
(1913) 03 BOM CK 0006
In the Bombay High Court
Case No : O.C.J. Suit No. 1 of 1913

Andrew Yule and Co.

APPELLANT

Vs

Ardeshir Bomanji Dubash

RESPONDENT

Date of Decision : 27-03-1913

Acts Referred:

Merchant Shipping Act, 1958 — Section 34
Specific Relief Act, 1877 — Section 57

Citation : AIR 1914 Bom 312(2) : (1913) 15 BOMLR 724 : 20 Ind. Cas. 844

Hon'ble Judges : Beaman, J

Bench : Single Bench

Judgement

Beaman, J.—Assuming the agreement of the 22nd November 1911, to charter the S 6\\ Gymeric to the plaintiffs for twelve consecutive voyages, to be in all respects good, there is still a question to be answered in limine, whether a charter-party of such a character will support the injunction prayed for.

2. If not then it follows that the suit would immediately be restricted to an ordinary suit for damages against the defendant No. 3, Ghulam Hussaiu Issaji. Section 57 of the Specific Relief Act is no doubt intended to give legislative effect to a group of English cases, of which, in the domain of personal service Lumley v. Wagner (1852) 1 De G.M. & G. 604 is the best known, and in the domain of shipping law De Mattos v. Gibson (1858) 4 De G. & J. 276 and Collins v. Lamport (1864) 34 L.J. Ch. 196 are good examples.

3. I have gone over all the authorities, to which my attention has been drawn, very carefully, and I doubt whether anyone of-them has gone the length I am now asked to go. It is interesting to note, how in subsequent decisions the cautiously worded and designedly very restricted judgment of Lord St. Leonards in Lumley v. Wagner (1852) 1 De G.M. & G. 604 has at times been overstated, if not actually misrepresented. There the case was of the simplest. As inter agreed to sing for a certain impressario, for a given time, and not to sing for any other impressario, during that period. Specific performance of the affirmative part of

the agreement obviously could not be decreed, but Lord St. Leonards thought that he might safely give effect to the expressed negative undertaking. He is careful to add that he would not have done so had it not been expressed. Upon this decision, followed cases which extended it to the length of taking in every case in which while the Courts could not decree specific performance of the affirmative agreement, they tried to bring about the same result indirectly by enforcing by injunction, what was taken to be an implied (not as in *Lumley v. Wagner* (1852) 1 De G.M. & G. 604) an expressed) negative agreement. That is why "implied" is used in Section 57. The section as a whole provides that where there is coupled with an affirmative agreement to do a certain act, a negative agreement express or implied not to do a certain act, the Court is not precluded from enforcing the negative agreement by injunction, although it cannot enforce the affirmative agreement by way of specific performance. It might be thought a pity, in the interests of a straightforward and intelligible administration of the law, to have engrafted an exception involving such nice distinctions and difficult determinations, upon the salutary general rule laid down in Section 56. One obvious objection is that where an agreement contains no more than a simple affirmative, it always must imply a negative agreement not to do anything else at the same time and place. This was pointed out by Lindley L. J. in *Whit-wood Chemical Co. v. Hanuman* [1891] 2 Ch. 416. So that in strict logic, every affirmative agreement ever yet made in the world, standing alone and unqualified, would seemingly fall within the scope of the section and give ground for an injunction restraining the party in breach from doing anything else, till he had performed it. No one has supposed that the law was meant to be carried that length. But little help can be gained from the actual words of the section, when read with the illustrations. It is only too plain whence those illustrations are drawn, and that the words "not to do a certain act", need to be much widened to meet all the cases contemplated. A man, who engages himself to be the skilled manager of a certain business, may be held to have impliedly agreed not to be the skilled manager of any other business. But it could hardly be said that he had impliedly agreed not to do anything else at all, say, ship as a common seaman before the must; yet in effect the latter is really as much implied as the former agreement if the Court is only looking at the enforcement of the affirmative agreement. And all the decisions which have given support to the rule will be found, I think, on careful analysis to have that aim in view. Little practical difficulty is occasioned by cases of personal service; but that can hardly be said of the decisions upon shipping contracts. This is no doubt partly due to the special character always attaching to ships in the English law, and the resultant ambiguity of thought and conception which seem often enough to obscure arguments about the legal obligations and true legal relations arising out of shipping contracts.

4. It is safe to say that in dealing with contracts of personal service the better opinion in the English Courts has always been against extending the decision in *Lumley v. Wagner* (1852) 1 De G.M. & G. 604 one inch further than need be ;

and that in all cases" in "which a supposed negative contract, that is to say an implied agreement not to do a certain act, has been enforced by injunction, that has been done with a clear eye to a very plain principle. It is only where the particular act, not to do which is held to have been implied, is in itself calculated to injure the party who was expecting to benefit by the affirmative agreement, that its performance has been restrained by injunction. A, having agreed to do a certain thing for B, may be thought impliedly to have agreed not to do that very thing for C, a rival of B. The Court in such circumstances might restrain him from doing for C what he had promised to do for B, not I apprehend in reality to compel him to do it for B but merely to prevent him thus doing B still further harm by giving his skill to a rival. But nothing like the same simplicity and intelligibility runs through the decisions upon shipping contracts. If the judgment of Lord Chelmsford in *De Mattos*" case be analytically studied, it will be found, so far as its reasoning goes, to be founded on this proposition, that the charterer of a ship has a special fancy for the ship he has chosen, and therefore no other ship will serve his purpose as well. That proposition serves the learned Lord Chancellor well as the ground-work of his reasoning. But it may be doubted whether tested by actual experience it is true. Except in the rare cases in which ships are chartered for passenger and holiday trips I doubt whether any merchant really cares a penny piece in what ship his goods are carried, provided that they are carried in a ship of equal capacity, class, position and speed, as the one named in the charter-party. But were it true that shippers on a large scale had these curious sentimental preferences for particular ships, then certainly it might be said that a ship so chosen and promised became a chattel of peculiar value in the eyes of the charterer, and the agreement of a kind which ought to be, if it could be, specifically enforced. Unfortunately it cannot be specifically enforced owing, as the Courts have always thought, to the complexity of details, and the interfusion of elements of personal skill, always to be found in these bargains. No injunction was granted in *De Mattos*'s case (1858) 4 De G. & J. 276, so that the judgment was really obiter ; but there can be no doubt that it was made the starting point of many decisions intended to give effect to the reasoning of that judgment. It is thus of importance to keep in mind what the Lord Chancellor had meant to be the reasoned ground of his conclusion, namely, that in chartering a particular ship, the charterer had picked it out from all other available ships, had a special preference for it, and could not have contemplated the substitution of any other ship for it. This is perfectly plain from the language used throughout that part of the judgment. It is true that in later cases, professing to be based upon and to follow *De Mattos v. Gibson* (1858) 4 De G. & J. 276, this narrow ground has either been much enlarged or wholly lost sight of. Such expressions for example as that in the chartering of ships Courts are face to face with a contract of such a special character that either party ought to be restrained by injunction from departing from the terms of the contract plunge us at once into a wider and much more confused sea of considerations which would, I think, be extremely difficult to classify and reduce to anything like a single intelligible principle. Adopting the test suggested in *De Mattos*" case, however,

what becomes of the reasoning as soon as it appears from the charter-party itself that the charterer had no such special sentimental preference. In the last clause but two of this agreement of chartering will be found a substitution clause. The owner has the privilege of substituting any other ship for the 5 S. Gymeric provided that other ship be of equal class, position, etc. Here then it could not possibly be contended that Yule and Co., when they chartered the Gymeric, regarded her as a chattel of peculiar value, a prize among ships, more to be desired than any other of her class, tonnage, speed, position, etc. I have not been able to verify this from the reports, but I apprehend that the charter-parties in all the reported cases, such as *De Mattos v. Gibson* (1858) 4 De G. & J. 276, *The Heather Bell* [1902] P. 272, *The Celtic King* [1894] P. 175, *Collins v. Lamport* (1864) 34 L.J. Ch. 196, *Messageries Imperiales Co. v. Baines* (1863) 7 L.T. 763, *Sevin v. Deslandes* (1960) 30 L.J. Ch. 457, were restricted to the particular ship in question. This must have been so in *De Mattos'* case, and the *Messageries* case, from the language used by Lord Chelmsford in the former and the facts themselves of the latter. Here we have the language of a statute to deal with, and we have a charter-party. The statute allows (though it does not compel) a Court to enforce by injunction a negative agreement express or implied not to do a certain act, although it cannot specifically enforce the affirmative agreement with which this happens to be coupled. Now had this charter-party not contained the substitution clause I have mentioned, it might have been fairly argued upon the authority of the English cases (though not perhaps consistently with rigorous logic) that the agreement to employ the Gymeric for twelve voyages between Calcutta and Bombay implied a promise on the part of her owners not to employ her in any other manner until those twelve voyages had been made. Had this been a contract of personal service instead of a shipping contract, the test of what negative agreement, if any, was implied, would have been whether the other employment contemplated was in itself a further wrong to the party seeking the use of the ship. But I cannot say that that test appears to have been applied decisively if at all in any of the shipping cases I have studied. Suppose the owners of the Gymeric, instead of fulfilling their charter-party with Yule & Co., had employed the ship in the interests of a rival firm in Calcutta to carry coal against the first charterer, then the case would have been clearly within the scope of the English decisions, and the intention of Section 57. But if, merely because they were able to get better terms for carrying hides to Genoa they refused to perform their charter-party with Yule and Co. and sent the ship off to Genoa, it might well be doubted whether this would really bring the matter as a whole within the reach of Section 57. For in truth the position would be very like that suggested by Lord Lindley. If a man contracts to serve A in a special capacity and after-wards refuses to do so, he may well be restrained from serving Z, a rival of A, in that capacity, but surely no Court would compel him to remain idle or carry out his contract with A. That difficulty would arise if the charter-party contained no substitution clause. Where it does, how can it be said that the owner expressly agreed not to do certain act, that act being to employ the Gymeric on any other voyage than the voyages mentioned

in the charter-party, until those voyages had been finished? It is quite true that the substitution clause was in fact a nullity, because the owner never had any other ship of the class, size, carrying capacity and position of the *Gymeric*. He had one small ship, but she would have been useless for the purpose of carrying out this charter-party. That does not, in my opinion, affect in the least the legal effect of such a clause, nor its logical effect upon the reasoning which was used in *De Mattos*" case (1858) 4 De G. & J. 276. Legally the effect is to allow the owner to send any ship similar to the *Gymeric*, in her place ; and although he has no such ship, there is nothing to prevent him in turn chartering one to fulfil the plaintiff's charter-party. To this plaintiff replies, I am quite satisfied with that provided that ray injunction be conditioned upon the owner for the time being of the *Gymeric* complying with the substitution clause, and sending me some other ship as good. I have no preference for the *Gymeric*-I am ready to take any other ship of similar class, etc. But surely that admission deprives the plaintiff of making any use of the judgment in *De Mattos*" case. Viewed in an ordinary light, not in the curiously special light in which English Courts always look at ships and shipping contracts, it is clear that a charter contract is exactly the same as any other contract, and that its breach could always be compensated for in damages. The reason why the charterer requires specific performance (only obtainable indirectly by injunction against the owner for the time being) is that by the time the contract is broken, the owner is in all probability insolvent. If for example the plaintiffs here could obtain their full measure of damages from defendant 3 they probably would be content with that and would not care to have an injunction against the defendants 1 and 2 as well. In all the English cases I have examined, with the single exception of *Sevin v. Deslandes* (1860) 30 L.J. Ch. 457 the owner had parted with his ship, and the charterer, as far as I can gather from the reports, would have had but a poor chance of recovering anything from him in damages. There might be exceptional cases in which the damages would be extremely difficult to estimate. Ordinarily this would not be so. But in this case, it certainly appears that the plaintiffs are not likely to be able to recover their damages from Ghulam Hussain Issaji. That is why they press for an injunction against the purchasers, defendants 1 and 2. The effect of such an injunction might be to lay the ship up indefinitely. And many considerations would have to be very carefully weighed before the Court would be disposed to grant it. It has been said in the broadest terms, that any person taking a chattel, with the knowledge that it has been made the subject of an agreement for use or employment in a special way, takes it subject to that agreement, so that mortgagees or purchasers of a ship under a charter-party, must take her subject to that charter-party. In principle this is opposed to the general law expressed in the third resolution in *Spencer's* case; and I confess that I think that it is something largely expressed. I should not perhaps in strictness have mentioned that point at all, for it properly arises only in connection with the liability of the mortgagees or purchasers. I limit myself, to the narrow- st ground, whether this agreement could be enforced, negatively, against the maker himself, supposing he had retained possession of the ship, by way of injunction? I do not think that

it could. I do not think that there is a single English case which goes that length. I have said that the best opinion later expressed in the English Courts has been against any extension whatever of the principle founded on *Lumley v. Wagner* (1852) 1 De G.M. & G. 604. That is my own view. It follows of course that that if the owner could not be restrained by injunction, as upon an agreement express or implied not to do a certain act, neither could his mortgagees nor purchasers. If I am right in this opinion it narrows the enquiry in this case into the liability of the owner Ghulam Hussain Issaji to the charterer for any damages sustained by them in consequence of the owner's breach of contract in failing to carry out the conditions of the charter-party.

5. [The trial next proceeded on the issues about damages. The following judgment was delivered :-]

Beaman, J.

6. Subject to the conclusion I have arrived at, and have just stated upon the preliminary issue, I must now deal as briefly as possible with the other points which are material, should the decision upon preliminary point prove to be erroneous.

7. First, it has been the contention of all the defendants that the alleged charter-party of the 22nd of November 1911 was never completed and has never therefore become a valid agreement binding either upon the owner or his mortgagee and subsequent purchaser. This contention appears to be mainly founded upon the fact that the "total agreement" is divisible into various parts each of which needs to be expressed in writing ; but I have never felt any doubt or difficulty upon this head. Looked at apart from the merest legal technicalities and verbal quibblings, there can I think be no room for argument but that it was the intention of the parties to conclude the agreement on the 22nd of November by which the then owner of the steamship *Gymeric*, Gulam Hussein Essaji, chartered her to the plaintiffs for a series of twelve consecutive voyages from Calcutta to Bombay, the first of such voyages to commence somewhere before the 21st of December 1911. The agreement as a whole is contained, and I think fully expressed, in the letter addressed by Symes, who was admittedly acting as agent plenipoteutary for Gulam Hussein Essaji (defendant No. 3), to the plaintiff's firm, Ex. B in this case. That letter is dated the 22nd of November and in my opinion contains the whole agreement. The nature of the agreement was such that it was obviously impossible to fill in certain portions of the twelve separate charter-parties at one and the same time. Pursuant to the letter Ex. B, the twelve charter-parties were sent on the 15th of December all duly signed by defendant No. 3 for completion by the plaintiff-firm, and they were all then duly completed, with this exception, of course, that the laying and cancelling dates had to remain blank in all except the first charter-party. The agreement being that the ship was to be at the disposal of the charterer for twelve consecutive voyages from Calcutta to Bombay, these laying and cancelling dates, which are always inserted for the protection of the charterer and not in any sense for the

protection of the owner, must plainly be left open until each voyage in turn had been duly completed. In a voyage charter-party of this description divisible into quite distinct parts, it is only the first part which could be completed before the first voyage" is undertaken. Assuming that to have been done, the next charter-party already duly signed by owner and charterer needs only to have the requisite dates filled in, to guarantee to the charterer the use of the ship, subject to the repudiation if she does not arrive within the said dates, and so to be made a complete and valid continuation of the entire agreement originally expressed. What actually happened in this case was that the Gymerio under the agreement of the 22nd of November and subject to the dates inserted in the first of the twelve consecutive charter-parties of the 15th of December was to be available for the use of the charterers in Calcutta up to the 21st of December. Supposing she had duly arrived there before that date and been loaded and despatched to Bombay, the conclusion of the first voyage would have synchronised with the ship having been unloaded and made ready for use again in Bombay. Then the charterer and the owner would have filled in the dates for her next appearance in Calcutta, limiting the time within which the charterer would be obliged to take her up for the second voyage. It needs only to look at the commencement of an agreement of this kind to see that there is really nothing imperfect in it merely because what are technically called the laying and cancelling dates of each successive voyage are not filled in until the preceding voyage is completed. The defendants' contention appears to rest upon Section 93 of the Indian Evidence Act read along with Section 29 of the Indian Contract Act; but in my opinion neither of those sections has any applicability at all to a case of this kind. Looking to the essence and not to the form of the contract, there is really no patent ambiguity at all and the mere fact that the requisite dates are not filled in (because it is impossible that they should have been filled in) is a very different thing from such a case as that of a will in which material portions are left blank. In effect, I view the subsequent twelve charter-parties as merely details of an already completed agreement, which in due course would be filled in one after another; and the agreement as a whole has this peculiarity (which must be touched upon in another connection) that it consists of twelve quite distinct and separable acts, the performance or non-performance of one of which need not necessarily, and in my opinion does not in law, affect the liability of the parties to duly carry out the remainder. I am therefore very clearly of opinion that the contract of the 22nd of November with its completion in detail by the signing of twelve charter-parties on the 15th of December was a perfectly valid and binding voyage charter between the defendant No. 3 as owner of the ship and the plaintiff-firm. If any question is to arise upon the date of this agreement, I should hold with little hesitation that the true date is the 22nd of November 1911.

8. It was strenuously contended on behalf of the defendants that whether or not the twelve charter-parties of the 15th of December following the letter of the 22nd of November completed and made the entire voyage charter a valid agreement binding upon the defendant No. 3, still the date of that must at any

rate be taken to have been the 15th of December and not the 22nd of November. I am unable to accede to that contention and I think I have sufficiently indicated the reasons why I am unable to do so. As will appear later, if my view of the law be correct, it really makes very little practical difference whether the date of the agreement be taken to be the 22nd of November or the 15th of December.

9. The next point on which the defendants rely is that even assuming the voyage charter of the 22nd of November to have been a valid and binding agreement, the plaintiffs' firm cancelled their agreement on the 21st of December 1911. Things fell out in this way. The laying and cancelling dates of the ship for her first voyage allowed the charterers to repudiate so much of the contract if she were not available on or before the 21st of December, and as a matter of fact this ship was not available. Thereupon Yule & Co. repudiated the first voyage under the agreement of the 22nd of November, and the defendants' contention is that this had the effect of entirely annulling all that had preceded that cancellation, so that although four voyages were in fact subsequently made upon exactly the same terms and conditions) each of those must be referable to a new and separate contract. Again, I am unable to accept that view. I have said that in my opinion what was really agreed upon between the parties was the performance of one contract in twelve acts and what actually occurred after the failure of the owner to have his ship ready in time for the first voyage, is proof enough, if any were needed, that this was the real understanding existing between the parties themselves. The four subsequent voyages were all made upon the originally signed twelve charter-parties of the 15th of December. In each case the missing dates were filled in as voyage followed voyage and, but for the unfortunate events which afterwards happened, there can be no doubt but that the whole twelve voyages would have been duly and successively performed. Now it has been the defendant No. 3's principal contention throughout, as I understand his evidence, that he was only too anxious to get his ship away from the mortgagees A. M. Jeevanji & Co. in order to carry out this voyage charter. Notwithstanding the low rates of freight, he said he expected to make about Rs. 10,000 profit on each voyage from Calcutta; so that as far as can be gathered from the evidence of the principals themselves, there is little room for doubt as to what their understanding of the contract of the 22nd of November and of their intentions as to the manner in which it was to be fulfilled truly were. I have not been referred to any principle or authority for the proposition that a contract so clearly divisible, as this contract is, is entirely rescinded because one ; of its parts has not been performed. It is, I think, quite true that as each voyage was either made or not made, the total number would have to be proportionately reduced. By this I mean that if the charterers availed themselves of their rights under the laying and cancelling dates for a particular voyage and refused to take up the ship for that voyage, then they could only claim her for the total number less the voyage so refused. In the present case the plaintiffs have claimed the fulfilment of twelve voyages. If the point at this stage were material, which I do not think it is, I should have no hesitation in holding that the)'' were only entitled to eleven

voyages after they had elected to cancel the voyage that should have been started on or before the 21st of December 1911.

10. The third point upon which the defendants rely is a technical point which I will dispose of in a few words. They contend that a part at any rate of the plaintiffs' present claim is barred by Order XLIII, Rule 2, and a part of it is *res judicata*, having regard to the decision of the suit brought by the present plaintiffs against A. M. Jeevanji & Co. in 1912. I do not think that there is anything whatever in either of these purely legal contentions. As to the first, it appears to me restricted to this contention that the plaintiffs in that suit ought to have sued for a declaration but did not, and a declaration in this suit is an indispensable preliminary, should the injunction have been asked for. I think it is enough to state that contention and express my entire dissent from it. Nor can I see any solid ground under the defendants' plea of *res judicata*. Unfortunately, this Court has no very clear record of what passed before my learned brother Davar; but from what he is reported to have said in dismissing that suit (see the evidence of F. E. Dinshaw in this case) and from the learned Judge's own notes it is quite plain to my mind that what really happened was something of this kind. The plaintiffs there were trying to obtain an injunction against A. M. Jeevanji & Co. very much as they are trying to obtain an injunction here against defendants 1 and 2 ; but at that time a receiver had been appointed of the steamer *Gymcric* and the learned Judge appears to have been informed (or perhaps to have himself known, for I believe he appointed the receiver) that one of the terms of the appointment was that the receiver was to allow the ship to carry out all her engagements as far as possible ; he was therefore unable to see that notwithstanding the alleged statements of A. M. Jeevanji & Co. the plaintiffs in that suit had any reasonable cause for apprehension and without going any further, without deciding any point really in controversy, he merely dismissed the suit for that reason as premature. If those were the real facts, if that is what passed before the learned Judge, and if the dismissal of the suit was so grounded, then I do not think it can seriously be contended that it is *res judicata* of any point material to the plaintiffs' success in this suit.

11. Having so far decided that the voyage charter of the 22nd of November was a perfectly good and valid agreement between the plaintiffs and defendant No. 3, it follows necessarily that there has been a breach of the contract, and that the defendant No. 3 at any rate will clearly be liable in damages for any such breach to the plaintiff-firm.

12. But then next arises a question of considerably greater difficulty and complexity, namely, how far, if at all, defendants 1, 2 and 4 are liable in their turn to an injunction compelling them either to make the ship available for the due discharge of her obligations or to lay her up altogether. In this connection, I may briefly mention a few dates and a few facts which belong to the history of the case. It is admitted that A. M. Jeevanji, the original mortgagee and the predecessor-in-title of defendants 1 and 2 in this suit, obtained his statutory

mortgage on the 6th of December 1911. On the 28th of October 1912, after many proceedings in this Court in connection with the steamship Gymeric, defendant No. 4, who was admittedly a mere agent and a nominee of defendants 1 and 2, obtained a transfer of A. M. Jeevanji's mortgage and the consent decree in the suit between A. M. Jeevanji & Co. and Gulam Hussein Essaji, for a sum of Rs. 2,15,000 and immediately sold them in turn to defendants 1 and 2 for the like sum plus Rs. 5,000 as a reward for his services in the matter. Now, if the date of the charter-party be the 22nd of November 1911, then the position would be that of a mortgagee coming in after the ship had been chartered by her owner, and the question to be answered would be whether in such circumstances he would be affected with the ship's engagements and bound not to interfere with their due performance. If, on the other hand, the date of the charter-party were, as contended by the defendants 1 and 2, the 15th of December and not the 22nd of November, the position would be that of a charter made after the mortgage and the question would still be how far the mortgagee is in law affected by such an engagement of the ship. It is of course common ground that whether the date be the 22nd of November or the 15th of December, the owner was still in ostensible ownership within the meaning of Section 34 of the Merchants Shipping Act (corresponding with Section 70 of the English Act) and within the scope and principle of the decision in *Collins v. Lamport* (1864) 34 L.J. Ch. 196. And, next, there might arise a question, assuming that the first mortgagee was affected with the liability of the owner for the discharge of the ship's obligations, whether his transferees and vendees would be similarly affected, assuming that they had no notice. In the case of the first mortgagee, the question of notice may or may not be essential. After a very careful study of all the leading cases upon this point, it certainly appears to me that the Courts have made a very great point of notice, and were it not for the decision of Lord Westbury in *Collins v. Lamport*, it might have been thought that no mortgagee could possibly be affected by any contract entered into by the owner of the ship whether these contracts were anterior or posterior to his mortgage until in fact he had notice of them. And it certainly does appear to me somewhat regrettable that no clear distinction has ever yet been positively laid down in any case decided in any English Court which I have been able to discover between the cases in which the mortgage is before and those in which it is after the chartering. It is quite true that in more than one case the distinction has been hinted at, has evidently been clearly perceived, and judgment no attempts have been made to state definitely whether it can in law be made a ground of differing practical consequences. The main ground of the decision taking all these cases together may safely be said, I think, to be this, that so long as a mortgagee has not actually taken possession of the vessel, all contracts made by her owner will be binding on him, to this extent at least, that he will not be allowed to interfere actively to obstruct the owner in the performance thereof, provided that they are not of an unusual character and do not seriously depreciate his security. In *De Maltos*' case (1858) 4 De G. & J. 276 no injunction was granted in fact and, as I said in my judgment on the preliminary point, all that appears in the report is

really obiter. But there can be no question but that notice was regarded as a very material factor. Now, it appears to me that the position of a mortgagee in a case of this kind must be referable to a totally different principle, when his mortgage is anterior to the chartering and when it is posterior to the chartering. In the former case, whatever liability attaches to him must, I think, be referable really to the principle of estoppel in pais. If Lord Westbury's judgment in *Collins v. Lamport* (2) be carefully considered, it would be found to turn exclusively upon Section 70 corresponding with our Section 34 of the Merchants Shipping Act, and although it is perfectly true that that section was undoubtedly enacted rather in the interest of the mortgagee than the mortgagor still the resultant position appears to be this that a mortgagee though he has a legal right u/s 35 to take immediate possession of the ship, may not do so, and so long as he does not do so, the ostensible owner, namely the mortgagor, remains for all purposes of contract, the real owner of the ship, and that means that the true legal owner, the mortgagee, allows the mortgagor to put himself forward to the world as the owner and make contracts in that capacity; so that the mortgagee has only himself to thank if owing to his lying by and acquiescing in the acts of the mortgagor he finds his security burdened with certain normal and ordinary contracts, provided those contracts do not transgress the intention and terms of Section 34 of the Merchants Shipping Act. Then, it is clear, I think, that the mortgagee is constructively liable for them upon this covert principle of estoppel. But where the mortgage is subsequent to the chartering, no principle of that kind is discoverable. Therefore, it appears to me that if a mortgagee is liable to fulfil the contracts previously entered into by the owner, it can only be upon the ground of express or constructive notice, and the cases as a rule I think can be shown to support this view. There are dicta to be found scattered amongst the judgment's, which clearly point to the obligations of a mortgagee to take due care and precaution in satisfying himself before advancing his money upon the mortgage of a ship what her already existing engagements may have been. And that really works out in practice, I think, to this, that in every case of a mortgage made after a charter-party, if the charter-party be of an usual and not an oppressive kind, the Courts would say that the mortgagee ought to have known of it even if in fact he did not. But there is upon a little deeper analysis something illogical and inconsistent in drawing distinctions of this kind between chartering contracts which are of an usual or of an unusual kind, for in either case the sole ground of the mortgagee's liability is found to be notice. If he has notice of a charter-party of an usual kind, he is said to be liable constructively to allow the ship to carry out her engagements ; but if it be of an unusual kind, he is said to be freed from this obligation because it seriously depreciates his security. This entirely overlooks the implied fact that he had notice of it; for, assuming that a man chooses to advance money upon a ship plus her engagements of no matter how unusual a kind, then surely his real security what he has advanced his money upon, is the ship plus the engagements and not the ship stripped of them. And this entanglement of thought runs as far as I can see through the dicta in every single judgment and the English law books which I have studied.

For all practical purposes, however, the Courts have looked to the nature of the charter-party and if they have thought that it was of a kind likely to diminish materially the security of the mortgagee, then they seem to have altogether ignored the fact of notice and to have refused to enforce such charter-parties by injunction upon the simple ground that that would be unjust to the mortgagee. And this is the principle to which effect was clearly intended to be given by the language of Section 34 which is as follows :-

Except as far as may be necessary for making a mortgaged ship or Bhire available as a security for the mortgage-debt, the mortgagee shall not by reason of the mortgage be deemed the owner of the ship or share, nor shall the mortgagor be deemed to have ceased to be owner thereof.

13. In this case, and indeed in other cases, it has been argued that the language of that section goes the length of annulling every charter-party the moment the mortgagee may desire to - sell his ship, and, taking the words as they stand, there is no doubt considerable force in that contention. The argument thus subtly divided would now go to this conclusion that although a charter-party might be of an ordinary and usual character and so binding on the mortgagee so long as he did "not desire to realise his security, the moment he did so in would cease to be binding upon him and he could sell the ship free of it to any intending purchaser, whether that purchaser had notice of it or not. There are dicta not exactly in point but certainly lending some colour to an argument of that kind in the English, cases. Notably, in *The Celtic King* Gorrel Barnes J. held that a mortgagee without notice could transfer a ship free of all obligations prior to his mortgage to a vendee with full notice of them, and this upon the ground that if he were not allowed to do so, it would materially diminish the value of his security. The converse case, however, has not, as far as I know, yet been considered, but I should think that in principle it would present no difficulty. That is to say, a mortgage with notice selling to a purchaser bonafide and for value without notice would, I apprehend, undoubtedly transfer to such purchaser the vessel sold, free of all her contract obligations But I am not prepared here to give anything like full assent to the argument that a mortgagee who would afterwards be affected by prior contracts may get rid of them: merely for the purpose of selling the ship. He might, I apprehend were steps taken in time, be restrained by an injunction from doing so. That is a case which does not arise here, and I do not think, as far as my memory goes, has yet arisen exactly for decision in any of our Courts. If my analysis so far be correct, it will be seen that a mortgagee for the purposes of the present argument would be in rather a worse position if his mortgage preceded than if it succeeded the chartering of the vessel, for in the former case his liability is referable to a perfectly simple and intelligible principle, the principle of estoppel; while, in the latter, it may be doubted whether any clear exposition at all has yet been given of how it arises or of its extent. True, it is always referable directly or indirectly, sometimes I think very indirectly indeed, to notice ; and if that be so, then the question of notice is always difficult to answer and always involves a certain amount of rather

elaborate inquiry. In the present case I shall assume for what remains in this judgment that the mortgagee A. M. Jeevanji became mortgagee after the owner of the vessel, Gulam Hussein Essaji, had contracted with the plaintiffs in this case to charter her for twelve successive voyages, and the question then arises how far A. M. Jeevanji in the first place would be affected with that contract, and in the next place how far if at all his vendees, defendants 1 and 2, would be similarly affected. And as I find no other ground upon which the mortgagee or the purchaser could be so affected but that of notice in a case where the mortgage is subsequent to the chartering, it becomes a mere question of fact and in this case a question of fact very easy to answer, whether A. M. Jeevanji had notice of the chartering and whether the defendants 1 and 2 in their turn had notice of the chartering before their purchase on October 28, 1912. There can be no doubt, I think, but that A. M. Jeevanji was perfectly aware of the charter of the 22nd of November 1911. Mr. Clarke of the plaintiffs' firm has positively sworn that he was. Gulam Hussein Essaji in an affidavit has also stated very positively that Jeevanji was aware of this charter-party. Now, considering that at that time Jeevanji and the owner of the vessel Gulam Hussein Essaji were on very close terms of intimacy, were virtually occupying "the same business rooms and daily and hourly coming in contact with each other while Gulam Hussein Essaji was the owner of the vessel, and A. M. Jeevanji engaged in stevedoring, it is on the face of it, and quite apart from any sworn testimony whatever, improbable in the highest degree that Essaji should have chartered this vessel for twelve consecutive voyages without his friend. A. M. Jeevanji being perfectly aware of it. Since then their relations have become extremely embittered and A. M. Jeevanji could no longer be called Essaji's friend; but I am speaking of November 1911. This is not all however; for the facts themselves speak eloquently more than any oral evidence could do. The agent of A. M. Jeevanji in Calcutta, Mahomedalli, had to do with this vessel when she first arrived there and was subsequently sent back in January on her first voyage. He was in this matter nominally acting for the owner Essaji. On his printed letter forms he describes himself very prominently as the agent of A. M. Jeevanji & Co. Essaji and A. M. Jeevanji, as I have said, were at that time occupying virtually the same business premises. In arranging for the loading and unloading and in dealing with this vessel in Calcutta, we find Essaji employing Jeevanji's Calcutta agent and all this avowedly under the charter-party of which it is now suggested Jeevanji had no knowledge. When the ship arrived in Bombay with her first consignment of Calcutta coal, she was actually stevedored by Collins & Co. which is the business name of A. M. Jeevanji's stevedoring branch. Further comment I think is quite unnecessary. The point would only be material in connection with the decision of Gorrel Barnes J. in the case of *The Celtic King* [1894] P. 175; for, it might be contended here that if A. M. Jeevanji had no notice, then even assuming that A. M. Jeevanji's vendees, defendants 1 and 2, had notice, they would not be affected after their purchase from the original mortgagee without notice. Now, between the arrival of the *Gymeric* in Bombay at the close of her first voyage in January 1912 and the time when the defendants 1 and 2 through

the medium of their tool, defendant No. 4, acquired the ship from the mortgagee on the 28th October 1912, that ill-fated vessel was almost incessantly in the public eye. One motion after another, one suit after another, of which she was the subject, came on in this High Court and all were fully reported in the newspapers. When I say fully reported, I mean of course so far as the substance of the particular matters was concerned. It is absolutely incredible that people like Dubashes who were themselves stevedores, and who from the very commencement of these charter-parties had been themselves doing stevedoring of this vessel, who moved in the shipping circles in Bombay, and were taking in shipping papers from Calcutta in which this ship's voyages we're advertised or at any rate announced, I say it is absolutely incredible, apart from any evidence at all, that these people, when they bought the Gymeric on the 28th October 1912, should have been as they now profess to have been, in complete ignorance of the alleged charter-parties of the preceding November. There are I should think twenty or thirty conclusive facts which might be culled from the evidence, in support of the same conclusion, if I thought it worth while to make a critical resume of that evidence. But there are one or two large and staring points which ought to be quite sufficient, particularly as they lie virtually outside the range of controversy. There can be no doubt that Bicknell Merwanji Romer & Co. were acting for the owner of the ship, Gulam Hussein Essaji; there can be no doubt whatever that Gulam Hussein was (sic) some friend of Darashaw Shroff, defendant No. 4. From the 9th of October 1912 Darashaw Shroff was acting hand in glove with Essaji in their joint attempt to get the ship out of the clutches of the mortgagee A. M. Jeevanji in order, as Essaji says, to carry out these very charter-parties. Could any one in the world believe for one moment that Darashaw Shroff did not know as well as Essaji himself what the plaintiffs' claims upon the vessel were, even assuming that neither he nor either of the Dubashes ever read newspapers? Only one of the first two defendants has come into the witness-box and he has sworn that he restricts his daily reading of the newspapers to the telegrams and a little commercial intelligence. Darashaw Shroff has been conspicuous by his absence in the witness-box and the reason for that is very plain. Now, as I say from the 9th October onwards he was really acting as much for the owner of the ship as for defendants 1 and 2; both he and the owner of the ship had the same solicitors. Look at Ex. A 14 and read along with that the deplorable explanation given of it, I am sorry to say, by a solicitor of this Court. It might be pleaded in extenuation that Mr. Merwanji at the time was extremely ill and that is the only excuse I can find for much of his evidence. The fact remains that this man Darashaw who was admittedly the mere agent and conduit pipe of the funds of defendants 1 and 2 was in the intimate confidence of the owner of the vessel, and the whole transaction was doubtless initiated by Gulam Hussein Essaji to the ship out of the hands of the first mortgagee A. M. Janji one who had been his friend but had now become his bitter enemy. Now, I say those facts alone are quite sufficient to dispose of the preposterous and ridiculous contention that defendants 1 and 2 had no knowledge whatever of the charter-parties, to enforce which the plaintiffs had already brought an elaborate suit into

Court and in respect of which notices were being continually sent to every intending purchaser. Look at the letter of the 25th October 1912 which most undoubtedly must have come, notwithstanding Mr. Merwanji's denial, to the knowledge of the intending purchaser for whom he was acting. That was three days before the completion or nominal completion of the transfer of mortgage and re-sale. In that there is express notice. There is no question here of constructive notice, and again in spite of Mr. Merwanji's improbable explanation, no reasonable man can doubt but that the contents of that letter were fully disclosed at any rate to Darashaw, and if to Darashaw then most certainly through him to his principals, the defendants 1 and 2. Enough I think has been said upon the squalid tissue of lies 10 which these defendants have been driven. No one who takes the trouble to study the evidence in detail will doubt but that the reasons I have already set forth might be multiplied and strengthened were it necessary, to do so. I think it unnecessary for myself to say more. The result of this conclusion is simply this, that but for the finding. I have arrived at on the preliminary issue, there would be a perfectly good case for injunction against defendants 1 and 2, and that every defence, except that to which effect has been given in my preliminary finding, has entirely broken down. There is no denial, there can be no denial, of the breach of contract by defendant No. 3; that of course is a matter entirely between him and the plaintiff-firm and in respect of that the plaintiffs' suit must be decreed with costs against defendant No. 3, and a reference made to the Commissioner for the ascertainment of damages and upon receipt of the Commissioner's report a decree as between plaintiffs and defendant No. 3 will be fully drawn up. Defendant No. 4 has really played no part as far as I can see in this litigation and I really do not know why he has thought it necessary to continue to appear. As against defendants 1 and 2 the only remedy which the plaintiffs could enforce would be by way of injunction, and upon that I have decided, I confess with some reluctance, that the Court ought not to grant that injunction; that means that the plaintiffs' suit against defendants 1 and 2 will have to be dismissed with costs of the suit. But having regard to the nature of the defence and the fact that defendants 1 and 2 do succeed upon a bare preliminary issue of law, I think it right to order that defendants 1 and 2 do bear their own costs of the hearing and do pay to the plaintiffs seven-eighths of the plaintiffs' costs of the hearing. Defendant No. 4 will also bear his own costs.

14. Defendants 1 and 2 to have costs of the injunction and appeal reserved.