Supreme Court of India

The Asiatic Steam Navigation Co., ... vs Sub-Lt. Arabinda Chakravarti on 12 January, 1959

PETITIONER:
THE ASIATIC STEAM NAVIGATION CO., LTD.

Vs.

RESPONDENT:
SUB-LT. ARABINDA CHAKRAVARTI

DATE OF JUDGMENT:
12/01/1959

BENCH:

ACT:
Shipping-Collision-Negligence--" Standing on " vessel-Giving way " vessel-Rights an duties-Nautical assessors-Advice not binding on Court-Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60) Regulations of 1910, Arts. 21, 23, 25, 27, 29.

HEADNOTE:
On December 13, 1940, in the afternoon, a cargo ship, N, left Madras harbour bound for Calcutta heading for the open sea. She was being navigated in a swept channel outside the 980
harbour our and was on her proper, namely the starboard side of the channel. At that time a patrol ship, K, was on an opposite course making for Madras harbour and entered the channel at about 6-25 p. m. At 6-30 p. m. N decided to overtake K by going port on an erroneous assumption that K was going in the same direction as N and was not an on-coming ship. By about 6-45 P.m. when K sighted N on the port bow the two ships were opposite each other near about the mid-line of the channel, the distance between the two being then a little more than a mile. N continued her port course and went over the mid-line into the wrong side of the channel and at about 6-48 P. m. the distance between the two ships was less than a mile. K noticed at that moment that N was converging on her and accordingly in order to avoid a collision K turned to hard port and gave a signal to that effect. N, however, took starboard action to get back to the right side of the channel and get out of the way of K. At about 6-49 P. m. finding that a collision was imminent the commander of N ordered full speed astern, but it was too late and a collision took place at about 6-5I P. m.
The appellant, the owner of N, instituted a suit for damages against the respondent, who was one of the officers in charge of and responsible for the navigation of K, on the plea that the collision was caused by the negligent

navigation of K. The trial judge who had been assisted by nautical advisers, held that K wrongly altered her course at the moment when she did, and if any step had to be taken she should have altered not to port but to starboard, and if any other action was necessary, she should have put her engines full speed astern. On appeal, the High Court, which also had the assistance of two assessors, reversed the findings of the trial court and dismissed the suit. On appeal to the Supreme Court, the appellant contended that K should have anticipated that sooner or later N would correct her mistake and go to the starboard side of the channel and, therefore, as the " standing on" vessel, K should have kept her course and speed as required by Art. 21 Of the Regulations of 1910, made under the Merchant Shipping Act, 1894, and that if she had done so, there would have been no collision. As in the lower courts, this Court also had the assistance of two assessors.

Held, that K was justified in taking port action at 6-48 p. m. when a collision seemed imminent, in view of Arts. 27 and 29 of the Regulations under which when a vessel finds herself so close to another vessel that a collision cannot be avoided by the action of the "giving way" vessel alone, she must also take such action as will best aid to avert collision.

Held, further, that it was an act of negligence on the part of N to take hard starboard action, instead of following the provisions of Art. 23, as the " giving way " vessel, by slackening the speed of or reversing N between 6-45 p. m. and 6-48 p. m.

"The Tioga ", (1945) 78 LI. L. Rep. 1 and " The Empire Brent ", (1948) 81 LI. L. Rep. 306, distinguished.

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The function of nautical assessors is to advise the court upon nautical matters but the decision of the court rests entirely with the court and even in purely nautical matters the court is I not bound to follow the advice of the assessors, but on questions of nautical science and skill great attention must be paid to the opinion of the assessors since they are the only source of information on these points and some reason must be given for disregarding them. The assessors in an appeal court are not substituted for those consulted in the trial court ; they are additional to them; and if one adviser or two advisers are to be preferred, it is because in the judgment of the court the advice given is such as, in itself, is the more acceptable.

The relevant articles of the Regulations of 1910, made under the Merchant Shipping Act , 1894, are set out in the judgment.

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 229 of 1954. Appeal from the judgment and decree dated February 28, 1952, of the Bombay High Court in Appeal No. 34 of 1952, arising out of the judgment and decree dated February 5, 1951, of the said High Court in Admiralty Suit No. 1 of 1943. S. C. Isaacs, P. N. Bhagwati, S. N. Mukherjee and B. N. Ghosh, for the appellants.

E. E. Jhirad and T. M. Sen, for the respondent. 1959. January 12. The Judgment of the Court was delivered by S.K. DAS, J.-This appeal on a certificate given by the High Court of Judicature at Bombay is from the decision of a Division Bench of the said High Court in Appeal No. 34 of 1951, dated February 27 and 28, 1952, by which it reversed the decision of a single Judge of the said High Court in Admiralty Suit No. 1 of 1943 dated August 8, 1950. The appellant, Asiatic Steam Navigation Company Ltd., is a company incorporated in the United Kingdom with its registered office in London and has an office in Calcutta. The respondent is ex-Sub-Lieutenant Arabinda Chakravarti, who at all material times was a commissioned officer in the then Royal Indian Navy with its headquarters at Bombay. The action which the appellant brought arose out of a collision in a swept channel, a little distance outside the Madras harbour, on December 13, 1940, at about 6-51 p.m. The two ships concerned in the collision were the cargo vessel, S. S. Nizam of 5,322 gross tons and H. M. S. Kalawati, a patrol ship of 1,185 tons. For the sake of brevity and convenience, these two vessels will be referred to in this judgment as the Nizam and Kalawati. At all material times, the appellant owned the Nizam and the respondent, it was stated, was one of the officers in charge of and responsible for the navigation of the Kalawati . One F. C. H. Mason was the Chief Officer of the Nizam and the Master was Malcolm John McLure. Henry Lee was the Commander of the Kalawati and Arabinda Chakravarti, as stated above, was one of the officers in charge of and responsible for the navigation of the Kalawati at the relevant time.

The case set out by the appellant in the plaint was this. On December 13, 1940, in the afternoon the Nizam, which was then under charter to the Ministry of Shipping, left Madras harbour bound for Calcutta carrying a cargo. She was then tight, staunch, strong, well manned and in every respect sound and fit. A few minutes after 6-45 p.m. when the weather was fine, clear but cloudy, the moon full, the wind moderate, the sea calm and the set of the tide from north to south, the Nizam was being navigated in a swept channel outside the Madras harbour. The swept channel wag approximately about one mile wide and seventeen miles long. The Nizam was heading for the open sea on her proper course to Calcutta and was being navigated in a proper and seamanlike manner and was on her proper, namely the starboard side of the channel. The Kalawati was on an opposite course making for Madras harbour. The Nizam having the Kalawati about one point on her starboard bow star- boarded with the result that the two vessels were about one mile apart on courses which would result in their passing from -port to port with a distance of about half a mile between them. At that time, the Kalawati made a " light " signal to the Nizam; the signal was not legible and the Nizam sent a signal which asked for a repetition of the signal of the Kalawati. The Nizam continued hard to starboard, but the Kalawuti altered course to port with the result that the Kalawati was converging on the course of the Nizam. The Nizam continued to go to starboard and the Kalawati to port; thereafter, when a collision seemed very imminent, the Nizam was put full speed astern, but the Kalawati was navigated across the bows of the Nizam and the result was that the starboard quarter of the Kalawati came into collision with the bows of the Nizam. The Kalawati then pivoted round the bows of the Nizam and again came into collision with the latter. After

alleging the facts stated above, the appellant pleaded in the plaint that the collision was caused by the negligent navigation of the Kalawati and the following particulars of that negligence were given: (a) alteration of the Kalawati's course to port so as to take her across the bows of the Nizam; (b) failure of the Kalawati to stop or to go astern and/or to put her helm hard a-starboard when there was yet time for her to do so and avoid a collision; (c) in breach of the Regulations for the Prevention of Collisions at Sea the Kalawati failed to keep to her proper side, namely, the starboard side of the channel, when it was her duty to do so, and further the Kalawati failed to keep out of the way of the Nizam when it was her duty to do so and (d) a proper look-out was not kept on board the Kalawati. The total claim which the appellant preferred forthe damage sustained was a sum of Rs. 88,000 and odd and particlars of the claim were set out in sch. B of the plaint.

In his written statement the respondent denied any liability for the damage sustained by the Nizam. The case of the respondent as set out in his written statement was, to put it briefly, this. The respondent said that at about 6-45 p.m. on December 13, 1940, he was the officer on watch and the Kalawati was steering a course north 800 west keeping to the Kalawati's proper side of the channel. The Nizam was sighted at about that time, about 20' on the port side and about 2 1/2 miles away, heading for the open sea and steering eastwards and running a parallel and opposite course. Due to certain wartime regulations, the lights of both the vessels were blacked out. According to the courses which the Nizam and the Kalawati were then pursuing they would have passed each other clear port to port and the respondent signalled to the Nizam with a portable Aldis Lamp, and asked for her identity. The Nizam replied with one long flash indicating that she was ready to receive signals from the Kalawati. As the respondent was about to continue signalling, he noticed that the Nizam altered her course to port in such a manner that she was converging on and crossing the course of the Kalawati. The respondent then stopped signalling and as the Nizam continued on the wrong course taken by her until her bows were fine on the. port bows of the Kalawati, a collision seemed imminent, the two vessels then being about two cables apart. In order to avert the imminent risk of collision the respondent ordered the Kalawati to be put hard aport and simultaneously indicated to the Nizam the alteration of the Kalawati's course. The Nizam, however, instead of keeping to the course already taken by her and passing the Kalawati on the starboard side, erroneously attempted to correct the earlier wrong course taken by her and attempted to go back to her proper side of the channel. The Nizam then altered her course to hard starboard with the result that the two vessels were in such a position that it was not -possible to avert a collision either by slackening the speed of the Kalawati or by going astern. In substance, the case of the respondent was that the collision was caused by the circumstances (a) that the Nizam failed to keep to her proper side of the channel, (b) that she continued to -port in such a manner as to put the Kalawati in a perilous position and the Kalawati had to take avoiding action and finally (c) the Nizam was negligent in altering her course to hard astarboard after being made aware repeatedly that the course of the Kalawati had been altered to port. Therefore, according to the respondent, the action of the Nizam in steering starboard after Kalawati had taken port action, was the proximate and effective cause of the collision.

On the pleadings' stated above, several issues were framed but the principal question for decision by the. learned trial Judge was if it was the negligent action' of the Nizam or of the Kalawati which caused the collision. Issues 1, 2 and 3 were the issues which related to this question. A further question was raised by issues 4 and 6 and that related to contributory negligence, and in case it was

found that both the vessels were to blame for the collision, the question raised was in what proportion the negligence of the Nizam and of the Kalawati contributed to the collision. The learned trial Judge found in favour of the present appellant. on the principal question and expressed his finding in the following words:-

" I have come to the finding that the first helm action was taken-and rightly taken-at the crucial time by the Nizam going hard astarboard, and the Kalawati turned to port when there was no question of the imminence of any collision..... In these circumstances, as a standing on vessel the Kalawati turned - and wrongly in my opinion - to port and but for her turning to port, there was no question of the two vessels coining. into a perilous position. In these circumstances, I am of the opinion that the Nizam was justified in starboarding. The Kalawati had to keep her course under the rule being a standing on vessel, and should have maintained her course in that manner until the last safe moment, but to my mind she turned to port much before any such occasion arose. On this point, I may say that had the Kalawati to take any action at all, the normal action would have been going to starboard, and this would have completely avoided the collision. On this point I may state that the nautical advisers whom I have had occasion to consult are in agreement with the view I am adopting.

I may also state that in my opinion the Nizam put its engines full speed astern at the earliest opportunity, looking to the situation. The Nizam was put full speed astern at least 2 1/2 minutes approximately before the collision took place, and even if the statement of McLure that she was dead slow before the collision is a slight overstatement it must follow that the back of the momentum of the Nizam had already been wholly broken and there is evidence that she was doing about 3 to 4 knots instead of her 9 to 10 knots normal speed. On the other band, I am clearly of the opinion that it was fundamentally wrong for the Captain of the Kalawati not to put her engines full speed astern immediately he saw the situation was perilous. In fact, instead of doing so, he went full speed ahead. To my mind, that was not only a wrong judgment but a judgment inspired by desperation, namely, that by putting them full spied ahead with a bit of luck, he would have cleared himself of the nose of the Nizam.

I have, therefore, come to the conclusion that the Kalawati wrongly altered her course at the moment when she did, and if any step had to be taken she should have altered not to port but to starboard, and if any other action was necessary, she should have put her engines full speed astern." -

In view of the aforesaid findings, the learned trial Judge expressed the view that the question of contributory negligence did not arise, as also the question in what proportion each contributed to the collision.The question of damages was, by agreement, held over until the findings on the question of negligence and, after the learned trial Judge had given the necessary findings on the question of negligence, the damage sustained by the Nizam was assessed at Rs. 76,893-2-8 and a decree was passed for that amount with interest thereon at four per cent. per annum from June 19, 1941.

The respondent then preferred an appeal and the appeal was heard by Chagla, C. J., and Bhagwati, J. Like the trial Judge, the Judges who heard the appeal also had the assistance of two assessors. On the principal question. as to, whether- the collision was caused by the negligent action. of 'the Nizam or of the' Kalawati, the learned Judges who heard the appeal reversed the findings of the learned trial Judge. They said:

"Therefore, in our opinion, on this evidence, we must find as a fact that the Nizam did not alter her course to starboard at 6-45 p.m., but she did so much later and very likely at 6-48 p.m. when she gave one blast to indicate the change of course. 'Now, if that is the fact we find, we have to consider what bearing that finding of fact has upon the question of the defendant's negligence. The question is whether the defendant was justified in turning his ship to port at 6-48 p.m. if at that moment the Nizam was still steering to port. The question is whether at 6-48 p.m. there was a reasonable probability of a collision which justified the Kalawati in changing her course to port in order to avoid that collision. We have the plan before us and we have the evidence before us, but as this question of fact involves a question of nautical skill we have availed ourselves of the assistance of the assessors. Commander Kale is emphatically of the opinion that at 6-48 p.m. if the Nizam was pursuing the same course that she was doing from 6-38 p.m., there was a reasonable probability of a collision which it was the duty of the defendant to avoid as best as he could, and according to Commander Kale, the only way he could have possibly avoided it was by steering his ship to port. Capt. Malcolm does not agree with this view. He takes the' view that the Kalawati should have rather turned to starboard than to port, and his opinion is based on the consideration that the Kalawati should have assumed that at sometime or other the Nizam would turn starboard and taking that possibility into consideration she should have gone to the right side and not to the wrong side. With respect to Capt. Malcolm, we are inclined to prefer the opinion given by Commander Kale as to what should have been done under the circumstances... Now, as the Nizam was the " giving way" vessel, there was the primary obligation upon her if necessary to stop the ship or to go astern, and on the evidence it is difficult to resist the conclusion that the order to go full speed astern, could have been given earlier either by the Captain himself or by Mason. On this point both the assessors have expressed their opinion that as a matter of nautical skill it would have been possible and indeed it should have ,been done, viz., that the ship should have been ordered to go full speed astern earlier than 6-49 p.m. In our opinion, therefore, there are these two facts which have definitely contributed to the collision taking place at 6-52 p.m. The first is the failure on the part of the Nizam to give the signal that she was going starboard, even assuming that we accept the plaintiffs' case that she starboarded at 6-45 p.m. If she had given the signal then it would have given proper and full warning to the Kalawati as to what the Nizam was doing or going to do at that moment. The other fact which has also contributed in our opinion to the collision is the failure on the part of the Nizam to go full speed astern earlier than 6-49 p.m." In the result, the appeal was allowed and the action of the appellant was dismissed with costs throughout.

We have already stated that the High Court of Bombay gave a certificate of fitness under Art. 133 of the Constitution and the present appeal has been brought to this Court in pursuance of that certificate.

Two assessors, Capt. J. A. Cleeve and Commodore A. K. Chatterjee, have assisted us. At the very outset, it is necessary to clarify two points. Firstly, it appears that the learned Judges who heard the appeal in the Bombay High Court did not base their findings on the evidence of the respondent or his witnesses; nor did the learned trial Judge attach any great importance to the evidence of the respondent or his witnesses. The learned Judges said:- " We do not blame the learned Judge because, when the evidence of both these witnesses was laid before us, we also felt that the evidence was not given in a manner which would inspire confidence."

Learned counsel for the appellant has placed before us in full the evidence of the appellant and its witnesses. He has also placed before us such portions of the evidence of the respondent and his witnesses as, in his opinion, support the case of the appellant. In arriving at our conclusions we have also proceeded on the footing that as the courts below did not consider the evidence of the respondent's witnesses to be reliable, the principal question of negligence must be decided on the evidence of the appellant's witnesses. The trial Judge took one view of that evidence and the Judges' who heard the appeal took another view. There being no concurrent findings, we allowed learned counsel for the appellant to place the entire evidence of the appellant's witnesses before us in support of his contentions. The other point relates to the assessors. It has not been disputed before us that the function of nautical assessors is to advise the court upon nautical manners and as Scott, L. J., said in The Clan Lamont (1):

"..... their advice is expert evidence, admissible in Admiralty Courts, on all issues of fact about seamanship." The decision of the case, however, rests entirely with the court and even in purely nautical matters the court is not bound to follow the advice of assessors, but on questions of nautical science and skill great attention must obviously be paid to the opinion of the assessors since they are the only source of information on these points and some reason should be given for disregarding them. In the Australia (2) Lord Dunedin deprecated putting to assessors a question that is tantamount to asking them whether they would find for the plaintiff or the defendant and repudiated the idea that the views of the assessors in an appeal court are entitled to more respect than those of assessors below. The assessors in an appeal court are not substituted for those previously consulted; they are additional to them; and if one adviser or two advisers are to be preferred, it is because in the judgment of the court the advice given is such as, in itself, is the more acceptable. There can be no question of any appeal from one set of assessors to another. We have followed the same principles with regard to the advice of the assessors given in this case and we shall refer to such advice in the course of this judgment when it has a bearing on the questions at issue before us.

The principal point for determination in this case is which of the two, the Nizam or the Kalawati, was (1) (1946) 79 LI. L. Rep. 521, 524 (Lloyds List Law Reports).

(2) [1927] A. C. 145.

responsible for the collision; and if both were responsible, what is the extent of the responsibility of each ? For a determination of these questions it is necessary first to find what courses the aforesaid two boats were, following at the relevant time and what changes of course were made by them.

These facts have to be determined first and in doing so we must keep in mind some of the regulations made under the, Merchant Shipping Act, 1894. It has been admitted by counsel for both -parties that these Regulations apply, and are concerned with the Regulations of 1910, namely, those made by an order in Council dated October 13, 1910. They embody rules which were to be followed at the relevant time by all vessels upon the high seas, and in all waters connected therewith navigable by sea-going vessels. Articles 17 to 27 of the 1910 Regulations relate to steering and sailing rules. Article 17 applies to sailing vessels, and Art. 18 to steam vessels. Article, 18 says in effect that when two steam vessels are meeting end on or Dearly end on so as to involve risk of collision, each should alter her course to starboard so that each may pass on the port side of the other. Article 19 is in these terms:

Art. 19. "When two steam vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other."

The vessel which has to keep out of the way of the other is called the " give way " vessel and the other is called the " standing on" vessel. In the case before us there is no dispute that the Nizam was the give way vessel and the Kalawati the standing on vessel. Article 21 has some bearing on the question at the issue before us and is in these terms:

Art. 21. " Where by any of these Rules one of two vessels is to keep out of the way, the other shall keep her course and speed."

Article 23 says :

" Every steam vessel which is directed by these Rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed or stop or reverse."

Article 24 says inter alia that notwithstanding any. thing in the Rules, every vessel overtaking another, shall keep out of the way of the overtaken vessel. Article 25 is very important for our purpose, as learned counsel for the appellant has placed great reliance on it. This Article must, be quoted in extenso.

Art. 25. " In narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side-of such vessel."

There has been considerable difficulty in defining a " narrow channel ", and in the trial court the present respondent denied that the swept channel outside the Madras harbour was a narrow channel within the meaning of Art. 25 aforesaid. The courts below proceeded, however, on the footing that the channel in question was a narrow channel within the meaning of the said Article and we have also proceeded on the same footing. Article 27 is also important for our purpose. It says:

Art. 27. " In obeying and construing these Rules, due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above Rules necessary in order to avoid immediate danger."

Articles 29 and 30 are two residuary Articles. Article 29 inter alia says that nothing in the Rules shall exonerate any vessel from the consequences of any neglect to keep a proper look out or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case, and Art. 30 says that nothing in the Rules shall interfere with the operation of a special rule, duly made by a local authority, relative to the navigation of any harbour, river or inland waters. We proceed now to a consideration of the evidence with regard to those facts on which the determination of the question of negligence depends in this case. We do not propose to embark on a very detailed third review of the evidence given in the case, but shall confine ourselves to those salient points which, in our view, are determinative of the principal question at issue between the parties, namely, that of negligence ,for the collision which took place at about 6-51 p. m. on December 13, 1940. We shall for that purpose refer to the evidence of Mason, McLure and Abdul Nabi, three witnesses for the appellant. As to the effect of the evidence of these three witnesses, the learned Judges who heard the appeal in the Bombay High Court came to conclusions different from those of the learned trial Judge and one of the points for our consideration will be if the appellate Court gave good and convincing reasons for differing from the view of the evidence which the learned trial Judge took. It may be stated here that the aforesaid three witnesses were examined by Blagden, J., in April, 1945, and February, 1946, and that learned Judge made some notes as to the manner in which the three witnesses gave their evidence. Our attention has been drawn to those notes by learned counsel for the appellant. Blagden, J., however had ceased to be a Judge of the Court before the suit was tried. The respondent and his witnesses were examined in 1950 by Coyajee, J., who tried the suit and gave judgment in favour of the appellant.

It appears from the evidence that at about 4-45 p.m. on December 13, 1940, the Nizam took the pilot on board and proceeded to sea. At about 5-22 p.m. the pilot was dropped and she proceeded at full speed under McLure's orders up the swept channel, the speed being about 10 1/2 knots. McLure handed over to Mason at about 5-55 p.m. and the Nizam was then steering a course north 86 degree east, making some allowance for the leeway to port for the set of the tide from north to south. At about 6 p.m. the third officer re- lieved Mason; Mason returned to the bridge at 6-30 p.m. and took over from the third officer. Mason said that be had checked the bearings of the Nizam just before he left the bridge at 6 p.m. and she was then two cables on the proper side of the channel. Soon after 6-30 p.m. Mason saw a vessel about two points on the starboard bow of the Nizam at a distance of about three miles. Mason's evidence was that he thought then that the Nizam was overtaking that other vessel which must have been the Kalawati. At 6- 38 p.m. Mason altered the course of the Nizam 8 degree to port, because he thought that the Nizam and the Kalawati were on converging courses. At 6-43 p.m. the look-out on the Nizam rang the bell twice indicating a vessel viz. the Kalawati on the starboard side. Mason then said that at about 6-45 p.m. the Kalawati was about one mile on the Nizam's starboard bow and was clearly seen to be crossing to starboard port. The Kalawati then made an Aldis lamp signal and Mason replied I.M.I. with a torch which asked for a repetition of the signal. Mason then ordered bard astar- board; he did this because under certain wartime orders a merchant vessel had to turn away from any ship that signalled. At 6-47 p.m. the Kalawati was several points on the port bow of the Nizam and near about 6-48 p.m. the Kalawati altered her course to port and indicated the alteration by two short blasts. Mason replied by one short blast indicating that the Nizam was turning to starboard. At about 6-49 p.m. McLure came on board and he rang full speed astern. By about 6-51 p.m., however, the collision took place.

The above gives in brief a summary of the events which, according to Mason, led to the collision. McLure's evidence was that he returned to the bridge at about 6-48 p.m. on hearing two short blasts from the Kalawati, and on coming to the bridge he saw that the Kalawati was turning to port. McLure at once ordered full speed astern and caused three short blasts to be given; but the collision occurred within about two minutes. Abdul Nabi was the Quarter Master of the Nizam. His evidence was to the effect that Mason came on the bridge at about 6-30 p.m. and at that time the Nizam was steering a course north 86 degree east. At about 6-40 p.m. (Abdul Nabi said that it was ten minutes after Mason came on the bridge) be received an order to steer 8 degree to port and he did so. Some five or ten minutes after he received another order to go to starboard, that is, to the Nizam's former course. Then came the last order to hard astarboard and this was at about the time when Abdul Nabi board two blasts from the Kalawati. It may be here remarked that Abdul Nabi's evidence differs essentially from that of Mason as to the time when the Nizam went hard astarboard and also as to the sequence of events which led to the alteration of the Nizam's course from north 86 degree east to 8 degree port first, then to her former course and then again to hard astarboard. We shall later return to these discrepancies. The three circumstances, however, which stand out from the evidence of Mason are-(a) that the Nizam was on the proper side of the channel at about 6-45 p.m.; (b) she turned to hard astarboard at about 6-45 p.m. in order to present her stern to the Kalawati in compliance with certain wartime orders; and (c) the Kalawati turned to port at about 6-48 p.m. after she had seen the Nizam turn to hard astarboard some three minutes earlier. If Mason's evidence is correct with regard to the aforesaid three circumstances and the Kalawati turned to port after she had seen the Nizam turn to hard astarboard and if at the time the Kalawati was on the wrong side of the channel, then there can be very little doubt as to where the responsibility for the collision should lie. Coyajee, J., accepted Mason's evidence with regard to the aforesaid three circumstances and held that the responsibility for the collision lay on the Kalawati, because she turned to port at the time she did after having seen the Nizam turn to hard astarboard some three minutes earlier. The learned Judges who heard the appeal did not accept as correct Mason's evidence that the Nizam turned to hard astarboard at about 6-45 p.m. in order to present her stern to the Kalawati ; on the contrary, from the evidence of McLure and Abdul Nabi read with the evidence of Mason, they came to the conclusion that it was impossible to accept the appellant's case that the Nizam turned starboard at 6-45 p.m. and it was more likely that she turned to starboard at about 6-48 p.m. after she had heard the signal of the Kalawati that she was turning to port. In other words, the learned Judges found that the Kalawati had turned to port first in order to avoid an imminent risk of collision and it was then that the Nizam altered her course to starboard in order to get to the proper side of the channel.

The question before us is which of these two views is correct. On a careful consideration of the evidence and the submissions made thereon by learned counsel for the parties, we are of the opinion that the view of the learned Judges who heard the appeal is the correct view. According to the evidence of Mason, he checked the bearings of the Nizam before he left the bridge at 6 p.m. and on checking the bearings from the Madras Light House and a conspicuous white house on the north side of the harbour, he found that the Nizam was two cables on the proper side of the channel. It appears that there should have been a dan buoy in mid- channel to mark the mid-line. Mason said that he looked for it , but did not find it. There was a fairway buoy at the end of the channel, that is, near the mouth of the channel from the open sea. It is not disputed that the Kalawati entered the channel south of the fairway buoy and was at the time of the entry into the channel on the wrong

side. The question, however, is what was the position of the two boats at the relevant time, namely, at about 6-45 p.m. when the distance between the two boats was about a mile or so. Mason's evidence itself shows that at about 6-45 p.m. both the boats were near about the mid-line of the channel. It is to be remembered that though the Nizam was about two cables on the proper side of the channel at about 6 p.m., she had altered her course 80 to port, even according to Mason, at about 6-38 p.m. Abdul Nabi's evidence indicated that the Nizam had altered her course to port by about 10'. Even allowing for the set of the tide, if the Nizam had continued in her port course in order to overtake the Kalawati (as Mason was then under the impression that the Nizam was overtaking the Kalawati), she would cross the mid- line and go into the wrong side of the channel. It is worthy of note that in the plaint there was no mention of the circumstance that the Nizam altered her course to port in order to overtake the Kalawati, on the wrong impression that - both the boats were going in the same direction. But be that as it may, it is quite clear that the Nizam did alter ,her course to port at about 6-38 p.m, and if she continued in that course till about 6-48 p.m., she would be near the mid- line of the channel or just across it at the relevant time. Mason admitted this and said in cross-examination: " At 18- 45 1 was just about in the mid-channel and the Kalawati was then steering a crossing course ". Mason prepared a chart to show the position of the two boats and this was marked as Ext. A. This chart also showed that at about 6-45 p.m. the Nizam was on the mid-line and if the Nizam had continued her port course she would be on the wrong side of the channel at about 6-48 p.m. Even though the Kalawati had entered the channel south of the fairway buoy, which was her wrong side, she was steering a course north 80 degree west, making an allowance for a southerly drift of about 1 or 1.5 knots. By steering that course the Kalawati would also be near the mid-line of the channel at about, 6-45 p.m. She would be on her right side of the channel at 6-46 p.m. This is also made clear from the chart, Ext. A. Learned counsel for the appellant repudiated the correctness of the chart, Ext. A, but it is a chart prepared by his own witness and so far as the position of the Nizam was concerned, the chart must have been prepared on the position and course of the Nizam as given by the appellant's own witnesses. We see no good reasons for discarding the chart, Ext. A. At our request the assessors also prepared a chart showing the position of the two boats on the following assumptions:.(a) Nizam's speed about 10.2 knots,(b) Kalawati's speed about 11 knots, (c) the set of the tide about.71 knots and (d) length of the swept channel about 18 miles. This chart also showed that at about 6-45 p.m. the Nizam was on the mid-line and the Kalawati had crossed the mid-line into her right side of the channel. If the set of the tide was two knots or three knots, as some of the witnesses said, then both the Nizam and the Kalawati would be outside the swept channel, and if the Kalawati was sighted two points on the starboard bow of the Nizam she would be further south of the southern limit of the swept channel. On a consideration of the evidence in the case it appears to us that at the relevant time, namely, 6- 45 p.m., both the boats were near about the mid-line, may be a little on the right or wrong side of it, and the distance between the two boats was about one mile at that time. The very elaborate argument of learned counsel for the appellant based on Art. 25, which requires every steam vessel in a narrow channel to keep to the starboard side of the channel, loses much of its force when we remember that at the relevant time the two boats were near the mid-line of the channel and, according to Mason, the Kalawati was then crossing to starboard port. One of the assessors, Commodore Chatterjee, gave as his opinion that if the Kalawati was coming from the south, it would be easier for her to enter the channel south of the fairway buoy and he would not consider it as a breach of the rules of the road unless the Kalawati was embarrassing another ship Coming out of the channel. Capt. Cleeve said

that as a merchant ship captain he would never do it, but as a naval ship captain he might do it and although it might be against the spirit of the regulations, it would not be a breach of them. It is to be remembered again that the Kalawati entered the channel at about 6-25 p. m. and at the time the Nizam was about seven miles away. We do not, therefore, think the circumstance that the Kalawati entered the swept channel south of the fairway buoy decisive on the issue of negligence. As we have remarked earlier the decisive question is what was the position of the two boats at the relevant time, namely, at about 6-45 p.m.? The evidence leaves no room for any doubt that at the relevant time the two boats were near about the mid-line of the channel.

The question is what happened thereafter ? Mason said that from 6-38 to 6-41 p.m. he assumed that he was overtaking the Kalawati; from 6-41 to 6-45 p.m. he was in two minds and when at 6-45 p.m. the Kalawati signalled the Nizam, then Mason came to know that the Kalawati was steering a crossing course. Mason said that he then changed to hard starboard.

This part of the evidence of Mason is flatly contradicted by Abdul Nabi and is -further not supported by several circumstances to which we shall presently refer. It is true that none of the witnesses gave the time with the precision of a watch and what they said about time was more or less approximate. Abdul Nabi was, however , very definite that Mason first ordered the Nizam to steer 80 to port; then there was a second order to go to the former course and lastly there was an order to go hard astarboard. If Abdul Nabi is telling the truth, then even making due allowance for the approximate nature of the times which he mentioned, the evidence of Mason that he changed the course of the Nizam to hard astarboard at about 6-45 p.m. cannot be correct. Then, take the following circumstances one by one. If Mason had changed the course of the Nizam to hard astarboard, why did he not give a signal to indicate the change of course ? The evidence is very clear on this point. It was the Kalawati which gave two short blasts at about 6-48 p.m. to indicate that she was changing to port. Thereafter the Nizam replied by one short blast indicating that she was changing to starboard. If the Nizam had changed to starboard three minutes earlier, why was no signal given ? It is necessary to refer here to Art. 28 which says that when vessels are in sight of one another a steam vessel under way shall indicate the course taken by her. Mason made an attempt to say in his evidence that Art. 28 was not adhered to in wartime; but then he had to admit that only a few minutes after, the Nizam did give one short blast in reply to the two short blasts of the Kalawati. It is obvious that Art. 28 was not abrogated during wartime and it was the duty of the Nizam to indicate by one short blast that she was changing to starboard, if she actually did so at 6-45 p.m. We are, however, of the opinion, in agreement with the learned Judges of the appellate Bench, that the Nizam did not change her course to starboard at 6-45 p.m. as Mason wants us to believe; on the contrary, the Nizam continued her port course till about 6-48 p. m. and she changed to starboard only after she had heard the two blasts from the Kalawati. This, we think, is clear from two very important circumstances. McLure admitted in his evidence that at the speed and under the conditions prevailing immediately before the collision, it would take the Nizam about 2 1/2 minutes to swing 90' with her helm hard over. If actually Mason had altered the course of the Nizam to hard astarboard at 6-45 p.m., then she would be heading back towards Madras at the time' when the collision took place. Even McLure said: " If Mason's statement is correct, I should have expected my ship to be heading at right angles to her former course." That was not, however, the position of the Nizam when the collision took place. The assessors were agreed that once the wheel had been placed

hard starboard, it was not possible to put the wheel further to starboard. If actually more than five minutes had passed, after the Nizam had been put hard starboard, she would be swinging starboard all the time and she would take a turn of about 180' within five minutes. In any event, by about 6-48 p.m. she would be at right angles to her former course, as stated by McLure. We think that McLure's evidence on this point destroys the case of Mason that he had altered the Nizam's course. to hard astarboard at 6-45 p.m. Then there is the second important circumstance that McLure admitted that he knew nothing about any helm action of the Nizam from 5-55 p.m. to 6-48 p.m. McLure said :

" First I heard at 6-43 p.m. two bells indicating an object on the starboard bow. I was still in my cabin at the time. I was reading Admiralty messages. I heard two blasts from the other ship at 6-48 p. m. I have no recollection of feeling any helm action of my ship before that. I immediately went up on the bridge. The Nizam did not sound one blast till I had reached the top of the ladder. That would normally suggest that the Kalawati had turned to port first ". McLure further said that when a ship alters course and signals, the alteration and the signal must be simultaneous. It would be surprising indeed that McLure would not notice the helm action to hard starboard if actually the Nizam had been put hard starboard at 6-45 p.m. The assessors were asked about this matter and Commodore Chatterjee said that if the helm was put hard over, be would feel it even if he was asleep. Capt. Cleeve said that the master of a fast ship would feel the helm action sooner than the master of a slow ship, probably twenty to thirty seconds sooner. McLure, however, felt no helm action at all up till 6-48 p.m. This also shows that the story of Mason that he changed the course of the Nizam to hard astarboard at 6-45 p.m. was not correct. The reason which Mason gave for altering the course of the Nizam hard a-starboard at 6-45 p. m. was an alleged war-time order that a merchant vessel when challenged must turn away from the challenging vessel. This reason is far from convincing. No such war-time order was produced in evidence. In Ex. C (Surveyor's report dated January 27, 1941) the reason for the starboard action was stated thus:- " At 6-45 p. m. the other vessel appeard to be about one point on the starboard bow and about one mile distant and to be beading to cross the bows of s. s. " Nizam ". The helm put bard astarboard in order to pass astern of the other vessel."

There was no reference to any wartime order or regulation then. McLure said in his evidence:

" The rule about turning away from a challenging vessel was a secret matter and I did not think it fit to mention it even to my Managing Agents. Mason told me he originally steered to starboard in order to pass port to port." Even Mason was far from being firm as to the reason which led him to turn hard astarboard at 6-45 p. m. Having said that the only reason was the alleged wartime order, he changed and said that he turned hard starboard because he was dazzled with the Aldis lamp signal and the Kalawati was too close. He admitted that he knew then that the Kalawati was a patrol vessel which was not hostile; yet he wanted to turn astern, as the Nizam had a gun mounted astern! Again, he changed and gave a third reason for going hard starboard, namely, he wanted to get out of the way of the Kalawati. In this state of the evidence, it is impossible to place implicit reliance on Mason's evidence that he turned hard starboard at 6-45 p. m. for the reason that a so-called war-time order required him to do so. Learned counsel for the appellant drew our attention to the respondent's evidence on this point. The respondent said: " When a ship is challenged she gives her name and turns round but not in the swept channel or in the harbour. I do not agree that in the swept channel when a ship was challenged to give her name she would have to turn round. I did

state before the Marine Enquiry that when a merchant ship is challenged she would turn about necessarily by starboard movement and give her name and the turning about would be action preparatory to running away and that owing to war these regulations were in force. I gay that I was trapped into giving answers by vague questions." We agree that the respondent's evidence is not very ingenuous; but it cannot be accepted as an admission which relieved the appellant from proving the existence of a war- time order or regulation of the kind and nature suggested by Mason in his evidence. Mason's evidence taken as a whole seems to indicate that the order to turn hard starboard came much later than 6-45 p. m. and the reason for the order was to get back to the right side of the channel and to get out of the way of the Kalawati, if possible. Unfortunately, the action was taken too late and after the Kalawati had already turned to port. On the evidence, we are unable to hold that the Nizam took starboard action before the Kalawati turned to port.

The question now arises-why did the Kalawati turn to port at about 6-48 p. m. and in doing so, did she commit an act of negligence or an act which in any way contributed to the collision? On behalf of the appellant, it has been argued that even if we find on the facts that the Kalawati took port action first, this action was wholly unjustified and wrong and, in any event, the Kalawati could and should have gone to starboard to avoid the collision; therefore, she was wholly to blame. Alternatively, it has been argued that she was mostly to blame and the blame should be apportioned. Ike shall deal with the alternative argument at a later stage.

The question is-why did the Kalawati turn to port at about 6-48 p. m. ? We think that Mason's own evidence furnishes an answer to the question. We know from the Kalawati's log book that she entered the swept channel at about 6-25 p. m. south of the fairway buoy and she was then steering a course of north 80' west; by about 6-45 p. m. she was on the mid- line of the channel when she sighted the Nizam on the port bow. The Nizam had already altered her course to port. Mason summarised the position at 6-45 p. m. thus: " At 18-45 she (meaning the Kalawati) was about one mile on my starboard bow and was crossing to starboard port." Capt. Cleeve thus explained the meaning of the aforesaid statement: "That means that the distance between the two boats was one mile, and she (Kalawati) was a mile, off to my (Nizam's) starboard bow and she was crossing from my starboard 'to my port. " Mason further clarified the position by saying that the two boats were then steering crossing courses and it was not correct to say that if both ships had kept their course and speed as it was at 6-43 p m., they would have passed port to port. Mason also said that " the two boats were on converging courses at 18-45 hours ". ,Obviously, there would have been a collision, if no avoiding action was taken. by either boat. That is why Mason was at pains to point out in his evidence that he took starboard action at 6-45 p. m. to get out of the way of the Kalawati and if both. the ships, had kept their courses as they were immediately after Mason had starboarded at 6-45 p. m., they would have passed port to port with about half a mile to spare. We have found, however, that Mason's statement that he had starboarded at 6-45 p. m. was not correct. The position, therefore, was that. the two boats- were on crossing courses in a, narrow channel and when the Kalawati signalled with the Aldis lamp, she found that the Nizam was still steering to port. The Aldis lamp has a small telescope attached to it and from a demonstration made in Court, it became obvious that the respondent was in a position to see through the telescope what course the Nizam was taking. At? about 6-48 p. m. the distance between the two boats was less than half a mile, and unless the Kalawati took avoiding action, a collision was imminent. Therefore, the Kalawati took

port action and indicated her direction by the necessary signal. The justification for the port action of the Kalawati was the continuance of the Nizam on a port course--a course which was not only taking the Nizam over the mid-line into the wrong side of the channel but was also making her converge on the course of the Kalawati. The Kalawati was the standing on vessel, and it was the duty of the Nizam to get out of the way. Instead of doing that, the Nizam persisted in her port course and changed to hard starboard after the Kalawati had justifiably taken port action to avoid an imminent risk of collision. It has been argued before us that the Kalawati should have anticipated that sooner or later the Nizam would correct her mistake and go to the starboard side of the channel and, therefore, as the standing on vessel, the Kalawati should have kept her course and speed as required by Art. 21, and if she had done so, there would have been no collision. This argument fails to take note of the perilous position in which the Kalawati was placed by the continuance of the Nizam in a port course till about 6-48 p. m. and furthermore ignores Arts. 27 and 29 under which when a vessel finds herself so close to another vessel that a collision cannot be avoided by the action of the giving-way vessel alone, she must also take such action as will best aid to avert collision. The Kalawati was, therefore, justified, in taking port action at 6-48 p. m. when a collision seemed imminent and perhaps the collision would have been averted if the Nizam had not taken the unfortunate action of hard starboarding after the Kalawati had taken port action. McLure realised the position as soon as he came on the bridge at 6-49 p. m. and ordered full speed astern. Unfortunately, it was too late then. If Mason had followed the provisions of Art. 23 and had slackened the speed of or reversed the Nizam between 6-45 p. m. and 6-48 p. m. the collision might have been averted.

Instead, however, he ordered the Nizam to be put hard starboard at about 6-48 p. m. This, in our opinion, was an act of negligence, which was primarily responsible for the collision. The findings of the learned trial Judge were, in our view, vitiated by reason of the circumstance that be accepted as correct Mason's evidence that he had put the Nizam bard astarboard at 6-45 p. m. in the teeth of circumstances which showed clearly enough that Mason's evidence about starboarding at 6-45 p. m. could not be correct. These circumstances were-(I) if Mason had put the Nizam hard starboard at 6-45 p. m., the Nizam would be 90' to her former course by 6-48 p. m. and by 6-49 or 6-50 p. m. she would be turning towards Madras; (2) McLure did not feel any such helm action at 6-45 p. m.; (3) the Nizam gave no signal of starboarding at 6-45 p. m. but gave such signal after the Kalawati had turned to port soon after 6-48 p. m.; and (4) the reason which Mason gave for starboarding at 6-45 P. m. did not stand the test of scrutiny. In the court of appeal below, one of the assessors, Commander Kale, said definitely that the only war-time restrictions in 1940 were with regard to lights and wireless communication. He said that signals bad to be given by ships when they decided to change their course, and the more so when ships were in restricted waters and there was another vessel coming ahead. We think that the learned Judges who heard the appeal rightly emphasised the importance of the circumstances stated above, and having given them due weight, rightly reversed the findings of the learned trial Judge. To summarise our conclusions now: (1) we accept the position that the Kalawati entered the channel at 6-25 p. m. on the wrong side and the Nizam was two cables on the right side at about 6 p. m.; but by 6-45 p. m., the two boats were opposite each other near about the mid-line of the channel, the distance between the two being then a little more than a mile; (2) the Nizam did not take any hard starboard action at 6-45 p. m.- rather she continued to steer to a port course till about 6-48 p. m. and probably went over the mid- line into

the wrong side of the channel ; (3) when the Kalawati signalled with the Aldis lamp, she noticed that the Nizam was steering to port and was on a course converging on the Kalawati and at about 6-48 p. m. the Kalawati took avoiding action by turning hard to port and gave a signal to that effect; (4) the Nizam then took starboard action to get back to the right side of the channel and get out of the way of the Kalawati; and (5) when McLure came on the bridge at about 6-49 p. m. he ordered full speed astern -but it was too late and the collision took place at about 6-51 or 6-52 p. m.

On the aforesaid findings there is little difficulty left in adjudging where the responsibility lies for the collision. As we have said earlier., the responsibility lies with the Nizam.

It is necessary to notice now, very briefly, two decisions on which learned counsel for the appellant has relied: " The Tioga " (1) and the " Empire Brent " (2). In the Tioga the question for consideration was the liability for damages in respect of a collision which occurred in the swept channel of the N. E. Coast of England between the Pundit, a ship in the port column of a south-bound convoy of eight ships, and the Tioga, an independent north-bound ship. The decision proceeded on the footing that south bound ships were under a strict duty to keep within the western half of the channel and north-bound within the eastern half, thus passing each other port to port. Down the centre of the channel there was a line of flashing buoys four or five miles apart. There was a general prohibition of navigation lights, which made the strict observance of the; rule of the road in the swept channel exceptionally imperative. The night was overcast and dark, and there was drizzling rain diminishing visibility. In those circumstances, it was found that the Pundit, instead of keeping to her right water, trespassed into the Tioga's water, and furthermore when she first saw the Tioga's red at a quarter of a mile away, her instant duty was to starboard out of the Tioga's way so as to pass port to port. This the Pundit failed to do. Therefore, the Pundit was held responsible on two grounds, which Scott, L. J., explained in the following words:-

(1) (1945) 78 Ll. L. Rep. 1 (Lloyd's List Law Reports). (2) (1948) 81 Ll. L. Rep. 306 (Lloyd's List Law Reports).

" The two ships were either meeting or crossing; and in either case it was the Pundit's duty to pass the Tioga port to port. If they were crossing ships it was also her duty to keep out of the way of the Tioga and go under her stern; if meeting ships, simply to starboard her helm. In addition, there was the special duty of the Pundit in that channel to regain her right water. She had been blundering out of it and endangering north bound traffic; and I entirely agree with the learned Judge's view that for that reason alone she was seriously to blame; and that position of itself would entitle the Tioga to expect her to be actually on a starboard helm, correcting her error, at the moment she put her lights on ".

We do not think that the decision in the Tioga is of any great assistance to the appellant. On our findings, it was the duty of the Nizam to keep out of the way of the Kalawati; and at 6-48 p.m. the Nizam was in all probability. in her wrong water and the Kalawati in her right water - at any rate - both were near the mid-line of the channel, and in these circumstances, the Nizam's action in starboarding after she had seen the Kalawati, turn to port cannot be justified either on the principles laid down in the decision aforesaid or on the provisions of the rule of the road in a narrow channel.

In the Empire Brent the collision took place in the river Mersey between the steamship Starmont and the steamship Empire Brent. It was found that so far as the Starmont was concerned, she deliberately set a course which meant that for most of the way up the river she was necessarily proceeding on the wrong side of the river for her. The Empire Brent had just left the Princes Landing Stage when she had to cope with the situation created by the approach of the Starmont. In these circumstances it was held that the Starmont was wholly in the wrong for coming up on the eastern side of the river and for breaking in that way the narrow channel rule which prevails in the Mersey. Willmer, J., said:-

" I find it difficult to find words sufficiently strong to condemn the action of a man who persists in coming up on the wrong side of the river--especially as this action of the Starmont was quite deliberate and was merely for the purpose of her own convenience."

Dealing with the alternative case that the starboarding action of the Empire Brent was the whole cause of the collision even if the Starmont was wrong in coming up on the eastern side of the river, the learned Judge observed: " That alternative way of putting the case has become academic, having regard to my finding that the vessels were green to green at any rate up to the time when they were about three - quarters of a mile apart. But, lest it should be thought that I agree with it, I should like to take the opportunity of saying that I regard that contention as wholly wrong. As I understand the principles which apply in narrow channels, it has been laid down for many, many years that, although the crossing rule does from time to time have to be applied in narrow channels (when, for instance, a vessel which is crossing the channel has to act in relation to a vessel which is proceeding up or down the channel), nevertheless, when vessels are approaching each other, navigating respectively up and down the channel, it is Art. 25 of -the Collision Regulations which applies and applies exclusively. There is no room in such a situation for applying the provisions of the crossing rule. at the same time as the provisions of the narrow channel rule, because the requirements under the rules are different. I have no hesitation in saying that as between a vessel coming up and a vessel going down, approaching each other in that way in a narrow channel like the Mersey, the narrow channel rule, and the narrow channel rule only, is the rule which has to be applied. However, that is a digression, because, having regard to my findings of fact, the point is academic." Learned counsel for the appellant has placed strong reliance on the aforesaid observations and has contended that in the present case also the provisions of the narrow channel rule should apply and not those of the crossing rule. We do not see how a strict or exclusive application of the narrow channel rule will help the appellant in the present case. We have found that the Nizam was in her right water at about 6 p.m. but she had altered her course to port later and at about 6-45 p.m. she was near the mid-line and at 6-48 p.m. when she starboarded in answer to the Kalawati's port action, she was in all probability in the wrong water. The Nizam cannot, therefore, say that if the narrow channel rule only applied, she is bound to succeed. We do not, therefore, think that the ratio of the decision in the Empire Brent helps to establish the case of the appellant. In view of our findings, we consider it unnecessary to deal with the alternative claim of the appellant as to an apportionment- of the blame for the collision in question. We do not think that the Kalawati was to blame for taking port action when she did, and we have already stated our reasons therefor. There is a further difficulty in the way of the appellant. It is true that the question of contributory negligence was one of the issues before the learned trial Judge, but in the view which he took of the evidence, he considered it

unnecessary to decide it. The appeal was decided on the footing that the Kalawati was not guilty of negligence and the entire liability for the collision was that of the Nizam. The appellant has no doubt contested the correctness of the findings arrived at by the learned Judges of the appellate bench; but neither in the memorandum of appeal nor in the statement of the case presented to this Court did the appellant raise the alternative claim which it has now raised. During the course of the hearing of the appeal in this Court, a petition was made for adding a fresh ground of appeal in order to raise the alternative claim of an apportionment of liability for the collision under the rules for the division of loss prescribed under the Maritime Conventions Act, 1911. We do not think that the prayer for an alternative claim can be allowed at this stage, because on our findings there is no case for an apportionment of the blame.

In the result, the appeal fails and is dismissed with costs. We have already passed orders for the payment of the fees of the two assessors, and no fresh orders thereon are necessary.

Appeal dismissed.