

(1936) 08 CAL CK 0034
In the Calcutta High Court

Bengal Assam Steamship Co. Ltd.

APPELLANT

Vs

Owners and Parties interested in S.S. "Shanku Maru"

RESPONDENT

Date of Decision : 27-08-1936

Acts Referred:

Citation : AIR 1937 Cal 122

Hon'ble Judges : Panckridge, J

Bench : Division Bench

Judgement

Panckridge, J.—This is an application by the plaintiffs for an order that the owners of the S.S. "Shanku Maru" do give security within three days of the date of the order for the sum of Rs. 2,47,426 and Rs. 4,000 and failing such security that a warrant do issue to arrest the S.S. "Harve Maru" belonging to the same owners. The plaintiffs are the owners of a steam vessel named "India" and two flats "Basildon" and "Kinsale." On 24th February 1936 ""Shanku Maru" came into collision with the "Kinsale" and in consequence of the collision the "Kinsale" with its cargo was sunk and the "India" and "Basildon" suffered damage. "Shanku Maru" returned to Calcutta for minor repairs, but shortly afterwards sailed from the Port and has not since returned. The defendants say that the "Shanku Maru" has been transferred to another run in the ordinary course of business, and the plaintiffs have expressly disclaimed any allegation of bad faith on the defendants' part as regards the use it appears they are now making of the "Shanku Maru." The defendants however are the owners of another steamship "Harve Maru," which is at present in the Port of Calcutta within the Admiralty Jurisdiction of the High Court. The plaintiffs claim the right to arrest the "Harve Maru," or in other words to exercise the same right of arrest over that vessel as they would have over the "Shanku Maru" were she within the local limits of the Admiralty Jurisdiction of the Court. As was pointed out by Jenkins, C.J. in Madras Steam Navigation Co. Ltd. Vs. Shalimar Works, Ltd., , the Admiralty Jurisdiction of the Court rests on Clause 32 of the Letters Patent of 1865 which continues Clause 31 of the Letters Patent of 1862 The effect of these Clauses is to vest in the High Court such civil and maritime jurisdiction as might be exercised by the

Supreme Court as a Court of Admiralty, or by any Judge of that Court as Commissary of the Vice-Admiralty Court. The Admiralty Jurisdiction of the Supreme Court is defined by Clause 26 of the Charter of 1774. No useful purpose will be served by setting out that clause at length, and it will be sufficient to say that it conferred upon the Supreme Court a Jurisdiction of Admiralty "as the same is used and exercised in that part of Great Britain called England."

2. The plaintiffs argue that, whatever now be the state of things in England, at the date of the Charter the right of the plaintiffs in an Admiralty action in rem to arrest the property of the defendants within the jurisdiction was not limited to property which was in some way connected with the plaintiffs' cause of action. In Halsbury's "Laws of England" Vol. 1, p. 81, it is stated that at one time the Court of Admiralty was in the habit of arresting the person of the defendant who was required to give bail both to enter an appearance and to answer judgment in the cause. When a defendant was not arrested, there was apparently always an alternative method of proceeding by arresting any property belonging to him in tidal waters, and then citing the debtor and all parties interested in the goods attached to appear at the suit of the plaintiff. The learned author of this particular title of Halsbury's "Laws of England" continues:

These methods of procedure became obsolete, but the Admiralty Court succeeded in establishing a right to arrest property, the subject matter of a dispute, and enforce its judgment against property so arrested on the theory that a pre-existing maritime lien to the extent of the claim attached to the property from the moment of the creation of such claim.

3. There is a detailed consideration of the development of Admiralty practice in the judgment of Jeune, J. in *The Dictator* (1892) P 304. The learned Judge alludes to the right of the plaintiff to attach any ship or goods belonging to the defendant within the Admiralty Jurisdiction in order to enforce his appearance. Thereafter he continues at the foot of p. 312 as follows:

But several changes in law or practice took place. Actions beginning with arrest of the person became obsolete in practice, as Dr. Lushington says in *The Clara* (1885) Swab 1, in the last century, the last recorded instance being in 1780; and arrest of property merely to enforce appearance became rare or obsolete, though in theory such arrest of the person or property would seem still to be permissible (per Fry L.J. in *the Henrich Bjorn* 10 P D 41 at 53, 54). On the other hand, arrest of property over which a lien could be enforced became more common as the idea of a pre-existing maritime lien developed, and arrest of property, in order to assert, for the creditor, that legal nexus over the proprietary interest of his debtor, as from the date of the attachment, of which Lord Watson speaks in *the Henrich Bjorn* 10 P D 41 at 53 grew up. The result was that arrest became the distinctive feature of the action in rem, such arrest having primarily for its object the satisfaction of the creditor out of the property seized. But there seems no reason to suppose that the action beginning by arrest of the res altered the course or character it had hitherto assumed as to the appearance of the debtor in

it; and, if that be so, it would seem clear that the full amount of a judgment, if a defendant, who might himself have been arrested, appeared, could be, enforced by the means available in the Admiralty Court, monition and attachment, whatever the value of the property arrested was.

4. The learned Advocate-General for the defendants has also drawn my attention to *Currie v. McKnight* (1897) A C 97 which is an authority for the proposition that in order to render a ship liable to maritime lien for injury caused, the ship itself must be the instrument which caused the damage. He has also referred to the judgment of Gorell Barnes, J. in *The Ripon City* (1897) P 226 p. 227 who adopts the historical view taken by Jeune, J. in *The Dictator* (1892) P 304 and goes on to say:

Whatever may have been the origin and process of development of a maritime lien for damage, there is no doubt that the doctrine of such a lien is now established, and the right to enforce it is different from the ancient right of arrest to compel appearance and security in this, that it is confined to the property by means of which the damage is caused, and may be enforced against that property in the hands of an innocent purchaser. I believe that the earliest English authority which establishes this doctrine is "*The Bold Buccleugh*" (1849) 7 P C 267 where it was held by the Privy Council that in cases of collusion a maritime lien for damages arises and may be enforced against the vessel which was in fault, and that such lien travels with the vessel into whosoever possession she may come, and when carried into effect by a proceeding in rem relates back to the period when it first attached.

5. My attention has been called to a passage in the last Edition of Roscoe's Admiralty Practice which sets out with approval a passage in a work by Mr. Marsden, an author of the highest repute, on matters connected with Admiralty practice, which puts forward the view that from an historical stand-point, the Judicial Committee in *The Bold Buccleugh* (1849) 7 P C 267 were wrong in tracing the right of the plaintiff to arrest the ship at fault, to the existence of a maritime lien in his favour, and approves the former view that the right to arrest was in essence a question of procedure and was enforced by the Court of Admiralty for the purpose of compelling the appearance of the defendant and compelling him to find security for the judgment that may be passed against him. As a matter of historical research it is possible that Mr. Marsden's view is correct but I notice that Gorell Barnes, J. in *The Ripon City* (1897) P 226 expressly takes Mr. Marsden's criticism into consideration and does not apparently disagree with it, but at the same time he treats the question on the assumption that he is bound by the opinion expressed by the Judicial Committee in *The Bold Buccleugh* (1849) 7 Moo P C 267. I think therefore that it must be recognised that in England the former right of the plaintiff to arrest a ship other than a ship alleged to be in fault is obsolete in the sense that no Court of Admiralty will enforce it.

6. Mr. Clough, however; argues that I am not hampered by the decision of the

Judicial Committee in *The Bold Buccleugh* (1849) 7 P C 267 and that what I ought to do is to treat the circumstances of the present case on the basis of the law as it stood 150 years ago, before the erroneous doctrine of mark time lien had gained acceptance. In my opinion it is not open to me to do so. It is not like a case where the English law at the time of the Charter has subsequently been modified by a statutory enactment having no application to India.

7. The English cases appear to me to lay down that in so far as the Admiralty Courts in the 18th century permitted the plaintiff to arrest a ship other than the ship at fault, that practice was wrong; I do not think it is open to me to regard the practice as it stood in the 18th century without reference to the subsequent development of the law applicable, nor is it possible for me to examine how far Mr. Marsden is right when he suggests that the old practice was a right one, and that the historical view which commended it self to the Judicial Committee in *The Bold Buccleugh* (1849) 7 P C 267 was erroneous. In these circumstances I hold that it not being in accordance with the correct Admiralty practice, I have no power to arrest the steamship "Harve Maru". The application is accordingly dismissed with costs.