

Supreme Court of India

Jalim Ram Mallah vs The R.S.N. Co. Ltd. on 23 January, 1969

Equivalent citations: 1969 I UJ 63 SC

Author: Bachawat

Bench: Sikri, Bachawat, Hegde

JUDGMENT Bachawat, J.

1. The defendants jointly carry on the business of transport services by rivers. The steamer "Pagan" belongs to respondent No. 2. The flat "Nurjehan" belongs to respondent No. 1. The charge against them is that the steamer Pagan 'while towing Nurjehan negligently dashed against two loaded country boats and sank them, with the result that the two boats and all the goods on board and the entire cargo were lost. The boats belonged to Jalim Mallah and were hired by Rameswar Agarwala for the carriage of mustard seeds ghee and jute from Ghilamara to Dibrugarh. Rameswar instituted Money Suit No. 6 of 1951 for recovery of damages for loss of the cargo Jalim instituted Money Suit No. 34 of 1952 for damages for loss his boats and articles. The Subordinate Judge Upper Assam Districts, Dibrugarh, decreed the two suits. The Assam High Court set aside the decrees and dismissed the suits. The present appeals have been filed by the plaintiffs after obtaining certificates under Article 133 of the Constitution.

2. The plaintiffs' case is fully established by the evidence adduced by them. On the Night of the 6th and 7th August, 1950 the two country boats were moored at anchor alongside the northern bank of the river Brahmaputra at a place midway between Koseck Miri Gaon and Schokichuk Miri Gaon and were manned by a crew of 10 boatmen including Jalim Mallah. The steamer Pagan was plying in the river. The empty flat Nurjehan was tied to the vessel on its port side. The boatmen saw the steamer at a distance of half a mile approaching the river bank where the boats were moored. When the steamer was at a distance of about 300 yards the boatmen raised warning shouts and lighted torches. Nevertheless the steamer headed towards the river bank and its tow Nurjehan violently struck the rear boat and then the front boat and sank both of them. All the boatmen fell into the water. Eight of them swam to the bank. The other two boatmen were carried in one of the broken boats and could reach the bank after several hours. The entire cargo and all the articles of Jalim Mallah were lost and could not be salvaged. One of the boats was completely smashed and no trace of it could be found. The other broken boat was found overturned and silted up two days later at a spot about a mile away down stream. Before the occurrence a motor launch on its way to Dibrugarh had been detained at a nearby place owing to some engine trouble, The launch carried its owner Tarsing Miri, the driver Bireswar Das and two other passengers, Lambodar and Gerua. All the four men saw the collision. Lambodar flashed his torch and read the word "Pagan" on the steamer. The four men in the motor launch left the spot the next morning. Jalim Mallah reached Dibrugarh on the 8th August and reported the matter to Bholanath son of Rameswar. On the same date he lodged the first information report (Ex. 9) with the officer-in-charge of the Dibrugarh Police Station. As he did not know the names of the occupants of the motor launch he went in search of them and found Bireswar at Kherghat in Dibrugarh on the 9th August. He then contacted J.K. Chaudhury the Sub-Inspector of Police Dibrugarh. On the same date Jalim Mallah, Bholanath, Bireswar and J.K. Chaudhury went in the motor launch to the place of the occurrence and found the broken boat. Later J.K. Chaudhury made investigations and examined Gura Meah, the master of Pagan, and

other defendants. On August 16, 1950 he submitted his report (Ex. 10) charging Gura Meah and others under Section 60 of the Indian Steam-Vessels Act, 1917 for wilful failure to give notice of the loss to the officer in charge of the nearest police station. Gura Meah was convicted of the offence by the Additional District Magistrate. The conviction was confirmed by the Assam High Court. On September 1, 1950 the plaintiffs' sent demand notices (Exs. 4 and 29) to the respondents claiming the damages for the loss. The respondents did not send any reply.

3. At the trial Jalim Mallah proved the plaintiffs' case to the hilt. His testimony is natural and convincing. He is corroborated by Ex. 9 and the demand notices. Bireswar and Tarsing gave supporting evidence. They were disinterested witnesses and were not shaken in cross-examination. J.K. Chaudhury proved Exs. 9 and 10. Gura died before the trial. Lambodar was lying ill with sore feet at an inaccessible village in the interior of North Lakhimpur town and could not be called at the trial.

4. The evidence leaves no room for doubt that the boats were sunk by a flat towed by a steamer. Only the respondents plied steamers in the river Brahmaputra. It is admitted that their steamer "S.S. Pagan" with its tow Nurjehan passed through the river on the night of the 6th/7th August, 1950. It is not suggested by the respondents that any of their other steamers passed that way. The respondents totally denied the collision. Their case is that on its way from Gauhati to Dibrugarh the steamer passed through Dekomukh on the 6th August, 1950 at 11.10 a.m., Desangmukh at 3 p.m. and Dehingmukh at 7.40 P.m. and reached Bhagibeel at 10 p.m. At Bhagibeel. it was anchored for watery fog for four hours and twenty minutes. It left Bhagibeel at 2.20 p.m. on the 7th August and reached Senari Kochara at 3.10 p.m. At Senai Kochara it was anchored for heavy rain and storm for 50 minutes.. It left Senai Kochara at 4. p.m. and. reached Dibrugarh at 5 a.m. on the 7th August. To prove their case, the respondents examined the master of the vessel Gura Meah, the second Serang Majibul Haque, the driver Sultan Ahmed, the second driver Abdul Khaleque and the pilot Subol Chaudhury. These witnesses were on the vessel Pagan on the night of the 6th and 7th August. They also called three Miri witnesses, Bhagirath, Dinanath and Paduram said to be living near the place of occurrence. The other supporting witnesses were pilot superintendent T.R.M. Cole, pilot inspector Biren Chaudhury, a clerk, Debendra Guha and A. Krishnana, officer-in-charge, meteorological office, Mohanbari:

5. For the purpose of corroborating the eye witnesses the respondents heavily relied on the logbook of the vessel Pagan (Ex. D1) and the upward voyage report (Ex. A-1), The voyage report, said to be a copy of the log book, was sent to the Gauhati and Calcutta offices of the respondents. Our attention has been drawn to several material discrepancies between the log book and the voyage report. The entries in the log book regarding Desangmukh, Dehingmukh, Bhagibeel and Senai Kochara are not found in the voyage report. The pilotage of Sobul Chaudhury from Desangmukh to Dibrugarh is mentioned in the voyage report but not in the log book. There are also differences in the entries of the particulars of the towages done. These discrepancies were overlooked in the courts below, and the witnesses were not asked to explain them. In the circumstances, we shall not rely on these discrepancies, but there are other serious infirmities in the log book. It does not bear any page number. Six of its pages are pasted together. There are signs of gumming in the pages where the relevant entries appear. The log book was not shown to J.K. Chaudhury when he examined Gura

Meah and other witnesses. It is the practice of the investigating officers to initial all documents produced before them in the course of investigation. The log book does not bear the initials of J.K. Chaudhury. Nevertheless Gura Meah, Majibul Haque and T.R.M. Cole falsely stated that the log book was shown to J.K. Chaudhury. Had the book been shown to J.K. Chaudhury, it would have been initiated by him. The log book is signed by Gura Meah, Sultan Ahmad and one Lal Mia., It was kept under the supervision of Gura Meah. Curiously enough, Gura Meah made no attempt to prove the relevant entries in the log book. They were proved through Majibul Haque, but Majibul Haque had nothing to do with the book. Lal Meah the writer of the relevant entries in the book was not called. Sultan Ahmed does not know English and cannot read the document. The log book was produced before the Magistrate for the first time on July 20, 1951. The trial court rightly held that the log book was a fabricated document and was manufactured to bolster up the respondent's case. In view of the fabrication of the log book and other infirmities in their evidence, we do not believe Gura Meah, Majibul Haque, Sultan Ahmad, Abdul Khalique, Subol Chaudhury and T. R. M. Cole, We do not accept the respondents' case that the Pagan was detained at Bhagibeel for watery fog or at Senai Kochara for heavy rain and storm. The Pagan reached Bhagibeel at about 10 p.m. and in the ordinary course passed through Senai Kochara and the place of occurrence at about midnight on the 6th August.

6. The respondents maintained a navigable channel in the river Brahmaputra between Dehingmukh and Dibrugarh for the passage of their steamers. On their behalf it is argued that as the Pagan had to pass through the navigable channel, it could not have deviated from its course and struck the boats near the bank of the river. We find that the channel used to be marked by bamboo posts on two sides. In the month of August the river Brahmaputra was in high flood and the markings on the two sides were frequently washed away. The respondents maintained 3 marking dingis for the purpose of noting the changes in the channel and replenishing the bamboo posts washed away. The dingi boatmen used to maintain note books showing the shifting position of the channel and the number of posts replaced. The note books and also the report of the pilot inspector for August 1950 were not produced at the trial. We are not satisfied that the Navigable channel near the place of occurrence was marked by posts at the relevant time and that the steamer could not deviate from its course. There were several bends in the channel from Bhagibeel to Dibrugarh and the steamer had to pass from the south to the north bank, and twice from the north to the south bank. At mid-night when the visibility was poor the steamer deviated from its course and struck the boats near the river bank.

7. The respondents set up an alternative case that the sinking of the boats was due to bank cutting or heavy rain and storm. The case was not made in their written statement filed on March 22, 1951 in M. S. No. 6 of 1951 and was set up for the first time in their written statement filed on October 17, 1952 in M. S. No. 34 of 1952. Their case now is that they came to know of the sinking of the boats due to bank cutting and heavy rain and storm inquiries made on the spot by Biren Chaudhury before August 15, 1950 from the Miri witnesses. Biren Chaudhury did not submit any report in writing. We are satisfied that he did not make the inquiry. Had he made the inquiry the respondents would have set up their present case long before October, 1952. As a matter of fact they did not send any reply to the demand notices dated September 1, 1950 setting up the present case or asserting that the steamer Pagan or its tow had not collided with the country boats. The Miri witnesses, Bhagirath. Dinanath and Paduram said that there was bank cutting at the place where the country boats were

moored. The story of Bhagirath and Dinanath that they warned Jalim Mallah of the bank cutting is incredible. Jalim Mallah is an experienced boatman. It is unlikely that an experienced boatman like him plying in the river Brahmaputra on being forewarned of bank cutting would moor his boats at a place where the erosion is on. Had the boats been sunk by debris falling from the river bank one of the boats could not have been found about a mile away down stream. We also do not believe that Biren Chaudhury contacted these witnesses before August 15, 1950. Their evidence is unreliable and must be rejected.

8. The respondents filed to establish that there was heavy storm and rain at the time and place of the occurrence. To prove this case they examined A. Krishnana and the records of the meteorological office Dibrugarh. A Krishnana was in charge of the meteorological office, Mohanbari and had nothing to do with the Dibrugarh office. The Weather records of Dibrugarh showed that on the night of the 6th/7th August, 1950 thunder clouds were present upto the afternoon of the 6th August, died down in the evening, developed again during the midnight and thunder showers commenced at 2.15 a.m. and continued up to 9 a.m. on the 7th August. The Dibrugarh records do not prove the state of weather at the place of the occurrence. It is conceded that Dibrugarh was an hour's journey by steamer from the place where the boats were sunk. We are inclined to accept the testimony of the plaintiffs witnesses that there was no storm and rain at the relevant time and that the boats were not sunk by storm or rain. It is not likely that the two boats anchored near the bank and heavily loaded with cargo and having the carrying capacity of 500 maunds each would be sunk by heavy rain and storm.

9. We do not find any merit in the criticisms advanced against the plaintiffs' case. The nine other boatmen were not called, but they could not have advanced the plaintiffs' case any further. The plaintiffs called two disinterested witnesses. viz.. Bireswar and Tarsing. Lambodar could not be called for reasons already stated. Jalim said that two or three Miri came to the spot 15 or 20 minutes after the occurrence. The Miri were not eye witnesses and it was not necessary to call them. The criticism that the first information report mentioned Pagan and not Nurjehan has no force because it is common case that Nurjehan was being towed by Pagan, The names of Bireswar, Tarsing and other occupants of the motor launch were not mentioned in the first information report because Jalim Mallah ascertained their names after the report was lodged. The plaintiff's case that the boatmen gave warning shouts and lighted the torches is not unnatural. The boatmen in charge of the boats at anchor were under a duty to exhibit lights and to do everything in their power to avert the collision. Nor is it possible to hold that the flat Nurjehan could not come to the shallow water where the boats were at anchor. The helm of the front boat was about 16 cubits from the bank, that of the other boat was about 12 cubits away and the depth of the water there was about 10/12 cubits. The draught or the depth of the water drawn by the empty flat Nurjehan is not known and it is not possible to say that the flat could not reach the shallow water.

10. The High Court discarded the clear and convincing evidence adduced on behalf of the plaintiffs on conjectures and surmises. It overlooked the infirmities of the log book and its late production, the possibility of the markings of the navigable channel being washed away, the non production of the note books kept by the marking dingis, the implications arising from the failure to reply to the demand notices, the improbability of the Story of the sinking of the boats due to bank cutting and

heavy rain and storm and also the fact that Bireswar and Tarsing were absolutely disinterested witnesses and had no reason to conspire with the plaintiffs for bolstering up a false case.

11. The plaintiffs established beyond doubt that the flat Nurjehan while being towed by the steamer Pagan dashed against the two country boats and sank them. The circumstances leave no room for doubt that the crew of the steamer Pagan rashly and negligently plied the steamer and did not keep a proper look out. The boatmen lighted their torches and gave the necessary warning. In spite of the warning the steamer did not deviate from its course and came headlong towards the bank. Having regard to the circumstances proved by the plaintiffs' witnesses the onus of proving the absence of negligence was on the defendants. In Halsbury's Laws of England Vol. 35, 3rd Ed. at page 688 it is stated thus: --

"By proving certain circumstances the plaintiff may shift the burden of proof on to the defendant. Thus, where a vessel under way in daylight and clear runs down a vessel at anchor, the burden, is on the owners of the vessel under way to prove they were not in fault. In a similar case at night, the owner of the vessel at anchor established a *prima facie* case when he has shown that his vessel had a proper light."

We are satisfied that the plaintiffs have established a *prima facie* case of negligence. The respondents made no attempt to rebut this *prima facie* case.

12. There is cogent and clear evidence of the quantum of loss sustained by the plaintiffs. The dak book (Ex. 1) showing the cargo despatched by the boats were produced before the investigating officer immediately after the occurrence. The entries in the dak book and rokar book and the testimony of Rameswar and other witnesses satisfactorily prove all the items of the cargo and their value. Jalim Mallah proved the value of the country boats and other articles belonging to him. The cargo, the boats and all the articles were lost and could not be salvaged. The trial Court rightly decreed the suits.

In the result, the appeals are allowed with costs in this court and in the courts below, the decrees passed by the High Court are set aside and the decrees passed by the Subordinate Judge, Upper Assam Districts, Dibrugarh, are restored. One hearing fee.