CALCUTTA HIGH COURT

Messrs. Lionel Edwards Ltd.

Vs.

State of W.B

A.F.O.D. No. 272 of 1957

(A.C. Sen and A.K. Das, JJ.)

28.07.1965

JUDGMENT

A.K. Das, J.

1. This is an appeal against the judgment and decree passed in Money Suit No. 5 of 1954 by Sri S. C. Talukdar, Subordinate Judge Alipore, decreeing the plaintiff's suit for recovery of cost of repairs to plaintiff's vessels.

2. The plaintiff in the suit is the State of West Bengal which had two motor launches Banalata and Banarani and the launches were placed with the Garden Reach Workshop Ltd. for repairs. On the 10th February 1951 when the launches were waiting for repairs at the Dock, S. S. Shahrok, a vessel owned by the defendant's principal suddenly collided with these launches and several others waiting there, causing serious damages. The plaintiff thereafter got sin estimate of repairs at Rs. 16,390 for Banalata and Rs. 1568 for Banarani from the Garden Reach Workshop and claimed the said amounts from the defendant as damages. The defendant while agreeing to pay the cost of repairs of Banarani contended that Banalata was not worthy of repairs and that the pre-collision value of Banalata being Rs. 5,000 only, the plaintiff was entitled to that sum and not the estimated cost of repairs. There was some correspondence between the parties and eventually the plaintiff filed this suit for recovery of the entire cost of repairs, namely, Rs. 16,390/-.

3. Defendant contested the suit pleading inter alia that the pre-collision market value of Banalata was Rs. 5000/- as it was not seaworthy and in a very weak state. The launch should be reckoned as constructive total loss and it was uneconomic to repair it and the plaintiff at best, could claim to be put in the same position peculiarly as if the collision had not occurred. They had offered Rs. 5,000/-which was the pre-collision value and the plaintiff was not entitled to a decree for the amount claimed.

4. The learned Subordinate Judge found that the launch was in a very poor condition prior to collision and he accepted the evidence of Mr. Patterson, who is a marine surveyor, that the pre-collision value of the launch was Rs. 5,000/-. He, however, found that the launch was not a constructive total loss but a partial loss. He also found that the estimated cost of repairs at Rs.

16,390/- by Garden Reach Workshop was accepted as fair and reasonable by Mr. Patterson and also by the defendant's Solicitors, Sandersons and Morgans and he therefore decreed the suit in respect of that claim. There was no dispute regarding cost of repair of Banarani and defendant agreed to pay it.

5. The admitted position is that the defendant's ship Shahrok collided with the launches Banarani and Banalata along with several others at the Garden Reach Workshop where the launchs were sent for repair. Damages were also caused by the impact and it is also an admitted position that the defendant's ship is at fault. Defendants have also admitted the nature of the damage and the items, as also the estimated cost of repairs Ext. 2(1) is the estimate by the Garden Reach Workshop while Ext. A is Patterson's report, where Patterson gave a "list of the repairs necessary to rebuild the vessel in her original condition". This list is not only identical with the list given by Garden Reach Workshop but reads like a copy of the list of damages given by Garden Reach Workshop. Ext. 2(h) is a letter from Sandersons and Morgans, Solicitors of the defendant and by this letter also, they accepted the repair cost estimated by Garden Reach Workshop. Mr. Patterson in answer to question No. 63 stated that he agreed with the estimate as it was not possible to replace the damaged timbers with the wood in the same condition as that damaged due to collision.

6. Defendant's case however is that the pre-collision value of the ship could not exceed Rs. 5,000/- and the repair cost being as high as Rs. 16,390/-, the launch was a constructive total loss and the owner is entitled only to the pre-collision price. The learned Counsel for the defendant, appellant referred to Marsden's Law of Collision at Sea, 10th Edition, page 515 and read out the following passage.

> "When a vessel is so much damaged by a collision that a prudent uninsured owner would not repair her, such vessel must be considered as a constructive total loss and her owner is entitled to claim from the wrongdoer the value of the ship as if she had been actually and totally lost".

This rule is based partly on the principle of restitutio in integrum and partly on the principle that the injured party must minimize his loss so far as is reasonably possible.

7. Before we consider the question further, let us see whether the preclusion value of the launch has been proved to be Rs. 5,000/- upon which, accepting the principles laid down, the launch may be reckoned as a constructive total loss. Mr. Patterson of Norman Stewart and Company who inspected the launch, estimated the pre-collision value at Rs. 5000/- and the learned Judge who tried the case accepted it "in the absence of any other evidence". The correspondence between the parties prior to the institution of the suit discloses that the defendant made an offer of Rs. 5,000/- on the basis of pre-collision price as reported by Patterson but the plaintiff rejected the offer. In paragraph 5 of the plaint, plaintiff clearly stated that they did not accept the offer; indeed, from the correspondence and the pleadings it is clear that the plaintiff never accepted pre-collision price at Rs. 5,000/-. The defendant having admitted the damages for which he was guilty and the cost of repairs and having pleaded in mitigation of plaintiff's claim that the launch is a constructive total loss in view of the pre-collision price of Rs. 5,000/-, it is for the defendant to prove that the pre-collision price was Rs. 5,000. As I have already pointed out, the only

evidence is that of Mr. Patterson who is an expert marine surveyor connected with Norman Stewart and Company and who examined the launches two days after the collision for the first time. The learned Counsel for appellant has argued that Mr. Patterson is an expert of some standing and due weight therefore should be given to the opinion given by him. He has referred to the case of the "Iron Master" reported in (1859) 166 ER 1206, where the learned Judge stated as follows on the question of assessment of the value of the ship at the time of the collision :

> "The best evidence is, first, the opinion of competent persons who knew the ship shortly previous to the time it was lost : That evidence is manifestly entitled to most weight, because, assuming their competency to form a just judgment, they had a personal knowledge of the state and condition of the vessel herself, whereas all other persons, however skilful, could only draw general inferences from their acquaintance with the price of vessel somewhat similar about the same time. The second best evidence is the opinion of persons such as I just described, persons conversant with shipping and transfers thereof".

In the instant case there is no evidence from persons of the first category and defendant claims Mr. Patterson as a witness of the second category upon whom reliance should be placed. Patterson on his own evidence did not examine the launch for more than 10 to 15 minutes and according to him this was sufficient for inspection of the damages and assessment of pre-collision price. I have already referred to the long list of damages sustained by the vessel, which tallies with the earlier report of Garden Reach almost word for word. The vessel was in water at the time and neither his report nor his evidence discloses that he examined the engine and certain other parts in forming the opinion as to the value of the launch and all that is stated in answer to question No. 45 is as follows :

> Ans. - I picked up some parts of the stem post and the timber after and crumbled them in my fingers.
>
> His view based upon such examination that the vessel was in an advanced state of deterioration has been strenuously challenged by the learned Advocate for the plaintiff. Mr. Patterson went further and even expressed his doubts in answer to question No. 58 that the price would have been as much as the sum of Rs. 5000/- mentioned by him in his report. Question Nos. 51 and 52 and the answers are interesting in this connection and they are reproduced below:
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> Ques. No. 51 - Would it be correct to say that you were conversant with the market in Calcutta of the vessels of the type of Banalata?
>
> Ans. - No.
>
> Ques. No. 52 - So far you know, Mr. Patterson, are the vessels made of soft pine timber sold in the Calcutta Market? (objected to)
>
> Ans. - No.
>
> Mr. Patterson had to admit that he was not conversant with the market in Calcutta of the vessel of the type of Banalata and he also stated that vessels made of soft pine timber - as in the case of Banalata are not sold in Calcutta market. His evidence therefore comes to

this that neither was there a market of such a vessel in Calcutta nor was he conversant with transactions of the vessels of this type. This being the position, how could he at once proceed, after a cursory glance of the launch for only 10 to 15 minutes, to assess its pre-collision value at Rs. 5,000/- and should this Court in the circumstances accept the value given by him, the value which has been challenged throughout by the plaintiff by refusing to accept compensation for that amount ? In the case of "Iron Master" (1859) 166 ER 1206 already referred to, the learned Judge referred to the second best evidence as the opinion of persons conversant with shipping and the transfers thereof. There being no market of the type in Calcutta, Mr. Patterson apparently was not conversant with the transfers of this kind of vessels and his competency to prove the pre-collision price can therefore be legitimately challenged. In answer to question about the job for which he was sent by Lionel Edwards Ltd., he replied that his job was "to verify, if any damage had actually been done to the various crafts involved in the collision and if so, how much". He did that job and accepted the report earlier made by Garden Reach Factory in its minutest details, including even the loss of cup and saucer. As an expert in the line, however, he knew the nature of defence that a client of his firm. Norman Stewart might take pre-collision value and therefore while accepting in toto the report of Garden Reach Workshop, he made an assessment of the pre-collision value although not strictly within his job. The assessment by Mr. Patterson, an expert though, should therefore be closely scrutinized. In his report to the Conservator of Forest, Ext. 2(c) the Forest Officer concerned stated that there was an offer of Rs. 5,000/- as the value at the time of the collision and that he had refused to accept that. For ascertaining the pre-collision value certain other factors may be taker into consideration, namely, the price at which it was purchased, the nature of the maintenance and its cost and whether it was in running condition prior to collision. Although the papers connected with the purchase have not been produced, it appears from the departmental report, Ext. 2(c) to the Conservator of Forest that the vessel was acquired from the disposals at a price of Rs. 25,000/- in 1948. It further appears from a similar letter to the Conservator of Forest, Ext. 2(i) that the vessel covered 10,523 miles since its purchase and that the period of active service of the launch was from 8-7-49 to 9-2-51, that is, the day prior to the day of collision. It further appears that after purchase the vessel was remodelled in 1948-49 at a cost of Rs. 10,980/- and thereafter cost of repairs in 1948-49 was Rs. 3,746/-, in 1949-50 Rs. 8,998/- in 1950-51 Rs. 2406/-. The learned Counsel for the appellant has argued that the annual cost of repair would show that the vessel was in an extremely dilapidated and worn out condition requiring so much as cost of repairs. The argument may be the other way as well. It was a departmental launch meant for Forest Officers and maintained at public cost and apparently the launch was properly maintained and it is common knowledge that the condition and value of a vessel is very much connected with its up-keep. So, a vessel purchased for Rs. 25,000 in 1948, remodelled at a cost of Rs. 11,000/- in the same year and thereafter properly kept up at considerable cost should not so much deteriorate that its value on the date of the collision comes down to Rs. 5,000/-. There is no doubt that

importance should be given to the expert's opinion but his opinion is not backed by sufficient data and the factors that I have already referred to, would, in my view be good grounds for not accepting the opinion of the expert. I may also point out that two letters, Exts. 2(c) and 2(i) referred to were written prior to the institution of the suit and there is therefore no reason to suspect that the report to the departmental superior by a public officer was anything but true. We are not therefore satisfied that the pre-collision value of the launch was Rs. 5,000/- and the defendant appellant having failed to substantiate it, the vessel cannot be treated as constructive total loss and resting on the principle of restitutio in integrum, plaintiff is entitled to receive the entire cost of repair. It is true that the plaintiffs did not give their estimate of the pre-collision price and did not even respond to defendant's letter Ext. 2(d) suggesting assessment by another firm of marine surveyors but their reply Ext. 2(e) shows that the officers dealing with the matter at that stage did not know the implications of the suggestion and were harping on the question of cost of repairs. In any case however, it was up to defendant to prove that the pre-collision price was so low that it was uneconomic to repair it and if they have failed to do it, plaintiff is entitled to admitted cost of repair.

8. The learned Counsel for the appellant has adversely commented upon the plaintiff's failure to produce the report of the Mercantile Marine Department, referred to in Ext. 2(i) and has invited the Court to draw an adverse inference. The same letter discloses that no report was received and an adverse presumption under Section 114(g) Evidence Act cannot therefore be drawn. The learned Counsel has also drawn our attention to defendant's petition under Orders 11 and 12 Civil Procedure Code asking the plaintiff to make discovery of this report. By order No. 11 dated June 22, 1954 parties were directed to take steps for admission, discovery etc. by July 6, 1954. No steps were taken by either party and then, after expiry of about a year, on May 5, 1955 defendant appellant filed a petition for directing the plaintiff to produce some documents. Petition was ordered to be put up on the next date in presence of lawyers of both parties. Order No. 19 on the next date shows that the lawyer for the plaintiff did not turn up and the learned Judge directed the plaintiff to make discovery of the documents within 10 days. On expiry of this period, the ordersheet records an order, "No steps taken for discovery by plaintiffs". The orders do not disclose that at any stage the plaintiff was aware of such an application, filed so long after the period fixed for discovery expired or the orders passed thereon. The defendant also did not apply for an order under Order 11, Rule 21 Civil Procedure Code for dismissing the suit for failure to make discovery but allowed the matter to rest at that. There is no evidence that such report from Mercantile Marine Department was received at all and the letter Ext. 2(i) stated that it was not received up to that time. In any case therefore no adverse presumption for failure to make discovery should arise and the penalty for such failure was dismissal of suit on an application by the party.

9. The learned Counsel for the defendant appellant has drawn our attention to ground No. 3 of the memorandum of appeal and hag argued that the contents of letter Ext. 2(i), marked exhibit on admission of defendant to dispense with formal proof, were neither admitted by the defendant nor proved by evidence. Ext. 2(i) is a typed office copy of a letter dated 22nd September 1952 from the Divisional Forest Officer to the Conservator of Forests, Southern Circle, West Bengal

wherein certain details of the cost of repairs are given. There are other similar letters including Ext. 2(c) where it is stated that this vessel was acquired from the disposals at a cost of Rs. 25,000/- in 1948 and that the detailed estimated cost for repair of the vessel for Rs. 60,000/- would be submitted. Exts. 2 to 2(n) were marked for plaintiff on admission, formal proof being dispensed with. On behalf of defendant too, some documents Exts. A, B and C to C(18) were also marked, formal proof being dispensed with. It was argued that the contents of these documents were not evidence till they were proved by a competent witness who could vouch for the correctness of the contents. Documents are either proved by witnesses or marked on admission. When it is marked on admission without reservation, the contents are not only evidence but are taken as admitted the result being, the contents cannot be challenged either by way of cross-examination or otherwise. In respect of documents marked on admission dispensing with formal proof, the contents are evidence, although the party admitting does not thereby accept the truth of the contents and is free to challenge the contents by way of cross-examination or otherwise. In this connection our attention was drawn to a case reported in *Madholal Sindhu v. Asian Assurance Co. Ltd*[1]., where Bhagawati, J. pointed out that where the correctness of the contents of a document produced in Court is in issue that should be proved by calling the executor of the document as a witness. The learned Judge pointed out that the issue before him was not whether the documents were written by X and that if that had been the only issue, the proof of the signatures or the handwriting could have been enough. What was in issue however before the learned Judge was apart from X having signed or written the documents, whether the contents of the documents were correct. This could not be proved by a witness who had no personal knowledge whatever about the contents. The view propounded here is not in conflict with the view I have taken in the case before us. The contents become evidence on being marked on admission, formal proof being dispensed with, whatever might be their evidentiary value and the evidentiary value has to be judged in the light of other evidence and circumstances. In the instant case, copies of correspondence were filed with the plaint and have been referred to in the petition of the defendant appellant under Order 11 Rule 14 Civil Procedure Code , dated 5th May, 1955 by which certain documents mentioned in that letter were also called for. It further appears that both parties have freely used the contents of the letters marked on admission to dispense with formal proof and the learned Judge also has referred to such letters in his judgment, which clearly shows that the parties came to trial accepting that the contents were evidence after admission and it is now too late to say otherwise. The letters again are typed copies of official correspondence from the Forest Officer to his superior, the Conservator of Forests and written and signed by the Forest Officer in due performance of his official duty after the collision in reply to queries made and were filed with plaint. The copies of the letters would therefore be evidence under Section 35 of the Evidence Act. As for evidentiary value, these are letters from the Forest Officer to his superior, the Conservator of Forests before institution of this suit and there is no reason to hold that incorrect statements were made in these letters.

10. Even assuming for a moment that the pre-collision value was Rs. 5,000 as per report of Mr. Patterson, let us see whether the damages claimed should be restricted to this amount. The learned Counsel for the defendant appellant, Mr. Mitra, has argued, resting on the principle of restitutio in integrum that the plaintiff is entitled to recover such sum as would place him in as good a position as if the loss had not occurred and the measure of damages in a replaceable chattel was its market value. He has further argued that the plaintiff was under a duty to mitigate the loss or minimise the damage and should not repair it at a cost exceeding the market value. He has in support cited the decision reported in *Darbishire v. Warran*[2]. That was a case where the

plaintiff, a mechanical engineer bought a second-hand 1951 Lea Francis shooting brake for £ 330. He kept it in good repair; it was reliable and it suited his family purposes. It was badly damaged in a collision and he repaired it at a total cost of £ 192, despite advice from the repair garage and insurers that the repairs would be "uneconomic". It was found that although a 1951

[1] AIR 1954 Bom 305

[2]1963 1 WLR 1067

Lea Francis was difficult to obtain, in the secondhand market, similar shooting brakes could be had for £ 80 to 100. It was held that the plaintiff was entitled to recover such sum as would place him in as good a position as if the loss had not occurred but the measure of damages in the case of a replaceable chattel such as a second-hand car was its market value. The plaintiff was under a duty to mitigate the loss and should not have repaired it at a cost exceeding the market value instead of trying to replace it with a comparable car at the market price. The instant case however is entirely different. There is no evidence that a vessel of the same or similar type is available in the second-hand market for a value less than the estimated cost of repairs so that the plaintiff in mitigation of damages should, instead of repairing it, purchase such vessel in the market. The only evidence is the estimated pre-collision price of this vessel but there is no evidence as to the existence of a second hand market or the ruling price in such market. A question may here arise as to what is exactly meant by market price. In the case already referred to, 1963-1 WLR 1067 at p. 1074, Pearson L. J. pointed out as follows :

> "There is no complete definition of the expression "market value" in the evidence or the judgment but I understand it as meaning standard replacement market value, that is to say, the retail price which a customer would have to pay.....on a purchase of an average vehicle of the same make, type arid age or a comparable vehicle. It is not the price for a sale to a dealer or between dealers."

The principle laid down in the case cited would not therefore apply in the instant case.

11. In the case reported in *Liesbosch Dredger v. Edison*[3], also referred to by the learned Counsel for defendant appellant, it has been pointed out that when a vessel is lost by collision due to the sole negligence of the wrong doing vessel, the owners of the former vessel are entitled to what is called resitutio in integrum, which means that they should recover such a sum as will replace them, so far as can be done by compensation in money, in the same position as if the loss had not been inflicted on them, subject to the rules of law as to remoteness of damage. It was pointed out in Liesbosch Dredger's case 1933 AC 449 that the true rule seems to be that the measure of damages in such a case is the value of the ship to her owner as a going concern at the time and place of the loss. The important point here is to "recover such a some as will replace them so far as can be done by compensation in money in the same position as if the loss had not been inflicted on them. If there is no market for the same or similar type of vessel and if there is no evidence that such vessel is available at below the repairing cost - in the present case there is no evidence on either point - and if it was not a case of total loss but repair was possible to put the vessel in her original condition, the owners of the damaged vessel should be entitled to get the cost of repairs, instead of the pre-collision price on the principle of restitutio in integrum. In this case the dictum laid down by Dr. Lushington in the Columbus 3 W. Rob. 158 (164) that "the true rule of law in such a case would be to calculate the value of the property destroyed at the time of the loss and to pay it to the owners as a full indemnity to them for all that may have happened

without entering for a moment into any other consideration" was not accepted. It was pointed out that the dominant rule of law is the principle of restitutio in integrum and subsidiary rules can only be justified if they give effect to that rule. If the vessel is not replaceable at a lower cost by a comparable one and if it is capable of being put into its original condition by

[3](1933) AC 449

repair, even though at a higher cost, the owner of the damaged vessel is entitled to recover cost of repairs on the same principle of restitutio in integrum. In later cases it was pointed out that the damages form the value of the vessel lost at the end of her voyage plus the profit, loss in the charter party. Marsden pointed out in paragraph 513 of his well known book, Law of Collision, that "in deciding whether the ship is a constructive total loss, other factors such as the cost of and time needed for temporary repairs, if any, the engagement of the vessel during which the vessel would be detained etc. have to be taken into consideration" and this supports the view that pre-collision price is not the only factor for determination as to whether a vessel is a constructive total loss. The learned trial court has also referred to page 856 of Halsbury's Laws of England, Volume 30, Second Edition, which supports Marsden's view earlier referred to that the injured party may derive a greater benefit than mere indemnification where this arises from the impossibility of otherwise effecting such indemnification without exposing him to some loss or burden. It was further pointed out in paragraph 1131, at page 857 that in the absence of a market value for a vessel, the test is what the vessel was fairly worth to her owners as a going concern at the time and place of loss. The vessel was not a commercial one but was a Government vehicle under the Forest Department used for administrative purposes in the Sunderbans and to that extent, it has its special value to the owner, State of West Bengal. The principle appears to be that in case of damages to a ship which is not sunk, the injured party may recover damages on the principle of partial loss and the measure of damages shall be the estimated cost of repairs. Marsden further pointed out in paragraph 531 of the same volume that,

> "If the damage received in a collision is greater than would ordinarily be the case because the ship was in a weak condition, the other is not the less liable for the entire loss, if she is in fault for the collision. The principle is, that a part of the damage was clearly attributable to the wrong-doer and it is impossible to draw the line with precision and to say how much, the wrong-doer must make good the whole loss; but where the damage occasioned by the collision can be easily discriminated, defects disclosed in consequence of the collision though existing prior to it. cannot be charged against the defendant."

Pennycuick, J. in 1963-1 WLR 1067, also stated as follows :

> "In the case of injury to a chattel, it may happen that restitution can be effected either by repair of the existing article or by the purchase of a comparable article, namely, an article possessing broadly similar attributes though not necessarily identi Cal. In such a case the measure of damage is restitution by whichever method it would be reasonable for the owner of the chattel to adopt in the particular circumstances. In considering what is reasonable one must, I think, having regard to the owner's obligation to mitigate damage treat him as looking only to his pecuniary interest and leave out of account matters of mere taste or convenience."

12. In the present case, therefore, even if the pre-collision value is Rs. 5,000, there is no evidence as to existence of a second-hand market for such vessels nor evidence as to the price for which a similar type of vessel can be purchased. The vessel was not a total loss in the sense that it could be repaired and put back into its original condition. Based on the principle of restitutio in integrant, the owner of a ship wrongfully injured is entitled to have her tully and completely repaired and if the necessary consequence of this is that the value of the ship is increased, so that the owner receives more than an indemnity for his loss, he is entitled to that benefit the plaintiff should not be deprived of his right to get damages to the extent of the repair cost although it exceeds the estimated pre-collision price.

13. To sum up, the pre-collision value of the vessel at Rs. 5,000 has not been proved and the vessel is admittedly capable of being repaired to be put in its original condition; it is not therefore a case of constructive total loss and plaintiff is entitled to realise the estimated cost of repair, notwithstanding that such repair results in increasing the value of the vessel or the owner receiving more than an indemnity for his loss. There is again no evidence that such a vessel or a similar one is available for Rs. 5,000 in the market. The principle of restitutio in integrum is applicable and in the instant case, replacement of the vessel from the second-hand market or otherwise, not being possible, the question of plaintiff's duty to mitigate loss does not arise and the plaintiff is entitled to recover such cost of repair as would be necessary to put back the vessel in its original condition on the principle of restitutio in integrum.

14. The plaintiff is therefore entitled to the cost of repairs which is estimated at Rs. 16, 390 but in awarding the cost we take note of the fact that the hull and superstructure of the launch was beyond repairs as the same was in an advanced stage of decay and no repairs were feasible (Ext. 2(i)). This is apparently not due to the collision but clue to other reasons and the estimated cost includes cost of repair of the hull although separate estimate is not known. We therefore deduct 10 per cent of the estimated cost in consideration of the condition of the hull prior to collision and decree the rest of the claim.

15. The appeal is therefore dismissed, subject to reduction of the amount claimed as indicated in the body of the judgment with proportionate cost in both courts.

A.C. Sen, J.

16. I agree.
Appeal dismissed.