Privy Council Appeal No. 6 *of* 1938
Bengal Appeal No. 25 *of* 1935

The Owners and Parties interested in the S.S. "Malacca Maru" - - - - - - - *Appellants*

v.

Deutsche Dampfschifffahrts Gesellschaft "Hansa" (Owners of S.S. "Marienfels") - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 22ND JULY, 1938.

Present at the Hearing:

LORD WRIGHT.
LORD ROMER.
LORD PORTER.
SIR SHADI LAL.
SIR GEORGE RANKIN.

NAUTICAL ASSESSORS:—
CAPTAIN A. H. RYLEY. CAPTAIN C. ST. G. GLASSON.

[*Delivered by* SIR GEORGE RANKIN.]

At 12.35 p.m. on Sunday the 16th March, 1930, the steamships "Marienfels" and "Malacca Maru" were in collision in the River Hughli at a spot south of Pukuria Point Column and north of Lower Brul Sand buoy. The "Marienfels" is a vessel belonging to the plaintiffs-respondents, a German company: her gross tonnage is 8,000 tons, her length 495 feet and her beam 58 feet. The "Malacca Maru" is a Japanese vessel of 5,374 tons, length 400 feet and beam 54½ feet.

The collision occurred in broad daylight: the weather was fine and clear: the wind of no material force. It was flood tide—a spring tide of 3½ knots in the navigable channel. The water had risen 17 feet above low water marks and it was still rising.

Both vessels were proceeding southwards to sea and the "Marienfels" was overtaking. They had left Garden Reach—the "Malacca Maru" at 9.25 a.m. and the "Marienfels" some twenty minutes later. The speed of the former was about ten knots and of the latter about 11½. Both vessels were part laden and both were drawing some 20 or 21 feet. Both were in charge of duly licensed pilots, Pilot King navigating the "Marienfels", Pilot Halford the "Malacca Maru".

At the time of the collision the bluff of the port bow—14 feet from the stem—of the "Malacca Maru" struck the starboard side of the "Marienfels" a little abaft amidships. The damage sustained by the "Marienfels" was not such as to prevent her from continuing her voyage to Madras, where her master made a protest on the 24th of March. The "Malacca Maru" was more severely damaged and put back to Calcutta, where a protest was made on the 25th of March. Both pilots made reports to the port authority at Calcutta on the day of the collision.

On 12th March, 1932, the respondent company brought in the Admiralty jurisdiction of the High Court at Calcutta the suit out of which this appeal arises. The plaint claimed Rs.64,870 as damages caused by the negligent navigation of the "Malacca Maru." The appellants, by written statement filed 25th April, 1932, denied negligence and asserted that the collision was caused or contributed to by the negligent navigation of the "Marienfels;" but as the period of two years limited by the Maritime Conventions Act, 1911, had been allowed to elapse they were unable to maintain a cross claim for damages. At the trial in December, 1934, Cunliffe J. heard the evidence of Pilot King but Pilot Halford had died in 1931 and his report of 16th March, 1930, was the only available means of ascertaining his version of the occurrence. Each side called the master and other witnesses from its vessel. The plaintiff company in addition called two pilots from the Bengal Pilot Service—Pilot Davies and Pilot Garnet; while the defendants called a river surveyor Mr. Oag and Captain Ducat-Amos master of the British India mail steamer "Karapara," plying from Calcutta to Rangoon and the Straits Settlements. Cunliffe J. (17th December, 1934), held that both vessels were to blame for the collision and apportioned the blame three-fourths to the "Malacca Maru" and one-fourth to the "Marienfels." On appeal a Division Bench (Derbyshire C.J. and Costello J.) varied this finding and held the "Malacca Maru" alone to blame. From their decree dated 11th February, 1936, the defendants have appealed to His Majesty by special leave.

By Article 24 of the General Regulations for Preventing Collisions at Sea every vessel overtaking any other is required to keep out of the way of the other and remains under a duty to keep clear of the other until she herself is finally past and clear. Article 25, which applies to the part of the Hughli now in question, requires steam vessels to keep to the starboard side of the fairway or mid-channel.

The local rules governing navigation in the Hughli which were in force at the time contain provisions which modify Article 24. Rules 5 and 7 are as follows:—

> "5. No steam-vessel shall attempt to strive or race the one against the other. When steam-vessels are proceeding in the same direction, but with unequal speed, the vessel which is steaming slowest shall in the narrow reaches of the river offer no obstruction whatever by crossing the channel or otherwise to the free passage of the faster vessel and shall ease and, if necessary, stop the engines, as soon as the faster vessel comes abreast in order to allow

her to freely pass. The Pilot of the faster vessel, if intending to pass, shall intimate such approach by a prolonged blast from his steam-whistle. But no vessel will be justified in passing such vessel at any of the turning points or bends of the river, nor in a part of the channel so narrow that a third vessel could not with safety pass them."

"7. A ball at the foremast head to be shown by every inward and outward-bound vessel. When going full speed the ball to be kept at the truck, but lowered about two fathoms when going slow."

It is common ground now that Pilot King at 12.20 p.m., while well astern of the "Malacca Maru" gave a long blast as a signal that he intended to pass her. The parties are not in agreement as to the exact position of the ships when the blast was given: the plaintiffs' case being that they were near the Fairway Outer Column while the defendants say that they were further south. So, too, while there is agreement that the time of collision was 12.35 p.m., the exact place of impact is disputed; the plaintiffs' witnesses say that it was very little north of the Lower Brul Sand buoy at a spot marked with the sounding 21 on Plan No. 186 (Exhibit A), while the defendants put the place of collision further north and west near a spot marked 39, very little south of Pukuria Point Column. The distance from the Fairway Outer Column to the Lower Brul Sand buoy is about 2¼ miles. Both Courts in India have accepted the evidence of Pilot King and believed the plaintiffs' story of what happened. Their Lordships see no reason to depart from their rule not to disturb concurrent findings of the fact and the main features of the case may be outlined as follows. Having given the long blast when near the Fairway marks, where the navigable channel had a width of about 1,000 feet, the "Marienfels," which was about two ships' length astern, began to overhaul the "Malacca Maru" so as to pass to the east of her, and the two ships were abreast between the Upper Brul Sand buoy on the eastern and Bight Column on the western bank. Between that place and Poadpara Beacon the "Marienfels" had gained about half a length. Thereafter the "Malacca Maru" began to gain on the "Marienfels" owing to the tide being less strong by some two knots on the western than on the eastern side of this part of the Brul Sands Reach. At a place which is marked on the western bank by a creek both vessels were still maintaining their respective speeds of 11½ and 10 knots abovementioned and the "Malacca Maru" had not quite come abreast of the "Marienfels," when the "Marienfels," which had been about 400 feet away from the "Malacca Maru" while overtaking her, opened out to port and gradually increased the lateral distance to 600 feet. At Pukuria Point Column, a little further south, an eddy is formed on the flood tide which crosses the river in a north-easterly direction and cushions off the eastern bank in a north-westerly direction but with diminished force. The vessels were abeam at this point when the "Malacca Maru," meeting the eddy, took a heavy run or sheer to port which carried her up against the "Marienfels" notwithstanding that the "Marienfels" went to port in an attempt to avoid the collision.

In the plaint the "Malacca Maru" among other heads of negligence had been charged with negligence in not porting her helm (old style) or easing or reversing her engines after the commencement of the sheer. The Japanese helmsman had deposed that he received the order hard-a-port almost immediately before the collision took place. Cunliffe J. found the "Malacca Maru" to be in fault for taking helm action too late, and the learned Chief Justice considered that her helm was not put hard-a-port as soon as it ought to have been. Both Courts were also of opinion that the "Malacca Maru" was in fault in not easing her engines when the "Marienfels" first came abreast of her near Bight Column. Cunliffe J., however, held the "Marienfels" to have been in fault in not abandoning the attempt to pass the "Malacca Maru" when she saw that the latter was taking no notice of the signal and was standing on without reducing speed. As Rule 5 of the local rules does not require the overtaken vessel to reduce speed before the vessels are abreast, the Chief Justice took a different view, holding that, the "Marienfels" having come abreast at Upper Brul Sand buoy, her pilot could not until some time had elapsed be expected to decide that the "Malacca Maru" had determined to disobey the rule as to lessening speed; and that in the meanwhile the "Marienfels" had gained half a length. In these circumstances he considered that to have slackened speed and come again abeam of the "Malacca Maru" was more dangerous and less advisable than the action which Pilot King in fact took—viz., to maintain her speed but open out to a lateral distance of 600 feet. Cunliffe J. inferred from the behaviour of the "Malacca Maru" that she kept a bad lookout, but this criticism does not appear to have been repeated by the Appellate Court and their Lordships do not think it established as an independent ground for imputing blame to that vessel.

The first question for determination is whether the part of the river in which the "Marienfels" proceeded to pass the "Malacca Maru" was one of the "turning points or bends of the river" within the meaning of Rule 5 of the local rules. It was contended for the plaintiff company that the phrase must be construed to refer not to the navigable channel but to the river as a whole and in all its breadth, and that below the Fairway marks the Hughli's eastern bank is practically straight, though there is a bulge or bight enlarging the river on the western side. Their Lordships are not prepared to hold that such considerations are necessarily conclusive of the question and have considered the matter with reference to the channel and from the practical standpoint of a navigator. The prohibition cannot be supposed to extend to all parts of the river where the channel is not completely straight, but must be interpreted with regard not only to the aggregate amount of deflection but to its gradualness or abruptness, which is only to say that the deflection must be considered in relation to the distance to be travelled. Their Lordships

have the advantage of the opinion of the Elder Brethren upon the matter and are in agreement with them and with the Courts in India in holding that the course of the river from above the Fairway marks to Fisherman's Point is not a turning point or bend. They accept the evidence of Pilot King to the effect that Brul Reach was a recognised passing place until the local rules were changed, as a result of the collision in this case, so as to prohibit passing below Bight Column.

On this view the action of the "Malacca Maru" in failing to slacken speed when the "Marienfels" came abreast of her at Bight Column cannot be seriously defended and was a plain breach of duty under Rule 5. Indeed their Lordships consider it to be a misinterpretation of her action to suppose that her pilot had any objection to being overtaken at that point. The state of the water afforded ample width of channel: he made no protest at the time or in his report of the same date that he was wrongly overtaken. He may or may not have appreciated that under the rule the duty to ease engines was unconditional, unlike the duty to stop the engines which arose only if such action became necessary. But in any case he was content to be passed while going against the tide at his full speed through the water and took no action whatever to alter this position, thus incurring unnecessary risk in disobedience to the rule. The circumstance that the superiority of the "Marienfels" in speed was not very great made it all the more his duty to slow down to let her pass and the fact that his own course would take him into the slacker water on the western side made it still more imprudent to maintain full speed.

The result was that there soon came a time at which the "Malacca Maru" was approaching the eddy with the "Marienfels" more or less abreast of her. This was the position opposite the creek on the western bank, and their Lordships accept the appellants' view that by this time it had become inadvisable for the "Malacca Maru" to slacken speed. They agree, however, with the learned Chief Justice in rejecting the contention that the "Marienfels" should have slackened speed. Before attributing blame to her in dealing with an emergency which the fault of the other vessel had produced, and for merely passing where she was entitled to expect to be allowed freely to pass, it is necessary to consider her exact position at the time when the emergency became apparent. Pilot King had opened out towards the eastern bank, increasing his lateral distance to 600 feet. He might expect to encounter some force from the eddy both in its secondary and primary stage, though not to the same degree as the "Malacca Maru" on the western side so far as regards the primary eddy. Had he eased engines, the period during which the two ships were over-lapping more or less must have been considerable even if the other pilot had not done likewise at the same time. But in any case it is in their Lordships' view unreasonable to expect him to have anticipated that the "Malacca Maru," though maintaining her own speed and keeping close to

the western bank, would meet the eddy so as to sheer right across the channel. It is not possible to account for behaviour so erratic by supposing it to be an ordinary consequence of the flood tide at this point and even if it was not necessarily negligent to enter the eddy with helm amidships and without trying in advance to swing the vessel's head against the eddy, their Lordships consider that the Courts in India had solid reason for regarding it as proved that the helm action of the " Malacca Maru " was late and negligently late. Their Lordships are advised by the assessors and agree that after the " Marienfels " had gone to a distance of 600 feet she had no reason to suppose that the " Malacca Maru " would be put in any difficulty; that the pilot of the " Malacca Maru " could be expected, more particularly with a vessel to port of him, to keep his proper water and have reasonable control of his vessel, anticipating by helm action any likely falling off of his vessel's head by reason of the eddy. In these circumstances it would be unwarrantable to hold Pilot King to blame for striving or racing, or for not slackening speed at the time when he realised that the " Malacca Maru " meant to stand on without easing engines.

The able argument of Mr. Hayward for the appellants laid much stress on the fact that the ball at the truck of the " Malacca Maru " was never lowered. But Pilot King would not be certain of her intention to continue at full speed until some time after he had come abreast of her, whether he waited to see if the ball would be lowered or whether he watched the relative position of the vessels. He could not in either case be expected to act at once on the view that the other vessel was not merely slow to respond but was minded to break the rule.

The High Court on appeal have rightly held the " Malacca Maru " alone to blame. Their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellants must pay the costs of the respondent company.

(11478—3a) Wt. 3168—30 190 8/38 P. St. G. 338

In the Privy Council.

THE OWNERS AND PARTIES INTERESTED IN THE S.S. "MALACCA MARU"

v.

DEUTSCHE DAMPFSCHIFFFAHRTS GESELLSCHAFT "HANSA" (OWNERS OF S.S. "MARIEN ELS")

DELIVERED BY SIR GEORGE RANKIN

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