
(1965) 04 BOM CK 0019
In the Bombay High Court
Case No : Admiralty Suit No. 1 of 1963

Argo Marine Supply Co.

APPELLANT

Vs

S.S. "Easthampton," An American Steamship

RESPONDENT

Date of Decision : 15-04-1965

Acts Referred:

Admiralty Courts Act, 1861 — Section 5

Citation : (1969) 71 BOMLR 832

Hon'ble Judges : Tarkunde, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Tarkunde, J.—This Notice of Motion has been taken out by a aviator in an admiralty suit. The suit was filed in rem by a supplier of necessities to the vessel "Easthampton" which was the 1st defendant in the suit. The second defendant was a Corporation registered in the U.S.A., which owned the vessel. The Corporation went into bankruptcy in the U.S.A. and is represented in the suit by trustees in bankruptcy. By an order made in the suit the vessel was sold by auction on 19th January 1965 for over two millions [sic] dollars. The aviator who has taken out this Notice of Motion, and who is referred to hereafter as the applicant, is also a Corporation registered in the U.S.A. and it claims an amount of Rs. 17,000 and odd for necessities supplied to the vessel. The main prayers in the Notice of Motion are that the defendants to the suit may be ordered and decreed to pay to the applicant the sum of Rs. 17,000 and odd with interest and costs of the Notice of Motion and that the amount of the decree so passed may be ordered to be paid out of the sale proceeds of the vessel subject to such priorities as may be determined in due course.

2. The Notice of Motion is opposed by some of the respondents who also had filed caveats in the admiralty suit. They have taken a preliminary objection to the Notice of Motion. Their objection is that the applicant is not entitled to get a decree or a decretal order in respect of its claim against the vessel merely by

filing a Notice of Motion, and that the proper remedy for the applicant is to file a suit in rem against the sale proceeds of the vessel and to apply for payment out after getting a decree in that suit.

3. The present Admiralty Rules of this High. Court were made under the Colonial Courts of Admiralty Act, 1890, and were approved by Her Majesty in Council on 29th January 1894. Section 3 of that Act empowers a Colonial Legislature to declare any Court of unlimited civil jurisdiction as a Colonial Court of Admiralty, and Section 7 lays down the manner in which rules of such a Court were to be made. The Indian Legislature then passed the Colonial. Courts of Admiralty (India) Act, 1891, and the High Court of .Judicature at Bombay was one of the Courts which was declared by Section 2 of this Act as one of the Colonial Courts of Admiralty. That is how the Admiralty Rules were made by this Court tinder Section 7 of the Colonial Courts of Admiralty Act, 1890.

4. The Admiralty Rules of this Court lay down the procedure to be followed in admiralty suits including the manner in which caveats of various types are to be issued and registered. Rule 51 provides that forms used in the Admiralty Division of the Supreme Court in England under the Rules of the Supreme Court, 1883, shall be followed as nearly as the circumstances of each case will allow. Then Rule 52 lays down that other proceedings in admiralty suits, in so far as they are not provided by these Rules, are to be regulated by the rules and practice of the Court in suits in the exercise of its Ordinary Original Civil jurisdiction. The Rules do not provide that a party which has a claim against a vessel or the sale proceeds of a vessel, and which has filed a caveat in an admiralty suit, can get a decretal order in respect of its claim by merely taking out a Notice of Motion directed to the parties and caveators in the suit. The normal procedure for obtaining a decretal order is to file a suit, and it is therefore not possible, in the absence of a rule sanctioning that practice, to hold that interveners in an admiralty suit can get a decretal order by adopting the procedure of a Notice of Motion.

5. It is, however, true that the Admiralty Rules of this Court do not lay down the mode in which priorities are to be fixed by the Court amongst the various claimants who are entitled to payment out of the sale proceeds of a vessel. In the absence of any provision in the Admiralty Rules, it would be proper to hold that this Court would be guided by the practice and procedure which prevailed in that respect in the High Court in England in the exercise of its admiralty jurisdiction at the time of passing of the Colonial Courts of Admiralty Act, 1890. Section 2(2) of that Act provides inter alia that a Colonial Court of Admiralty "may exercise" its jurisdiction "in like manner and to as full an extent as the High. Court in England", and this appears to imply that in all matters not covered by our Admiralty Rules this Court will follow the same procedure as prevailed in. the exercise of the admiralty jurisdiction of the High Court in England at the time of the said Act.

6. Turning to English practice, it is clear that in England also an intervener in the

position of the present applicant was not entitled to get a decretal order in respect of his claim by taking out a Notice of Motion in an admiralty suit already filed by some other claimant. The English practice was, and is, that all the claimants file suits, either jointly or severally, and obtain judgments in their favour, and it is thereafter that priorities amongst them are determined by the Court. In *British Shipping Laws, Volume I, Admiralty practice*, by McGuffie, Pugeman and Gray (1964) the learned authors, after observing that the usual practice in judgments in admiralty suits in rein is to provide for priorities to be reserved, go on to say (page 396) :

...This means that when all the actions against the res have proceeded to judgment, with priorities reserved in each action, there are two main alternatives :

(1) If the parties are able to reach agreement as to how much should be paid to each of them and agree to payment out being made accordingly, payment out will be made on an order made by the registrar or district registrar following application to him....

(2) Otherwise, the matter will have to be determined in court by the judge on a motion for determination of priorities and payment out.

It is clear that a claimant against a vessel or its sale proceeds must first secure a judgment in a proper suit, and it is only thereafter that he can claim payment to be made to him on the determination of priorities between the various claimants.

7. That this was also the practice in the High Court in England at the time of passing of the Colonial Courts of Admiralty Act, 1890, is clear from certain passages in *Williams and Bruce on Admiralty Practice, Third Edition (1902)*. The learned authors, while dealing with the Rules of the Supreme Court of 1883, have observed (pp. 271-272) :

...Where there are other claimants besides the plaintiff, who seek to enforce claims against the property, it is usual for them to institute a fresh suit, and, if necessary, to apply to the Court on motion to withhold its final decree in the original suit until all the claims have been brought before the Court. Where several suits are pending against the same property or proceeds, the course commonly taken is that, at the hearing of each suit, on application made on behalf of the plaintiffs in the remaining suits, the Court reserves all questions of priority, and such questions subsequently come on to be argued on motion or on a special case.

The statement in the above passage that it is "usual" for claimants to institute a fresh suit is explained in the foot-note where it has been observed that when the interest of all the claimants is the same, and arises out of the, same right, separate suits are unnecessary, for they should all join as plaintiffs in one suit, and if separate suits have been instituted, they will be consolidated,

8. Mr. M. H. Shah for the applicant tried to show that according to English

practice an intervener in an admiralty suit is entitled to get an order of payment out by a mere motion and without instituting a suit. For this purpose Mr. Shah relied on the following- observation in Roscoe's Admiralty Practice, Fifth Edition, at page 283:

The intervener is then (i.e., after registering his appearance) in a position to assert his legal rights, either by means of pleading in the action or by motion if there is no need to plead, as in a default action after judgment, and the question of rights is raised on an application for payment out of, proceeds.

This passage, in my view, assumes that the intervener who participates in an application for payment out of proceeds has already obtained a judgment in his favour in a regular action. This is clear from another passage of the same book on page 286. There the learned author refers to the case of the "Alster" (1928) 30 Ll. L.L. Rep. 5 and says, "A party, e.g., a mortgagee, cannot obtain payment out of monies in Court in default action unless he has commenced proceedings and obtained a judgment." A copy of Mr. Justice Bateson's judgment in "The Alster" was produced before me, and it shows that the learned Judge refused to order payment out in favour of mortgagees of the steamship "Alster" until the mortgagees obtained a judgment in their favour by the issue of a writ, i.e. by filing a suit.

9. Further support to the above conclusion is found in Lord Atkin's Encyclopaedia of Court Forms and Precedents in Civil Proceedings, Volume I. The volume contains numerous forms and precedents relating to admiralty proceedings, and amongst them is not found any form or precedent of a Notice of Motion in which a claimant or intervener asks for a decretal order- in respect of his claim against a vessel or its sale proceeds. On the contrary, Form No. 122 (page 406) gives an instance of a "Decree determining priorities and for payment out", and the form clearly shows that the only priorities considered by the Court are between plaintiffs in various actions instituted by them. The form does not mention any claimants or interveners other than plaintiffs.

10. A reference may then be made to the decision of the Privy Council in Johnson v. Black: The "Two Ellens" (1872) L.R. 4 P.C. 101. The Privy Council considered in that case the stage at which a maritime lien arises in favour of suppliers of necessities u/s 5 of the Admiralty "Courts Act, 1861. Their Lordships observed (p 170) :

Therefore, their Lordships think it is quite sufficient to say that, according to the true construction of this section, the res, the Ship, does not become chargeable with the debt for necessities until the suit is actually instituted, and that all valid charges on the Ship to which any person other than the Owner of the Ship who is liable for the necessities is entitled must take precedence.

I am not concerned at this stage with any question of priority between the present applicant and the other caveators. "What is, however, significant in the above passage for our present purpose is that, in specifying the time when a

maritime lien arises in favour of suppliers of necessities, their Lordships referred to the institution of a "suit" and not any other proceedings.

11. It is thus clear that neither according to our Admiralty Rules nor according to English practice is the applicant entitled to get a decretal order in respect of their claim by merely taking out a Notice of Motion. Mr. M. H. Shah argued that according to American practice an intervener in such cases is entitled to share in the sale proceeds of a vessel by filing a mere petition and without instituting a regular suit. In support of his argument Mr. Shah relied on para. 116 of American Jurisprudence, Volume I, where it has been observed (page 606):

The Admiralty Court retains jurisdiction over the disposition of the proceeds remaining in its registry after satisfying the purpose for which its jurisdiction was originally called into exercise. Any person having an interest in such proceeds has a right, by petition and summary proceeding, to intervene point crease suo for delivery thereof to him; and upon due notice to adverse parties, the court may proceed summarily to hear and decide thereon and to decree therein according to law and justice. The court has power to distribute surplus proceeds to all those who can show a vested interest therein, no matter how their claims originated or whether such claims give rise to liens.

It does appear that this passage supports Mr. Shah's argument that the applicants' Notice of Motion would have been tenable under the practice prevailing in the U.S.A. The argument, however, is of no avail to the applicants, since the practice which prevails in the U.S.A. cannot be adopted here in the absence of any law or rule justifying that course.

12. For the same reason I cannot give any effect to Mr. Shah's plea that it would be more convenient to allow all the caveators in such a ease to apply by way of Notices of Motion for payment of the sale proceeds than to require them to file separate suits in rem on the basis of their respective claims. The procedure recommended by Mr. Shah cannot be adopted in the absence of appropriate law or rule in that behalf. I may, however, add that while the procedure advocated by Mr. Shah might be useful in avoiding multiplicity of independent proceedings, it would not enable the claimants to avoid the payment of Court-fees on the amounts claimed by them, as assumed by Mr. Shah. If I had held that a decretal order can be passed in favour of the applicant in this Notice of Motion, ad valorem Court-fee would have been payable on the amount claimed in the Notice of Motion under item 7 of Schedule I of the Bombay Court-fees Act, 1959.

13. In the result I hold that the, Notice of Motion is not tenable. It is accordingly dismissed. The applicant to pay the costs of respondents Nos. 19, 20, 21, 22 and 23 in one set, and of respondent No. 26 in another set.