Privy Council Appeal No. 146 *of* 1924.

The British Petroleum Company, Limited - - - - *Appellants*

v.

The Attorney-General of Ceylon - - - - - *Respondent*

FROM

THE SUPREME COURT OF CEYLON.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 10TH DECEMBER, 1925.

Present at the Hearing:

LORD DUNEDIN.
LORD SUMNER.
LORD WRENBURY.

[*Delivered by* LORD DUNEDIN.]

The s.s. "British Ensign," belonging to the plaintiffs and appellants, laden with benzine, arrived outside the harbour of Colombo, on a voyage from Rangoon to Suez for orders, on the 10th September, 1919. She needed bunker fuel and consequently wished to enter the harbour for that purpose. She signalled for a pilot and a pilot came off, who proceeded to put her into a berth in the harbour. She was moored to certain stationary buoys in the harbour. In all the manœuvres required to place her in the berth she was under the charge of the pilot. She took in the fuel required, and next morning essayed to leave the berth. It was then found that she had taken the ground at the stern. After some ineffectual efforts to free her from the ground she was eventually got off at high tide and proceeded on her voyage. Before she started from the harbour, a perfunctory examination was made of her hull, so far as could be seen or felt by divers, and it was not thought that she had sustained any injury, but eventually, when she came to England and was dry-docked, it

was found that her stern and some of the plates of her hull had been severely injured. The plaintiffs then raised the present action against the defendant, the Attorney-General of Ceylon—the Government of Ceylon being the harbour authority of Colombo —for the damage done.

The harbour of Ceylon is a roadstead which has been artificially turned into a harbour by the erection of breakwaters which has converted it into a closed area of 640 acres. The erection of the breakwaters was effected under various ordinances having the authority of law which constituted the Government the harbour authority and gave them rights and imposed duties. Under the ordinances no vessel may enter without a pilot. When entered, she is directed to a berth and the pilot takes her there. A pilot also takes her away from the berth and out to sea. A tariff is charged, which varies according to services rendered and the size of the ship. It is not necessary to go into particulars because it is common ground that the "British Ensign" in respect that she only entered for coaling (liquid fuel being held as equivalent to coal) and taking in water, fell to be charged a special consolidated rate of Rs. 200 for a stay not exceeding 96 hours.

The so-called berths in the harbour are rectangular spaces which are marked by means of numbered buoys. The buoys at the part of the harbour, with which the case has to do, are placed in pairs, east and west, at a distance of 600 feet. The distance between each pair is 400 feet, and the line between each pair of buoys represents the middle line of a berth. In other words, each berth is represented by a parallelogram 600 by 400. The berth to which the "British Ensign" was sent was numbered No. 21 and the centre line buoys were marked, 43 being the eastmost and 33 the westmost respectively. After complaint was made and before the trial of the action, very minute inspection by divers was made of the place in which the ship had taken the ground. It then became apparent that in the neighbourhood of buoy 43 there was an irregular boomerang-shaped piece of rock such as would easily account for the injuries on the ship's bottom if she were allowed to rest on it.

The plaintiffs accordingly contend that by accepting a fee from them for the entry to the harbour and berthing of their ship, the harbour authority impliedly contracted to give the ship a safe berth; that the berth provided and to which the ship was compulsorily obliged to go was not safe, and consequently the harbour authority is liable in damages. The defendant, on the other hand, contends that no contract had been entered into by him or could be inferred against him by the mere taking of dues which, by ordinance equivalent to statute, he was obliged to charge. Further, he said that the berth provided was, in fact, a safe berth for the ship, in the sense that a ship properly placed within the limits of No. 21 would be safe, but that the ship was improperly placed in respect that the soundings, which were well-known to the pilot, indicated not indeed a rock, but a shallow

patch where the rock was, and that a ship should not have been placed there. Further, he said that in any view, even if a contract was held against him, the failure to keep the ship safe was a tort, and the Government of Ceylon, which is just another name for the Crown, is not liable for torts; and, further, if with or without a contract the fault in putting the ship in an unsafe position was the fault of the pilot, he (the defendant) was specially excused by Section 11 of Ordinance No. 4 of 1899, which is in these terms:—

> "11. The Governor or the owner or master of a ship shall not be answerable to any person whatsoever for any loss or damage occasioned by the fault or incapacity of any pilot acting in charge of that ship within the limits of any port brought under the operation of this Ordinance."

To this the plaintiffs replied that Section 11 had not the effect contended for and that by Roman Dutch law the Crown is answerable in tort. The learned Trial Judge found for the plaintiffs. He found that in respect of the decision in such cases as *Parnaby* v. *Lancaster Canal Company*, 11 A. & E. 223, *Gibbs* v. *Mersey Docks*, 1864, 11 H. of L. 686. The "Moorcock," 1889, 14 P.D. 64, *Francis* v. *Cockrell*, 1870, L.R. 5 Q.B. 501, and *Lax* v. *The Corporation of Darlington*, 1879, L.R. 5 Ex. D. 28, there was to be inferred a contract from the payment of the dues; that such contract was to provide a safe berth; and that the non-provision of a safe berth was a breach of contract and not tort. As to the latter point, he also founded on an *obiter dictum* in the judgment of this Board in the *Scrutton & Sons* v. *The Attorney-General of Trinidad*, 1920, 90 L.J., P.C. 30. As to the Crown being free from liability in tort, the question in his view did not arise. Had it been so he would have been bound by the decision of the Court of Appeal in *The Colombo Electric Tramway Company* v. *The Attorney-General*, 16 N.L.R. 161.

Appeal being taken to the Appeal Court, this judgment was reversed, and the action dismissed. The Chief Justice held that there was no contract and discriminated the cases quoted on the point in respect that in them there was an invitation to the ship or to others to avail themselves of the services offered; whereas here the ship entered the harbour as of right, and what she paid was a mere due or toll and not a consideration for a contract. That being so, the fault which in fact he ascribed to negligent berthing by the pilot was a tort and therefore the Crown was not liable as in the case of *The Colombo Electric Tramway Company* above quoted.

The other learned Appeal Judge rested his judgment upon a different ground. He was not inclined to say there might not be a contract. But the fault he held was the fault of the berthing pilot, and then whether that fault was looked on as a breach of contract or a tort, in either case the Government was freed by the terms of Section 11.

Their Lordships were favoured with a careful and interesting argument on the various points of law which may be gathered from the contentions of the parties and the opinions of the learned

Judges above set forth. They think, however, that it is necessary first to come to a clear conclusion as to the facts, and it will then be apparent what points of law are necessary to be determined for the decision of the case.

There is no question but that the vessel in being berthed was entirely under the control of Pilot Sorensen, and that he was directed by the Master Attendant, whose orders in that matter he was bound to obey, to place the vessel in berth No. 21. Now Sorensen, as all other pilots, was in possession of a chart showing the soundings all over the harbour and with this chart he was very familiar. That chart showed in the immediate neighbourhood of buoy 43, that is to say the eastmost or shoreward end of the berth, that there was what has been called a shallow patch. The exact extent of the patch he did not know because the shallow patch was outside the 30-feet contour line, and the soundings which were shown individually are at distances of 50 feet from east to west and 200 feet from north to south. Within 100 feet to the north of 43 there was a sounding of 23·9 feet, and to the west of that two others of 23·3 and 24·3 respectively. After that, continuing to the west, came the contour line of 30 feet. The length of the " British Ensign " was 430 feet and her draught as she arrived at her moorings 25·6 forward and 24·10 aft. With the filling up of the oil, her draught aft would slightly increase. Sorensen was fully aware of the shallow patch and says he would not have placed the stern of the vessel over it. An examination of the position, in the light of the accurate soundings, showed that there was quite room to place a ship of the size of the " British Ensign " in the berth without its stern being over the shallow patch. As a matter of fact, Sorensen thought he had left the vessel clear of the patch. The ship is moored by an anchor to the west and by a cable from each of the two buoys. The buoy is capable of being pulled to a certain extent towards the ship. What seems to have happened is that there was a mistake made, either by one of the ship's crew, unnoticed by Sorensen, or by Sorensen himself, as to how many shackles of chain were out from the ship towards the anchor. The result was that the ship was not pulled up sufficiently near to buoy 33, a position which would have cleared her stern from the shallow patch. All the pilots examined speak to the shallow patch. They all say that berth 21 was fit for a ship of the size of the " British Ensign " if properly placed, and this was not cross-examined to by the plaintiffs. The truth is that the plaintiffs rested their claim on the idea of a contract for a safe berth in fact, and considered that if the actual position to which the ship was conducted by the pilot, appointed by the harbour authority, turned out to be unfit they were entitled to succeed.

In this state of the facts, which is in accordance with the views of the Court below, it seems to their Lordships that it is quite unnecessary to decide many of the legal questions raised. In particular, they need not decide the question as to whether,

looking to the position of the harbour authority as distinct from private persons owning a wharf or premises, there was a contract. Assuming that there was a contract, it would only be a contract to provide a berth to which it was safe to go. The ship was improperly moored therein. That was either the fault of the pilot or the ship's crew (if they moved the ship after the pilot left them). If it was the fault of the ship's crew it was not the fault of the respondent. If it was the fault of the pilot, then their Lordships hold that the harbour authority is excused by reason of Section 11. and that irrespective of whether the fault was breach of contract or a tort.

As to Section 11 their Lordships agree with the Court of Appeal. The words are absolute and without exception. There is nothing in the section to cut it down to questions only arising between the persons mentioned and persons not mentioned, excluding all questions which may arise between the persons mentioned *inter se*. Looking to the position of the harbour authority who were not like a private trader catering for trade, but were obliged to furnish facilities, it is not a section which need cause surprise or excite anxiety to restrict its operation.

For these reasons their Lordships are of opinion that the appeal falls to be dismissed and they give no opinion as to the general questions raised. They would, however, wish to remark that as to the question of whether the Roman Dutch law differs from the English in holding that the Crown may be liable for a tort, inasmuch as the matter has been often mooted and has been solemnly settled by the case of the *Colombo Electric Tramway Company* (*supra*), and inasmuch as the question in Ceylon is always not only what is Roman Dutch law, but how far has any part of it been recognised in Ceylon, they would require very clear arguments to induce them to reverse the Court of Appeal on such a matter.

Their Lordships will therefore humbly advise His Majesty to dismiss the appeal with costs.

In the Privy Council.

THE BRITISH PETROLEUM COMPANY, LIMITED,

v.

THE ATTORNEY-GENERAL OF CEYLON.

DELIVERED BY LORD DUNEDIN.

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