**(1967) 04 CAL CK 0019**

**Calcutta High Court**

**Case No:** Admiralty Suit No. 1 of 1967

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| National Co. Ltd. | | APPELLANT |
| | Vs | |
| Asia Mariner, M.S., The Owners and Parties Interested in | | RESPONDENT |

**Date of Decision:** April 20, 1967

**Acts Referred:**

- Colonial Courts of Admiralty (India) Act, 1891 - Section 2
- Constitution of India, 1950 - Article 225
- Government of India Act, 1915 - Section 106
- Government of India Act, 1935 - Section 223

**Citation:** 72 CWN 635

**Hon'ble Judges:** S.K. Mukherjea, J

**Bench:** Single Bench

**Advocate:** Subrata Roy Chowdhury and Biswarup Gupta, for the Appellant;B. Das and Tapas Kumar Banerjee, for the Respondent

**Judgement**

S.K. Mukherjea, J.

On January 16, 1967, M. S. Asia Mariner, a Liberian vessel, was lying at anchor in the port of Calcutta. She had brought a cago of jute from Bangkok for National Company Limited, manufacturers of jute goods. They re-fused to take delivery of the cargo, brought an action in rem against the Asia Mariner in the Admiralty Jurisdiction of this court and had her arrested. The owners of the vessel have moved the court for dismissal of the suit on the ground that this court has no jurisdiction to entertain the suit in its Admiralty jurisdiction, for taking the plaint off the file and for release of the vessel.

2. The plaintiffs entered into a contract for purchase of 1000 long tons of Thai mesta jute, grade "C", crop 1966-1967 to be shipped from Thailand on or before November 30, 1966. Under the contract, the plaintiffs opened four letters of credit in favour of

their shipper. In order to draw on the letters of credit, the shipping documents had to evidence shipment of the agreed quantity of Siam mesta jute, grade "C" crop 1966-1967 and shipments were to be made by November 20, 1966 which was subsequently extended to November 30, 1966.

3. It appears from the bills of lading, that the shipper shipped by the Asia Mariner 5560 bales of jute of the aggregate weight of 1000 long tons to be delivered at Calcutta to the order of State Bank of India on account of the plaintiffs. After shipment of jute, the shipper on presentation of the bills of lading has realised the full value of the letters of credit.

4. The plaintiffs'' grievance is that when delivery of the goods was offered, they found that the jute carried under the bills of lading was jute cutting and not mesta jute, grade "C". They con-tend that the defendants were aware that the goods shipped under the bills of lading were not the goods shown on the bills of lading.

5. It appears from the bills of lading that they were issued by Eastern Development Corporation Limited, Bangkok. They are signed not by the master but by some one on behalf of the master. Under the words "ship-per''s particulars" the goods are shown as Siam mesta jute, grade "C". They contain the usual clause "contents, nature, quality, measure, weight, marks, numbers and value unknown."

6. The plaintiffs, who are the holders of the bills of lading, say that in showing the goods shipped as Siam mesta jute, grade "C" in the bills of lading the defendants, in collusion with the shipper, to defraud the plaintiffs, knowingly or recklessly made a false statement that the goods were Siam mesta jute, grade "C" although the goods to the knowledge of the defendants were Siam jute cutting, with intent that on the basis of the false statement in the bills of lading, the letters of credit would be drawn upon by the shipper. In support of these allegations the plaintiffs rely on the tally sheets made at the time of shipment, which show the goods as jute cutting and not as jute mesta grade "C". The plaintiffs also contend that the defendants, in breach of the contract of carriage as contained in the bills of lading have failed to deliver 5560 bales or any quantity of Siam mesta jute.

7. The petition in support of the application of the owners for release of the vessel, has been verified by the master. The master says that on December 1, 1966, by a charter party the vessel was chartered to Eastern Development Corporation Limited. It is a voyage charter and not a charter by demise. The charter party contains, among others, the following provisions:

Clause 2-Owners are to be responsible for loss or damage to goods or delay in delivery of the goods only in case the loss, damage or delay has been caused by the improper or negligent storage or by personal want of due diligence on the part of the owners or their manager to make the vessel in all respects sea-worthy and to secure that she is properly manned, equipped and supplied or by the personal act or default of the owners or their manager.

8. And the owners are not responsible for any loss or damage or delay arising from any other cause whatsoever, even from the neglect or default of the captain or crew or some other person employed by the owners on board or ashore for whose acts they would, but for this clause, be responsible, or for unseaworthiness of the vessel on loading or commencement of the voyage or at any time whatsoever :

Clause 9.-The captain to sign bills of lading at such rate of freight as presented without prejudice to the charter party, but should the bills of lading amount to less than the total chartered freight the difference to be paid to the captain in cash on signing bills of lading.

Clause 20.-Collective bill of lading, in accordance with mate''s receipts, to be signed by master and issued to charterers. Bill of lading not to be marked freight paid until paid to owners as per clause 16. Eastern Development Corporation Ltd. to issue their own liner bill (s) of lading to shippers as per mate''s receipt.

9. The master says that in terms of the charter party, on December 6, 1966, he gave notice of readiness to the charterers. Thereafter jute was loaded on the vessel and loading was completed on December 10. In the collective bill of lading there is no mention of the quality of jute. He submits that the contract of carriage is between the charterer and the shipper. The owners are not a party to the contract. The liner bills of lading issued by the charterers on the basis of which the plaintiffs have brought the action, were issued by the charterers and not by the owners or the master or under the owner''s authority. They were issued before the charter party of December 1, 1966 was executed and before the usual formality of execution of a letter of authority by the master authorising an agent or servant of the charterers to sign bills of lading on behalf of the master. The owners had nothing to do with the tally-sheets on which the plaintiffs rely. They never had any knowledge of the quality or quantity of jute apart from the number of bales. They have not made any false statement in the bills of lading. They were not under any liability to deliver any goods to the plaintiffs, and no breach of contract has been committed by the owners. The master denies the charge of fraud and collusion.

10. While the hearing of the application was going on, the plaint was amended. In view of the amendments, I granted leave to the defendants to use a further affidavit. Before time to file the affidavit expired, hearing was concluded but I made it clear that I would give a further hearing if the defendants filed any affidavit. No further affidavit has been filed but counsel have made their submissions on the amendments.

11. Mr. B. Das argued on behalf of the owners that the averments and submissions in the amendments, not having been made in the affidavit in support of arrest, I should take no notice of the amendments. The objection might have been of some force if the application were an application merely for release of the vessel. The application is also for taking the plaint off the file. It would be strange if the Court

were to make an order for taking the plaint off the file without looking into the amendments made in the plaint. I cannot therefore agree with Mr. Das.

12. By the amendments, the plaintiffs say that the defendants knew from the tally sheets that the goods loaded on board the Asia Mariner bore the leading marks "Jute Cutting". These marks are essential to the character, description or identification of the goods. In breach of the paramount clause in the bills of lading and in breach of their duty as carriers, the defendants, through their master and crew, suppressed or omitted or permitted to be suppressed or omitted these leading marks; they also made or permitted to be made a false statement in the bills of lading that the goods shipped were Siam mesta jute, grade "C"; and that the defendants or the master, on behalf of the defendants, knowingly or recklessly or fraudulently or in collusion and conspiracy with the shipper made a false statement in each of the bills of lading with regard to the date of shipment. Loading of the vessel did not commence before the 6th December 1966 and yet the defendants or the master issued the bills of lading as of November 29, 1966. The defendants or the master acted in breach of duty and in breach of contract in not mentioning the correct dates in the bills of lading and in not issuing the same upon shipment of the goods. The false statements made in the bills of lading with regard to marks, the goods and the dates were made with intent that the letters of credit would be drawn upon to the prejudice of the plain-tiffs.

13. Counsel for the owners submitted that the order for arrest ought to be recalled because on the materials before the Court, there is no prima facie case against the owners and in any event, the Court, in its Admiralty jurisdiction is not competent to try this action.

14. It is contended that as the vessel was under a charter and the bills of lading were issued by the charterers and not by the owners, the contract of carriage is with the charterers and not with the owners. If any fraudulent misrepresentation or misstatement has been made in the bills of lading, the charterers alone are responsible. The signature on the bills of lading are not of the master but of a person who claims to have signed on behalf of the master. There is no evidence that the master has authorised the charterers or any one on behalf of the charterers to sign the bills of lading. Even if it be held that the bills of lading have been duly signed on behalf of the master, the master, in signing the bills of lading through his agent, was acting not as the agent of the owners but as the agent of the charterers.

15. Mr. Das submitted that the provision for signing the bills of lading by the captain in clause 9 of the charter refers to the collective bill of lading and not to the liner bills of lading which were to be issued by the charterers. In my opinion, cl. 9 clearly contemplates that the captain is to sign the liner bills of lading and not the collective bill of lading. By definition, there can be only one collective bill of lading. Clause 20 speaks of collective bill of landing not of collective bills of lading but in clause 9 the plural and not the singular is used. Moreover, there is no reason why the provision

for the master''s signature on the collective bill of lading should be made once in clause 9 and again in clause 20. Under clause 9 the captain is to sign bills of lading at such rate of freight as presented without prejudice to the charter party. The phrase "at such rate of freight as presented without prejudice to the charter party" in the context of collective bill of lading makes no sense. The freight payable by the charterer has been provided in the charter party itself, viz., a lump sum of ₹13,500. Therefore, clause 9 refers to liner bills of lading and imposes a duty on the master to sign the liner bills of lading.

16. It is submitted that the bills of lading have been signed not by the master but by some one on behalf of the charterers purporting to act for the master. In the petition. the master does not say that the bills of lading were signed by a person who did not have any authority to sign on his behalf. He says that the bills of lading are not and cannot be bills of lading issued by the owners or the master or under the authority of the owners. He is careful not to say what the bills of lading were not issued under his authority. He says that the bills of lading were issued long prior to the usual formality of execution of a letter of authority by the master of the vessel authorising an agent or servant of the charterers to sign bills of lading on behalf of the master. Therefore, it seems that the master contemplated a situation where he was to execute a letter of authority by which he was to authorise an agent or servant of the charterers to sign the bills of lading on his behalf. It is to be noticed that the master describes the letter of authority as a formality. As he did not sign the bills of lading himself, which he ought to have done in terms of clause 9 of the charterparty, it is not unreasonable to conclude that he did authorise an agent or servant of the charterers to sign the bills of lading. I understand that while the hearing was going on, the master delivered the goods to the plain-tiffs. In any event, the master carried the goods under the bills of lading signed by an agent of the charterers and delivered the goods to the holder of the bills of lading. He has therefore acquiesced in, acted upon and ratified the bills of lading.
17. In (1) Tillmanns & Co. v. Knutsford, (1908) 1 KB 185, where under the terms of the charter, the master was to sign the bills of lading as presented by the charterer, and one of the bills of lading was not signed by the master but by the charterer for the master and the owners, it was held by the Court of Appeal that the signature by the charterer on the bill of lading bound the owners. Here under cl. 9, the captain is to sign the bills of lading as presented, which can only mean, as presented by the charterer.

18. In these circumstances, I am of opinion that the signatures on the bills of lading are as good as the signatures of the master.

19. The question arises whether the owners are a party to the contract of carriage contained in the bills of lading and whether the holder of the bills of lading can enforce the contract against the owners. The bills of lading were issued by the charterers but no notice of the charterparty was given in the bills of lading. There is

no reference to the charterparty in the bills of lading, far less to any of the terms of the charterparty agreement.

20. In (2) The St. Cloud, 167 ER 269 in an action in rem for damages for injury done to cargo by improper storage, the owners contended that the snip was under a voyage charter and they were not liable for any claim for breach of contract of carriage. In disposing of these contentions, Dr. Lushington said :

"It is contended however that the contract contained in the bill of lading was made by the master as agent of the charterer, and not as agent of the owner; and in support of this position, is cited the case of (3) Schuster v. Mckellar, 119 ER 1407. But there in an important distinction in this case. The shipper is not proved to have had notice of the charterparty. Until he had such notice, he would be justified in supposing that in dealing with the master for the carriage of his goods, he was dealing with the owner''s agent. For prima facie the master is the agent of the owner of the ship. I cannot think that it is consistent with justice, or ac-cording to ordinary mercantile practice, that a shipper of goods on board a ship put up in the usual way should lose his right to sue the owner for damage, on account of a charter of this description, of which he had no notice. I think the burden of proof must fall upon the ship-owner claiming exemption from liability; he must show that the shipper had notice of the charter, and was aware that in making the contract, the master was agent for the charterer."

21. In (4) Sandeman v. Scurr, (1866) 2 QB 86, the ship was chartered for a voyage; the captain was to sign bills of lading at any rate of freight without prejudice to the charter. The ship was put up as a general ship by the charterer''s agents without any intimation that she was under charter. The plaintiff shipped some casks of wine and received bills of lading signed by the captain. The wine was stowed by a stevedore appointed by the charterer''s agents. The wine having leaked for bad stowage, an action was brought against the owners of the ship. It was contended on behalf of the defendants, that, as the use of the ship had been made over to the charterer and the ship had been put up as a general ship by his agents and the bill of lading had been given by the captain in furtherance of a contract for freight of which the charterer was to have the benefit, the captain must be considered as having given the bill of lading as the agent of the charterer and the contract as having been made with the latter, and not with the defendants, the owners of the vessel; and that, consequently, the charterer alone was responsible for the negligent stowing of the goods in question. In his judgment Cockburn, C.J., said :

"So long as the relation of owner and master continues, the latter, as regards parties who ship goods in ignorance of any arrangement whereby the authority ordinarily incidental to that relation is affected, must be taken to have authority to bind his owner by giving bills of lading. We proceed on the well known principle that, where a party allows another to appear before the world as his agent in any given capacity, he must be liable to any party who contracts with such apparent agent in a matter

within the scope of his agency. The master of a vessel has by law authority to sign bills of lading on behalf of his owners. A person shipping goods on board a vessel, unaware that the vessel has been chartered to another is warranted in assuming that the master is acting by virtue of his ordinary authority, and therefore acting for his owners in signing bills of lading. It may be that, as between the owner, the master and the charterer, the authority of the master is to sign bills of lading on behalf of the charterer only, and not of the owner. But, in our judgment, this altered state of the master''s authority will not affect the liability of the owner, whose servant the master still remains, clothed with a character to which the authority to bind his owner by signing bills of lading attaches by virtue of his office. We think that until the fact that the master''s authority has been put an end to is brought to the knowledge of the shipper of goods, the latter has a right to look to the owner as the principal with whom his contract has been made."

22. In this connection reference may also be made to (5) The Patria, LR (1871) 3A & E 436, and (6) Chappel v. Comfort, (1861) 10 CB NS 802, 810 where a similar view was taken.

23. In (7) Manchester Trust v. Furness, (1895) 2 QBD 539 it appeared from the bill of lading that it was sub-object to payment of freight and other conditions of the charterparty. In an action for misdelivery of goods against the shipowners, it was held that the reference to the charterparty in the bill of lading did not give the holder of the bill of lading constructive notice of the contents of the charterparty, the equitable doctrine of constructive notice not applying to mercantile transactions. In the (8) Figlia Maggiore, LR (1868) 2 A & E 106 an action was brought by the assignees of bills of lading for negligence and misconduct of the master resulting in damage to cargo. It was held by Sir Robert Philimore that as the vessel had been put up as a general ship and the plaintiff had no knowledge of the charterparty, the owner of the ship was the proper party to be sued.

24. Mr. Das submitted that as the name of the Eastern Development Corporation appears on the bills of lading, the shipper knew or ought to have known of the charter and the terms of the charter. The objection may be disposed of on two ground. First, the doctrine of constructive notice has no application, and secondly, clause 17 of the bills of lading specifically states that the contract evidence by the bill of lading is between the merchant and the owner of the vessel named therein and the ship-owner only shall be liable for any damage or loss due to any breach or non-performance of any obligation arising out of the contract of carriage. In (9) Apex Oilfields Ltd. v. Lunham & Moore Shipping Ltd., (1962) 2 LLL.R. 203, in similar circumstances, the name of the charterer appeared prominently in the bill of lading. It was held that the charter not being a charter by demise the master in signing the letter of lading acted as the agent of the owners.

25. In view of the absence of notice of the charterparty to the shipper and clause 17 of the bills of lading, I am of opinion that the owners are the carriers and the

plaintiffs are entitled to look to the owners for any breach of contract of carriage or any breach of duty in relation to carriage.

26. Mr. Roy Chowdhury contended that the carriers committed breach of contract of carriage contained in the bills of lading in not delivering the goods shown in the bills of lading, in issuing shipped bills of lading before the goods were shipped, in not showing the leading marks and in showing goods other than goods actually shipped. He also contended that apart from contract, these acts and omissions amount to a breach of duty which the carrier owes to the shipper or to the holder of the bills of lading.

27. The plaintiffs have pleaded that the defendants, in breach of the contract of carriage, failed to deliver 5560 bales of mesta jute grade "C". The core of the plaintiffs'' complaint how-ever is that the goods actually shipped were jute cuttings to the knowledge of the defendants and yet the defendants knowingly or recklessly made a false statement in the bills of lading that the goods shipped were mesta jute, garde C, in consequence of which they have suffered damage. It is not the case that the goods actually shipped were not delivered or short delivered or that there was delay in delivery or that the goods were damaged or affected in any manner to the plaintiffs'' prejudice. It may be that the plaintiffs have a cause of action against the owners for issuing bills of lading containing misstatements or false statements but that is not a cause of action founded on breach of contract of carriage of goods or breach of duty in relation to carriage of goods. Carriage of goods, in this context, means carriage of goods actually shipped and not hypothetical goods which ought to have been shipped but were never shipped.

28. It is argued that under the bills of lading the carrier was under an obligation to deliver 1000 bales of Siam mesta jute, grade ''C'' and in not delivering the same, the carrier committed breach of contract and breach of duty. In the bills of lading, the contents have been shown to be Siam mesta jute, grade ''C'' but only as per shipper''s particulars and the carrier has expressly disclaimed any knowledge of the contents, nature, quality and marks. In these circumstances, the carrier cannot be said to have warranted in the bills of lading that the contents were Siam mesta jute, grade ''C''. As against the carriers, the plaintiffs cannot insist on delivery of mesta jute, grade ''C'' unless those are the goods which have been actually shipped. The carrier or the master is only bound to carry and deliver safely the goods received by him. Moreover, the master cannot ordinarily bind the owner by any representation in the bill of lading as to the quality of the goods. (10) Cox v. Bruce, (1886) 18 QBD 147.

29. Mr. Roy Chowdhury submitted that the carrier cannot take shelter be-hind the clause "contents and quality unknown" in the bills of lading because the master and the crew, who are the carrier''s agents, knew that the goods were not what they were declared to be, by the shipper. I do not agree. In my opinion, a carrier cannot be held liable for representations which he does not make and which he is careful to

say, he does not make. In support of his argument, Mr. Roy Chowdhury relied on the decision in (11) Compania Importadora De Arroces Y Kamp S. A. v. P. & O. Steam Navigation Co. Ltd., (1927) 28 LLL.R. 63. That was an action for misdelivery of goods. The Court found that the goods delivered were not the goods which had been shipped under the bills of lading. It was nobody''s contention, as it could not be, that the carrier was under an obligation under the bill of lading to deliver goods which he had never received. Here the plaintiffs contend that they are entitled to delivery of goods other than the goods which were actually shipped. The decision has, there-fore, no application to the facts of this case.

30. I may now come to the substance of the plaintiffs'' complaint. The case is that the defendants in collusion and conspiracy with the shipper have fraudulently or recklessly issued bills of lading showing the goods shipped to have been Siam mesta jute, grade ''C'' while to the knowledge of the defendants the goods were jute cutting; that the defendants, by their servants and agents suppressed or omitted mention of the leading marks ''jute cuttings'' in the bills of lading although the master and the crew knew of those leading marks from the tally sheets; and that the defendants, through the master, dated the bills of lading as of November 29, 1966 although the goods were not and could not have been loaded before December 6, 1966.

31. In this context, the plaintiffs rely on the paramount clause or clause 2 of the bills of lading, the material, portion of which provides as follows :

"The Hague Rules as enacted in the country of shipment shall apply to the contract. When no such enactment is in force, in the country of shipment, the corresponding legislation of destination shall apply".

Thailand is not among the countries which have enacted the Hague Rules by domestic legislation (Carver- Carriage by Sea, 11th Edition, Vol. 2, Article 1650 et seq.) Mr. Das submitted that there is no evidence that the Hague Rules have not been enacted by Thailand since the publication of the 11th Edition of Carver. It seems to me that it is a matter of no consequence for the purpose of this case whether Thailand has enacted the Hague Rules or not. Either under a statute of Thailand by which the Hague Rules have been enacted or under the Schedule to the Indian Carriage of Goods by Sea, Act 1925 by which the Hague Rules have been enacted, the Hague Rules will apply to the bills of lading. Under article 3, rule 3 of the Hague Rules, the carrier, or the master or agent of the carrier, has a duty, after receiving the goods in his charge and on demand of the shipper, to issue a bill of lading showing among other things, leading marks necessary for identification of the goods as the same are furnished by the shipper before the loading of such goods starts. The marks ''jute cuttings'' are undoubtedly leading marks necessary for identification of the goods. The proviso to the rule says that no carrier, master or agent of the carrier, shall be bound to show in the bill of lading any marks which he has reasonable grounds for suspecting not accurately to represent the goods

actually received or which he has no reasonable means of checking.

32. Article 3, rule 7 of the Hague Rules provides that after the goods are loaded the bill of lading to be issued by the carrier, master or agent of the carrier, to the shipper shall, if the shipper so demands, be a shipped bill of lading. Here the bills of lading are shipped bills of lading and in so far as the carriers have issued or purported to have issued shipped bills of lading before the goods were loaded, it may be said that they have contravened the Hague Rules. In my opinion, contravention of the Hague Rules in issuing bills of lading is not a breach of contract of carriage of goods or breach of duty in relation to carriage of goods for reasons which will appear later in the judgment.

33. In the view I have taken, I hold that there is no prima facie case against the owners for breach of contract of carriage or for breach of duty in relation to carriage. The plaintiffs may have a case against the owners for issuing shipped bills of lading before the goods were loaded, for not showing the leading marks in the bills of lading or for showing the goods as mesta jute, grade "C" under shipper"s particulars if they or the master knew or ought to have known that the goods shipped were not what the shippers re-presented them to be. It may be, that the plaintiffs are liable for deceit, if deceit is proved, in circumstances similar to those which emerged in the case of (12) Ellerman and Bucknall Steamship Co. Ltd. Vs. Sha Misrimal Bherajee, .

34. Assuming that the plaintiffs have a cause of action against the owners for issuing bills of lading before the goods were loaded and for making misstatements in the bills of lading in respect of contented and marks in consequence of which the plaintiffs have suffered loss and damage, the question arises whether, this court in its Admiralty Jurisdiction, is competent to hear and determine this action.

35. It is common knowledge that this court has inherited its Admiralty Jurisdiction from the Supreme Court of Calcutta. By clause 26 of the Charter of 1774 the Supreme Court was made a Court of Admiralty in and for the provinces, countries and districts of Bengal, Bihar and Orissa, and Islands adjacent thereunto, to hear, examine, try and determine and take cognizance of 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 relate to freight, or money due for ships hired and let out, transport money, maritime usury or 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 or between others contracted, done, had or commenced in, upon or by the sea, or public rivers or ports. Wide as the language is, in which the Admiralty Jurisdiction of the Supreme Court is defined, the jurisdiction is nevertheless expressed to be limited to those matters "the cognizance whereof doth belong to the jurisdiction of the Admiralty as the same is used and exercised in that part of

Great Britain called England."

36. In 1861, the Imperial Parliament passed the High Courts Act (24 and 25 Vict C 104) section 1 of which provided that "it shall be lawful for Her Majesty, by Letters Patent, to erect and establish a High Court of Judicature at Fort William in Bengal." Sec. 9 of the Act provided that "each of the High Courts to be established under this Act shall have and exercise Admiralty and Vice-Admiralty Jurisdiction."

37. The Admiralty Jurisdiction of the Supreme Court 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. Subsequently, by clause 32 of the Letters Patent of 1865, it was 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 Vice-Admiralty. The next and the last landmark in the development of Admiralty Jurisdiction of this Court was reached in 1890 when the Imperial Parliament passed the Colonial Courts of Admiralty Act (53 & 54 Vict. Ch. 27).

38. Section 2(1) of the Act pro-vides that "every Court of law in a British possession, which is for the time being declared in pursuance of this Act to be a Court of Admiralty, or which if no such declaration is in force in the possession, has therein original unlimited civil jurisdiction, shall be a Court of Admiralty, with the jurisdiction in this Act mentioned and may, for the purpose of that jurisdiction, exercise all the powers which it possesses for the purpose of other civil jurisdiction, and such Court in reference to the jurisdiction conferred by this Act is in this Act referred to as a Colonial Court of Admiralty.

39. Section 18(2) of the interpretation Act, 1889 provides that the expression ''British possession'' shall mean "any part of Her Majesty''s dominions exclusive of the United Kingdom and where parts of such dominions are under both a Central and local legislature, all parts under the Central legislature shall, for the purposes of this definition be deemed to be one British possession." 41. By section 2 of the Colonial Courts of Admiralty (India) Act, 1891 (Act 16 of 1891) the High Court of Judicature at Fort William in Bengal was declared to be a Colonial Court of Admiralty. By the combined operation of section 2(1) of the Act of 1890 and section 2 of the Act of 1891 this High Court became a Colonial Court of Admiralty. The Colonial Court of Admiralty Act, 1890 and the Colonial Courts of Admiralty Act, 1891 still remain in force. The Admiralty Jurisdiction of this Court was preserved and continued by section 106 of the Government of India Act, 1915, section 223 of the Government of India Act, 1935 and subsequently by article 225 of the Constitution of India.

41. The Admiralty jurisdiction of this Court is defined by section 2(2) of the Colonial Courts of Admiralty Act, 1890 which provides as follows :

"The jurisdiction of 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 of England, and shall have the same regard as that Court to international law and the comity of nations."

42. The High Court at Calcutta as a Court of Admiralty is, therefore, a Court of prescribed jurisdiction. Its jurisdiction is prescribed by clause 26 of the Charter of 1774 and by section 2(2) of the Colonial Courts of Admiralty Act, 1890. The jurisdiction has not been extended or modified by any statute. None of the subsequent British statutes by which the Admiralty Jurisdiction of the High Court in England has been extended or affected have been made applicable to India.

43. To decide the question of jurisdiction in this case it will be necessary to enquire whether the High Court in England in its Admiralty Jurisdiction had the jurisdiction to try an action of like nature at the time when the Act of 1890 came into force.

44. The origin of the Admiralty Court in England is lost in the mist of antiquity. In the Middle Ages there was a Lord High Admiral and there were other Admirals who exercised disciplinary powers over vessels under their command and decided disputes in regard to prize. In course of time they came to exercise jurisdiction in maritime disputes. "Finally there emerged a personage, who from deputy of the Lord High Admiral, became the appointed judge of the High Court of Admiralty, who had criminal jurisdiction, who in time of war fulfilled duties as a judge of the Prize Court and exercised in the Instance Court jurisdiction finally limited to certain maritime causes." (Roscoe''s Admiralty Jurisdiction and Practice, 5th Edition, pages 1-15). After a long period of conflict with Superior Courts of Common Law, the Court of Admiralty came to exercise, at the beginning of the nineteenth century, a severely restricted jurisdiction. It appears that the Court had no jurisdiction to hear and determine actions for non-delivery of cargo or damage to cargo or breach of contract of carriage or cargo claims in general (Halsbury''s Laws of England 3rd Edition, Vol. 1, Article 87). In 1840 an Act was passed to extend the jurisdiction and improve the practice of the Court. In 1850, an Act of Parliament was passed relating to the jurisdiction of the Court of Admiralty in cases of captures from pirates. In 1861, the Admiralty Court Act, an Act important for the purpose of this case, was passed which conferred still more extended powers upon the Court (Roscoe''s Admiralty Jurisdiction and Practice, 5th Edition, p. 15).

45. In England, the jurisdiction in Courts of Admiralty in rem in matters arising out of contracts for the carriage of goods and cargo claims is founded on statutes. Jurisdiction in relation to the carriage of goods was first acquired by the Admiralty Court Act, 1861 (Carver''s Carriage by Sea, 11th Edition, Vol. 2, Article 1371; Roscoe''s Admiralty Practice, 5th Edition, p. 121).

46. There was no further extension of Admiralty jurisdiction of the High Court in England by statute or otherwise over cargo claims or over contracts of carriage of goods till 1920, so that at the time when the Colonial Courts of Admiralty Act, 1890

was en-acted, the High Court in England in its Admiralty jurisdiction could exercise jurisdiction in those matters only under the Admiralty Court Act, 1861. There-fore, it transpires, that this Court can have jurisdiction to entertain the present action, it at all, only under the Admiralty Court Act, 1861 and under no other statute or principle.

47. Mr. Roy Chowdhury claimed a jurisdiction for the Supreme Court of Calcutta larger than the jurisdiction enjoyed by the Admiralty Court in England. He relied on the expansive language of clause 26 and contended that apart from the Act of 1861, the High Court which has inherited its Admiralty jurisdiction from the Supreme Court has jurisdiction to entertain this claim. He sought to make a distinction between the extent and the exercise of jurisdiction. Exercise of jurisdiction, he submitted, is a matter of procedure. Under clause 26 of the Charter, the procedure in exercising jurisdiction was to be the same as the procedure of the Admiralty Court in England, but the jurisdiction of the Supreme Court was not limited by the jurisdiction of the Admiralty Court in England. He relied on an observation of G. K. Mitter, J., in (13) The Edison Marmer, 66 CWN 1083. There it is said "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."

48. In my opinion, G. K. Mitter, J., did not make nor did he intend to make a distinction between the extent and the exercise of jurisdiction. If there is a jurisdiction in a Court which can never be exercised, it is no jurisdiction at all. The Charter granted to the Supreme Court the power to take cognizance of and to hear and determine only those causes the cognizance where-of did belong to the jurisdiction of the Admiralty in England. The limit of the jurisdiction is therefore clearly defined.

49. The Charter of 1774 is not ex-pressed in the classical prose of the eighteenth century with its balance and economy of expression, but in the ornate and flowing diction of the Age of Queen Elizabeth. It is a Royal Charter with overtones characteristic of a Royal Charter. However, the jurisdiction conferred by the clause is limited in very specific terms to the extent to which jurisdiction was exercised by the Admiralty Court in England.

50. In (14) Bengal Assam Steamship Co. Ltd. Vs. Owners and Parties interested in S.S. "Shanku Maru", , Panckridge, J. said "the Admiralty jurisdiction of the Supreme Court is defined by clause 26 of the Charter of 1774. No useful purpose will be served by setting out that clause at length, and it will be sufficient to say that it conferred upon the Supreme Court a jurisdiction of Admiralty "as the same is exercised in that part of Great Britain called England."

51. It has been held by the Bombay High Court in (15) K. M. Bhagat v. Scindia Steamship Navigation Company Limited, AIR 1961 Bombay 186, that the High Court of Judicature at Bombay being one of the Colonial Courts of Admiralty under Act 16

of 1891 today exercises the same Admiralty Jurisdiction as was exercised by the High Court of Admiralty in England in 1890 when the Colonial Courts of Admiralty Act was passed by the British Parliament. It may be pointed out that clause 26 of the Charter of 1774 and clause 53 of the Letters Patent by which the Supreme Court of Judicature at Bombay was established are in similar terms. I cannot accede to the proposition advanced by Mr. Roy Chowdhury and must hold that apart from the Act of 1861, this Court in its Admiralty jurisdiction can have no jurisdiction to entertain this action.

52. Section 6 of the Admiralty Court Act, 1861, which is the relevant section 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 or 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 snip 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 or Wales; provided always, that if in any such case the plaintiff do not recover twenty pounds he shall not be entitled to any costs, charges or expenses incurred by him therein, unless the Judge shall certify that the cause was to be a fit one to be tried in the said Court."

53. Section 35 of the Act provides that the jurisdiction conferred by the Act on the High Court of Admiralty may be exercised either by proceedings in rem or by proceedings in personam.

54. In this connection, it is also necessary to refer to proviso (a) to section 2 of the Colonial Courts of Admiralty Act of 1890 which states :

"Any enactment in an Act of the Imperial Parliament referring to the Admiralty Jurisdiction of the High Court in England, when applied to a Colonial Court of Admiralty in a British possession, shall be read as if the name of that possession, were therein substituted for England and Wales."

55. Therefore the word "India" is to be read for the words "England and Wales" in section 6 of the Act of 1861, in its application to this High Court.

56. The question of jurisdiction in this case inevitably raises the question of construction of section 6 of the Act of 1861. The section may be logically split up as:- The High Court of Admiralty shall have jurisdiction over any claim by the owner of assignee or consignee of any bill of lading of any goods carried into any port of India for damage done to the goods or any part thereof (i) by negligence or misconduct of the owner, master or crew, (ii) for any breach of duty or any breach of contract on the part of the owner, master or crew. If this is the proper analysis, and I think it is, no action will He under the section unless the action is for damage done

to the goods and the cause of action in negligence or misconduct or breach of contract or breach of duty in relation to the goods. Indeed in (16) The Santa Anna, L.J. 1863 NS 32 PMA 198, where an action was brought by the consignee of a cargo against the ship and her owner for damage done to the cargo, u/s 6 of the Act of 1861, Dr. Lushington, a high authority on Admiralty matters said "I admit the distinction which has been taken by Dr. Deane that this section may be divided into two parts - the first gives the Court jurisdiction as to any damage occasioned by negligence or misconduct and the second for any breach of duty or breach of contract on the part of the owner. I entertain very great doubt whether both these sections are not connected with damage done to goods." In the (17) Princess Royal LR (1870) 3 A & E 41. Sir Robert Philimore said "I am of opinion that it is not necessary that the damage should be actual in order to found the jurisdiction of the Court. It may be of that constructive character resulting from wrong or improper delivery or detention, or the like causes; and in this opinion I am fortified not only as well by the precedents to which I have referred as by the natural construction of the language of the statute."

57. In (18) The Kasan, 167 ER 268, an action was brought u/s 6 of the Act of 1861 for non-delivery of cargo. The vessel was to proceed from Cardiff with a cargo of coal to Port Isabella and deliver the cargo; then proceed to Moulmein, load a cargo of timber to be delivered in England. The petition charged that neither the cargo of coal shipped at Cardiff nor the cargo of timber shipped at Moulmein were duly delivered. In support of their claim for non-delivery of coal which was not deliverable at a port in England or Wales, the plaintiffs contended that they were owners of the timber, that is to say, "goods carried into England and they were suing "for a breach of contract on the part of the owner or master of the ship." These latter terms are general and independent of the terms that precede. Dr. Lushington in pronouncing against jurisdiction in respect of the claim for coal which was to be carried not to a port in England but to a foreign port, said "there is but one sentence; and upon reading it in a simple, plain way the words "for any breach of duty or breach of contract" clearly relate to the foregoing "goods carried into England or Wales."

58. In (19) The St. Cloud, 167 ER 269, an action was brought u/s 6 of the Act of 1861 for damage done to cargo by improper stowage. The plaintiff was a consignee of the bill of lading for value in respect of one consignment but a bare assignee in respect of another. The defendant contended that having regard to the Bills of Lading Act, 1855 under which a bare assignee cannot sue at Common Law, the plaintiff was not entitled to sue in the Admiralty for damage to the consignment of which he was the bare assignee. In dismissing the claim, Dr. Lushington held that "any claim" is any claim lawfully existing independently of the Act. If it was intended to create any new right of action, the Legislature would have expressed such intention in clearer and more intelligible terms. On the remedial character of the Act of 1861 Dr. Lushington said:

"The general intention of the Legislature cannot be doubtful. The statute is remedial. The short delivery of goods brought to this country in foreign ships or their delivery in a damaged state, was frequently a grievous injury for which there was no practical remedy; for, the owners of such vessels being resident abroad, no action could be successfully brought against them in a British tribunal. To send the merchant who had sustained a loss to commence a suit in a foreign tribunal and probably in a distant country, could not be deemed a practical or effectual remedy. With a view to obviate a grievance so oppressive to British merchants, the enactment contained in the 6th section was passed. It was intended to operate by enabling the party aggrieved to arrest the ship in cases where, from the absence of the ship-owner in foreign parts, the common law tribunals could afford no effectual redress."

59. In the (20) Tigress, 167 ER 286, the master refused to deliver a cargo of wheat to the plaintiff who was an unpaid seller and on whose behalf a bill of lading, duly endorsed, was presented to the master. The master contended that the plaintiff was not entitled to delivery as he had previously endorsed another bill of lading in favour of his buyer and had made it over to him. The bill of lading contained the usual proviso "one being accomplished, the others to stand void". The buyer had not presented the bill of lading or demanded delivery. The plaintiff brought an action in rem u/s 6 of the Act of 1861 and had the ship arrested. It was contended on behalf of the defendants that by endorsement of the bill of lading to the buyer, the contract had passed to the buyer and presentation of the other bill of lading was inoperative on the master; and secondly, the right of the plaintiff to stop the cargo in transit was defeated by negotiation of the bill of lading. The defendants'' contentions were rejected and Dr. Lushington held that the master was bound to deliver the goods and said; "and if the master was bound to deliver the wheat to the plaintiffs, I think his refusal so to do is a breach of duty within the meaning of the Admiralty Court Act, 1861."

60. On the question as to whether the plaintiff lost the right of an unpaid seller to stop the goods in transit by reason of negotiation of the bill of lading, Dr. Lushington held that the plaintiff had not lost his right and said that it is clear that the use they made of the bill of lading was merely auxiliary to the right claimed by them of stoppage in transit.

61. In (21) The Bahia 167 ER 298, the plaintiffs, who were the owners of certain corn which was loaded under a bill of lading to be delivered at Dunkirk in France, brought an action in rem under the Act of 1861 for non-delivery of goods. On the voyage the master put into Ramsgate and refused either to proceed to Dunkirk or deliver the goods at Ramsgate. It was contended that the statute does not apply where the goods are only incidentally brought into England. Dr. Lushington said : "here then is a cargo originally destined to be imported into the port of Dunkirk; in consequence of accident the ship puts into the port of Ramsgate. That this is a great grievance

cannot be denied, and the Court ought to give, if necessary, great latitude to the construction of the Act of Parliament in order to extend the remedy to this case. However, it appears to me that this section was carefully worded to give the utmost jurisdiction in the matter. It uses the words "carried into any port in England." and does not use the word "import". I apprehended the phrase "carried into" was advisedly used instead of the word "import". Then it goes on, "or for any breach of duty or breach of contract." Here there is a clear breach of contract and breach of duty. I am of opinion that without any violence of construction the statute applies to this case."

62. In (22) The Norway 167 ER 34 ?, a suit was brought by an assignee of certain bills of lading against the ship u/s 6 of the Act of 1861 in respect of a cargo of rice. The plaintiff alleged that the master had committed breach of duty and breach of contract in throwing overboard a part of the cargo and selling part of it on the voyage; that the master had not delivered the cargo according to the contract contained in the bill of lading in pretended exercise of the lien for excessive freight; that he had wrongfully claimed from the plaintiff the freight in excess of what was lawfully due and withheld from the plaintiff information necessary for calculation of the freight due on the plaintiff''s cargo.

Objection was raised to the petition that the Court had no jurisdiction because no corresponding right of action existed in Common Law. At Common Law, the plaintiff could not sue for injury to the goods before he was entitled to delivery of them. The plaintiff was not entitled to the delivery of the goods as he had not paid the freight due on the cargo, Reliance was placed on The St. Cloud, Dr. Lushington said :

"I did not state that in no case does the statute confer new rights. Without stating that rights unknown at Common Law are conferred by this statute, still less specifying them, I am of opinion that it is the duty of the Court so to construe the statute as to afford a remedy for all the evils contemplated in the statute itself. I, therefore, shall hold that if damage has been done to goods carried or to be carried into any port in England or Wales by the negligence or misconduct of the owner, master or crew, or if there has been any breach of duty or breach of contract, then provided that the owner of the vessel is non-resident in this country, the Court has jurisdiction over a claim by the owner, consignee or assignee of the bill of lading whether or not Common Law provides a remedy in the like cases against the owner of the vessel."

Later, in his judgment he says:

"The master claims to detain the cargo until the whole amount he claims for freight and average has been paid him, and at the same time he refuses to give any information as to the particulars which are indispensable for the computation of the amount of freight and average rightly due - particulars, which must be within his own know-ledge, and cannot be within the know-ledge of the holder of the bill of

lading. That such conduct of the master is a "breach of duty" covered by the words of the 6th section of the Admiralty Court Act, 1861, I cannot bring myself to doubt, nor that it has occasioned delay and thereby injury to the holder of the bill of lading. The plaintiff therefore has a remedy in this Court, whether or not in analogous cases, when the ship-owner is resident in this country, there would be a remedy at common law."

63. In the (8) Figlia Magghre, LR (1868) 2 A & E 106, an action in rem was brought by the assignee of a bill of lading u/s 6 of the Act of 1861 on the ground of negligence and misconduct of the master resulting in damage to the cargo by improper stowage. It was contended that the property in the goods did not pass to the plaintiff by the endorsement of the bill of lading and the plaintiffs were not entitled to sue in respect of the bill of lading. Sir Robert Philimore held that the property in the goods had passed to the plaintiff and, therefore, the plaintiff was entitled to sue for a breach of contract and said: "But if I am wrong upon this point. I am clearly of opinion that upon the other ground, viz., the negligence mentioned in section 6, they are entitled to sue."

64. In (23) The Nepoter, LR 1869 2 A & E 375, the assignee of a bill of lading sued u/s 6 of the Act of 1861 for damage done to cargo by negligence or for a breach of the contract contained in the bill of lading.

65. The defence was taken that the plaintiffs wee not assignees of the goods to whom the property in the goods had passed. It was held by Sir Robert Philimore that u/s 6 of the Act of 1861, the assignees named in the bill of lading are entitled to sue for negligence in the carriage of goods or for a breach of contract in the bill of lading although the property in the goods had not passed to them. In holding so, the learned judge relied on the case of (24) The Beta, LR 2 PCC 447. He added, how-ever, "if the construction of the statute in The St. Cloud be right, and my present construction wrong, I adhere to my opinion expressed in The Figbia Maggiore, (supra), that the assignee would have a persona standi on the ground of negligence or for breach of duty, if not on the ground of breach of contract."

66. The reported decisions show that the section has been applied not only to cases of damage done to the goods in the strict sense, as in The Figlia Magghre and The NePoter, but also to cases of non-delivery or short delivery as in The Tigress, The Bahia and The Norway. It has also been applied where the master withholds essential information from the holder of the bill of lading and thereby occasions delay in delivery of the goods as in The Norway. The Section has also been applied to a case where the cargo did not reach the part of destination until an unduly late period as in The Wilhelm, an unreported case cited in The Princess Royal. In all these cases damage, actual or constructive, in the sense spoken of by Sir Robert Philimore was alleged to have been done to the goods. The goods shipped and carried or to be carried were said to have been affected or the carriage or delivery of the goods shipped were said to have been affected in some manner or other.

67. It may be conceded that the section is attracted not only when the claim arises on account of breach of contract of carriage but also where the claim arises on account of negligence, misconduct or breach of duty, independently of the contract, as was held in The Figlia, Maggiore and The Nepoter. But whether the claim arises by reason of breach of duty or breach of contract, or negligence or misconduct on the part of the owner, master or crew of the ship, the breach of contract or the breach of duty or negligence Or misconduct must relate to the goods carried or to be carried by the ship. It was so held in The Kasan, (supra). That is also the proposition which emerges from the cases. As far as I am aware, in no case was the section applied where the goods or the carriage or delivery of the goods actually shipped were not affected in some manner or other. The sense of the section also supports that construction.

68. In Roseeoe''s Admiralty Jurisdiction and Practice (5th Edition, pp. 122-23) the opinion is expressed on the basis of decided cases, that the claim must be in respect of goods actually shipped on board the vessel which is made subject to the proceedings in rem, and the jurisdiction under the Act of 1861 is confined to cases where the breach of duty or breach of contract is in relation to the goods and connected with damage to them.

69. In (25) The Ironsides, 3.67 ER 205, three hundred bales of cotton were shipped on board the vessel consigned to the plaintiffs at Liverpool. A fire broke out on board the ship; and in the result, part of the cargo was destroyed, part was sold abroad and the residue was carried to Liverpool by another ship. Only one bale was delivered to the plaintiffs at Liverpool and that one bale was in a damaged condition. Sub-sequently, the Ironsides came to Liverpool. The question arose whether the remedy in rem given by section 6 of the Act of 1861 could be enforced against the Ironsides which did not carry any of the plaintiffs'' goods to England. It was held that as the Ironsides did not carry any part of the goods into any port in England, the Court had no jurisdiction to proceed in rem against the vessel.

70. In (26) The Marlborough Hill, 1921 AC (1) p. 444, the Full Court of the Supreme Court of New South Wales expressed the opinion that no writ in rem could be issued u/s 6 of the Act of 1861, against the ship in respect of any goods except those which were actually shipped. The Court found that some of the goods, in fact, had been shipped as was admitted by the defendants and held that the Court had jurisdiction to entertain the claim. On appeal to the Privy Council by the defendants on other grounds, Sir Robert Philimore, in delivering the judgment of their Lordships, said :

"The defendants have the advantage that they have an expression of opinion by the full court, and possibly it should be considered as a decision of the full court, from which there has been no appeal, that the case will fail except as to goods actually shipped on board the Marlborough Hill. In other words, the opinion or decision of the full court is that the contract in a bill of lading, whatever obligation it imposes upon the ship-owner in an action in personam, cannot be considered as giving a

right in rem except for such goods as were actually shipped on board the res. From the course this case has taken, this point does not come before their Lordships for decision, and therefore they do not decide upon it; but they desire it to be understood that they have formed no opinion contrary to the view taken by the full court."

71. It is not the complaint that the goods actually shipped on'' board the Asia Mariner under the bills of lading, have not been delivered or short delivered or that any damage has been done to them, nor is it the complaint that the goods actually shipped have been affected or their carriage or delivery has been affected in any manner to the prejudice of the plaintiffs by any act of omission or commission on the part of the owners, master or the crew. There is no duty in contract or independently of the contract on the part of the owners or the master to deliver goods which were never shipped but ought to have been shipped under the bills of lading. As it is not the case that there has been any breach of contract or breach of duty in relation to the goods actually shipped, section 6 of the Act of 1861 can-not have any application.

72. Mr. Roy Chowdhury relied on the alternative case made in the plaint that the defendants in breach of the contract of carriage evidenced by the bills of lading failed to deliver 5560 bales of Siam mesta jute grade, "C". He said the Court is bound to assume the statements made in the plaint or the petition to be true in deciding whether the Court has jurisdiction. But then the plaint or the petition has to be read as a whole. The central theme of the plaint or the substance of the charge is, that to the knowledge of the defendants, the right goods were not shipped and yet the defendants issued false bills of lading showing that the right goods were shipped. It does not appear from the bills of lading that the defendants were under any obligation to deliver 5560 bales of Siam mesta jute to the plaintiffs irrespective of shipment of such goods. The plaintiffs complain that the defendants did not issue correct bills of lading as they ought to have done but issued false bills of lading. Those bills of lading might have been issued in contravention of the Hague Rules or in breach of a contract express or implied, to issue correct bills of lading in the usual manner. In is-suing false bills of lading the defendants might have also committed a breach of duty. The breach of contract or the breach of duty in the matter of issuing bills of lading is not however a breach of contract of carriage or breach of duty in relation to carriage of goods.

73. The contract of carriage comes into existence only after the bill of lading is completed, signed and delivered. Art. 1(b) of the Hague Rules provides that "contract of carriage" applies only to contract of carriage covered by a bill of lading from the moment at which such bill of lading regulates the relations between a carrier and a holder of the same. It is clear that a bill of lading cannot regulate the relations of the parties before it is completed, signed and delivered. Any misstatement in the bill of lading precedes the completion and delivery of the bill of

lading. Misstatements made in the bill of lading cannot, therefore, be a breach of contract evidenced by the bill of lading. It is a separate and distnct breach of duty or breach of contract. Mr. Roy Chowdhury submitted that the breach of the Hague Rules is the breach of the paramount clause in the bills of lading and therefore there has been a breach of contract of carriage. The breaches of the Hague Rules complained of are however alleged to have been committed in issuing the bills of lading and not in relation to carriage of delivery of goods shipped under the bills of lading. I am, therefore, unable to hold that by reason of the breach of the Hague Rules, in the facts of the present case, there has been any breach of contract or breach of duty in relation to carriage of goods.

74. It was then argued that the contract with the seller having been a C.I.F. contract, the shipping documents, including the bills of lading, represent the goods and any injury to the shipping documents amounts to injury to the goods. A C.I.F. contract is a contract for sale of goods. There is no evidence that the bills of lading were made over to the carrier for carriage by the Asia Mariner. In any case, in the context of "goods carried into England or Wales" in section 6 ''goods'' cannot possibly mean bills of lading.

75. In my opinion, in applying section 6 of the Act of 1861 it is not permissible to go behind the bill of lading as it stands, for the whole object of the Act is to provide the owner or the consignee or the assignee of the bill of lading with a remedy for acts of omission and commission on the part of the owner, master or crew of the ship in the matter of carriage and delivery of the goods shipped in accordance with the tenor of the bills of lading.

76. In paragraph 11 (e) of the petition, the master says that the liner bills of lading on which the suit has been filed were issued before the charterparty dated December 1, was executed, a statement which he verifies as true to his knowledge. In paragraph 12(d) of the amended plaint, the plaintiffs rely on the defendants'' knowledge of anteclating of the bills of lading. If the bills of lading were issued on the dates they bear, they cannot be antedated. They will however be open to the objection that they were issued before shipment of the goods.

77. In my opinion, there can be no breach of contract of carriage or breach of duty in the carriage of goods before the goods are delivered to the carrier. In holding so, I am fortified by a judgment of Sir Robert Philimore in (27) The Damebrog, LR (1874) 4 A & E 386. Under a charterparty the ship was to proceed to a port and load a cargo. The master refused to proceed to the agreed port of loading and proceeded to another port. An action was brought u/s 6 of the Act of 1861 by the charterers. On section 6 of the Act of 1861, Sir Robert Philimore said : "it cannot be that the legislature intended the Court to exercise jurisdiction over every breach of contract on the part of the owners, master. or crew of a ship. the provisions of the section include a case in which the breach of contract was The Court has now to decide whether committed before the goods were put on board. I have already said I feel

great difficulty in arriving at a satisfactory decision upon the construction of the statute, but I do not think that the statute can relate to such a case as that now before the Court". It was held that the Court had no jurisdiction to entertain the action.

78. The section has been liberally construed in (2) The St. Cloud, (22) The Norway and by the Privy Council in (28) The Pieve Superiore, LR (1874) 5 PC 482. In The Peive Superiore the Privy Council said: "The statute being remedial of a grievance, by amplifying the jurisdiction of the 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." It is on this principle that the expression ''damage done to the goods'' in the section was given a wider meaning in some cases. The section however, cannot be stretched to serve purposes which it was not intended to serve and which the fair meaning of the section does not permit. The object of the statute as Dr. Lushington said in The St. Cloud was to provide a remedy for non-delivery, short delivery or damage to goods before an English tribunal. The object was not to provide a remedy for misstatements made in the bills of lading or for anything done which is not connected with carriage or delivery of goods. As will be seen, remedy for causes, other than non-delivery, short delivery or damage to goods, arising out of a contract of carriage, was provided by subsequent enactments in England. No corresponding statutes have been passed by the Indian Legislature.

79. It is submitted on behalf of the plaintiffs that the section should be construed to mean that 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 England or Wales in any ship (a) for damage done to the goods or any part thereof by the negligence or misconduct of the owner, master or crew of the ship or (b) for any breach of contract on the part of the owner, master or crew of the ship or (c) for any breach of duty on the part of the owner, master or crew of the ship.

80. In other words, it is contended, as it was contended in The Kasan that the terms ''breach of duty'' and ''breach of contract'' are general and independent of the terms that precede. The contention was rejected by Dr. Lushington himself who on more than one occasion, spoke of the remedial character of the statute. In my opinion, there has been no breach of duty or breach of contract in relation to the goods nor has there been any damage done to the goods in the sense of section 6 of the Act of 1861.

81. Mr. Roy Chowdhury relied on the decision in (29) The St. Elefterio, 1957 PDA 179. That was an action brought not u/s 6 of the Admiralty Court Act, 1861 but u/s 1 (i) (ii) of the Administration of Justice Act, 1956. In order to appreciate the relevance or irrelevance of the decision to the present case which is governed by section 6 of the Act of 1861, it will be necessary to go into subsequent transformation of section 6 of the Act of 1861.

82. By section 21 of the Administration of Justice Act, 1920 (10 & 11 Geo. 5 Ch. 81), section 6 of the Admiralty Court Act, 1861 was repealed in relation to England and Wales and was substituted by section 5, the material portion of which provided as follows :

Section 5(1): The Admiralty Jurisdiction of the High Court shall, subject to the provisions of this section, extend to-

(b) any claim relating to the carriage of goods in any ship; and

(c) any claim in tort in respect of goods carried in any ship.

It will be noted that section 5(1) of the Act of 1920 omitted the words "owner, consignee or assignee of a bill of lading" who were the only persons who could sue u/s 6 of the Act of 1861. u/s 5 of the Act of 1920, any person was entitled to prefer a claim so long as such claim related to the carriage of goods in any ship or was a claim in tort in respect of goods carried in any ship. Moreover, the words ''damage done to the goods'' were also omitted. It was, therefore, no longer necessary that the claim should be con-fined to damage done to the goods. Also, the words ''misconduct'', ''negligence'', ''breach of duty'', and ''breach of contract'' were omitted. It was also no longer necessary that the goods were to be carried to any port in England or Wales.

83. Section 5(1) of the Act of 1920 is, therefore, wider than section 6 of the Act of 1861.

84. By section 226 of the Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16, Geo. 5 Ch. 49). Section 5 of the Admiralty Jurisdiction Act, 1920 was repealed but was re-enacted substantially in the same language by section 22 (1) (a) (xii). The extension of the jurisdiction of the Court by the Act of 1920 in respect of cargo claims is recognised in the Preface to the fifth edition of Roscoe''s Admiralty Jurisdiction and Practice (1931). The learned editor says :- "By the Administration of Justice Act, 1920 (now consolidated in section 22 of the Judicature (Consolidation) Act, 1925) the jurisdiction of the Court in relation to cargo claims has been extended in certain directions. Whereas the admiralty jurisdiction in such cases was formerly restricted to claim for damage to cargo by the owners, consignee or assignee of the bills of lading, the jurisdiction now extends to claims either in contract or in tort in respect of cargo carried in any ship."

85. Thereafter, by section 49 of the Administration of Justice Act, 1956 (4 and 5 Eliz. 2 Ch. 46), section 22 of the Supreme Court of Judicature (Consolidation) Act, 1925 was repealed and was substituted by section 1 (i) (h). The material part of the section provides as follows : -

86. The Admiralty Jurisdiction of the High Court shall be as follows, that is to say, jurisdiction to hear and deter-mine any of the following questions or claims:

(h) any claim arising out of any agreement relating to the carriage of goods in a ship.

87. By section 1 (i) (h) a jurisdiction wider than the jurisdiction confer-red by section 5(1) of the Act of 1920 or section 22 (1) (a) (xii) of the Act of 1925 was vested in the Court. It is no longer necessary that the claim should relate to the carriage of goods or should be in respect of goods carried in any ship. All that is required is that the claim must arise out of an agreement for carriage of goods.

88. In the St. Elefterio, the plaintiffs purchased some goods shipped on board the defendant''s vessel. The bills of lading were endorsed in blank by the shippers and presented to the plaintiffs. The plaintiffs resold the cargo and in their turn, presented the bills of lading to their purchasers who rejected the goods on the ground that bills of lading were antedated. The plaintiffs brought an action in rem against the owners of the vessels and had her arrested. The defendants moved the court for setting aside the order of arrest on the ground that u/s 1 (i) (h) of the Administration of Justice Act, 1956, the Court had no jurisdiction in rem to entertain the action. It was submitted on behalf of the defendants that section 1 (i) (h) of the Administration of Justice Act, 1956, is by its terms narrower than the corresponding provision contained in section 22 of the Judicature Act, 1925, because, while the Act of 1925 made specific provision for Admiralty Jurisdiction in tort in respect of goods carried, section 1 (i) (h) of the Act of 1956, makes no corresponding provision and the plaintiffs'' claim being one in tort, no action in rem can lie. It was held that section 1 (i) (h) of the Act of 1925, although materially different from the corresponding clause in the Act of 1925, is nevertheless wide enough to cover the claims whether in contract or in tort arising out of any agreement relating to the carriage of goods in ship and the Court pronounced for jurisdiction.

89. The main distinction between section 6 of the Act of 1861 and section 1 (i) (h) of the Act of 1956, for the purpose of this case, is that in section 6 of the Act, 1961. the words ''damage done to the goods'' occupy a central place and the words ''breach of duty'' and ''breach of contract'' are by syntax and sense related to the words "goods carried into any port in England or Wales", but in section 1 (i) (h) of the Act of 1956 "any claim arising out of any agreement relating to the carriage of goods in a ship" need not relate to damage done to the goods and the cause of action need not be in respect of goods carried by the ship. No doubt, the words ''carriage of goods'' occur in section 1 (i) (h) but they occur in a different context.

90. Any agreement relating to the carriage of goods in a ship is not a bill of lading. However, for the purpose of construction of section 1 (i) (h) of the Act of 1956, the words "any agreement relating to the carriage of goods in a ship" may be equated with and read as "any bill of lading." Regarded as such, section 1 (i) (h) of the Act of 1956 will read as "any claim arising out of any bill of lading." In other words, the Act of 1956 provides that the High Court in its Admiralty Jurisdiction shall have jurisdiction to hear and determine any claim arising out of any bill of lading. A claim

for issuing an ante-dated bill of lading or a false bill of lading or a bill of lading in contravention of the Hague Rules will certainly be a claim arising out of a bill of lading and such a claim will be well within the scope of section 1 (i) (h) of the Act of 1956 but not within the scope of section 6 of the Act of 1861. Such a claim will not come within the scope of section 6 of the Act of 1861 because the claim though arising out of a bill of lading, is not, without anything more, in respect of damage done to the goods nor does it relate to goods carried by the vessel.

91. Mr. Roy Chowdhury relied on an observation made by G. K. Mitter, J. in course of his judgment in The Edison Mariner, at page 1097 of the Report, it is said:

"The various heads under which an England Court of Admiralty would exercise its jurisdiction, are summarised in Part II of Halsbury''s Laws of England, third edition, vol. 1. It cannot be disputed that this court can exercise admiralty jurisdiction in rem or in persoman 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."

92. It is clear that His Lordship relied on Halsbury 3rd Edition, Vol. 1, Part II, page 63, Article 125. The Article says ''The High Court has by statute Admiralty Jurisdiction which may be exercised is rem or in personam over all claims arising out of any agreement for the use or hire of a ship, or relating to the carriage of goods in a ship, and over any claim in tort with respect to goods carried in a ship.'' The first volume of Halsbury, third edition, was published in 1954, long after the repeal of section 6 of the Admiralty Court Act, 1861 in England and when section 22 (i) -(a) (xii) of the Supreme Court of Judicature (Consolidation) Act, 1925 remained in force. The statement in Article 125 was therefore made, with reference to the Act of 1925 as will appear from footnotes (p) and (q) and not with reference to the Act of 1861. As I have said, section 22 (i) (a) (xii) is far wider than section 6 of the Act of 1861. The statement has, therefore, no relevance on the question of Admiralty jurisdiction of this Court. His Lordship''s attention does not appear to have been directed to this aspect of the matter.

93. The Admiralty Court Act, 1861, although repealed in part in relation to England and Wales, remains in force in India. None of the subsequent English statutes relating to Admiralty jurisdiction over cargo claims or contract of carriage have been made applicable to the High Courts in India exercising jurisdiction in Admiralty.

94. In the view I have taken, I have to pronounce as I must, against the jurisdiction of this Court to try this action in its Admiralty Jurisdiction. It seems to me that Indian merchants have no right before an Indian tribunal exercising jurisdiction in Admiralty, to prosecute a claim arising out of an ante-dated or false bill of lading against a foreign ship-owner and proceed against a foreign ship. They can have no relief unless the cause of action relates to and damage is done to the goods. In England, the remedy has been provided by Parliament by appropriate legislation. It

is time, the Indian legislature did the same.

95. However, it is not for the Courts of law, to provide relief, where relief should be provided by the legislature, by straining the construction, against principles and precedents, of a pro-vision of a century old statute, repealed in the country of its origin, and assume powers which more properly belong to the legislature. In the result, the order for arrest made on January 16, 1967 is re-called and the Asia Mariner is directed to be released. The plaintiffs will pay the costs of this application.

Certified for two counsel.