
(1914) 05 CAL CK 0059
In the Calcutta High Court

Madras Steam Navigation Co. Ltd.

APPELLANT

Vs

Shalimar Works, Ltd.

RESPONDENT

Date of Decision : 02-05-1914

Acts Referred:

Interpretation Act, 1889 — Section 18(2)
Limitation Act, 1963 — Article 29

Citation : AIR 1915 Cal 681 : (1915) ILR (Cal) 85 : 28 Ind. Cas. 463

Hon'ble Judges : Jenkins, C.J.;Stephen, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Jenkins, C.J.—On the 4th June 1910, a company called the Shalimar Works, Limited, instituted a suit in rem against the vessel, Clan Macintosh, for an amount alleged to be due to them for that which is described in the plaint in this suit and has throughout been treated as maritime necessities.

2. On the same day the vessel was arrested, and she thenceforth remained under arrest until her release on the 31st January 1912, the suit in rem having been dismissed two days earlier.

3. On the 4th June 1912, the present suit was instituted on the ordinary original side of this Court claiming damages for the wrongful arrest.

4. In the plaint it is alleged that the plaintiff company is the owner of the ship, that the defendant company instituted the suit in rem "falsely alleging therein that a sum of Rs. 89,187-12 was due to the defendant company for maritime necessities supplied to the said vessel and maliciously and without reasonable or probable cause procured a warrant of arrest from the said Court "and that" therefore in pursuance of the said order the defendant company caused to be sued out of the said Court and in the said action the said Warrant of arrest directed to the Marshal of Calcutta and caused the said vessel, her tackle, apparel and furniture to be wrongfully arrested and detained from the said 4th

day of June 1910 until the time hereinafter mentioned"

5. The plaintiff company then alleges the dismissal of the suit in rem for want of jurisdiction (para. 3) and submits "that the said warrant of arrest was issued without jurisdiction...and was absolutely void and inoperative and of no effect in law and that by reason of wrongful and malicious arrest and detention of the said vessel...the plaintiff company has been deprived of the use and of the possession of the said vessel from the said 4th day of June 1910 till the said 31st day of January 1912 and has suffered damages to the extent of Rs. 5,85,630-6-9" (para. 4).

6. In form the suit is essentially one for the malicious abuse of the process of the Court [see Bullen and Leake's Precedents. 3rd Edition, pp. 353-356 and Redway v. Mc. Andrew (1873) L.R. 9 Q.B. 74 But no attempt was made at the trial to prove malice, and before us this aspect of the case has been deliberately abandoned from the onset, for no mention or even suggestion has been made of malice, or the absence of reasonable and probable cause, or crassa negligentia or bad faith.

7. The only case made before us was trespass pure and simple; I will, therefore, limit myself to that.

8. It may be a question whether a plaint, framed as this is, fairly supports a claim based on trespass, more especially as the plaint is defective in an important; particular. [See the declaration in Redway v. Mc. Andrew (1873) L. R. 9 Q. B. 74. to which there was a general demurrer]. It is imperative under Order VII, rule 1 (e), that the plaint should contain, in addition to other particulars, "the facts constituting the cause of action and when it arose." There is no specific allegation in the plaint when the cause of action arose; and yet if the plaint is to be treated as permitting an alternative claim on the ground of trespass, there would be a different date according as it was treated as a suit for malicious prosecution or a suit for trespass.

9. But apart from that, I am not at present prepared to hold that an ordinary suit for trespass lies for the arrest of a ship. There is no trace of any such suit in the books, and yet the occasion for it must have frequently arisen.

10. The only reference to such a suit that I have been able to find is in The Walter v. D. Waller [1893] . 202. where an action was brought for an alleged trespass on a vessel and for its wrongful arrest. Sir Francis Jeune in disposing of the case said that the claim for trespass clearly could not be maintained. The reason of this decision, however, does not appear, and it may be it has no application in the circumstances of this case.

11. The arrestment of the ship is a judicial act of the Court and an ordinary step in an action in rem, so, where it constitutes a legal grievance, it is not an independent wrong, but an integral part of an action in rem in which there was malice, or its equivalent, entitling the aggrieved person to seek compensation

either in the Admiralty proceedings or by separate action.

12. In the case of *Xenos v. Aldersley, The Evangelismos* (1858) 12 Moo. P.C. 352. a ship was arrested, and in *The Strathnaver* (1875) L. R. A. G. 58. the result of that case was summed up as follows; "Their Lordships came to the conclusion, though the case was certainly a very strong one, inasmuch as the wrong vessel had been seized, that in the absence of proof of mala fides and malicious negligence, they ought not to give damages against the parties arresting the ship."

13. The principle enunciated in *Peruvian Guano Co. v. Dreyfus Brothers & Co.* [1892] A. C. 166 . may fairly be cited in this connection. One of the questions there considered was whether the wrongful possession of the defendant continued after the appointment of a Receiver so as to give a claim for damages. It was held it did not, and Lord Watson in the course of his Judgment said: "The order of the 17th December 1880 for the appointment of a receiver had the immediate effect of making the company bare custodiers for the Court; and the appointment of the 23rd of February 1881 transferred the actual possession of the cargoes or their proceeds from the company to an officer of Court. In my opinion, detention by the company, whether it had been legal or illegal, ceased at the first of these dates. That circumstance would not affect the quantum of damages due by the company, if it could be shewn that the law regards loss arising to the party ultimately successful from the possession of the Court as stake-holders, as loss directly and naturally resulting from the previous wrongful acts of his adversary. I know of no principle, and of no authority, for that proposition. It appears to me that from the time when the order of the 17th of December 1880 was made, the company and Dreyfus Brothers stood towards each other in the same position in which they would have been placed if the eleven cargoes had never come into the possession of the company, and had been thrown into Court by the captains of the carrying vessels. When possession of the subject of controversy is with the Court, the competing parties are simply preferring their claims in the ordinary course of law; and any damages which the successful party may suffer from the continuance of litigation are due to the laws delay, and not to any legal wrong perpetrated by his unsuccessful competitor."

14. Lord Macnaghten too remarked- "But it appears to me that the detention of these cargoes by the company came to an end when the order was made for the appointment of a receiver. From the date of that order possession was taken out of the hands of the company. Thenceforth the possession was the possession of the Court. I do not think that the possession of the Court can be regarded as detention by the company, nor do I think that any loss or diminution of profit, which may be attributable to the circumstance that the property in question in the action was placed in the custody of the Court, is the direct or natural result, of the detention by the company."

15. Here too it may fairly be said that under the arrest the custody and possession was with the Marshal as an officer of the Court, and cannot be

regarded as a detention by the defendant company. The damage, if any, suffered from the continuance of the officer's custody and possession was due not to default of the defendant company, but to the law's delay.

16. The English decisions must be our guide in dealing with maritime matters here, and therefore I feel justified in citing them.

17. This Court's general Admiralty Jurisdiction rests on Clause 32 of the Letters Patent of 1865, which continues Clause 31 of the Letters Patent of 1862; and 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.

18. The Admiralty Jurisdiction of the Supreme Court is defined as follows in the Charter of 1774, Clause 26: "And it is Our further will and pleasure, and We do hereby grant, ordain, establish and appoint that the said Supreme Court of Judicature at Fort William in Bengal, shall be Court of Admiralty, in and for the said provinces, countries or districts, of Bengal, Bihar and Orissa and all other territories and islands adjacent thereunto, and which now are or ought to be dependent thereupon; and We do hereby commit and grant to the said Supreme Court of Judicature at Fort William in Bengal, full power and authority to take cognizance of, hear, examine, try and determine all causes civil and maritime, and all pleas of contracts, debts, exchanges, policies of assurance accounts, charter-parties agreements, loading of ships and all matters and contracts, which in any manner whatsoever relate to freight or money due for ships hired and let out, transport-money, maritime usury or bottomry, or to extortions, trespasses, injuries complaints, demands and matters civil and maritime, whatsoever, between merchants, owners and proprietors of ships and vessels employed or used within the jurisdiction aforesaid, or between others, contracted, done, had or commenced, in upon, or by the sea or public rivers, or ports, creeks harbours and places overflown within the ebbing and flowing of the sea and high water mark, within, about and throughout the said three provinces, countries or districts of Bengal, Bihar and Orissa and ail the said territories or islands adjacent thereunto and dependent thereupon, the cognizance whereof doth belong to the jurisdiction of the Admiralty, as the same is used and exercised in that part of Great Britain called England, together with all and singular their incidents, emergents, and dependencies annexed and connexed causes whatsoever, and to proceed summarily therein, with all possible despatch according to the course of our Admiralty of that part of Great Britain called England without the strict formalities of law considering only the truth of the fact and the equity of the case."

19. It was ultimately settled to be the law in England that previous to the passing of 3 and 4 Vict 65, the Court of Admiralty had no jurisdiction in the case of necessities supplied to a ship, though perhaps it occasionally purported to exercise the jurisdiction where not prohibited: *The Two Ellens* (1872) L. R. P. C. 161 *The Hen-rich Bjorn* (1886) L. R. 11 A. C. 270.

20. The same view has obtained in India [Murray v. Langford (1842) 1 Ful 95 The Asia (1868) 5 Bom. H. C. (O C.) 64 but there is a difference of opinion as to whether the extended powers under 3 and 4 Vict., c. 65 and 24 Vict., c. 10 became vested in Indian High Court by virtue of the several Letters Patent: The Portugal (1870) 6 B L. R. 323 The Asia (1868) 5 Bom. H. C. (O.C.) 64 Bardot v. The Augusta (1873) 10 Bom. H. C. 110.

21. For the purposes of this case I will assume they did not. If this be the true view, then this Court's jurisdiction in relation to necessities rests on the Colonial Courts of Admiralty Act, 1890; which vests in it (among other things) the powers described in Section 5 of 24 Vict., c. 10. That Section provides that the High Court of Admiralty shall have jurisdiction over any claim for necessities supplied to any ship elsewhere than in the port to which the ship Court belongs unless it is shewn to the satisfaction of the Court that at the time of the institution of the cause any owner or part-owner of the ship is domiciled in England or Wales. u/s 35 the jurisdiction conferred by the Act may be exercised either by proceedings rem or by proceedings in personam.

22. By the Colonial Courts of Admiralty Act, 1890, Section 2(3)(a), it is provided that any enactment in an Act of the Imperial Parliament referring to the Admiralty jurisdiction in England, when applied to a Colonial Court of Admiralty in a British possession, shall be read as if the name of that possession were therein substituted for England and Wales. By the Interpretation Act 1889, Section 18(2), it is provided that the expression "British possession" shall mean any part of Her Majesty's dominions exclusive of the United Kingdom, and where parts of such dominions are under both a central and local Legislature, all parts under the central Legislature shall for the purposes of this definition be deemed to be one British possession.

23. British India and Burma thus take the place of England and Wales for the purposes of this case.

24. It is conceded that when the suit in rem against the Clan Macintosh was instituted, the ship was elsewhere than in the port to which the ship belonged.

25. To that extent then the suit was in order.

26. It is, however, contended that the owner was domiciled in Burma, and that the suit was thus beyond the jurisdiction of this Court. But to take away jurisdiction it is not enough that the owner was so domiciled; this domicile had to be shewn to the satisfaction of the Court. Blackburn J. dealing with Section 5 of 24 Vict., Cap. 10 in Ex parte Michael (I) said,--"That seems clearly enough to enact that the Admiralty Court shall have jurisdiction when the necessities are supplied in England just as if they had been supplied abroad; but then it is added, unless it be shewn to the Court that the owner be domiciled in England; but that must be alleged and proved to the satisfaction of the Court before judgment; and it is too late afterwards."

27. In the same case Cockburn C. J. thus described the position: "It is conceded that the County Court had jurisdiction over the subject-matter of the suit and the only ground on which the Court could be called upon to proceed no further is the exception in the Section which gives the jurisdiction, that it be shewn to the satisfaction of the Court, that is, the Court in which the suit is pending, that the defendant is domiciled in England or Wales."

28. When the arrest in this case was made it had not been shewn to the Court that the owner was domiciled in Burma at the time of the institution of the suit; it was, to use the language of Blackburn J., neither alleged nor proved, and so that exception which would have made it imperative on the Court to proceed no further had not been established at that stage.

29. No doubt the plaintiff company contends that by paragraph 1, T. W. F. Bremner's affidavit, the owner's domicile was shewn to the satisfaction of the Court; but the fact is that it was not so shown, and the statement in that paragraph is taken from the agreement and is not an independent allegation of the state of affairs at the institution of the suit. And here I may point out that the rule, which prescribes what the affidavit leading to a warrant of arrest should state, does not require any statement of the owner's (sic). Had the present plaintiff company so desired, it could have made such a statement and have procured the release of the ship at any time. It, however, did nothing of the kind, and counsel for the present plaintiff company has admitted before us, that even in its written statement in that suit it did not specifically allege that its domicile was in Burma.

30. It is true that the suit in rem was dismissed, and the decree contains a recital of the Court's opinion that it had no jurisdiction. But on what materials this result was reached does not appear.

31. Assuming for the purpose of the case that a person aggrieved by the arrest of his ship is entitled to compensation even in the absence of proof of malice or its equivalent, it remains to be seen what would be the nature of his suit: it would be for a seizure under legal process.

32. But if the seizure was lawful, no suit would lie; if unlawful it would be governed by Article 29 of the Limitation Act, and that in the circumstances of the case would be a bar to this suit.

33. It has been argued that the seizure was not under legal process, for that as the suit was dismissed for want of jurisdiction, the order for arrest was coram non judice.

34. But the order for arrest was an usual step in a suit in rem, and at the time when it was made the Court had jurisdiction over the subject-matter and the exception had not been established. Therefore, the order of arrest cannot (in my opinion) be treated as coram non judice or a nullity.

35. It has been further contended that as this was a trespass to goods, Article 36

should be applied; but Article 29 is specific and fits the case, and it is a rule of construction of long application that a general Article does not govern where there is a particular Article which covers the case.

36. Nor do I think can Article 49 be treated as governing this case rather than Article 29. It was the seizure, if wrongful, that was the cause of action and the plaintiff cannot treat the suit as one for trespass apart from the seizure for the purpose of evading Article 29.

37. The conclusion then to which I come is, that this suit as framed is based on malice or its equivalent: that in the absence of proof of malice or its equivalent the suit if treated as one for trespass will not lie in the circumstances of this case: and that if such a suit did lie it would fall under Article 29 and would be barred. I, therefore, would dismiss this appeal with costs.

Stephen J.

38. I agree.