

(1913) 09 BOM CK 0009
In the Bombay High Court

Andrew Yule and Co.

APPELLANT

Vs

Ardeshir Bomenji Dubash and Another

RESPONDENT

Date of Decision : 22-09-1913

Acts Referred:

Specific Relief Act, 1877 — Section 57

Citation : 24 Ind. Cas. 758

Hon'ble Judges : Basil Scott, C.J.;Batchelor, J

Bench : Division Bench

Judgement

1. The plaintiffs who are agents of the Bengal Coal Company are engaged as such agents in an extensive coal trade between Calcutta and Bombay supplying coal from the Bengal collieries to the many users of coal for industrial purposes in Bombay.

2. This trade is continuous throughout the year and it is not disputed that it is common to charter steamers for the trade for as many as twelve consecutive voyages.

3. On the 17th of November 1911 the agents of the 3rd defendant wrote to the plaintiffs' agent in Bombay :

With reference to your call this morning and the conversation we had regarding coal-supplies and steamers I now have to inform you that the owners of the "Gymeric" are ready to charter the steamer to your firm provided suitable terms can be arranged. The position of the steamer and particulars for the charter are briefly as follows : "Gymeric" should be ready at Calcutta in ballast from lie-union from 10th to 20th December. Capacity for about 6500 tons Bengal Coal. Charter-party usual terms. Available for full cargo from Calcutta to Bombay and will consider question of larger charter on expiration of voyage. "Gymeric" is a first class steamer and registered in Bureau Veritas.

4. On the 18th the plaintiffs' Calcutta principals wired that they could take Gymeric on twelve voyages at Rs. 5 per ton. On the 22nd the 3rd defendant's

agents wrote to plaintiffs' agent in Bombay :

With reference to your Mr. Young's call on me this morning and subsequent telephone, I now have to confirm the charter of the steamer {Gymeric) for twelve voyages with coal from Calcutta to Bombay at Rs. 5-2 per ton, the steamer will be ready at Calcutta to load for her first trip between. 10th and 20th December pro forma. Charter-party will be sent to you in a day or two the terms being usual.

5. These terms were agreed to by the plaintiffs' principals on the 25th November. On the 29th November the 3rd defendant's agents wrote to plaintiffs :

I have now the pleasure to hand you a pro forma copy of the charter-party of the Gymeric for the voyage from Calcutta to Bombay. It is of course understood that a similar charter-party will hold good for eleven more voyages to take place consecutively.

6. On the 15th December the twelve charter-parties for twelve consecutive voyages were signed by the parties. The 3rd defendant's agents when forwarding them for signature wrote that the cancelling dates for the eleven following voyages were left blank and were to be filled in after the completion of each voyage, it being understood that the plaintiff would accept such a date for lay days to commence in Calcutta as would enable the owner to commence the voyage as soon as possible after the previous one was completed".

7. The ship was used under four successive charter-parties but owing to the intervention of mortgagees, named A.M. Jivanji & Co., and to other complications which subsequently arose, the plaintiffs were unable to obtain the use of the ship under the remaining eight charter-parties.

8. At the beginning of July 1912 before the fourth charter-party had been performed, the mortgagees, A.M. Jivanji & Co., sued the 3rd defendant in this Court to recover Rs. 2,06,481-2 by sale of the ship and for interim possession of the same, and on the--8th July a Receiver was appointed of the steamer and the freight to become due., On the 31st August the plaintiffs having unloaded the vessel in Bombay after her fourth voyage sued A.M. Jivanji & Co. and she Receiver on the allegation that they were apprehensive that the mortgagees intended to induce the Receiver to avoid the remaining charter-parties and deal with the steamer in derogation thereof, and claimed an injunction restraining them from dealing with the vessel in any manner inconsistent with the remaining eight charter-parties.

9. That suit came to a hearing and was dismissed on the 7th October 1912 on the ground that there was no evidence that the defendants intended to deal with the steamer in violation of the eight charter-parties.

10. On the 11th October a decree was by consent passed in the mortgagees' suit for Rs. 2,11,001 giving liberty to the mortgagees to sell the steamer when and as they should, "think fit in satisfaction of the decree.

11. On the 25th October the plaintiffs' attorneys sent the mortgagees' attorneys a notice warning them that any sale would be subject to the eight charter-parties still to be performed and a copy of this notice was on the same day forwarded by the mortgagees' attorneys to Messrs. Bicknell, Merwanji, Romer & Co., as attorneys for the intending purchaser. The mortgage of A.M. Jivanji & Co. and the decree obtained by them were on the 28th of October transferred by endorsement to the 4th defendant Shroff for its. 2,15,000. By an agreement also bearing date the 28th of October and made between the 4th defendant and the defendants Nos. 1 and 2 it was witnessed that if the 4th defendant should succeed in obtaining a transfer of the mortgage of A.M. Jivanji & Co. and of their decree he would sell and the defendants Nos. 1 and 2 would buy the Gymeric at a price exceeding by Rs. 5,000 the amount paid to the mortgagees for obtaining the transfer, and that the defendants Nos. 1 and 2 should, advance to the 4th defendant Rs. 2,20,000 to enable him to obtain the transfer and that the transaction should be completed as soon as the vendor should obtain the transfer and that in anticipation of the completion of the sale the vendor should execute a bill of sale in favour of the purchasers as an escrow and that he should as soon as he obtained, possession of the steamer put the purchaser in possession thereof.

12. On the same day the 4th defendant wrote to the master of the Gymeric asking him to hand over possession of the Gymeric to the defendants Nos. 1 and 2, they having purchased the steamer from him. The vessel was thereafter despatched from Bombay to Calcutta by the defendants or some of them where she loaded a cargo of coal for another firm of coal-shippers in Calcutta and having returned to Bombay was fixed by the defendants Nos. 1 and 2 for December-January loading to Genoa at 23/5 d. a ton.

13. This suit was instituted by the plaintiffs on the 3rd of January 1913 claiming an injunction against the defendants restraining them until the completion of the eight remaining voyages from dealing with the vessel in any manner inconsistent with or which might interfere with or prevent the execution of the agreement of the 22nd of November and the remaining charter-parties.

14. None of the facts above stated are in dispute.

15. The respondents, however, who are the 1st and 2nd defendants, contend, first, there never was any completed agreement for chartering for twelve voyages : that if there was, its date was the 15th of December and not the 22nd of November, and even then the completed contract was for only one voyage and that none of the remaining eight charter-parties are complete contracts because the lay and cancelling dates have not been specified in any of them.

16. Secondly, that a dispute in December 1911 led to the cancellation of the agreement of chartering of the 22nd of November to which the charter-parties were merely complementary.

17. Thirdly, that the defendants Nos. 1 and 2, even though they may have

purchased with notice of the agreement and charter-parties, took a title unincumbered by them inasmuch as they have acquired that of A.M. Jivanji & Co. who had no notice.

18. Fourthly, that the plaintiffs are estopped from claiming relief in this suit by the dismissal of the suit against A.M. Jivanji & Co.

19. Fifthly, that no injunction can be granted against them having regard to the provisions of the Specific Relief Act and the case law relating to charter-parties. On the first point We agree with the learned trial Judge that the agreement for chartering was complete on the 22nd, of November when the 3rd defendant by his agents' letter accepted the, proposed charter of the steamer for twelve voyages with coal from Calcutta to Bombay at Rs. 5-2-0 per ton and that the lay and .cancelling dates which are inserted solely for the protection of the charterers must be left open until each voyage in turn had been duly completed. Even if they were not inserted in the last eight charter-parties the Court would have no difficulty in holding that the lay days commence within a reasonable date of the arrival of the ship in the port of loading and the cancelling date within a reasonable time thereafter. The parties indicated in the first charter-party what dates would be reasonable and adhered to the same measure of reasonableness in the three subsequent charter-parties which were performed.

20. On the second point we agree with the learned Judge that the contract consisted of twelve parts and that non-performance of one would not necessarily indicate an intention to put an end to the whole contract. It is clear that the 3rd defendant did not regard notice of cancellation in respect of the first charter-party as putting an end even to that part of the contract, but it was understood to mean that the charterers would not load after the cancelling date in December unless the steamer was held at their disposal until such date in January as they could load this difference was adjusted and the loading began on the 12th January, We do not think that in the circumstances the limit of the plaintiffs' rights was eleven voyages only as held by the learned Judge.

21. On the third point we have no doubt that Jivanji & Co. took the mortgagee of the 6th of December with full knowledge of the agreement between the plaintiffs and the 3rd defendant of the 22nd of November. His knowledge has been deposed to by the plaintiffs' manager, Clarke, and also by the 3rd defendant in an affidavit of the 12th April 1912. The 3rd defendant and Jivanji were occupying the same office rooms and in constant contact. Jivanji's firm was actually stevedoring for the 3rd defendant and Jivanji's agent in Calcutta was also the ship's agent in that place. Jivanji himself has not been called to contradict Clarke's statement.

22. The fourth point of estoppel by judgment has no substance. The plaintiffs' suit against the, mortgagees was dismissed on a different state of facts : the issue now arising between the plaintiff and the defendants was not heard and finally determined in that suit nor could it have been raised therein.

23. The fifth point is that raised by the plaintiffs" appeal against the decree of the lower Court which merely directed an inquiry as to damages against the 3rd defendant and refused the claim for an injunction.

24. It was contended in the lower Court that the defendants Nos. 1 and 2 before acquiring an interest in the steamer had no notice of the plaintiffs" agreement and charter-parties, but no argument has been addressed to us challenging the conclusion of the learned Judge and upon the evidence we are satisfied of the correctness of the finding that notwithstanding the sworn denials of defendant No. 1, the defendants Nos. 1 and 2 acquired their interest with express notice of the plaintiffs" rights. There is some obscurity as to the exact relations of the 3rd defendant, Gulam Hussein, and the defendants Nos. 1 and 2 before the assignment by A.M. Jivanji. & Co. of their rights under the mortgage and decree. According to the evidence in cross-examination of Merwanji, the solicitor, he was trying to free Gulam Hussein, his client, from the claims of Jivanji and another creditor and second mortgagee named Badridas and proposed to purchase the steamer from Jivanji for Gulam Hussein at Rs. 2,51,000 (in order to top another offer of Rs. 2,50,000) : the difference between Rs. 2,15,000, the mortgagees" claim, and Rs. 2,51,000 was to be paid by Gulam Hussein to Badridas as second mortgagee and Badridas was to take hundies for the balance of his claim, thus leaving the ship in the hands of Gulam Hussein. This proposal was eventually rejected by Badridas" solicitor on the 24th October. Merwanji"s diary shows that from the 11th October the date of the consent decree in Jivanji"s suit the solicitors of the defendants Nos. 1 and 2 were taking part in the negotiations for purchase and that Gulam Hussein disappeared from the position of an open party to them not earlier than the 26th October. On the 28th Darasha Shroff, the 4th defendant, appears in Merwanji"s diary as his client in place of Gulam Hussein. On the 22nd of October the defendants Nos. 1 and 2 gave a cheque for Rs. 2,15,000 (the amount Jivanji would be satisfied with) to Merwanji who was noting for Gulam Hussein, but Merwanji does not mention it in his diary. In his affidavit of the 7th of January 1913 the first defendant says that the cheque was handed to Merwanji to enable the 4th defendant Shroff to complete the transfer from Jivanji to himself, but it is clear from Merwanji"s letter to Payne & Co. of the 23rd October, despite Merwanji"s attempted explanation that Gulam Hussein was then the intending purchaser. In cross-examination the first defendant very unwillingly admitted, that Rs. 2,15,000 represented by the cheque had been supplied to him by some one else. The money was returned by Merwanji on the 26th October.

25. In an undated letter signed by the fourth defendant Shroff, attested by Merwanji and addressed to the defendants Nos. 1 and 2, the fourth defendant declares that in the matter of the purchase of the ship from the mortgagees he is merely the nominee and agent of the defendants Nos. 1 and 2. The first defendant in the affidavit incorporated in his written statement says this letter was given to him on the 22nd of October. This seems unlikely having regard to Merwanji"s letter of the 23rd and the entries in his diary. It is impossible to

extract the exact truth from the evidence on this part of the case which the learned Judge has characterised not too strongly as a squalid tissue of lies. We agree with him in his conclusion that the fact was that Uarasha Shroff, who was admittedly the mere agent and conduit pipe of the funds of the defendants Nos. 1 and 2, was in the intimate confidence of the owner of the vessel and the whole transaction was doubt-loss initiated by Gulam Hussein to get the ship out of the hands of Jivanji.

26. Having arrived at this conclusion we will consider the present legal position of the defendants Nos. 1 and 2. Are they mortgagees or are they owners?

27. In taking the transfers from Jivanji, the Shroff was merely their agent and he filled the same position when he executed the bill of sale.

28. In *Farrar v. Farrars* (1888) 40 Ch.D. 395 : 58 L.J. Ch. 185 : 60 L.T. 121 : 37 W.R. 196. Lindley, L.J. said : A sale by a person to himself is no sale at all, and a power of sale does not authorize the donee of the power to take the property subject to it at a price fixed by himself, even although such price be the full value of the property. Such a transaction is not an exercise of the power and the interposition of a trustee, although it gets over the difficulty so far as form is concerned, does not affect the substance of the transaction.

29. The defendants Nos. 1 and 2 are, therefore, mortgagees and nothing more. Putting their rights as mortgagees at their highest, they can only interfere with the contracts for the employment of the ship if they prejudice the security and if no such prejudice is shown, they will be restrained from interfering with the performance of the charter-parties. This results from the statutory position of mortgagees of ships : see *Collins v. Lamport* (1865) 34 L.J. Ch. 196 : 11 Jur. 1 : 11 L.T. 497 : 13 W.R. 283. The defendant Nos. 1 and 2 in paragraph 23 of "their written statement submit that the agreement of the 22nd November 1911 was invalid against their predecessors-in-title as depreciating their security and was, therefore, invalid against the defendants, but no issue was raised nor was the learned Judge invited to deal with this point in the lower Court. The onus is on the mortgagees [see *The Fanchon* (1880) 5 P.D. 173 : 50 L.J. Adm. 4 : 42 L.T. 483 : 29 W.R. 339 : 4 Asp. M.C. 272.] and they have not discharged it. We are, therefore, of opinion that on this ground the plaintiffs are entitled to the injunction asked for against the defendants Nos. 1 and 2.

30. The plaintiffs' position as against the mortgagees is, however, stronger than that of the plaintiff in *Collins v. Lamport* (1865) 34 L.J. Ch. 196 : 11 Jur. 1 : 11 L.T. 497 : 13 W.R. 283. where the mortgage was prior to the charter-party, for here the mortgage to Jivanji was subsequent to the agreement of the 22nd of November for the hiring of the ship by the plaintiff and he took with notice of it and the defendants Nos. 1 and 2 took their assignment of the mortgage with full notice of the plaintiffs' rights. The learned Judge has very reluctantly refused an injunction against these defendants because he considered that the plaintiff could stand in no better or different position as against them than or from, that

which he occupied in regard to Gulam Hussein, the owner, against whom (in our judgment erroneously) he thought he could not legally grant an injunction.

31. The judgment of the Lord Chancellor in *De Mattos v. Gibson* (1859) 4 D.G. & J.276 : 28 L.J. Ch. 165 : 5 Jur.347 : 7 W.R. 100 : 45 ER. 108 : 124 R.R. 250, by which the learned trying Judge was chiefly influenced, shows that, while the question as against the owner of the ship was whether the plaintiff, though not entitled to specific performance, might not nevertheless be entitled to an injunction to restrain a breach of the contract contained in the charter-party, the question as against the mortgagee was whether the charterer of the vessel might not be entitled to the benefit of the equity which (the owner) Curry might have against Gibson, the mortgagee, to prevent his committing or compelling a breach of the contract. Gibson," he says, as the mortgagee, though with full notice of the charter-party, incurred no liability in respect of the contract with the plaintiff (charterer), nor was he bound to do anything to forward its performance," and again, Gibson's position is entirely different from Curry's, He is not bound by any engagement to the plaintiff. It is true that he took his mortgage with a full knowledge of the charter, and that he must, therefore, abstain from any act which would have the immediate effect of preventing its performance."

32. In *Johnston v. Royal Mail Steam Packet Co.* (sic) 37 L.J.C.P. 33 : L.R. 3 C.P. 38 : 45. Willes, J., in delivering the judgment of the Court, said : "The Case of the mortgagees and mortgagors of the ship appears to be one quite of a different complexion (from that of mortgagees of land), because the mortgagees may fairly be taken, so long as they do not interfere and claim the possession, to have allowed the mortgagors to enter into all engagements for employment of the sort usually entered into by a person who has the apparent control and : ownership of a vessel : and as they would" unquestionably be bound (the mortgage being subsequent to the arrangement of September 1857) by any creation of an interest under that contract prior to their mortgage, so we .think it is just to conclude, under the circumstances of this case, and looking to the terms of their notice of the 10th of August, 1858, that they were, and meant to be, and assented to be actually bound by the arrangement made by implication between the European and Australian Company in continuation of the contract of September," 1857, just as they were in respect to any interest created by that contract prior to the mortgage."

33. In the *Law Guarantee and Trust Society v. Russian Bank for Foreign Trade* (1905) 1 K.B. 815 : 74 L.J.K.B. 577 : 92 L.T. 435 : 10 Com. Cas. 158 : CO. Asp. M.C. 41 : 21 T. L.R. 383. the Court appears to have thought that the doctrine of *Collins v. Lamport* (1865) 34 L.J. Ch. 196 : 11 Jur. 1 : 11 L.T. 497 : 13 W.R. 283. would not necessarily apply where the charter-party sought to be invalidated by the mortgagee was made previously to the mortgage. The position of the charterer where the mortgagee took his security with notice of charter-party would be much stronger. That is the plaintiffs" position here.

34. It remains to consider whether an injunction should also be granted against

the 3rd defendant, Gulam Hussein. He has stated on solemn affirmation that he has now no interest in the ship. He is, however, unscrupulous and unreliable. In the view we take of the position of the defendants Nos. 1 and 2 he must be treated for the purpose of the case as still the owner. The Statute Law relevant to the question is contained in the Specific Relief Act, Section 21 of which enacts that certain classes of contracts cannot be specifically enforced, namely, (b) contracts which run into minute or numerous details or from their nature are such that the Court cannot enforce specific performance of their material terms, and as an illustration to Clause (6) the instance is given of a charter-party whereby it is agreed that a ship shall proceed to Rangoon to load a cargo of rice and take it to London for a certain freight. This is a re-enactment of the English Law. It shows that specific performance cannot be decreed of the plaintiffs' charter-parties. Section 56 deals with perpetual injunctions and Clause (f) provides that an injunction cannot : be granted to prevent the breach of a contract which would not be specifically enforced. This again, speaking generally, is a statement of the English Law.

35. Section 57 provides that notwithstanding Section 56, Clause (f), where a contract comprises an affirmative agreement to do a certain act, coupled with a negative agreement, express or implied, not to do a certain act, the circumstance that the Court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting an injunction to perform the negative agreement.

36. It has for many years been held that an agreement for the letting of a ship to a certain charterer implies that she shall not during the currency of the charter-party, provided the charterer is ready to supply cargo," be employed for any other person or purpose : see *De Mattos v. Gibson* (1859) 4 D.G. & J. 276 : 28 L.J. Ch. 165 : 5 Jur. 347 : 7 W.R. 100 : 45 Eng. Rep. 108 : 124 R.R. 250.

37. The learned Judge, however, thought that in the circumstances of the case the negative could not be implied because each of the charter-parties giving the use of the *Gymeric* to the plaintiffs contains a provision that "owners are to have the privilege of substituting another steamer of the same class and similar size and position not exceeding 6,500 tons." This it appears to us merely qualifies the implied negative by condition subsequent. If the condition is not fulfilled the negative, implied upon the authority of *De Mattos v. Gibson* (1859) 4 D G. & J. 276 : 28 L.J. Ch. 165 : 5 Jur. 347, 555 : 7 W.R. 100 : 45 ER 108 : 124 R. R. 250. and many other cases, is enforceable by injunction u/s 57 An injunction granted in the terms of the prayer will not prevent the defendants from exercising their option to substitute another ship for the *Gymeric* if it is convenient for them to do so in terms of the charter-parties. The evidence, however, shows that Gulam Hussein at no time had at his disposal another steamer similar to the *Gymeric*.

38. It has been argued that the illustrations to Section 57 indicate that an injunction should not be granted when it is not required to preserve the plaintiff from the competition of a rival, but we have in this case evidence that the very

first employment on which the Gymeric was sent after the transfer to the defendants Nos. 1 and 2 was a voyage to Calcutta to bring a cargo of coal to Bom-hay for a shipping firm who are competitors of the plaintiffs in the Calcutta-Bombay coal trade.

39. For the above reasons we set aside the decree and pass a decree for an injunction against all the defendants in terms of the prayer of the plaint and the defendants must pay the costs throughout.