:

(1) Did the plaintiff ship 7037 tons of goods on board the ship in performance of the contract in suit or at the request of the Master or charterers''

agent or at all?

(2) (a) Did the plaintiff incur the loading charges mentioned in paragraph 10 of the plaint or any part thereof?

(b) Is the defendant No. 2 liable for the same?

(3) Did the second defendant agree to all the terms of plaintiff''s cable dated July 17, 1957 as alleged in paragraph 12 of the plaint?

(4) Was the plaintiff ready and willing to deliver the documents mentioned in paragraph 13 of the plaint to the defendant No. 2?

(5) Did the second defendant obtain delivery of the goods in suit or did the first defendant act as the agent of the defendant No. 2 for obtaining

such delivery?

(6) (a) Has this court jurisdiction to entertain this suit?

(b) Has the defendant No. 2 acquiesced or submitted to the jurisdiction of this court?

(c) Is the defendant No. 2 estopped from denying the jurisdiction of this court?

(d) Has the said defendant waived the question of jurisdiction of this court?

(7) Is the plaintiff entitled to the price of goods as alleged in the plaint?

(8) To what reliefs, if any, is the plaintiff entitled?

8. The relevant documents which were proved at the trial were as follows :

Ext. ''A'' is the contract in suit, some of the terms whereof are mentioned in the plaint. The quality mentioned in the contract is ''iron ore 63/65 per

cent. Fe", lumpy, of the chemical analysis and mechanical composition as follows:

Ore with a lesser iron content than 63 p.c. Fe. and higher Slice, Alumine, Phosphorus and Sulphur content than guaranteed, shall be rejected.

Price: sh. 82/6d. (Shillings Eighty two and pence six only) per dry long ton, based on 65 p.c. Fe; FOB Calcutta trimmed.

Scale of sh. 1/6d. per each unit below the basis 65 per cent. and sh. 2/-per each unit over 65 p.c. Fe.

Loading rate: The seller guarantees a loading rate of 500 tons WWDSHEX. Demurrage and despatch based on this loading rate shall be on

seller"s account. Despatch half demurrage.

9. Lay days start counting 24 hours after notice of readiness tendered whether, vessel is berthed or moored (at such a spot where according to

port usages and possibilities loading of the ore can take place).

10. Ext. B contains a bundle of documents most of which were admitted by the parties; some which were not, were later on proved at the trial.

11. On May 6, 1957 the United Commercial Bank Ltd. informed the plaintiff No. 1 that it had received an air mail advice from the Midland Bank

)Ltd., London, to the effect that the validity of the credit had been extended to July 10, 1957.

12. The charter party agreement between the defendant dated June 3, 1957 provides inter alia, as follows:

(a) The ship shall proceed with all convenient speed to Calcutta and Madras in this rotation to take a complete cargo of iron ore and/or manganese

ore in charterer"s option 9500 tons 10 p.c. more or less and then to proceed to a safe port in Jugoslavia as ordered on Master"s radio application

to "Jugometal" Beograd.

(b) The ship to unload barges sent alongside with all possible despatch (should this mode of shipping be used).

(c) The captain to sign bills of lading at any freight required by charterer"s agent not less than chartered rate.

(d) Shippers to put the mineral on board free of expenses to the vessel and trimmed and cargo to be discharged free of expenses to the vessel.

(e) A commission of one third of 2 1/2 per cent, on the gross amount of freight etc., is due on delivery of cargo to "Jugometal" Beograd.

(f) Ship to apply to "Rungtas" Calcutta.

(g) All liability of charterer to cease on completion of loading and payment of advance, if any, owner having lien on cargo for freight, deed freight

and demurrage.

(h) The steamer shall load at Calcutta as much cargo as the Master considers safe (quantity to be in charterer"s option) at Master"s discretion but

not more than steamer can load to safe drift for navigating the Hooghly river and the balance of the cargo to be loaded in the port of Madras.

13. On June 21, 1957 the plaintiffs sent a telegram to the defendant No. 2 to the effect that "Edison Mariner" was loading midstream as no berth

was available with a request that the addressee should share half the extra expenses which would come to about 8 shillings per ton. One June 22,

1957 Messrs. Shaw Wallace & Co. agents of the steamer ''Edison Mariner'' informed the plaintiffs that the ship was in port and was ready to load

cargo from 8 A.M. on June 23, 1957 in terms of the charter party and the telegram should be treated as 24 hours'' notice of readiness to load.

According to the plaintiffs, this was received by them on June 25, 1957. By telegram dated June 23, 1957 the defendant No. 2 informed the

plaintiffs that their customers were not agreeable to share the extra expenses. On June 24, 1957 the plaintiffs wrote to Messrs. Shaw Wallace &

Co. to the effect that the notice of readiness could not be accepted in advance when the steamer was not ready to load. There were some further

exchange of telegrams with regard to the sharing of expenses but nothing tangible came out of it. On July 16, 1957 the plaintiffs sent a cable to the

second defendant informing that the vessel was going to sail on the 18th due to pilot shortage and that 7037 Tons had been loaded therein and that

instruction should be given to release the bill of lading immediately. Another cable was sent by the plaintiffs on the next day with a request that the

tonnage and amount of the letter of credit 31151/7 should be increase and the shipment date thereof extended to July 17. On the 19th July the

plaintiffs sent a reminder by cable that no reply had been received to their cable of the 17th regarding amendment. On July 20, 1957 the second

defendant sent a cable to the plaintiffs the relevant portion whereof reads as follows:

Ediscn Mariner instructed bank increase credit please instruct your bank mail documents first plane.

14. Any person would on a perusal of this cable take the view that the second defendant was not going to object to delay in shipment and that it

had instructed its bankers to increase the letter of credit for the increased tonnage but this evidently was not what was in the mind of the second

defendant. On the same day the plaintiffs sent a cable to the second defendant thanking them for the amendment and instructing the bank to

despatch documents as soon as possible. The plaintiffs made a further request to increase the credit by 6 shillings per ton as extra loading

expenses. Thereafter the plaintiffs approached the United Commercial Bank Ltd., with the necessary documents and requested the bank to

negotiate the bill for Ã¯Â¿Â½ 26.001-16-5 under the above mentioned letter of credit. It appears that the bank informed the plaintiffs that the bill was

not drawn in conformity with the terms of the letter of credit in respect of the amount as well as the date of shipment and that as such the

documents could only be taken for collection. On the assurance of the representative of the first plaintiff that the second defendant had already

been approached for extension of shipment and had agreed to increase THE amount of credit and on production of the cable of the 20th July from

the second defendant in response to the plaintiffs cable the bank purchased the plaintiff''s bill and issued a cheque for Rs. 3,45,491.32 nP. on the

guarantee of the plaintiff to refund the amount if the bill was dishonoured for any reason whatsoever and in particular for the delay in shipment or

the excess drawing. On July 24, 1957 the bank wrote a letter to the second plaintiff putting the above facts on record and informing the addressee

that it had received a cable from Beograd to the effect that under the credit referred to the limit of shipment date was July 10, 1957 and that no

payment was to be effected if the goods were loaded thereafter, that the buyers would decline any responsibility in respect of documents showing

shipment after July 10, 1957 and if the documents bore any date prior to July 10, 1957 they must be forged. The bank accordingly called upon the

Rungtas to return the cheque for Rs. 3,45,491.32 nP.

15. This surprising conduct of the second defendant appears to have been inspired by certain disputes between them and the Rungtas with regard

to another contract. On July 26, 1957 the second defendant sent a cable to the plaintiff to the effect that it had instructed the bank not to issue any

payment until further instruction to ensure protection of their rights in respect of another contract and that they were prepared to accept the liability

for extra expenses up to 4 shillings which would be deducted from the freight payable by them. On July 26, 1957 the plaintiff complained by cable

that the defendant''s conduct was unparalleled and constituted a serious breach of trust. This was followed by other cables in which mutual

recriminations were indulged in. The plaintiff, thereafter returned the cheque for Rs. 3,45,491.32 nP. to the bank and filed this suit on July 25,

1957.

16. [His Lordship then discussed the evidence in the case and proceeded as follows]:

On the evidence adduced the answers to the issues are as follows:

Issue No. 1: That the plaintiff shipped 7037 tons of goods on board Edison Mariner is not in dispute. The tonnage was certainly according to the

contract under which 6490 tons remained to be shipped taking into account 3510 tons previously shipped by s. s. Alriadah. 10,000 tons was not

the outside limit but it could be exceeded or diminished by 10 per cent. either way depending on charter party conditions at the option of the

charterer but nevertheless at the discretion of the master of the vessel considering the navigability of the river Hooghly. No point was taken by the

second defendant that the tonnage of the goods exceeded the limits specified. The evidence of the plaintiff that 7087 tons of ore was loaded into

the vessel at the direction of the master remained uncontradicted. Subject to the question about the date of shipment it must be held that the goods

were shipped in performance of the contract.

Issue No. 2(a): The plaintiff made no effort to adduce the best evidence to establish that it had incurred the loading charges mentioned in paragraph

10 of the plaint. There can be no doubt that the plaintiff had to incur expenses for loading the goods midstream and had to engage lorries and boats

for the purpose. Strangely enough the plaintiff did not disclose its books of accounts to support the plea of payment. It relied on the oral testimony

of persons like Sheikh Isamdar and Mathura Prosad Chaudhury neither of whom produced their books of accounts. The only documents were

two bills which were shown to Sheikh Isamdar showing the payments and acknowledged by Ram Chandra & Co. In the absence of more

trustworthy evidence the absence of which is not accounted for I can not hold that the payments mentioned in paragraph 10 of the plaint were

made.

Issue 2(b): The defendant No. 2 is not liable for the extra expenses which the plaintiff had to incur. The contract between the parties shows that the

price was to be 82s. 6d. per ton F.O.B. Calcutta trimmed and that lay days would start counting 24 hours after notice of readiness tendered

whether vessel was berthed or moored. It was agreed between the parties that the word ''trimmed'' meant ''inclusive of all expenses for loading the

goods into the boat'' and that the seller was under an obligation to deliver the goods midstream is also clear from the above term. The seller can not

therefore complain if a portion of the goods had to be loaded on the ship while the vessel was not berthed but was moored at a buoy. Issue No.

2(b) must therefore be answered in the negative.

Issue No. 3: On a consideration of the three cables of the plaintiff dated July 16. 17 and 19, 1957 and the cable of the second defendant dated

July 20, 1957 I have to hold that the second defendant did not agree to the terms of the plaintiff''s cable dated July 17, 1957 as alleged in

paragraph 12 of the plaint. The shipment date agreed upon between the parties was July 10, 1957. By cable dated July 16, 1957 the plaintiff

informed the second defendant that the vessel was leaving the port on the 18th due to pilot shortage and that 7037 tons had been loaded therein.

The date by which shipping had been accomplished was not given in the cable. Neither was the said date given in the cable of July 17, 1957 by

which the statement that 7037 tons had been shipped was being reiterated and a request was being made to increase the tonnage and the amount

of the letter of credit and extension of the shipping date till July 17, 1957. The cable of July 19, 1957 was only a reminder of the prior cables. On

July 20, 1957 the defendant''s cable came with the intimation that the bank had been instructed to increase the amount of the letter of credit and

that all documents should be booked by the first plane. That the second defendant was in no delusion about shipping having been made after July

10, 1957 is apparent from the cable the test of which is to be found quoted in the letter of the United Commercial Bank Ltd.. to the plaintiff written

on July 24, 1957. Further there would have been no occasion for a request for extending the shipping date to July 17, if the shipment had been

completed by July 10. But inasmuch as the plaintiff''s cables do not expressly state that shipment had been effected after July 10, 1957 the

defendant''s cable dated July 10, 1957 can not be said to contain an implied promise to extend the date of shipment. The cable of July 16 shows

that loading had been finished; that of July 17 asks for extension of the shipping date July 17. The reply of the defendant on July 20 is silent on this

point. Consequently, the defendant''s cable can not preclude it from relying on the date of shipment as contained in the contract and pleading that

load had not been done within the time specified therein. The cable received by the bank and mentioned in its letter of July 24, 1957 shows that the

defendant had received information from same source that loading had concluded on July 17, 1957 and the honorable course for the second

defendant would have been to inform the plaintiff that it was not prepared to extend the date of shipment. Issue No. 3 must therefore be answered

in the negative.

Issue No. 4: The goods shipped by the plaintiff were certainly in terms of the contract as regards their quality. The defendant did raise a dispute

that the iron content of the ore was too low but the ultimate analysis thereof in London by which the parties are bound showed that the iron content

was even higher than that mentioned in the certificate furnished by the plaintiff at the time of shipping. There is no dispute that all the documents

mentioned in the agreement were obtained by the plaintiff and that the plaintiff was always ready and willing to make over full sets of bills of lading,

provisional invoice at the rate of 95 per cent. of the goods value, Surveillance certificate on the preliminary sampling determining weight, moisture

etc., and copy of cable to Jugometal advising forwarding of the goods shipped on the vessel. The plaintiff''s default only lay in the fact that shipment

had not been effected within the period of the contract and the bills of lading bore a date subsequent to July 10, 1957. I must therefore hold that

the plaintiff was not in a position to deliver documents in terms of the contract between the parties. It is not the plaintiff''s case in the plaint that by

reason of the ship being moored at a buoy it was prevented from putting the goods on board by July 10, 1957 and was thus excused from

adhering to the said date. When the plaintiff No. 1 started loading the goods on June 25, 1957 it well knew that shipment would have to be

effected by July 10, 1957 and the plaintiff should either have taken steps to abide by the said date of shipment in the contract or to have informed

the defendant that it could not load the goods by the date in view of the ship being moored midstream.

Issue No. 5: Counsel for the second defendant strongly relied on paragraph 18 of the plaint in support of his contention that the first defendant had

acted as authorised representative and agent of the second defendant in the matter of taking delivery of the cargo and carriage of the same. On the

basis of the said paragraph it was argued that the goods were delivered to the second defendant as soon as they were put on board Edison

Mariner in Calcutta and there could be no question of stoppage in transitu - a right sought to have been exercised by the plaintiff in this case.

Curiously however the contesting defendant denied the allegations made in paragraph 18 of the plaint and issue No. 5 is the result of such denial.

Even according to paragraph 18 of the plaint the first defendant became the agent and representative of the second defendant under the charter

party and the terms of this document must therefore be taken into consideration for finding out whether the assertion of the plaintiff is borne out

thereby. By the charter party the first defendant was under an obligation to proceed to Calcutta and thence to Madras to take a complete cargo or

iron or manganese ore at the option of the second defendant (the quantity to be 9,500 tons 10 p.c. more or less) and to proceed to a part in

Yugoslavia under the direction of the second defendant. The master had a discretion in the matter of loading commensurate with safety in

navigating the river Hooghly but the safe carriage of the goods to a port in Yugoslavia was to be an obligation of the first defendant. This in my

view is borne out by clause (g) of the terms of the charter party set forth earlier limiting the liability of the charterer on the completion of the loading.

Under the contract between the parties it was the obligation of the seller to put the goods on board free of cost and it was the obligation of the

buyer to find shipping space for the purpose. The contract further shows that the quantity of the ore was to depend on charter party conditions.

The charter party in my view does not show that the first defendant was to act as agent of the second defendant for the purpose of taking delivery

and there is nothing in the document to show that the first defendant acted as such agent of the second defendant so far as the loading of the goods

on the vessel and the carriage thereof to Yugoslavia were concerned. Issue No. 5 therefore must be answered in the negative.

Issue No. 6: The most controversial question in this case is whether the Admiralty jurisdiction of this court is attracted to the plaintiffs'' cause of

action as pleaded in the plaint. The jurisdiction dates back to the Charter establishing the Supreme Court of Judicature at Fort William in Bengal, in

the year 1774. By clause 26 of the said Charter the Supreme Court was made a Court of Admiralty, in and for the provinces, countries, or

districts, of Bengal, Bihar and Orissa, and all other territories and islands adjacent thereto. The Supreme Court was to have full power and

authority to take cognizance of hear, examine, try, and determine all causes, civil and maritime, and all pleas of contracts, debts, exchanges,

policies of assurance, accounts, charter parties agreements, loading of ships, and all matters and contracts, which in any manner whatsoever related

to freight, or money due for ships hired and let out, transport money, maritime usury of bottomry or to extortions, trespasses, injuries, complaints,

demands, and matters, civil and maritime, whatsoever, between merchants, owners, and proprietors of ships and vessels, employed or used within

the jurisdiction aforesaid, or between others contracted, done, had, or commenced in, upon or by the sea, or public rivers, or ports, creeks,

harbours, and places overflown..... and throughout the said three provinces, countries, or districts, of Bengal, Bihar, and Orissa, and all the said

territories or islands adjacent thereunto and dependent thereupon, the cognizance whereof did belong to the jurisdiction of the Admiralty, as the

same was used and exercised in that part of Great Britain called England, together with all and singular, their incidents, emergent and dependencies

annexed and connived causes, whatsoever, and to proceed summarily therein with all possible dispatch, according to the course of... Admiralty of

that part of Great Britain called England, without the strict formalities of law, considering only the truth of the fact, and the equity of the case.

17. It will be noticed that the jurisdiction was given in very wide terms and was to be as extensively exercised as in England and the course to be

followed in proceedings was to be identical with that of the court of Admiralty in England.

18. This jurisdiction was preserved by clause 31 of the Letters Patent of 1862 by which the High Court of Judicature at Fort William in Bengal

was established. Fresh Letters Patent were given to the said High Court in the year 1865, clause 32 of which provided that the High Court was to

have and to exercise all such civil and maritime jurisdiction as might then be exercised by the High Court as a Court of Admiralty or of Vice

Admiralty.

19. This jurisdiction was contained by section 106 of the Government of India Act. 1015 and section 223 of the Government of India Act, 1935

and lastly by Article 225 of the Constitution of India.

20. There was some extension of this jurisdiction by the Colonial Courts of Admiralty Act, 1890. By section 2(3) (a) of the said Act, it was

provided that any enactment in an Imperial Parliament referring to the Admiralty jurisdiction in England, when applied to a Colonial Court of

Admiralty in a British possession, was to be read as if the name of that possession were therein substituted for England and Wales. By the

Interpretation Act, 1889, section 18(2) ""British possession"" was to mean any part of Her Majesty''s dominions exclusive of the United Kingdom,

and where parts of such dominions were under both a Central and local Legislature, all parts under the Central Legislature were to be deemed to

be one British possession for the purpose of the above definition. In terms of this, so far as the Admiralty jurisdiction is concerned, India after the

coming into force of the Constitution of 1950, takes the place of England and Wales.

21. In the year 1861 the Imperial Parliament passed an Act to extend the jurisdiction and improve the practice of the High Court of Admiralty.

Omitting the proviso, section 6 of the Act provides as follows:

The High Court of Admiralty shall have jurisdiction over any claim by the owner or consignee or assignee of any bill of lading of any goods carried

into any port in England or Wales in any ship, for damage done to the goods or any part thereof by the negligence or misconduct of or for any

breach of duty or breach of contract on the part of the owner, master or crew of the ship, unless it is shown to the satisfaction of the court that at

the time of the institution of the cause any owner or part owner of the ship is domiciled in England and Wales.

22. The various heads under which an England Court of Admiralty would exercise its jurisdiction, are summarised in Part II of Halsbury''s Law of

England, third edition, vol. 1. It can not be disputed that this court can exercise admiralty jurisdiction in rem or in personam in respect of claims

arising out of any agreement for the use or hire of a ship or relating to the carriage of goods in a ship or in respect of claims in tort with respect to

goods carried in a ship.

23. Counsel for the plaintiffs sought to invoke the Admiralty jurisdiction of this court on the strength of section 46 of the Sale of Goods Act

coupled with the plea that it was the duty of the master of the vessel to unload the plaintiffs'' goods after request in that behalf. There is no case

made out in the plaint that the master of the vessel committed any tort in respect of the goods on the high seas. The goods were put on board at

Calcutta on the plaintiffs'' expectation that all would go well. It was only on receipt of the intimation from the bank on July 24. 1957 that the

plaintiffs found out that the second defendant did not mean to extend the shipping date and did not intend to pay. According to the plaintiffs they

got in touch with Mr. Rozario of Best & Co.. on July 24, 1957 to find out what could be done. In his examination-in-chief Mr. Rungta said that he

informed Messrs. Best & Co.. that unless payment was made the whole cargo should be unloaded at Madras and the information communicated

to Mr. Rungta was that they (Best & Co.) would inform the master about it and that Mr. Rungta should contact Best & Co., the next day. From

the oral testimony of the same gentleman it appears that he got in touch with Best & Co., between 3 and 3-30 P.M. on July 25, 1957 and learnt

from them that the master would not unload the goods. According to Mr. Rungta"s evidence this message was immediately communicated to the

plaintiffs" solicitors who at once rushed to court and moved Bose, J. before the rising of the court at 4 P.M. and obtained an order for arrest of the

ship. I cannot accept this story without any corroboration. The least that one would expect in corroboration would be the evidence of the solicitor

in charge of the matter confirming Rungta"s evidence. It is unbelievable that after getting the communication from Madras at the plaintiffs" office in

Burrabazar the same would be put before the solicitor who would then come to court and move it for the arrest of the ship before 4 P.M. If the

importance of the communication of Best & Co., was realised at that stage, as it appears from Mr. Rungta"s evidence, it is surprising that there is

no mention of it either in the plaint or in the petition moved on July 25, 1957. Not only was that not done, no mention of it is to be found in the

application for final judgment made by the plaintiff to this court on August 22, 1957. Strangely enough it is not brought out even in the affidavit - in

-opposition used in the application for taking the plaint off the file in September 1957 on the part of the second defendant. This aspect of the case

is for the first time put in black and white in the affidavit affirmed by Mr. Rungta on March 21, 1958 after Bachawat, J., had directed preliminary

issues as to jurisdiction of this court to be tried on affidavits to be used in that connection. Apart from the late stage in the proceedings when this

case sees the light of the day it is difficult to see why the plaintiffs" case should rest on oral testimony alone. I fail to appreciate why no telegram

was sent to the master of the vessel while the ship was at Madras or why no letter or telegram was sent even to Messrs Best & Co. or again why

the refusal of the master to unload the vessel upon the request made through Messrs. Best & Co., was not put on record.

24. Again there is no proof that Best & Co., were the agents of the first defendant. This story of the agency rests only on the uncorroborated

testimony of Mr. Rungta who is supposed to have learnt the same from some representative of Shaw Wallace & Co., who has remained unnamed.

I can not accept the case that Best & Co., were the agents of the ship at Madras. According to the oral testimony of John William Pusey, it was

Shaw Wallace & Co., who were the agents of the steamer company at Madras. Counsel for the plaintiffs emphasised the fact that no evidence had

been led on the part of the defendant to contradict the assertion made by Mr. Rungta that Best & Co., were the agents of the first defendant. If

strong prima facie evidence had been adduced to the effect that Best & Co., were such agents, the absence of testimony to contradict that would

certainly go a long way in establishing the agency. But the plaintiffs'' case with regard to this agency is so weak that not much support can be

derived from the absence of contradictory evidence. Normally it is for the person who asserts that A is authorised by B to do a certain thing to

prove the authority of A for the purpose. The fact that B does not come forward to contradict the evidence denying the authority may be taken into

consideration but the absence of such evidence does not necessarily prove the authority. As I have already said there should have been some

record of the telephonic conversation with the representatives of Best & Co., and the absence of all documentary evidence with regard to this part

of the case, in my opinion, establishes the fact that there was no such communication. Further even if Best & Co., were acting as agents of the

steamship company at Madras there is no evidence as to the extent of their authority. u/s 52(1) of the Sale of Goods Act notice must be given to

the person in actual possession of the goods or his principal. The request to unload should have been made to the master of the vessel directly and

not through any such agents like Best & Co., who normally only act in the matter of clearing and handling the goods imported into or exported out

of a port.

25. Assuming that a proper request was made to the master to off-load the goods the plaintiffs must still satisfy that the conditions mentioned in

section 46(1) of the Sale of Goods Act were complied with. The judgment of Dr. Lushington in the case of The Tigress (1) 32 Law Journal,

Probate and Admiralty, page 97 corresponding to 167 English Reports, page 286, which has never been dissented from, establishes that an unpaid

vender exercising his right of stoppage in transitu can call upon the master of the vessel to deliver the goods and refusal on the part of the latter

would constitute a breach of duty within the meaning of section 6 of the Admiralty Courts Act, 1861 quoted above. There the plaintiffs Messrs.

Lucy & Son of Liverpool, claimed damages for the refusal by the master of the American ship ""Tigress"" to deliver to them a cargo of wheat

shipped at New York and carried to Bristol. The plaintiffs re-reived an order from a corn-broker acting for John Bush, for purchase of 500

quarters of wheat at a certain price to be shipped to Bristol. The plaintiffs gave an order to their agent at New York for wheat corresponding in

quality and price with the order received by them; and the agent caused wheat to be shipped on board the ""Tigress"". Three bills of lading by which

the wheat was made deliverable at Bristol, ""unto order or its assigns"", were signed on behalf of the master of the ""Tigress"" on October 2, 1862.

The agent endorsed two of these bills of lading, ""deliver to order of Messrs. William Lucy & Son"" and sent them to the plaintiffs. He also sent to

the plaintiffs an invoice of the wheat as shipped by order of Messrs. William Lucy & Son, of Liverpool. On receipt of the bills of lading the

plaintiffs on or about October 15, sent to Bush an invoice of the wheat, ""shipped to Bristol from New York per ship ""Tigress"", by order of William

Lucy & Son, Liverpool, for account and risk of J. Bush, Esq., Bristol"", and also an account for the same. For the amount of this account, Ã¯Â¿Â½ 893.

18s., they at the same time drew on Bush at two months. The bill was accepted by him and returned to the plaintiffs, who thereupon, on October

21, forwarded to Bush one of the bills of lading endorsed, ""deliver to John Bush, Esq.. or order - William Lucy & Son."" The ""Tigress"" arrived at

Bristol on or about November 18. On December 2, the plaintiffs received a circular, calling a meeting of the creditors of Bush, who was then

insolvent. Thereupon the plaintiffs endorsed the bill of lading remaining in their hands in blank, and gave it to one Dyson, whom they sent to Bristol

to receive the wheat in their name. Whilst the wheat was still in transitu, and before any other bill of lading in respect of the same had been

presented to the master of the ""Tigress"", Dyson, on December 3, presented to the master the bill of lading in his possession, and demanded

delivery of the wheat, offering at the same time to pay the freight. He also presented to the master a paper, signed by the plaintiffs, giving him notice

that they were the owners of the wheat; that they claimed delivery thereof; that they thereby cancelled any delivery order, actual or constructive,

previously given by them. The master refused to deliver the wheat to Dyson. On December 18, after the commencement of proceedings, the bill of

exchange became due, but was not presented for payment by reason of the insolvency of Bush. The managing owner of the ""Tigress"" gave notice

of motion to reject the petition. Various contentions were raised on the part of the defendant to the effect that the plaintiffs had no right to stop in

transitu including the plea that the bill of lading had been endorsed by the plaintiffs and so negotiated. These pleas were negative by Dr. Lushington.

The learned Judge said that the validity of stoppage in transit depended upon several conditions: (1) The vendor must be unpaid, (2) The vendee

must be insolvent, (3) The vendee must not have endorsed over for value. He went on to observe ""but for the vendor to prove to the master that all

these conditions have been fulfilled would be always difficult, often impossible. * * * * The vendor exercises his right of stoppage in transit at his

own peril; and it is incumbent upon the master to give effect to that right as soon as he is satisfied that it is the vendor who claims the goods, unless

he (the master) is aware of a legal defeasance of the vendor''s claim. * * * * Neither can I attach any weight to the further objection of the

defendant, that, assuming that the plaintiffs had a right to stop in transitu and that they duly asserted that right, yet the master was guilty of no

breach in refusing to deliver to them, in as much as he was simply retaining the custody of the wheat for the person entitled until it should appear

who that person was. An abundance of cases shows that the right to stop in transitu means the right not only to countermand delivery to the

vendee, but to order delivery to the vendor. Were it otherwise, the right to stop would be useless, and trade would be impeded. The refusal of the

master to deliver upon demand is, in a case like the present, sufficient evidence of conversion. * * * * The master may indeed sometimes suffer for

an innocent mistake; but he can always protest himself by filing a bill of interpleader in Chancery. This step it is his duty to take if he have any

reasonable doubt. * * * * And if the master was bound to deliver the wheat to the plaintiffs, I think his refusal so to do is a breach of his duty

within the meaning of the Admiralty Court Act, 1861. I am therefore satisfied that the petition shows such a prima facie case of breach of duty as

to render the vessel liable in this court under the 6th and 35th sections of the statute.

26. In order to bring the case u/s 46(1) of the Sale of Goods Act, the plaintiff must allege and prove: (a) that he was an unpaid seller, (b) that the

buyer was insolvent, (c) that the goods were in transit. As there is no question here of the buyer having endorsed the bill of lading to another the

third condition mentioned by Dr. Lushington in the above case does not arise. In addition the seller must under sub-section (1) of section 46 prove

that the property in the goods had passed to the buyer.

27. The plaint in this case is a curious pleading with inconsistent pleas''. According to paragraph 14 the bills of lading being in possession of the

plaintiff, the property in the goods had not passed to the buyer and yet in paragraph 16 the claim made is for the price of the goods. In paragraph

17 there is an averment that the second defendant threatened to remove the goods from India without paying the value thereof. As mentioned

already there was nothing in the plaint as filed originally to show that the master of the vessel had committed any breach of duty in respect of the

goods which would attract the Admiralty jurisdiction of this court. For the first time in the year 1960 by the amendment of the plaint by introduction

of paragraph 17A therein the plaintiff averred that the agents and the master of the vessel had failed and neglected to comply with the plaintiffs''

request not to leave the port of Madras until payment of the plaintiffs'' dues or until after unloading the said goods. Even in the amended plaint there

is nothing in express terms to show that the plaintiffs were exercising their right to stop the goods in transitu and there is no trace of any suggestion

that the buyer had become insolvent.

28. Under sub-section (8) of section 2 of the Indian Sale of Goods Act, a person is said to be insolvent, who has ceased to pay his debts in the

ordinary course of business or cannot pay his debts as they become due, whether he has committed an act of insolvency or not. There is no

evidence in this case that the buyer had ceased to pay its debts in the ordinary course of business or that it was not in a position to pay its debts as

they became due. As a matter of fact there was sufficient money lying with the United Commercial Bank Ltd., earmarked for the payment to the

plaintiffs in case the goods had been shipped by July 10, 1957. Section 62(3)of the English Sale of Goods Act is practically in the same terms as

section 2(8) of our Act. According to Benjamin on Sale, 8th Edition, page 888 ""the failure to pay one just and admitted debt would probably be

sufficient evidence. And in a number of the cases the fact that the buyer or consignee had stopped payment has been considered, as a matter of

course, to be such an insolvency as justified stoppage in transits."" The just and admitted debt must be a debt different from the one by reason

whereof the vendor claims to be an unpaid vendor. The buyer in this case was certainly trying to get the goods out of India by means of a trick but

it was not insolvent.

29. I have no hesitation in holding that the goods were in transit in this case. Mr. Das, for the second defendant, argued that according to

paragraph 18 of the plaint, it was the plaintiff''s case that the first defendant was the authorised agent of the second defendant in the matter of

taking delivery of the cargo and carriage of the same and as such putting the goods on board ''Edison Mariner'' meant delivering the goods to the

second defendant and the voyage was not a transit so far as the goods were concerned. I cannot accept this contention because this over-looks

the statement in paragraph 18 that the first defendant was the authorised agent of the second defendant for the matter mentioned above under the

charter party and as I have already found that the charter party does not show that the ship became the second defendant''s ship and the master

was merely to act under the direction of the latter. u/s 51(5) of the Sale of Goods Act ""when goods are delivered to a ship chartered by the buyer,

it is a question depending on the circumstances of the particular case, whether they are in the possession of the master as a carrier or as agent of

the buyer"". As the master was liable under the charter party for the safe carriage of the goods once they were loaded on board the ship and until

delivery thereof to a port in Yugoslavia, the master in my view must be taken to be a carrier and not an agent of the second defendant. From this it

follows that the goods were in transit when they were on Edison Mariner at Madras in July 1957.

30. The cardinal principle with regard to the passing of property in goods under a contract is that property passes when it is intended to pass. This

is embodied in section 19 of the Sale of Goods Act. Sections 20 to 24 of the Act lay down rules for ascertaining the intention of the parties unless

they are in conflict with the terms of the contract. In the case of unascertained goods the property in them passes when they are unconditionally

appropriated to the contract by any of the parties with the assent of the other. Again such assent need not be express and may even be given

before or after the appropriation. Where the goods are delivered to a carrier for the purpose of transmission to the buyer without the reservation of

the right of their disposal, the seller must be taken to have appropriated the goods to the contract unconditionally. Such right may be created

expressly by the terms of the contract or may arise by the conduct of the seller in appropriating the goods to the contract subject to certain

conditions. In the last mentioned case the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled.

u/s 25(2) of the Act, the seller''s right of disposal is preserved when goods are shipped and by the bill of lading they are deliverable to the order of

the seller or his agent.

31. The contract between the parties in this case provided that the payment for the goods was to be made under an irrevocable, divisible and

transferable letter of credit to be opened by the buyer in favour of the seller at the latest by the end of December, 1956. Provisional payment under

the said letter of credit was to be made against documents including full set bills of lading to order Judgmental. Final settlement was to be made on

the basis of weight, analysis of iron content determined at the discharge of goods in Yugoslavia.

32. From these terms it will appear that it was the obligation of the seller to ship the goods within the contract period and to get payment under the

letter of credit by presenting the documents mentioned. Bills of lading had to be made out to the order of the second defendant. It was not open to

the plaintiffs to take the bills of lading in their own name or to their own order. The contract envisaged that the seller would ship the goods within

the time limited and obtain payment from the letter of credit by presenting the documents mentioned not to the buyer at Yugoslavia but at the bank

in Calcutta where the credit lay. The letter of credit opened in India was the guarantee for the payment of the price of the goods by the buyer. The

terms of the contract did not give the seller any right of disposal of the goods once they were shipped and the documents contemplated by the

parties came into existence. There is no pleading in the plaint nor is there anything in the correspondence to show that the shipping of the goods or

the appropriation thereof to the contract was subject to any condition. Therefore the property in the goods passed to the buyer on shipment and

the issue of the Bill of Lading in favour of the buyer. The seller was then left only with his rights u/s 46(1) of the Sale of Goods Act.

33. Various cases of C.I.F. and F,O,B, contracts were cited at the bar to show how and when property in goods is transferred. None of these

however, are on a par with the instant case as regards the facts. The general rule with regard to the passing of property in F.O.B., contracts was

laid down in very clear terms in the case of Brown v. Hare, (2) 3 H. & N. 484. There the defendants at Bristol bought from the plaintiffs of

Rotterdam, through the plaintiffs'' broker at Bristol, ten tons of refined rape oil, to be shipped free on board at a certain rate, to be paid for on

delivery to the defendants of the bills of lading by bill of exchange to be accepted On intimation from the plaintiffs that they had secured oil

deliverable in September, the defendants asked them to be sent by the next steamer. The plaintiffs wrote to their broker that they had shipped five

tons of rape oil for the defendants and forwarded to him the invoice, the bill of lading and the bill of exchange. The bill of lading was for delivery to

the plaintiffs'' order or assigns and endorsed over by them to the order of the defendants. The letter to the broker enclosing documents, reached

him on September 10, and he sent them to the defendants the next day. The ship was then actually lost. The broker knew it, but the defendants did

not until two hours after receiving the bill of lading and they then immediately returned the same to the broker. The majority of the Court held that

property in the oil had passed and the buyers must bear the loss. The judgment was rested on the following circumstances:

(1) that the contract being F.O.B. the goods were to be for account of the defendants as soon as delivered on board;

(2) that taking the bill of lading to the shippers'' own order, and then endorsing it to the defendants was precisely the same in effect as taking the bill

of lading to the order of the defendants;

(3) the forwarding of the bill of lading to the broker was only for the purpose of his getting the defendants'' acceptance on handing the same over in

terms of the contract and with the intention not of preventing the passing of property, but of controlling the possession only.

34. This judgment was upheld by the Exchequer Chamber. Erle, J. observed that ""the property passed when the goods were placed free on board

in performance of the contract. * * * If the bill of lading had made the goods to be delivered to the order of the consignee, the passing of the

property would be clear. The bill of lading made them ''to be delivered to the order of the consignor'', and he endorsed it to the order of the

consignee, and sent it to his agent for the consignee. Thus, the real question has been on the intention with which the bill of lading was taken in this

form: whether the consigner shipped the goods in performance of his contract to place them free on board, or for the purpose of retaining a control

over them and continuing to be owner contrary to the contract, as in the case of (3) Wait v. Baker 2 Ex. page 1 and as is explained in (4) Turner v.

The Trustees of the Liverpool Docks, 6 Ex. 543 and (5) Van Casteel v. Booker, 2 Ex. 691. The question was one of fact an must be taken to

have been disposed of at the trial; the only question before the court below or before us being, whether the mode of taking the bill of lading

necessarily prevented the property from passing. In our opinion it did net under the circumstances"".

35. All the elements on which the judges relied in the above case are to be found in the present case. Nay more: by the terms of the contract in this

case the bill of lading was to be taken to the order of the buyer and there was no question of acceptance of any bill of exchange. The presentation

of the bills of lading, provisional invoice, Surveillance certificate on preliminary sampling and copy of cable advising forwarding of the goods was to

enable the seller to take payment under the letter of credit. All the above documents were made out in this case and subject to the shipping date

etc. being adhered to the sellers had become entitled to the price and the property in the goods had passed to the buyer

36. Section 46, sub-section (2) of the Act cannot therefore be called in aid by the seller.

37. Mr. Das took an additional objection based on the fact that the ultimate destination of the ship was not a port in India but in Yugoslavia. He

argued that the Admiralty Jurisdiction is not attracted unless the goods are being imported into India and the ship is coming into an Indian port as its

ultimate destination. He relied on the case of ""The Kasan"" (6) and observations of Dr. Lushington in that case. See 32 Law Journal Admiralty,

page 97 corresponding to 157 English Reports page 268. The ""Kasan"" was a Russian ship chartered by Thomas Dunlop Finley of Glasgow who

also were the holders of the bills of lading for the homeward cargo. The vessel was engaged to proceed from Cardiff to port Isabella with a cargo

on charterer''s account to be delivered freight free; thence to proceed to Moulmein or other Indian port and load a cargo of timber to be delivered

in England according to order. It was alleged that the coal shipped at Cardiff was not delivered at Port Isabella nor was timber shipped at

Moulmein delivered in England. The point raised on motion was whether the plaintiffs were entitled to sue in respect of the nondelivery of coal on

the outward voyage. The question was whether the case fell within section 6 of the Admiralty Court Act 1861. It was argued on behalf of the

owners of the ""Kasan"" that the section applied only to claims in respect of goods imported and not to goods exported. Dr. Lushington observed in

his judgment that the section had nothing to do with goods exported and by contract deliverable abroad. This is the observation relied on by Mr.

Das but in my view this certainly does not settle the question. The vessel was not due at a port in England and Wales on its outward journey. The

question is put beyond any controversy by a decision of the Privy Council in (7) Giovanni Danueto v. James Wyllie & Co., Law Reports 5 P.C.

Appeal Cases, 482. There the appellant, an Italian shipowner entered into an agreement of charter party with the Schiller on behalf of Borradaile,

Schiller & Co. Calcutta, in London by which it was agreed that the ship should proceed to one of certain named ports in India, there to load a

cargo of rice for which the master was to make out bills of lading. The ship went to Rangoon, was loaded with a cargo of rice and bills of lading

were issued describing the ship to be bound for various places including Falmouth for orders to discharge at a port in the United Kingdom or on

the continent between Havre and Humburg. The ship went into the port of Falmouth with her cargo for orders and while lying there the master

received orders to go to Bremen to discharge. She went there and discharged her cargo and afterwards sailed to Cardiff on a new voyage and

was arrested in that port. It was argued by the appellant that the words ""carried into any port"" u/s 6 of the Admiralty Court Act must receive some

limitation otherwise if a ship with cargo on board, being under no obligation to enter an English port, was driven to take refuge in such a port by

stress of weather or other accident, the jurisdiction would be founded. Delivering judgment of the Board Sir Montague Smith said, ""Cases must

frequently arise at ports of call and intermediate ports, giving occasion for the remedy it was intended to afford to English merchants against foreign

shipowners, by proceedings in the English Court of Admiralty. Besides the instances where causes of action have arisen before the arrival of the

ship at such ports, take the case of damage done to goods, or of unjustifiable delay, in the port of call itself; or the case of a ship bound, without

calling for orders, to go direct to London to discharge her cargo, and the master improperly putting into some other English port, and refusing to

take the cargo on. Instances of this kind would certainly be within the scope of the mischief intended to be dealt with; and their lordships are

reluctant in construing the Act so to interpret words, large enough in their ordinary manner to embrace such cases, as to exclude them from its

operation and thus leave foreign masters who may have broken their contracts free to take away their ships from this country in the sight of English

consignees, who would be powerless, as they were before the Act, to stop them.

38. The Board further observed that the Act had ""said nothing of delivery nor of the purpose for which the goods might be carried into port"". It

was pointed out that ""the parties contemplated that the goods would, or at least might, be carried into and delivered in an English port, and the bill

of lading signed by the master at Rangoon, in pursuance of a charter party made in London, so provided"". There their lordships thought that in the

circumstances of the case ""at least in respect of then existing causes of suit, the jurisdiction arose when the goods were as carried into the port of

Falmouth and was not taken away when the ship was subsequently ordered to a foreign port to be discharged. If the jurisdiction of the Court of

Admiralty over the claim once attached, that Court, in their lordships'' opinion, would be competent at any subsequent time to entertain a suit either

in persona or in rem by arrest of the ship whenever it came within reach of its process. The statute being remedial of a grievance, by amplifying the

jurisdiction of the English Court of Admiralty, ought, according to the general rule applicable to such statutes, to be construed liberally, so as to

afford the utmost relief which the fair meaning of its language will allow. And the decisions upon it have hitherto proceeded upon this principle of

interpretation"". In the case of The Bahia, (8) Br. & Lush, page 61 and The Patria, (9) L.R. 3A & E, 459, the arrival at an English port was not

contemplated by the contract and the ships put into English ports by reason only of circumstances extrinsic to it nor did they enter them for the

purpose of discharging their cargoes. In the case of Bahia the ship put into the English port of Ramsgate in consequence of an accident while in the

case of Patria the German ship bound under the bill of lading to take a cargo of coffee to Hamburg, put into Falmouth and the master refused to go

on to Hamburg or to deliver the cargo at Falmouth. In both the cases the Admiralty jurisdiction of the court to deal with the causes of action was

upheld.

39. In the case of Cap Blanco (10) 1913 Probate Division, 130, the plaintiffs, as owners of certain cases containing German gold coin, sued the

defendants for damages for breach of duty or of contract in respect of non-delivery of the same at Monte Video or Buenos Aires of one of such

cases which were shipped on the Cap Blanco under a bill of lading. The vessel proceeded on her voyage and called at Southampton. She

subsequently went to Monte Video where all but one of the cases were delivered. The vessel then proceeded on her return voyage to Hamburg.

On her way she called again at Southampton and was arrested at the suit of the plaintiffs. The question before the court was whether the goods

were carried into the port of Southampton within the meaning of section 6 of the Admiralty Court Act. Sir Samuel Evans, the president, relying on

the cases mentioned above, had no difficulty in coming to the conclusion that the court had such jurisdiction. It was argued in that case that there

was no breach of duty or of contract before the goods were carried into Southampton. His Lordship observed ""it does not appear where the

breach of duty took place: for aught I know it may have been in Southampton itself. No case has decided that the breach of duty or of contract

must take place, and the cause of action must have arisen, before the goods were carried into a port in England and to say that, that must be so,

would be to place limitation upon the jurisdiction which the authorities and the section do not justify, and introduce into the section words which are

not to be found.

40. These cases show conclusively that in order to attract the jurisdiction of the Admiralty court it is not necessary that the goods should be

imported into India or that their carriage should be for delivery in India. It is sufficient if the goods are carried into an Indian port and there is a

breach of duty 01 contract on the part of the master in respect of the goods so carried.

41. The net result is that the Admiralty jurisdiction of this court was not exercisable in the facts and circumstances of the case. The plaintiffs have

not been able to establish insolvency on the part of the defendant No. 2 on which the right to stop in transit is based. Nor have they been able to

prove a notice on the master in exercise of the said right. The evidence does not establish that there was any breach of duty or of contract by the

master of the vessel with respect to the goods carried into the port of Madras.

42. Issue No. 6(b), (c) and (d) can be conveniently tried together as they arise out of the same set of facts. In this connection it is necessary to

take note of a few events which happened during the early stages of the suit.

43. The warrant for the arrest of the ship shows that on July 25, 1957 this court ordered that an attachment should issue by arrest and detention of

the vessel Edison Mariner then at the port of Madras, until the cargoes lying in her holds were discharged or some arrangements made or security

given in respect of the plaintiff''s claim in the suit to the satisfaction of the Registrar of this court. The Marshal was directed to arrest the vessel if she

were within the local limits of the Admiralty jurisdiction of the High Court at Madras and keep the same under safe arrest until the happening of the

events mentioned above. On August 10, 1957 Messrs. Orr, Dignam & Co., entered appearance on behalf of the second defendant. It was not

under protest of any kind. Immediately thereafter an affidavit was affirmed by an assistant of the said firm on August 12, 1957 putting on record

that defendant No. 2 had duly deposited the sum of Rs. 4,50,880.80nP. with the Registrar of this court as security for the plaintiff''s alleged claim

in the suit and further sum of Rs. 4,509/- on account of the Registrar''s commission. The deponent prayed for an order for release of the vessel and

her cargoes from arrest and detention with a direction that the Registrar should hold the said sum of Rs. 4.50.880.80 nP. until the disposal of the

suit or until further orders. Bose, J. made an order as prayed for on August 12, 1957. On September 5, 1957 the second defendant presented a

petition to this court for dismissal of the suit on the ground that the court had no jurisdiction to entertain the same. In paragraph 10 of the petition it

was pleaded ""the cause of action alleged in the suit is not one in respect of which the Admiralty jurisdiction of this Hon''ble Court can be invoked

and for exercised and this Hon''ble Court had no jurisdiction to entertain the proceedings in rem against the said steamship in respect of the

plaintiff''s alleged claim herein"". It was further pleaded in paragraph 11 of the petition that the said steamship was lying at the port of Madras when

the suit was filed and the order of arrest made and this court as an Admiralty court had no jurisdiction to entertain a suit for the arrest of a ship lying

at Madras outside the Admiralty jurisdiction of this court. It was also pleaded that the steamship was a foreign vessel sailing under the U. S. flag

and not registered in India: neither the owner of the steamship nor the second defendant had any place of business or residence in India. The

plaintiffs also presented two petitions one on August 20, 1957 and the other on August 24, 1957. By the first the plaintiffs wanted an order for

payment out of the sum of Rs. 4,50,880.80 nP. deposited in the court while by the second the plaintiff asked for final judgment in the suit against

the second defendant for Rs. 4,24,581.28 nP. The defendant filed its written statement on November 16, 1957. In paragraphs 22 and 23 whereof

it was pleaded that the Admiralty jurisdiction of this court was not attracted to the facts of the case.

44. In the above state of things I do not see my way to hold that the defendant has so submitted itself to the jurisdiction of this court that it is

precluded from taking the point as to jurisdiction at the trial of the suit.

45. The Admiralty Rules of this court are to be found in Appendix No. 5 of Ormond''s Rules at page 789. Under rule 15 an attorney desiring to

enter an appearance in any suit, must file in the Registry a precise, a copy of which must have been previously served on the attorney for the

opposite party. Under rule 17 where security is to be given in the Registry, it shall be given according to the rules and practice of the court as to

security in the case of an attachment before judgment in an ordinary Civil suit. Under rule 18, property arrested by warrant shall only be released

under the authority of an instrument issued by the Registrar, to be called a ""release"". Under rule 20, an attorney may obtain the release of any

property by paying into the Registry the sum in which the suit has been instituted. The relevant provision of rule 23 where security shall have been

given in the sum in which the suit has been instituted or such sum shall have been paid into the Registry, an attorney shall be entitled to a release of

the property unless there is a caveat against the release thereof outstanding in the ""Caveat Release Book"". Under rule 38, all money paid into court

shall be paid to the Registrar and under rule 39, money paid into court shall not be paid out of court, except in pursuance of an order of the court

or a judge.

46. It will be noticed that very early in the proceedings, i.e., within six weeks of the institution of the suit the second defendant took put an

application for dismissal of the suit on the ground of want of jurisdiction. This was done even before the filing of the written statement. The only

circumstances which have been relied on by the plaintiff as amounting to submission to jurisdiction by the second defendant are: (1) entering

appearance without protest in the suit and (2) taking advantage of the Admiralty jurisdiction in getting an order for release of the ship. As regards

the former it is enough to note that our Admiralty rules do not make any provision for entering appearance under protest. Under order 12, rule 30

of the Rules of Supreme Court in England, a defendant is ""at liberty without obtaining an order to enter or entering a conditional appearance, to

take out a summons in the King''s Bench Division and in any other Division take out a summons or serve notice of motion to set aside the service

upon him of the writ or of notice of the writ, or to discharge the order authorising such service"". In England there is no real difference between

entering appearance under protest and a conditional appearance. By the latter ""the defendant reserves the right to apply to set aside the writ of

service thereof for an alleged informality or Irregularity which renders either the writ or service invalid or for lack of jurisdiction"". (See Annual

Practice 1958 page 198). It has been held in cases decided in England that after unconditional appearance it is too late to object to any irregularity

in the service or issue of the writ of which the defendant had knowledge, and that such irregularity cannot be pleaded in defence after unconditional

appearance. The only corresponding provision in the CPC is with regard to partners and under order 30, rule 8 thereof any person served with

summons as a partner under rule 3 of order 30 may appear under protest. The only rule for appearance under protest in the Rules of the Original

Side of this court is to be found in Chapter 8. rule 20A which provides for the case envisaged by order 30, rule 8, of C. P. Code.

47. It is true that in the application based on the affidavit of August 12, 1957 for an order for release of the ship want of jurisdiction was not

pleaded but in my view this makes no difference. By the terms of the order for arrest itself the defendant was able to obtain a release of the ship by

furnishing security for the plaintiffs claim. The warrant is ".....really like an order for attachment before judgment and under order 38, rule 6 of the

CPC it is open to the defendant to get his property released from attachment by furnishing the required security. I do not think it can be contended

that by furnishing security and getting the release of the property from attachment under order 38, rule 6, the party so submits to the jurisdiction of

the court that he cannot thereafter take exception to it. Nor do I see any reason why there should be any difference in the case of a suit filed in the

Admiralty jurisdiction of this court where an order for arrest of the ship is made on terms set forth above.

48. In my opinion, the authorities relied on by Counsel for the defendant do not really help him on the facts of the case. The first case cited was

that of Achut Anant Pai Vs. Governor General-in-Council, This was a suit for recovery of sums for compensation for non-delivery of two

consignments of Indian Cotton twist yarn for carriage from Wadi Bunder and Ahmedabad to Raigarh on the Bengal Nagpur Railway. The suit was

filed in the court of Subordinate Judge, Alipore and transferred to the High Court under clause 13 of the Letters Patent in 1945. In the written

statement filed in this court there was no specific plea taken that the court had no jurisdiction to try it and what was said was that the defendant

denied that the plaintiff had any cause of action as alleged in paragraph 11 of the plaint. The statement in paragraph 11 of the plaint was ""that the

cause of action arose on April 13, 1944 at Raigarh and at the head office and principal place of business of the Railway concerned situated at 12,

Garden Reach Road, Kidderpore, within the jurisdiction of this court"". The court referred to herein is the court at Alipore. Nearly 8 years after the

continuance of the proceedings, the defendant applied for amendment of the written statement raising the plea as to want of jurisdiction of the

court. The suit being one which had been filed at Alipore and sections 20 and 21 of the CPC being applicable Bose, J. held that the defendant was

precluded from taking an objection as to the place of suing. His Lordship held on the facts that the defendant had waived the objection as to

jurisdiction.

49. In Indian National Steamship Co. Ltd. Vs. Maux Faulbaum, the same learned Judge held that the petitioner before him had waived its claim for

immunity by submitting to the jurisdiction of the court. An application was made in this case by the Republic of Indonesia for an order granting the

petitioner leave to take actual possession of certain property notwithstanding the appointment of a receiver by this court and in the alternative for

an order vacating the order for the appointment of the receiver. The petitioner''s case was that it was a sovereign independent State and had

applied for leave to be examined pro interesse suo to establish its title to the goods in question as against the adverse claim of the plaintiff

whereupon the court ordered an enquiry as asked for. In order to make the proceedings effective the Republic applied for issue of letters of

request to examine witnesses in Holland. On these facts Bose, J. held that the Republic must be declared to have submitted to the jurisdiction of

the court and to have waived its privilege to claim immunity from its process.

50. Reliance was placed on rule 23 of the General Rules as to jurisdiction to be found in Dicey''s Conbict of Laws, 7th Edition, at page 171. Dicey

thus lays down the rule''-

The court has jurisdiction in an action over any person who has by his conduct precluded himself from objecting to the jurisdiction of the courts.

51. The learned author notes the question of submission to jurisdiction as one depending upon the circumstances of the case. He further points out

that submission can give the court jurisdiction only to the extent of removing objections thereto which are purely personal to the party submitting,

as, for example, the objection, in the case of a defendant, that he has not been duly served with a writ or that service of a writ outside England has

been allowed in a case not within the letter or spirit of Order 11, rule 1 of the Rules of the Supreme Court.

52. Mr. Mitra relied on the case of In re Dulles'' Settlement (No. 2) Dulles v. Vidler, (13) 1951 Chancery Division, page 842, and on certain

observations of Evershed, M.R. at page 847. These observations, in my view, do not help Mr. Mitra at all. Denning, L.J. pointed out (page 850)

that a man could not be said to have voluntarily submitted to the jurisdiction of a court, when he has all the time been vigorously protesting that it

has no jurisdiction.

53. It cannot be suggested in this case that it was the duty of the second defendant first to object to the exercise of jurisdiction by making an

application of the kind made by it on September 4, 1957 and then await the result of that application or the result of the suit before it could ask for

release of the ship. In principle I can see no reason why a person who objects to the jurisdiction of the court should not be allowed to free his

property from attachment by furnishing sufficient security. I do not hold that by getting the order for release of the ship by the substitution of

security the defendant submitted to the jurisdiction of the court. If the property attached was such that its detention would cause no damage the

defendant might well have waited for the decision on the merits of the case including that of jurisdiction before he got an order for release of the

ship. Merely because the second defendant took the prudent course of furnishing security sufficient to meet the plaintiff''s claim as a condition of the

release of the ship it cannot be said that it had waived its objection to the exercise of the Admiralty jurisdiction of the court and the arrest of the

vessel. The defendant was not getting any special benefit. It was only substituting the ship by sufficient amount in cash to meet the plaintiff''s claim.

54. A passage in Cheshire''s Private International Law. 5th edition, page 110, cited by Mr. Mitra at first blush seems to suggest that if a defendant

enters appearance, deposits security as bail and obtains the release of the vessel he cannot afterwards question the jurisdiction of the court. But a

closer scrutiny of the facts of the case relied on by Mr. Mitra shows that the principle laid down there cannot apply to the facts in the present case.

The relevant portion of the passage in Cheshire''s Private International Law is as follows:

The local situation of property determines the sovereign to whose physical power it is subject, and the rule is that an English Court has jurisdiction

to entertain an auction in rem only if the subject-matter of the suit is situated in England at the time of the proceedings. But the mere presence of

property in England docs not render an absent owner personally amendable to the jurisdiction. The court is competent to adjudicate upon all

questions directly relating to the property but not to pronounce judgment upon matters unconnected therewith. To command international validity

the judgment must do no more than determine the owner''s rights with regard to the property.

If, for instance, the ship of a Frenchman resident in Paris is arrested at Southampton, the court is entitled to declare a lien in favour of a salvor, but

having once acquired jurisdiction to this extent over the defendant it cannot proceed to try an action that is totally unconnected with the arrest ship.

If, however, the owner of an arrested ship against which proceedings in rem have been instituted appears and deposits security as bail, thus

obtaining the release of the vessel, he submits himself personally liable to process of execution in respect of the amount by which the ultimate

judgment against him may exceed the amount of the bail.

55. The case given in the foot note and relied on by Mr. Mitra is that of The Gemma (14) 1899 Probate Division, 285. There the facts were as

follows:

A collision took place in Sea Beach of the river Thames between the British steamship Kildona and the foreign steamship Gemma. The owners of

the Kildona commenced an action in rem, and caused the Gemma to be arrested. The London solicitors instructed by her managing owners,

entered an appearance and undertook to put in bail, whereupon the vessel was released. The surveyors appointed by the parties, valued the vessel

Ã¯Â¿Â½ 4500 and the freight at Ã¯Â¿Â½ 375. The bail was completed in the sum of Ã¯Â¿Â½ 4875, the bond being conditioned in the usual form that if the

owners of the ""Gemma shall not pay what may be adjudged against them in the said action with costs, execution may issue forthwith against the bill

for a sum not exceeding Ã¯Â¿Â½ 4875"". Thereafter the plaintiffs delivered their statement of claim, claiming judgment in the usual form against the

defendants and their bail for the amount of damages occasioned by the collision. The defendants put in a defence, making a counter-claim in similar

terms against the plaintiff"s and their bail. At the hearing the court pronounced the Gemma alone to blame, dismissed the defendants" counter

claim, and, in the usual form, condemned the defendants and their bail in damages and costs. The Registrar assisted by merchants, assessed the

plaintiffs" damages at Ã¯Â¿Â½5538 5s. 10d. with interest to date of payment, and the costs were subsequently taxed at Ã¯Â¿Â½ 441.10s. 5d. The

defendants paid the plaintiffs Ã¯Â¿Â½ 4875 being the full value of their ship and of her freight, and the amount for which bail had been given. In respect

of the unsatisfied balance the plaintiffs sued out a writ of Fieri facias directing the Sheriff to cause to be made of the goods and chattels of the

German owners, of the Gemma in his bailiwick the sum of Ã¯Â¿Â½ 1317 8s. 10d. together with costs and interests. Under this writ, the Gemma was

seized again at Berwick. The owners of the Gemma applied for an order directing the Sheriff to withdraw, and Bucknill, J., sitting in Admiralty,

made the order on the ground that the bail was equivalent to the res, and bail having been completed in the full value of ship and freight the Gemma

was released from all rights and claims against her in respect of the collision. It was argued on behalf of the plaintiffs appellants that (a) by

accepting bail in the value of the ship the plaintiffs released their maritime lien, but they did not thereby surrender their rights against the owners of

the vessel personally, for, by appearing, the owners submitted to the jurisdiction and. as against them, the proceedings were in personam, (b) if the

defendants, relying upon their position as foreigners domiciled abroad, had not entered an appearance, the proceedings would have been

throughout in rem. and the judgment would have been limited to the res, but if the owners appeared to contest or reduce their liability they were

before the court not only for the purpose of protecting their interest in the res, but also for the purpose of protecting their own parietal liability. On

behalf of the respondents the defendants, it was argued that bail having been given for the full amount of the value of the ship and freight the vessel

was discharged from any further claim against her in the action and section 15 of the Admiralty Court did not apply. Delivering the judgment of the

appeal court, A. L. Smith L.J, pointed out that the appearance by the defendants, the putting in of bail, the form of the bail bond, the nature of the

statement of claim of the plaintiffs, and the defence and counter-claim of the defendants showed that the defendants had submitted to the

jurisdiction of the court. The learned Judge took the view that apart from authority, when persons, whose ship had been arrested by the marshall of

the Admiralty Court, thought fit to appear and fight out their liability before the court, the form of the proceedings in the Admiralty Court showed

that the persons so appearing became parties to the action, and personally liable to pay whatever in the result might be decreed against them; and

the action, though originally commenced in rem became a personal action against the defendants upon appearance. According to his lordship there

could be three reasons for the appearance; first, to release the ship, so that it might go on trading for the owner; secondly, to contest the plaintiffs''

allegations that the ship had been in default; and, thirdly, in order to prevent its being sold. His Lordship further held that the judgment in the

Dictator 1892 P. at page 306 supported this view.

56. As will be noticed from the recital of the facts in the above case not only was there no appearance under protest (where such was allowed) the

defendants undertook to put in bail thus getting the release of the ship. They further made a counter-claim against the plaintiffs which put the matter

beyond any controversy so far as the submission to jurisdiction was concerned. By their counter-claim the defendants really became the plaintiffs in

a cross action and thus invoked the jurisdiction of the court to pronounce judgment against the plaintiffs. In this case which was one in rem so far as

the first defendant is concerned there has been appearance. It was the second defendant who put in sufficient amount in cash with the Registrar to

secure the plaintiffs'' claim if any, in the event of their success.

57. Mr. Mitra next urged that although the CPC and the Rules of the Original Side of this Court do not provide for entering appearance under

protest under the practice prevailing in England in Admiralty matters it was open to the defendant to put in such an appearance and failure in this

respect amounts to a submission to jurisdiction of this court. For this purpose he relied on the case of The Vivar, (15), 2 Probate Division, 29.

There a collision took place at sea about ten miles from the South Stack Light House, between an American and a Spanish vessel. Both vessels

sank in consequence of the collision, and the owners of the American vessel applied in the Registry for leave to issue a writ for service cut of the

jurisdiction in an action to recover compensation for the loss of their vessel, against a British subject resident in Spain, who was alleged to be one

of the owners of the Spanish vessel. The Registrar having granted the necessary leave, the writ was issued and service was effected on the

defendant in Spain. Thereupon an appearance under protest was entered on his behalf. On a motion being made to the Judge of the Admiralty

Court the action was ordered to be dismissed. This was upheld in appeal. Before entering an appearance the defendant''s Solicitors wrote to the

plaintiff''s solicitors that (i) their client was a British subject Residing in England, (ii) by the law of Spain a foreigner could not own a Spanish vessel,

(iii) the client was not an owner of the ship and could not be the owner of The Vivar and (iv) unless the notice given by the plaintiff''s solicitors was

withdrawn the defendant was prepared to appear in the action and asked for costs, and (v) the letter might be treated as an undertaking on the

part of their client to do so. Delivering judgment of the court of appeal James, L.J. observed, ""the fact of the Solicitors for the defendant writing the

letter undertaking to appear, in ignorance of the fact that there might be disclosed a perfectly objection on the ground of the cause of action having

taken place out of the jurisdiction, did not bind the defendant. I am also of opinion that an appearance under protest is not an idle form, but that it

is the old form known to the court of Admiralty, and is not expressly taken away by the rules under the Judicature Act. The solicitors for the

defendant appeared under protest, and moved the court to dismiss the action, for the real purpose of raising the question whether the defendant

was properly cited and subject to the jurisdiction of the court by the procedure which had taken place there, in other words, whether he was

properly compellable to appear.

58. Mr. Mitra also cited two more decisions on to this aspect of the matter. The first is the case of (16) Staniforth v. Richmond, 13 Weekly

Reporter, 724. This was not an Admiralty action at all. In this matter the writ, which was for service abroad, has been served upon the defendant.

It was not specially endorsed, but the defendant had appeared by his attorney, and was subsequently served with the declaration and particulars in

the action. It was then discovered that the cause of action was not within the jurisdiction of the Court, and he then applied to the Court for setting

aside the service of the writ of summons. Crompton, J. held that the defendant having appeared gratis, could not be allowed after wards to object

to the jurisdiction. The defendant was only put to plead and the plaintiff would not get his judgment unless he made out his case. The second case

was that of (17) The Evangelistria, 25 Weekly Reporter, 255 There the plaintiff in an action in rem claimed to be the sole owner or mortgagee of a

foreign vessel against which the suit was brought, and to be entitled to have possession of the same decreed to him. The defendant appeared under

protest, and delivered a petition on protest alleging that the plaintiff and the defendants were foreigners resident abroad, and praying the court to

pronounce against its jurisdiction. The Consul of the foreign State where the ship was registered was desirous that the court should entertain the

suit and prima facie evidence was given at the hearing that by a decree of a competent court of such foreign State possession of the vessel had

been transferred to the plaintiff. The court said that it would not decline to exercise its jurisdiction. It was contended that the court had no

jurisdiction in questions of mortgage of foreign ships. Sir Robert Phillimore observed that ""the court, however, has occasionally been in the habit of

entertaining suits between foreigners in matters of Admiralty law and jurisprudence. In The See Renter, Lord Stowell said, ""the court never

intervenes unless with the consent of the parties or through intervention of the representative of the foreign State devolving the jurisdiction of his

own country on this Court. The Consul General of Greece wishes the jurisdiction of this court to be exercised. Now, without entering into the

argument, which appears to me to deserve considerable attention as to the provisions in the Judicature Acts with respect to jurisdiction of the High

Court, I think for the reasons I have stated that I ought not to decline to exercise jurisdiction so far as to enquire into the position of the respective

parties. As it is undesirable that the ship should remain under arrest I should be inclined to allow the arrest to be removed if bad is given.

59. These judgments however do not in my opinion clinch the matter. There is nothing which corresponds to order 11, rule 1 of the Rules of the

High Court in England providing for service of a writ out of the jurisdiction of the court. That rule gives the defendant a right to object to the

jurisdiction at the very first stage. Under Order 11, Rule 6 of the Rules of the Supreme Court when the defendant is neither a British subject nor in

the British Dominion notice of the writ and not the writ itself is served upon him. If the defendant does not appear under protest his conduct

amounts to a submission to the jurisdiction of the court. This is the substance of the decision in the case of Staniforth v. Richmond (16). So far as

the case of Evangelistria (17) is concerned Sir Robert Phillimore decided only on the basis that the Consul General of Greece had requested that

an English Court should exercise jurisdiction and that the Admiralty Court in England had in the past acted upon such request. In the case of the

Vivar reliance was placed on the forms in use in England from ancient times and the practice of the court of Admiralty. I cannot see why the old

practice prevailing in the Admiralty Court in England should apply to an Admiralty action of this court unless there is specific provision to that

effect. Rule 51 of Appendix 5 (of our Admiralty Rules) provides that ""where no other provision is made by these rules proceedings in suits brought

in the court in the exercise of its jurisdiction under the Colonial Courts of Admiralty Act, 1890, shall be regulated by the rules and practice of the

court in suits brought in it in the exercise of its Ordinary Original Civil Jurisdiction."" There is no reference to the Admiralty practice in England and

rule 50 of our Rules only provides that the forms used in the Admiralty Division of the Supreme Court in 1883 should be followed as nearly as the

circumstances of the case may permit. But it was argued that the Colonial Courts of Admiralty Act, 1890, enjoined upon this court to exercise

jurisdiction in cases where the English court of Admiralty would have exercised the same. Emphasis was laid in particular to section 2(2) of the said

Act which runs as follows:

The jurisdiction of a Colonial Court of Admiralty shall, subject to the provisions of this Act, be over the like places, persons, matters, and things, as

the Admiralty jurisdiction of the High Court in England, whether existing by virtue of any statute or otherwise, and the Colonial Court of Admiralty

may exercise such jurisdiction in like manner and to as full an extent as the High Court in England, and shall have the same regard as that court to

International Law and the comity of nations"". Mr. Mitra submitted that the use of the expression ""or otherwise"" after the words ""by virtue of any

statute"" showed that the jurisdiction was not confined to that conferred by statutes only but that it was attracted in all such cases whether the

English Court of Admiralty would exercise jurisdiction. In my view, the expression ""or otherwise"" only refers to the jurisdiction of the English Court

of Admiralty which existed even prior to the passing of any statute by Parliament in that regard. Article 86 of section 1 of Halsbury"s Laws of

England, vol. 1 dealing with the history of Admiralty jurisdiction shows that in England this jurisdiction took its origin from Saxon times or from the

time of Henry I. According to the learned author ""the record of an Ordinance at Ipswich clearly refers to the Admiral"s Court: at all events, in the

reign of Edward III the authority of the Crown to administer justice in respect of piracy or spoil and other offences committed on the sea was

undisputed. As a not unnatural consequence of possessing the criminal jurisdiction, the court of the Lord High Admiral began the hear disputes in

all civil matters connected with the sea, gradually usurping also a jurisdiction over cases arising in inland tidal waters. In consequence of this

encroachment on the province of the courts of Common Law, two statutes were passed in the reign of Richard II confining the admirals and their

deputies to things done upon the sea, and in the main streams of great rivers beneath the bridges. There was a long course of conflict between the

Admiral"s court and the Common Law courts in England and the Adrmiralty Court Act of 1840 and the later Acts served to extend the jurisdiction

of the Admiralty Court. Hals-bury records in Article 93 of Vol. 1, 3rd edition at page 50: ""that the present jurisdiction of the High Court of Justice

in relation to Admiralty matters is derived partly from statute and partly from the inherent and statutory jurisdiction of the High Court of Admiralty.

In my opinion, in enacting the Colonial Admiralty Courts Act, 1890, the Legislature had in mind the ancient jurisdiction apart from any statute as

mentioned above. The Act has no reference to jurisdiction exercisable by a court because of the submission of the defendant to it.

60. As issues No. 6(b), (c) and (d) all relate to the entry of appearance by the defendant in this suit and the deposit of moneys for the release of

the vessel they must all be answered in the negative. In my view, there is no question of waiver or acquiescence or estoppel.

61. On behalf of the defendants reliance was placed on the cases of Ledgard v. Bull, (18) 13 Indian Appeals, 134. Meenakshi Naidoo v.

Subramaniya Sastri, (19) 14 I.A. 160 and other cases where the principle of these two cases have been followed in support of the argument that if

the court had no jurisdiction to hear the matter, to start with consent of the party objecting thereto or submission by it to the jurisdiction cannot

found it in the court. In Ledgard"s case an action for damages for infringement of a patent which should have been filed in the District Court, was

instituted in the court of the Subordinate Judge and thereafter transferred to the District Judge. The Judicial Committee observed that ""when the

Judge has no inherent jurisdiction over the subject-matter of a suit, the parties cannot by their mutual consent convert it into a proper judicial

process, although they may constitute the Judge their arbiter, and be bound by his decision on the merits when these are submitted to him. But

there are numerous authorities which establish that when, in a cause which the Judge is competent to try, the parties without objection join issue,

and go to trial upon the merits, the defendant cannot subsequently dispute his jurisdiction upon the ground that there were irregularities in the initial

procedure which, if objected to at the time, would have led to the dismissal of the suit."" In Meenakshi Naidoo''s case the question was as to the

competency of an appeal from an order of the District Judge-under Act XX of 1863. The Judicial Committee held on a construction of the relevant

section of the Pagoda Act that ""the 10th section places the right of appointing a member of the committee in the Civil Court, not as a matter of

ordinary civil jurisdiction, but because the officer who constituted the Civil Court, was fit to exercise his discretion widely in the matter and that

there was no right of appeal therefrom"". The Board discountenanced the plea of waiver of jurisdiction by the appellant in the High Court on the

ground that consent could not confer jurisdiction where none existed. These decisions, in my view, only establish the proposition that if the court

has no inherent jurisdiction there can be no question of waiver or estoppel or acquiescence. The position is however otherwise where the court

does not lack in such inherent jurisdiction but takes a wrong view on the facts of the case in coming to the conclusion that it has jurisdiction. This

court has Admiralty jurisdiction and can and ought to exercise the same if the facts warrant it. It is not like the case of Ledgard and Bull, where the

Subordinate Judge could not have entertained the suit at all and the transfer of the suit to the file of the District Judge did not improve matters; nor

can this case be equated to Meenakshi Naidoo''s case where the relevant statute did not provide for any appeal being filed. The appeal was wholly

incompetent no matter that no objection as to its competency was taken in the High Court.

62. This Conclusion lis supported by the judgment in Hriday Nath Roy v. Ram Chandra Barna Sarma and ors. (20) 24 C.W.N. 723, Full Bench,

The question referred to the full bench was whether an order for withdrawal of a suit with leave to institute a fresh suit on a ground not covered by

order XXIII, rule 1 (2) of the CPC should be treated as one without jurisdiction and therefore null and void. Delivering judgment of the full bench

Sri Ashutosh Mookerjee observed that ""since jurisdiction is the power to hear and determine, it does not depend either upon the regularity of the

exercise of that power or upon the correctness of the decision pronounced."" His Lordship found that the court had jurisdiction to try the suit and in

the exercise of that jurisdiction was competent to make an order for withdrawal with liberty reserved to the plaintiff to institute a fresh suit in

respect of the same subject-matter, if it was satisfied that circumstances existed which would justify such an order. The Full Bench observed that

however erroneous that order might be, it was not an order made by a court without jurisdiction but was an order made by a court of competent

jurisdiction acting with material irregularity in its exercise. It was held that the order for withdrawal of the suit with leave to bring a fresh suit was not

null and void.

63. Issue No. 7: - As the plaintiff did not ship the goods within the contract period, it cannot claim the price of the goods and issue No. 7 must be

answered in the negative.

64. Issue No. 8: - In the result the suit must be dismissed.

With regard to costs I think that this is a fit case where the successful party ought to be deprived of them. As I have said more than once the

conduct of the second defendant in asking the plaintiff to mail documents in the circumstance of this case was nothing more than an attempt to get

the goods by a trick out of India. If the defendant has not taken the goods at all because they were not in terms of the contract nothing more need

have been said. But it raised a dispute as to quality which was decided against it and has utilised and consumed the plaintiff''s goods. In my opinion,

these are things which a court of law cannot disregard in awarding costs. In the circumstances of this case I shall direct the parties to pay and bear

their own costs. Certified for two counsel.