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ESSAR SHIPPING LTD.

v.

THE BOARD OF TRUSTEES FOR THE PORT OF CALCUTTA

(Civil Appeal No. 5654 of 2007)

FEBRUARY 15, 2019

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**[ABHAY MANOHAR SAPRE AND
UDAY UMESH LALIT, JJ.]**

Major Port Trust Act, 1963:

*Liability of vessel – For causing damage – Accident while
berthing appellant's vessel – Causing damage to a coal loader –
Dock complex put the responsibility for the damage on the vessel –
Master of the vessel denied its responsibility stating that the coal
loader was not kept at proper position – However, subsequently,
the master of vessel accepted the liability under protest – Thereupon
the vessel was allowed to sail out – Committee, set up by Government,
found that accident took place due to dynamic situations viz.
deballasting of ship, higher water level in dock, high wind speed,
inadequacy of communication and parking of coalloader at wrong
position and hence no individual responsibility could be assigned
– Suit by master of the vessel seeking declaration that
acknowledgment of liability was void and seeking its cancellation –
Respondent-Port filed its written submission with a counterclaim,
claiming a decree of Rs. 30 lakhs – Trial court decreed the suit
relying on the finding of the Committee – In appeal, Division Bench
of High Court allowed the counter-claim dismissing the suit – On
appeal, held: The Committee which found that individual
responsibility could not be assigned, consisted of persons having
technical expertise and knowledge in the field – The assessment of
all the relevant factors were duly considered by the Committee in
correct perspective – Therefore view taken by trial court was just
and correct and hence the suit is decreed – Bye-laws of the Port of
Calcutta – Clauses 16 and 20.*

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Allowing the appeal, the Court

**HELD: 1. The accident in the present matter had evoked
attention and the Government of India had appointed a Committee
to examine various aspects of the accident and fix responsibility.
The Committee consisted of four persons having technical**

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expertise and knowledge in the field. Said Committee found that no specific responsibility could be fixed due to the dynamic situation prevailing at the time of accident and that it was occasioned, as a result of combination of five factors named by the Committee. Every single factor was gone into and at the end of its discussion the Committee had found that individual responsibility could not be assigned in the matter. [Para 19][270-B-C]

2. The Division Bench of High Court relied on the facts that the Master of the vessel was told by the Berthing Master to drop the anchor and whether there was any time lag in obeying such instruction by the Master of the vessel which made it further difficult for the Berthing Master, but the evidence in that behalf is not clear. In his answer as regards factors which caused the accident, the Berthing Master gave two reasons: ship's high board i.e. the area above the water surface and the impact of the wind. However, he did not name, delay in regard to anchoring as one of the reasons. The Committee, consisting of experts in the field had also examined witnesses and considered the entire material before it whereafter it arrived at its conclusion. Said Committee also did not put this factor of delay in anchoring the vessel to be one of the reasons. The Division Bench, therefore, ought not to have taken into account said aspect while considering the matter. [Para 22][272-D-E]

3. From the facts of the case, two crucial aspects that emerge are (a) non-intimation on part of the Master of the Vessel about the fact that the vessel had deballasted while at the locks and (b) failure on part of the Berthing Master to apprise himself of the draft of the vessel though he was obliged to check that part. All the other factors were either natural factors, such as the level of the water in the impounded dock or intensity of the wind or were the factors over which neither the Master of the vessel nor the Berthing Master had any direct control. The factors like lack of communication, as was sought to be projected by the plaintiff-appellant, between the tugs and the Berthing Master or the location of the coal loader on the Southern tip of the Jetty or the berthing area could be contributing factors but at the core of the matter were aforesaid two features. Each of those two features are relied upon by either side to put the liability on the opposite side. [Para 23][272-F-H]

A 4. It was part of the duty of the Berthing Master to check
the draft of the vessel before he took over the control of the
vessel. Under the bye-laws the vessel had to be under the control
of the officer of the Port or the Berthing Master. The Berthing
Master was not a new comer or an inexperienced person. He
had to his credit the experience of having navigated vessels from
B the locks to the dock area on at least 1500 previous occasions.
If the intensity of the wind was 24 knots when he took over the
control of the vessel, it was all the more reason for him to be
more careful in checking the draft before assuming control over
the vessel. As an officer employed and authorised by the Port,
C he was having greater knowledge than anyone else how the vessel
had to be navigated from the locks to the dock area. A Committee
of four experts in the field was appointed by the Government of
India to look into the matter and fix the responsibility; that the
Committee had recorded statements of all the concerned persons
including the Master of the vessel, Berthing Master and all other
D concerned officials; and that after thorough enquiry the
Committee found that the factors which were responsible for the
accident were beyond the control of anyone. [Para 23][273-B-D]

E 5. Considering the entirety of the matter, the assessment
of all the relevant factors were duly considered by the Committee
in correct perspective and it cannot be concluded that the acts of
commission or omission on part of the Master of the vessel alone,
were responsible for and resulted in causing the damage to the
coal loader. He may be held responsible to a certain extent for
his non-intimation but the failure on part of the Berthing Master
in doing what was expected of him and other factors were also
F responsible. The conclusion arrived at by the Committee in the
circumstances, which weighed with the Single Judge, is the correct
perspective from which the matter is required to be considered.
Therefore, the view taken by the trial court was just and
correct and that of the Division Bench was erroneous.
[Para 24][273-E-G]

G *Fowles v. Eastern and Australian Steamship Company,
Limited* [1916] 2 AC 556 – distinguished.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5654
of 2007.

H From the Judgment and Order dated 27.10.2006 of the High
Court at Calcutta in A.P.D. No. 338 of 1997.

ESSAR SHIPPING LTD. v. THE BOARD OF TRUSTEES FOR THE PORT OF CALCUTTA 257

Pinaki Addy, Chira Ranjan Addy, Advs. for the Appellant. A

Buddy A. Ranganadhan, A. V. Rangam, Advs. for the Respondent.

The Judgment of the Court was delivered by

UDAY UMESH LALIT, J.

1. This appeal by special leave challenges the judgment and order dated 27.10.2006 passed by the Division Bench of the High Court at Calcutta allowing appeal namely A.P.D. No.338 of 1997 and setting aside the decree dated 09.04.1997 passed by Single Judge of the High Court in Suit No.12 of 1998. B

2. On 27.08.1987 at about 1148 hrs. the vessel “M.V. Chennai Nermai” belonging to the appellant (formally known as South India Shipping Corporation Ltd.) arrived at the lock gate of Haldia Port for loading of cargo of coal at Haldia Docks for delivery at the port of Tuticorin. The vessel de-ballasted while at the lock gate upto 1300 hrs. At 1306 hrs., in terms of the Rules of Calcutta Port Trust, Berthing Master Mr. Rajak of the Port Trust boarded the vessel and by 1342 hrs. the forward and aft tugs were attached for towing the vessel from the lock gates to the berthing area of Haldia Port. While the vessel was being berthed at about 1354 hrs., the starboard quarter of the vessel came in contact with a coal loader stationed by the side of the berthing area and the coal loader got damaged. C D E

3. On the same day a letter was issued by the Plant Engineer, Haldia Dock Complex to the Master of the vessel putting the responsibility for the loss on the vessel. A reply was given by the Master that very day denying acceptance of liability while emphasizing that the coal loader was not kept at proper position. On the same day a notice was sent from Marine Operations Division, Calcutta Port Trust to the Master of the vessel holding said Master and the vessel responsible for the damages with a request to immediately intimate acceptance of liability. The Master put endorsement; “*Received without prejudice, I do not accept liability for above as contravention proper position of safe berthing letters follows:*” A reply to the said notice was also sent by the Master on the same day, reiterating that the coal loader was not kept at a proper position as against the normal practice of keeping the loader in the center of the jetty and that the communication between the Berthing Master and the tugs was poor. On the very day, a letter was also sent by the Master of F G

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A the vessel to the Deputy Chairman, Haldia Dock Complex, Haldia that the vessel had also suffered damage as a result of the coal loader not having been kept at proper position and for other reasons mentioned in said letter.

B 4. Again on 29.08.1987 the Master of the vessel wrote to the Manager, Marine Operations, Haldia Dock Complex referring to the failure on part of tugs and faulty communication system specially in the conditions where there were strong winds. On 30.08.1987 the vessel completed loading operations but was kept waiting for want of clearance by the Port authorities. On 31.08.1987 a notice was issued by the Manager, Marine Operations Division, Calcutta Port Trust to the Master of the vessel holding him and the vessel responsible for the damages with a request to intimate acceptance of liability. The endorsement put by the Master on the copy of said letter was; *“Liability accepted under protest without prejudice to owners/agents contention for right of defence.”* Another notice was sent by the Manager, Marine Operations Division of Calcutta Port Trust on 01.09.1987 to the same effect. The endorsement on the copy of said notice was to the following effect: *“Liability accepted without prejudice to the extent of only loader being put in working condition on turn key basis.”* After the aforesaid endorsement, the vessel was allowed to sail out of Haldia Docks on 01.09.1987.

E 5. On 20.10.1987 an Order was passed by the Government of India, Ministry of Surface Transport setting up a Committee as under: “A shiploader at the coal berth at Haldia Dock complex was damaged on 27.8.87 when a vessel “Chennai Nermai” was being berthed. The damage was of serious and extensive nature. It has been decided to set-up an enquiry committee to examine the various aspects of the accident and fix responsibility. The Committee will consist of following members :-

- F i) Principal Officer,
Mercantile Marine Department,
Calcutta.
- G (ii) Director (Mechanical)
DA(P) Organisation, Ministry of Surface Transport.
- (iii) Director (Technical) “Poompuhar” Shipping Company.
V.Floor, 304/305, Anna Salei,
Madras – 600 018.
- H (iv) Director Marine Department.
Calcutta Port Trust – Convenor.

2. The Committee will submit their report by 30.11.87.” A

6. The Committee went into the matter, examined various officials and then submitted its Report on 06.01.1988. Paragraphs 5 to 9 of the Report were:

“5. M.V. “Chennai Nermai” with accommodation aft has a length of about 190 metres. Capt. Arun Rajgopal was the master of the ship when she arrived at Sandheads prior to the accident. Arrival draft of the vessel was reported as 7 metres. The vessel was deballasted before entering the Haldia locks on 27th August, 1987 and the same was continued in the lock so that the mean draft of the vessel was reduced to about 5.5 metres as per the master of the ship. The matter was not however, reported to Shri S. P. Rajak, Berthing Master of the Haldia Dock Complex who boarded the ship at the locks. On the fateful day the water level inside the docks was 5.0 metres above datum because of high tide against normal state of around 4.5 metres. B C

6. While proceeding to the Coal Berth the vessel encountered heavy wind from South south-west at a speed of 24 knots. MT Ahalya and MT Kunti were available for assisting the vessel in berthing operation. As M.V. “Chennai Nermai” had a light draft she was subjected to considerable wind force from the port side. The effect was further pronounced because of the high water level in the impounded dock. The accommodation on the vessel being located on the aft and the side thrust on that area was much higher than on the rest of the ship. As a result, the aft part of the ship was constantly being blown towards the berth which could not be adequately checked by the tugs. As a consequence, stern of the vessel made contact with the jetty and overhanging counter of the ship contacted No.1 Shiploader which was parked towards the southern end of the berth. The Committee did not have the opportunity to examine the damage sustained by the ship but the same appears to have been of a light nature as the vessel could leave port after completion of loading. However, because of impact the structure of the Shiploader was distorted and one set of wheels was derailed. Due to this damage the particular shiploader was rendered in-operative. D E F G

7. It has been observed that the master of the ship did not keep the berthing master informed of the deballasting as a result of which the ship was subjected to larger wind force from the port side. The wind speed on that particular day which is reported to H

- A have been 24 knots was considerable though berthing operation under such condition is not normally suspended. At one stage of the operation there was even danger of M.V. “Chennai Nermai” getting set on to a dredger which was tied up beyond southern end of the Coal Berth. Fortunately, the accident could be averted.
- B 8. The wind force acting on the accommodation located at aft part of the vessel proved to be too strong which could not be checked by the assisting tugs. Though stern of the vessel came in contact with the berth the damage to the jetty did not appear to be considerable. Unfortunately, the overhanging counter of the ship touched one leg of No.1 Shiploader causing damage to the same as described earlier.
- C 9. While no specific responsibility can be fixed due to dynamic situation prevailing at the time of accident a combination of the following factors seems to have led to occurrence of the above accident :-
- D (i) Deballasting of the ship thereby exposing larger area of the vessel to wind force.
(ii) Higher water level within the impounded dock because of the higher rise of tide which resulted in enhanced wind action on the ship.
- E (iii) Blowing of wind at high speed of 24 knots at an angle giving rise to considerable wind force on aft part of the ship because of the superstructure.
(iv) Inadequacy of communication system between the ship and the assisting tugs leading to delay in timely action.
- F (v) Parking of No.1 Shiploader at southern end of the berth instead of usual location at the centre.”
7. After setting out various factors in para no. 9, those factors were considered in detail by the Committee and finally the conclusion was arrived at:
- G “17. As has been pointed out earlier, the accident took place due to unfortunate combination of certain unusual factors put together for which no individual responsibility can be assigned.”
8. Soon thereafter, the appellant instituted Suit No.12 of 1988 on the original side of the High Court at Calcutta praying *inter alia* for a declaration that the acknowledgement of liability dated 01.09.1987 was
- H void and without any legal effect and for cancellation of said endorsement.

It was contended that the Master of the vessel had initially refused to acknowledge the liability for the accident in question; that despite having completed loading of cargo, the vessel was not allowed to sail out of the docks and was kept waiting; and that the acknowledgement dated 01.09.1987 was wrested out of the reluctant Master by wrongful detention of the vessel.

9. The respondent filed its written statement with a counter claim and claimed a decree for Rs.30 lakhs. It was contended that the accident occurred purely because of negligence on part of the Master and the crew of the vessel; that the appellant was bound by the acknowledgement of liability and that the plaintiff/appellant was liable to compensate the respondent for damage to the coal loader which was estimated at Rs.30 lakhs. In the written statement a specific stand was taken in para 14 as under:

“14. The defendant further states that the said Vessel M.V. Chenai Nermai arrived at Haldia from sandhead on 27th August, 1987 and was placed in the locks at about 1100 hrs. As about 1305 hrs. the said Vessel proceeded to coal berth with the assistance of a tug M.T. Ahalya for to coal berth with the assistance of a tug M.T. Ahalya for towing and M.T. Kunti for checking. At the time there was a rough weather and the wind was blowing at a speed of 24 knots. The draft of the said Vessel when arrived at sandhead was reported as 8 meters. Further the Master of the Vessel de-ballasted the Vessel at the time of approaching Haldia load in jetty for ingress into the dock system and continued to do so in the locks thereby reducing the draft of the Vessel considerably and increasing the freeboard of the Vessel thus offering bigger area to the prevailing strong wind to play upon. While the vessel was sent to the berth, there was considerable wind force playing on aft part of the vessel. It was found that because of this stern of the vessel came in contact with the Southern and of the coal berth and the Vessel collided with no.1 ship loader parked in that area. As the Vessel had been de-ballasted, and freeboard of the Vessel had been increased, there being very little hold of the vessels under water area in the water, the Vessel heeled over and damaged the Coal loader which would have been avoided if the board had not increased due to de-ballasting of the vessel. As a result of such accident the said ship loader was damaged rendering the same totally out of commission. While the vessel was entering into the port the mean draft of the Vessel was reduced to about

A 5.5 metres according to the Master of the Vessel. The Master of the Vessels did not report the same to the berthing Master who boarded the vessel at the locks. As the said vessel had a light draft she was subjected to considerable wind force from the port side. The effect was further pronounced because of the high water level in the said dock. As a result, the Master and crew and/or the servants and agents of the plaintiff made the said vessel unmanageable in the said weather condition which was not even disclosed to the berthing Master.”

B 10. In its rejoinder/replication, the appellant dealt with assertions in para 14 of the written statement as under:-

C “5. With reference to paragraph 14 of the written statement, the plaintiff states that the true facts were as follows:-

(a) The vessel arrived at Sandheads from Tuticorin at 17.42 hours on 23rd August, 1987. Her draft then was 7 meters which was reported from Sandheads to Haldia. Soon thereafter River Pilot Mr. Malik Boarded the vessel which then proceeded to Haldia, the draft of the vessel was reduced to 6.5 meters. The vessel arrived at Haldia on 24th August, 1987 towards noon. As permission to enter the locks was not given, the vessel had to remain anchored in the River off the locks.

E (b) In the morning of 24th August, 1987 the vessel was directed by the Marine office at Haldia to go back to Sandheads and the vessel accordingly went back reaching Sandheads on 26th August, 1987. On the following day, the vessel again proceeded to Haldia under the pilotage of a River Pilot and arrived at Haldia on 27th August, 1987. The vessel was deballasted again at Haldia prior to entry into the Locks and while inside the Locks until her draft was brought down to 4.69 metres forward and 6.25 metres aft.

F (c) The Berthing Master Mr. Rajaak boarded the vessel in the locks at about 13 hours to shift the vessel to the coal berth with the assistance of two Tugs owned by the defendant and marked by the defendant’s employees. The vessel then moved out of the Locks assisted by the Tug “Ahalya” which was made fast forward with two ship’s lines. As the wind was SSW., the second Tug “Kunti” was kept as a stand by on the starboard side. After the vessel cleared the Locks,

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the Tug “Kunti” was made fast aft with 2 ship’s lines and the vessel proceeded towards the coal berth. A

(d) On the way to the coal berth the vessel was observed to be canting towards port whereupon the Forward Tug “Ahalya” was cast off and was directed by the Berthing Master to push the vessel’s bow towards star board. At the same time the aft tug “Kunti” was directed to pull the Stern towards port side, unfortunately both the Tugs were poor in responding to the repeated orders of the Berthing Master with the result that the intended maneuver of the Berthing Master to arrest the cant of the stern of the vessel towards starboard could not be carried out effectively and at about 13.54 Hours the starboard quarter of the vessel came into contact with the jetty and the Loader No.1 and both the Loader and the Jetty sustained damages. B C

6. Except as to what has been stated in the next proceeding paragraph and except that the wind force was about 24 knots at the relevant time the plaintiff denies each and every statement contained in paragraph 14 of the written statement. In particular, it is denied that the stern of the vessel came into contact with the loader because of the wind force or that the wind force was considerable or that there was very little of the vessel’s under water area in the water or that the collision would not have occurred if the vessel had not been deballasted. It is further denied that the Berthing Master was not aware of the draft of the vessel or that the vessel was rendered unmanageable by any act of the plaintiff or its servants or agents as alleged or at all.” D E

11. The appellant/plaintiff examined Capt. Arjun Raj Gopal, Master of the Vessel as PW1 in support of its case. In his examination-in-chief, in answer to question No.112 PW1 accepted that while the vessel was in the locks the windforce was about 24 knots. In answer to question No.239 he stated that while the vessel is in the dock, it would be under the control of the Berthing Master. In answer to question No.393 he stated that since the vessel was not allowed to sail out of Haldia port for two days, he put his signature under the endorsement. While giving answer to question No.396, the cause for collision was stated as under: F G

396 Q. What according to you was the cause of this collision?

A. It was due to the negligence on the part of the officers of the port since one loader was placed at a wrong position for the H

A berthing of the vessel. There was no response from the forward tug for carrying out Berthing Master's orders. The aft tug was very slow in responding to the Berthing Master's orders. The communication between the Berthing Master and the tug specially the forward one was very poor and should have been by walkie talkie through the tug's V.H.A. The Anchor could not be brought earlier because the dredger was tied between the ore and coal berths. Lastly there was no mooring boat to take a line from the ship's bow to the coal berth which would have been helpful in checking the cant and straightening the vessel."

B In his cross-examination, while answering question No.466, PW1 accepted that he had not informed the Berthing Master about the fact that he had de-ballasted the vessel. His answer to question No.468 was to the following effect.

C **468.Q.** If I, therefore, suggest that you did not keep the Berthing Mater informed about all necessary particulars including the fact that the vessels draft was lowered by the deballasting what would be your answer?

D A. The berthing Master worked along the Jetty and climbed up the ships local gang-way and therefore, he should have read the draft which is always customary by the Boarding Pilot. The deballasting was completed by 1300 hrs. before the Berthing Master boarded as he boarded 1306 hrs. So, he should have read the latest draft of the draft of the vessel."

E 12. Four witnesses were examined by the respondent/defendant in support of its case. Capt. R.M. Gangadhar, Manager (Marine) Haldia Dock Complex, Calcutta Port Trust was examined as DW1. Answer to Question No.16 in his examination-in-chief was as under:-

F **"16. Q.** Is it usual to decrease the draft in dock before the berthing loading?

A. In normal weather it does not make any difference but when the wind is strong no prudent master deballasts the ship during the passage of the vessel."

G In response to question no.51, in his cross-examination he accepted that before taking charge of the vessel it was customary for the Berthing Master to acquaint himself of the draft marks. Further, in response to question no.123 he also accepted that the draft lines of the vessel are clearly visible to the Berthing Master while he approaches the ship. In answer to question No.124 he accepted that if the Berthing Master did not check the draft lines, it would be negligence on his part.

H The questions and answers were:-

123. Q. If that be so then the draft lines of the vessel were clearly visible to the berthing master while he approached the lock? A

A. Yes.

124. Q. The fact that he did not is negligence on his part?

A. Yes.”

13. Witnesses DW2 and DW3 were examined in regard to the damage sustained by the Coal Loader, Mr. S.P. Rajak, Berthing Master was examined as DW4. In his examination-in-chief the witness accepted that he had the experience of having maneuvered many vessels on more than 1500 occasions including the very same vessel on 2/3 times earlier. In response to question no.32 regarding reason for the accident he deposited: B C

“32. Q. According to you what was the reason of that accident?

A. Because of the ship’s high very board. The wind impact was too much.”

Some of the questions and answers given by the witness in his cross-examination were as under:- D

“36. Q. You have deposed that the master of the vessel is the person who issues the command to the engine room and other stations on board vessel. On what basis does the master of the vessel issue such command? E

A. Whatever advice I give he repeats to his crew members and officers.

37. Q. You are aware of certain CPT bye-laws which is in force?

A. Some of them. F

38. Q. Are you aware that when a vessel is inside the dock complex she is in the command of responsible officer of CPT?

A. Yes, for the movement of the vessel the berthing master boards the vessel.

39. Q. When you say that the berthing master boards the vessel in an advisory capacity – you are supported by some instruction – are you not? G

A. Instructions means that the vessel has to be berthed safely. Yes.

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A **40. Q.** When you say that you board in an advisory capacity is it supported by any written instruction of CPT?

A. I do not know that, but since the day I joined at Hooghly Dock Complex I have seen that in the ships log book it is noted that whenever any berthing master or pilot boards on the vessel it is on the advisory capacity.

B **41. Q.** If what you say is correct that the berthing master or the pilot board the vessel in an advisory capacity should it not appear from the CPT bye-laws?

A. I am just berthing master so about all these rules my superior officers must be knowing but the berthing master of the ship acting as Advisory capacity.

C **42. Q.** Shown bye-laws specially clause 16 and 20. Do you find from clause 16 that a vessel is inside the dock she is incharge of a duly authorized officer of CPT?

D A. Yes.

To Court:

43. Q. Have you seen these rules before?

A. No.

44. Q. Are you aware of these Rules?

E A. No.

... ..

48. Q. Can a vessel be berthed without a Berthing Master on board the vessel?

A. No.

F **49. Q.** Did you personally check the draught before boarding the vessel?

A. No. Because, the vessel Master had already declared the 7 metres' draught and as I was a new man handling as a Berthing Master. I had checked whatever draught she had declared, she had to maintain that. This is in respect of other vessels also that they have to maintain that draught and the River Pilot confirms me that he has seen the draught.

... ..

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54. Q. Do you normally ask the Master of the vessel about her draught at the time you take charge? A

A. When vessel is going for loading, normally we do not ask the Captain about the draught, because we know that she is light and going for loading.

... ..

67. Q. You agree with the reasons given by the Commission? B

A. Yes.

68. Q. You also agree with the recommendations of the Commission? C

A. Yes.

... ..

71. Q. Who informed about the 7 metres' draught?

A. The Captain had already sent the wireless message that the vessel was having 8 metres' draught and cannot be reduced to 7 metres' draught. D

72. Q. The Captain did not tell you that the vessel was having 7 metres' draught?

A. The Captain did not tell me anything."

14. After considering the material on record and rival submissions, the Single Judge by his judgment and order dated 09.04.1997 decreed the suit. It was observed that the Committee set up by the Government of India had found that the accident had taken place due to unfortunate combination of certain unusual factors for which no responsibility could be assigned: that though the Master of the vessel had not informed the Berthing Master about the fact that the vessel had de-ballasted, it was for the Berthing Master to acquaint himself with the draft of the vessel: that in terms of clause 16 of the bye-laws of the Port of Calcutta there could be no movement within the docks unless the vessel was incharge of a duly authorized officer and that the Berthing Master was responsible for guiding the vessel to its berth: that the coal loader was parked at the southern end of the berth instead of its usual location at the centre; and that the endorsement in question obtained from the Master of the vessel was not in keeping with Section 116 of The Major Port Trust Act, 1963. The Single Judge thus concluded:

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A “For those reasons, I hold that during the process of berthing the vessel was under the guidance and in the charge of the berthing master, who was a duly authorized employee of the defendant, and that the accident occurred due to the lack of proper care and inadequate expertise of the berthing master coupled with the

B archaic communication system which was both audible and unseable by the berthing master as also the tugs, then prevalent in the Haldia Dock Complex. The defendant wrongfully gave a go bye to the procedure laid down in Section 116 of The Major Port Trust Act, 1963 and malafide obtained the endorsement from the master in acceptance of liability for the damage. Therefore there

C shall be a decree in terms of prayer (a) and (b) of the plaint.”

15. The respondent being aggrieved, challenged the decision of the Single Judge by filing appeal namely A.P.D No.338 of 1997 which was allowed by the Division Bench of the High Court by decision dated 27.10.2006. The Division Bench also allowed the counter claim and directed the appellant/plaintiff to pay sum of Rs.24,04,237/- towards cost of repair along with interest at the rate of 12% per annum till payment. The Division Bench accepted that the report of the Committee set up by the Government of India could be taken as evidence in the matter but it concluded as under:

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E “We, thus, have before us material to come to the following conclusion –

(a) Draft of the vessel was reduced;

(b) Such reduction was not communicated to the Berthing Master;

(c) By reduction of the draft larger area of the vessel was exposed to wind;

F (d) Wind on the fateful day was blowing violently which we are, inclined to hold, made the ship unmanageable and

(e) the Master added fuel to the fire by not dropping the anchor at the time suggested by the Berthing Mater.

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 “..... For the aforesaid reasons we are inclined to hold that the vessel collided with the loader not due to any fault or negligence on the part of the Berthing Master or any Servant or employee or any tug of the defendant but solely because of negligence on the part of the Master of the ship. The Master of the ship owed a

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duty to safely navigate the vessel. He committed breach of the duty in the manner discussed above resulting into severe damage to the loader.” A

16. The decision of the Division Bench of the High Court is presently under challenge. Mr. Bhaskar P. Gupta, learned Senior Advocate appearing for the appellant laid stress on the report of the High-Power Committee including the conclusions added by the Committee. Further, it was submitted that the Berthing Master was an experienced officer and in terms of the bye-laws of the Calcutta Port Trust, the vessel was under his command. According to him, as accepted by DW1, the Berthing Master was obliged to check the draft marks before taking charge of the vessel and if he had failed to do so it was a clear case of negligence on his part and, therefore, even if the Master of the vessel had not specifically intimated to the Berthing Master the fact that the vessel had deballasted, the liability of the Berthing Master would not get absolved. Mr. Gupta also submitted that the quantification towards cost of repair as accepted by the Division Bench and the award of interest at the rate of 12% was also incorrect. B C D

17. Mr. Parag P. Tripathi, learned Senior Advocate appearing for the respondent submitted that the Master of the vessel had admittedly not intimated that the vessel had deballasted and the evidence clearly indicated that, that factor was the major cause for the accident resulting in damage to the coal loader. According to him as a result of deballasting, the draft of the vessel had reduced and it became difficult to navigate the vessel into the docks. Mr. Tripathi, learned Senior Advocate relied upon judgment of the Privy Council in *Fowles vs. Eastern and Australian Steamship Company, Limited*¹ in which statutory provision similar to the present bye laws had come up for consideration. E F

18. Before we deal with the factual controversy. Bye laws 16 & 20 of the Port of Calcutta may be extracted:

“16. Movement of vessels by authorized officials – No sea-going vessel shall move into, or out of, or within the Docks, or to or from a jetty berth, unless she is in the charge of a duly authorised officer of the Commissioners. G

20. Co-operation with authorised officials – The Master or Owner shall obey every lawful direction of, and act in full co-operation with all duly authorised officers of the Commissioners for the

¹[1916] 2 AC 556

A purpose of mooring or unmooring, moving or removing a sea-going vessel or of regulating her position or of adjusting her equipment and gear, for the loading or discharging of her cargo.”

19. At the outset, an important feature of the matter must be noted. The accident in the present matter had evoked attention and the Government of India had appointed a Committee to examine various aspects of the accident and fix responsibility. The Committee consisted of four persons having technical expertise and knowledge in the field. Said Committee found that no specific responsibility could be fixed due to the dynamic situation prevailing at the time of accident and that it was occasioned, as a result of combination of five factors named by the Committee. Every single factor was gone into and at the end of its discussion the Committee had found that individual responsibility could not be assigned in the matter.

20. We may now deal with some of the technical terms which have been used in the present matter by the witnesses and the Committee.

D We have been given to understand that a vessel in which cargo is yet to be loaded, being lighter in weight, can pose problems for effective navigation in high seas. In order to stabilize the vessel certain amount of weight is added which then helps in letting part of the vessel to be under the surface of the water and thereby lend stability. The weight for such purpose could be in any form but normally there are tanks which are filled with water and the weight of such filled water affords stability to the vessel when no cargo is loaded. Adding of such weight is called ‘ballasting’ a vessel. However, before the loading operations begin, the vessel is required to pump out the water from such tanks and this process is called “deballasting”. The portion of the vessel which is below the water surface is normally referred to as “draft” of the vessel. The larger the draft, the more stable the vessel. As a result of “deballasting” the weight of the vessel gets considerably reduced and consequently the “draft” of the vessel, namely, the portion below the surface of the water also gets reduced. Resultantly, the surface above the level of the water would get increased and in windy conditions such larger surface of the vessel above water may have impact on navigation. Further, it is common case that Haldia Port proper is not directly touching the sea and from the place where river Hooghli meets the sea, the water is arrested by employing locks. The journey of the vessel from the locks to the berthing area of the docks is through the water so arrested and is to be undertaken under the express guidance of an authorised officer.

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21. Now, the facts as they emerge from the records are: A

(a) The vessel arrived at the Sandheads that is location just before Haldia locks on 23.08.1987 and the “draft” of the vessel was reported to be seven meters. For guiding its onward journey, Rivor Pilot boarded and the vessel proceeded towards Haldia locks. The draft was then reduced to 6.5 meters. Though the vessel arrived at Haldia locks on 24.8.1987, the vessel was not allowed to enter and was directed to go back to Sandheads. B

(b) On 27.8.1987 under the Pilotage, the vessel again arrived at Haldia locks. Just before the entering the locks it had deballasted and the “draft” was brought down to 4.69 meters forward and 6.25 meters aft. The conditions at that time were quite windy and the force of the wind was 24 knots. C

(c) At this stage, Berthing Master Mr. Rajak boarded the vessel while it was in Haldia locks to guide the vessel with the assistance of tow Tugs to the berthing area. During its entire passage the vessel was tugged by said tugs employed by the Board and was under the command of the Berthing Master. D

(d) The Berthing Master had adequate experience of having guided navigation from locks to the berthing area on at least 1500 occasions. In fact he had guided the very same vessel on two or three previous occasions. E

(e) Going by the text of bye-laws of Port of Calcutta as well as the accepted factual position, the vessel was under the control of the Berthing Master.

(f) The Master of the vessel did not intimate to the Berthing Master that the vessel had deballasted and that the draft had been reduced to 4.69 meters forward and 6.25 meters aft. However, as accepted by DW1, Manager (Marine), Haldia Docks Complex, it was the responsibility of the Berthing Master to check the draft before he could start navigating the vessel. F

(g) Same witness further admitted that in normal conditions it was usual to decrease the draft before passage of the vessel into the berthing area. G

(h) On the relevant day, the level of the water in the impounded dock was also high.

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A (i) While being berthed, the vessel came in contact with a coal loader which was stationed at the Southern end of the Jetty or berthing area as against the normal location being at the center of the Jetty.

(j) As a result of collision the coal loader got damaged.

(k) At a stage when the damage was yet to be assessed, an endorsement was given by the Master of the vessel after the vessel was in the Docks for two days even after being loaded.

(l) The damage to the loader, according to the evidence led by the defendants-respondent was to the tune of Rs.24.04 lakhs.

22. There is one more issue as well, namely, whether the Master of the vessel was told by the Berthing Master to drop the anchor and whether there was any time lag in relaying such instruction by the Master of the vessel which made it further difficult for the Berthing Master. The Division Bench has relied upon this aspect while assessing the fact situation on record but the evidence in that behalf is not clear. In his answer as regards factors which caused the accident, the Berthing Master gave two reasons: ship's high board i.e. the area above the water surface and the impact of the wind. However, he did not name, delay in regard to anchoring as one of the reasons. The Committee, consisting of experts in the field had also examined witnesses and considered the entire material before it whereafter it arrived at its conclusion. Said Committee also did not put this factor of delay in anchoring the vessel to be one of the reasons. The Division Bench, therefore, ought not to have taken into account said aspect while considering the matter.

23. If the emerging facts, as set out earlier are considered, two crucial aspects that emerge are (a) non-intimation on part of the Master of the Vessel about the fact that the vessel had deballasted while at the locks and (b) failure on part of the Berthing Master to apprise himself of the draft of the vessel though he was obliged to check that part. All the other factors were either natural factors, such as the level of the water in the impounded dock or intensity of the wind or the factors over which neither the Master of the vessel nor the Berthing Master had any direct control. The factors like lack of communication, as was sought to be projected by the plaintiff-appellant, between the tugs and the Berthing Master or the location of the coal loader on the Southern tip of the Jetty or the berthing area could be contributing factors but at the core of the matter were aforesaid two features. Each of those two features are relied upon by either side to put the liability on the opposite side. To

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make the appellant liable, question would be whether non-intimation of said fact by the Master of the vessel, as indicated above, was so singularly crucial as to justify putting the entire blame on the appellant. We cannot disregard the fact that it was part of the duty of the Berthing Master to check the draft of the vessel before he took over the control of the vessel. Under the bye-laws the vessel had to be under the control of the officer of the Port or the Berthing Master. The Berthing Master was not a new comer or an inexperienced person. He had to his credit the experience of having navigated vessels from the locks to the dock area on at least 1500 previous occasions. If the intensity of the wind was 24 knots when he took over the control of the vessel, it was all the more reason for him to be more careful in checking the draft before assuming control over the vessel. As an officer employed and authorised by the Port, he was having greater knowledge than anyone else how the vessel had to be navigated from the locks to the dock area. We must also give due regard to the facts that a Committee of four experts in the field was appointed by the Government of India to look into the matter and fix the responsibility; that the Committee had recorded statements of all the concerned persons including the Master of the vessel, Berthing Master and all other concerned officials; and that after thorough enquiry the Committee found that the factors which were responsible for the accident were beyond the control of anyone.

24. Considering the entirety of the matter, we find that the assessment of all the relevant factors were duly considered by the Committee in correct perspective and it cannot be concluded that the acts of commission or omission on part of the Master of the vessel alone, were responsible for and resulted in causing the damage to the coal loader. He may be held responsible to a certain extent for his non-intimation as stated above, but the failure on part of the Berthing Master in doing what was expected of him and other factors were also responsible. The conclusion arrived at by the Committee in the circumstances, which weighed with the Single Judge, in our view, is the correct perspective from which the matter is required to be considered. In our assessment, the view taken by the trial court was, therefore, just and correct and that of the Division Bench was erroneous.

25. Before we conclude we must deal with the case relied upon by Mr. Tripathi, learned Senior Advocate for the respondent. What was in issue in that case was the alleged negligence of a licensed pilot. What we have found is that it was combination of all factors as concluded by

- A the Committee and the matter could not be put at the level of negligence on part of any individual simplicitor. We, therefore, do not find said case or the discussion therein to be of any relevance in so far as the present matter is concerned. In the assessment that we have made, it would also not be necessary to go into the questions as to the extent of damage to the coal loader and whether the amount as claimed by the defendant-respondent was correctly arrived at and assessed or the interest had to be at the level of 12% or at any lesser rate.
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26. We, therefore, allow this appeal, set aside the judgment under appeal and restore the judgment and decree passed by the Single Judge in Suit No.12 of 1988. No costs.

C

Kalpana K. Tripathy

Appeal allowed.