

(1974) 09 CAL CK 0005
In the Calcutta High Court
Case No : Admiralty Suit No. 1 of 1974

Venus Engineering and Co.	Vs	APPELLANT
Owners and Parties Interested In M.T. Stolt Argobay		RESPONDENT

Date of Decision : 25-09-1974

Acts Referred:

Citation : 79 CWN 194

Hon'ble Judges : S.C. Deb, J

Bench : Single Bench

Advocate : Biswarup Gupta and Suhrid Chowdhury, for the Appellant; Ajit Roy Mukherjee and S. Ukil, for the Respondent

Judgement

Deb, J.—This action in rem has been commenced in the Admiralty Jurisdiction of this Court for realisation of claims arising out of repairs done and accessories supplied for such repairs to the vessel m.t. "Stolt Argobay". The demurrer taken in paragraph 10 of the written statement is that the plaint does not disclose any cause of action triable within the Admiralty Jurisdiction of this Court. Hence, on September 11, 1974, the following preliminary issue of law was settled with the consent of the parties in terms of a consent order dated September 2, 1974 :

Issue

(i) Has this Court no jurisdiction to try this suit in its Admiralty Jurisdiction, as alleged in paragraph 10 of the written statement This vessel was not under prior arrest when she was repaired by the plaintiffs and, therefore, Section 4 of the Admiralty Court Act, 1861, does not apply to this action. The question now is whether the pleading is insufficient to bring this action within Section 5 of this Act which reads as follows:

The High Court of Admiralty shall have jurisdiction over any claim for Necessaries supplied to any Ship elsewhere than in the Port to which the Ship belongs, unless it is shown to the Satisfaction of the Court that at the Time of the Institution of the Cause any owners or Part Owner of the Ship is domiciled in England or

Wales: Provided always, that if in any such Cause the plaintiff do not recover Twenty Pounds he shall not be entitled to any Costs, Charges, or Expenses incurred by him therein, unless the Judge shall certify that the Cause was a fit one to be tried in the said Court.

It has been contended by Mr. Biswarup Gupta, the learned Counsel for the plaintiffs, that the repairs are necessities within the meaning of this term used in this section and, therefore, this action is triable in the Admiralty Jurisdiction of this Court. Mr. Ajit Roy Mukherjee, the learned Counsel for the defendants, has, however, argued that the plaint does not show that the repairs are necessities and, therefore, this action must fail. Hence, the statements made in the plaint are set out below for appreciating the contentions of Mr. Roy Mukherjee :

(ii) "Since January 12, 1974, m.t. "Stolt Argobay" (hereinafter referred to as the said Vessel) arrived at Budge Moorings and now staying at the port of Calcutta within the said jurisdiction carrying oil from abroad and after getting the same empty stayed in the Budge Moorings for effecting certain urgent repair works and for supply of divers materials to the said vessel.

(iii) Between the period 13th January and 19th January 1974 during the time when the said vessel was in the Budge Moorings within the said jurisdiction, the plaintiffs on diverse dates did diverse works and supplied diverse materials to the said vessel in effecting repairs thereto pursuant to and/ or upon the request of the said vessel and/or its Master and Chief Engineer.

(iv) The said repairs were duly completed to the satisfaction of the defendants and in fact certificate of completion in writing duly signed by the Chief Engineer of the said vessel dated January 19, 1974 were given to the plaintiffs. The plaintiffs crave leave to refer to the original of the said certificate of completion. The bills relating to the said work certificate as also other bills were all duly accepted and signed by the Chief Engineer of the vessel. Copy of the said certificate of completion is annexed hereto and marked "A".

(v) In respect of the works done and the materials supplied the plaintiffs duly submitted 3 several bills aggregating to Rs. 1,60,215-00 to the defendants and/ or the Chief Engineer and the Master of the said vessel and each and all of the said bills were duly accepted by the defendants. Particulars of the works done and materials supplied will also appear from the said bills. Copies of the said 3 bills are annexed hereto respectively marked "B", "C" and "D"

(vi) In spite of demands the defendants failed and neglected to pay the said sum of Rs. 1,60,215-00 or any portion thereof. The particulars of the said sum will also appear from the said bills.

(vii) That after the completion of the aforesaid repairing jobs of repairing works and supply of spares and other accessories to the said vessel the same is at present lying at Netaji Subhas Dock in the said Port of Calcutta within the said jurisdiction. The said vessel is of D.W.T. 20000 tons. The said vessel is a foreign

vessel (out Port ship) flying the flag of "Liberian" and is not registered in India, which is registered in the Port of Monrovia.

(viii) The suit being an Admiralty Suit, the Hon'ble High Court, Calcutta, has got exclusive jurisdiction to try and determine this suit.

2. I will now briefly state the particulars of repairs and accessories as shown in annexures "B", "C" and "D" to the plaint. The impeller shaft of the Pump was unserviceable and after manufacturing a new shaft out of stainless steel, it was refitted to the Pump; the Main-fridge was leaking and it was repaired; Crankshaft of the Compressor was unserviceable and after remetalling it, it was refitted to the Compressor; the Neoprene Collar of the Compressor was unserviceable and it was replaced by a new one; the Butterworth Pumps were thoroughly repaired; the Compressor of the Pump Engine was defective and the defects were rectified; eight piston rings were manufactured and supplied; many valves, springs, bolts, valve-set discs, v-belts for the Main Compressor, and an ante-magnetic stainless steel shaft were supplied; 80 tubes of the Condensor were badly leaking and were replaced; each and every bearing of the Diesel Generator Engine was replaced; and the Boiler tubes were expanded.

3. In annexure "A" to the plaint it has been recorded by the Chief Engineer of the vessel that the plaintiffs have repaired "the Boiler, Condenser, Pumps and the Refrigeration plant" of the vessel "on an emergency job basis" to his "entire satisfaction" and "most of the spare parts which were not available readily were manufactured by them on record time".

4. It has been contended by Mr. Roy Mukherjee that these particulars should be ignored for construing the pleading as they are not set forth in the plaint, but the particulars being "too voluminous" I am not impressed by his contention, for in the case of Ramprasad Chimanlal v. Hazarimull Lalchand, reported in ILR 58 Cal. 418 at p. 425 of the report, Mr. Justice Lord-Williams says this :

Particulars which are too voluminous to be included in the plaint, may be annexed thereto or may be delivered separately, and those facts should be stated in the plaint.

5. His next contention is that it has not been stated in paragraph 3 of the plaint that the repairs done and the accessories supplied by the plaintiffs were "urgent repair works" for which this vessel was mooring at Budge as stated in paragraph 2 of the plaint, and, therefore, there is no nexus between these two paragraphs. But, the pleading must be read as a whole and the Court should look to its substance and not to its form is the recent Division Bench decision of this Court in the case of Shri Radha Gobinda Jew & ors. v. Sm. Kewdla Debi Jaiswal & ors. reported in AIR 1974 Cal. 285 at p. 287 of the report, and, therefore, it is a complete answer to his contention.

6. Further, in paragraph 2 of the plaint it has been stated that this vessel was moored for urgent repair works at Budge and "is now staying at the Port of

Calcutta". It has been pleaded in paragraph 3 that the plaintiffs have carried out the repairing works at Budge and their particulars are set forth in the annexures. It has also been pleaded in paragraph 7 of the plaint that "after the completion of the aforesaid repairing jobs and supply of spares and other accessories to the said vessel, the same is at present lying at Netaji Subhas Dock in the said Port of Calcutta"

7. These statements made in the plaint, in my opinion, conclusively show that the plaintiffs have carried out those "urgent repair works" and have supplied those "materials" for which this vessel was mooring at Budge and after those repairs were completed by the plaintiffs she came to "Netaji Subhas Dock" at Calcutta. Moreover, in the case of Kidar Lall Seal and Another Vs. Hari Lall Seal, , Mr. Justice Vivian Bose, speaking for the Supreme Court at page 52 of the report, says this:

I would be slow to throw out a claim on a mere technicality of pleading when the substance of the thing is there and no prejudice is caused to the other side, however, clumsily or inartistically the plaint may be worded.

Mr. Roy Mukherjee has asked me only to read paragraphs 2 and 3 of the plaint, but I am unable to do so. The Supreme Court is against him and, that apart, I am bound by my own decision in Shri Radha Gobinda Jew's case (supra) and hence his contention must fail.

8. His last contention on the pleading is that it has nowhere been pleaded in the plaint that those repairs and accessories were necessities and therefore Section 5 of the Admiralty Court Act. 1861 is not attracted. He cited Nash v. Inman, reported in (1908) 2 K.B. 1, but the question involved in it was whether the supplies made to a minor were "necessaries" within the meaning of that expression used in Section 2 of the Sale of Goods Act, 1893 and, therefore, he cannot derive any assistance from this decision.

9. He then cited the "Pacific", reported in 167 E.R. 356. The material man supplied her with the necessities at a British Port. She was thereafter mortgaged and was registered as a British ship. The contest was between the material man and the mortgagee regarding the priority of their claims. And Dr. Lushington, at pp. 358-59, says this :

The material man, by the law of some countries, has a lien upon the ship, and in very early times he could maintain a suit against the ship in the Admiralty Court But the decision of the Privy Council, in the case of The "Neptune" (3 Knapp, 94), given in the year 1835, took away the last vestige of Admiralty jurisdiction in the case of necessities; and from that date till the recent statutes, the material man had no locus standi whatever in the Admiralty Court. His only remedy was in the Common Law Courts; and there, unlike the mortgagee, he could proceed only against the ship-owner, not against the ship. This state of things was altered by the 3 & 4 (246) Vict. c. 65, s. 6, which gave the Court jurisdiction over claims for necessities supplied to a foreign ship; but that

statute not applying to British ships, the 24 Vict. c. 10, s. 5, gave jurisdiction over claims/for necessities supplied to any ship, "subject to two provides that the supply should have been made elsewhere than in the port to which the ship belongs, and that at the date of the institution of the suit the ship owner should not be domiciled in this country. These enactments may seem diverse, but the reason for them is plain and uniform. Against the foreign vessel, a real action is given to the material man in all cases, because the owner is assumed to be beyond the jurisdiction. And it is also denied against a British vessel, in case the necessities have been supplied in the home port, because the presumption is that the supply was made upon the personal credit of the owner, who would there be known and trusted. In short, the remedy against the ship is given only where a personal action against the owner would be fruitless; and not even then, where the supply is to be assumed to have been made on his personal credit. The material man, therefore, by the mere fact of his supplying necessities, in no case obtains the ship as a security until he institutes his suit in this Court; and, in the case of a British ship (like the present), he may never obtain it at all, if by reason of the owner having a domicile in this country, the suit cannot be instituted. This, I think, shews that the material man has not a maritime lien; for a maritime lien accrues from the instant of the circumstances creating it, and not from the date of the intervention of the Court.

10. Dr. Lushington has said nothing on the question of construction of any pleading with which I am at present concerned. Further, at the time of institution of that suit the "Pacific" was no longer a foreign vessel whereas the "Stolt Argobay" is still a foreign ship, and nothing said therein against the material man can apply to the plaintiffs in this action, for in the case of the "Two Aliens", reported in L.R. 3 A & E 345, Sir Robert Phillimore, at p. 356 of the report, did not agree with the reasons upon which the judgment in the "Pacific" was founded in view of the decision of the Privy Council in the case of the "Bold Buccleugh", reported in 7 Moo. P.C. 267. The Privy Council at page 284 of the report says this:

having its origin in this rule of the civil law, a maritime lien is well defined by Lord Tenterden to mean a claim or privilege upon a thing to be carried into effect by legal process; and Mr. Justice Story explains that process to be a proceeding in rem, and adds that wherever a lien or claim is given upon the thing, then the Admiralty enforces it by a proceeding in rem, and, indeed, is the only Court competent to enforce it. A maritime lien is the foundation of a proceeding in rem, a process to make perfect a right inchoate from the moment the lien attaches, and, whilst it must be admitted that where such a lien exists a proceeding in rem may be had, it will be found to be equally true that in all cases where a proceeding in rem is the proper course, there a maritime lien exists which gives a privilege or claim upon the thing to be carried into effect by a legal process. This claim or privilege travels with the thing into whatsoever possession it may come. It is inchoate from the moment the claim or privilege attaches, and, when carried into effect by legal process by a proceeding in rem relates back to the

period when it first attached.

11. It is true that the "Pacific" was not overruled by Sir Robert Philimore but she cannot assist Mr. Roy Mukherjee for the reasons already stated and also in view of the above decision of the Privy Council read with Clause 26 of the Charter of 1774 which conferred exclusive Admiralty jurisdiction on the Supreme Court at Fort William in Bengal for enforcement of maritime lien against a foreign vessel. The next decision cited by him is the case of Jaiswal Shipping Company v. S.S. "Lilabati", reported in 69 C.W.N. 468. She was an Indian ship, and, therefore, that action failed for want of Admiralty jurisdiction of this Court and hence, it has no bearing on the question involved before me.

12. The last case cited by him is the "Rigs", reported in L.R. 3 A & E, 516. It is not a case on repairs and Sir Robert Philimore disallowed some claims though the word "necessaries" was pleaded, for they were not necessaries but allowed the other claim even though this term was not used in relation to those claims as they were necessaries and satisfied the following test laid down by Lord Fenterden, in the case of Webster & anr. v. Soneamp, reported in 23 R.R. 307 :

The general rule is, that the master may bind his owner for necessary repairs done, or supplies provided for the ship. It was contended at the trial that this liability of the owners was confined to what was absolutely necessary. I think that rule too narrow, for it would be extremely difficult to decide, and often impossible, in many cases, what is absolutely necessary. If, however, the jury are to enquire only what is necessary, there is no better rule to ascertain that, than by considering what a prudent man, if present, would do under circumstances in which the agent, in his absence, is called upon to act. I am of opinion, that whatever is fit and proper for the service on which a vessel is engaged, whatever the owner of that vessel, as a prudent man, would have ordered, if present at the time, comes within the meaning of the term "necessary", as applied to those repairs done or things provided for the ship by order of the master, for which the owners are liable. I think, therefore, that the question in this case was properly left to the jury, and that this rule ought to be discharged.

In Webster's case (supra), Mr. Justice Bayley says this:

The Captain of a ship, as agent for the owners, has a general authority to act for them. They ought not to appoint a man upon whose compliance with their orders, and on whose prudence and discretion, they cannot rely. The owners are responsible for anything ordered by him for the ship within the scope of his general authority. Now, I think, it is within the scope of his authority to order such repairs or supplies as it may reasonably be supposed that the owners, if they had an opportunity of deciding for themselves, would have ordered.

And, Mr. Justice Best says this:

No man can say what is absolutely necessary. If the topmasts were lost, a vessel might sail without them, and possibly perform her voyage with safety. A topmast

might, therefore, be said not to be absolutely necessary. Yet no prudent man would proceed to sea without it. If, therefore, that rule is not the proper one, I know no other than that which was left to the jury in this case, viz. what repairs were proper or necessary. The mode of ascertaining that is to ask what a prudent owner himself would do if present.

13. Hence, in my opinion, it is not necessary to use the term "necessaries" in the plaint for the purpose of attracting the Admiralty jurisdiction of this Court under sec. 5 of the Admiralty Court Act, 1861. The facts pleaded in the instant plaint before me read with the particulars set forth in the annexures conclusively show that the repairs done and the materials supplied are *prima facie* necessities, as will be shown within the meaning of that expression used in sec. 5 of the Act and, therefore, I overrule the contention of Mr. Roy Mukherjee.

14. Some repairs were done and a screw Propeller was supplied to the "Flecha", reported in 164 E.R. 252, and it was held that they were necessities within the meaning of that expression used in sec. 6 of the Admiralty Court Act, 1840. A liberal meaning is to be given to the term "necessaries" used in sec. 6 of the Admiralty Court Act, 1840 is the decision in the "Perla", reported in 166 E.R. 1164, where it has also been held that copper-sheatings are necessities within the meaning of that expression used in that section and Mr. Justice Hill, in the case of the "Maggie A", reported in 16 Asp. M. (N.S.) 117, says this:

I am quite satisfied that by sec. 5, under the circumstances of the case, this Court has *prima facie* jurisdiction and there is nothing to displace that *prima facie* jurisdiction. *Prima facie* the court has jurisdiction under sec. 5 in respect of claims for necessities supplied to any ship elsewhere than in the port to which the ship belongs. Repairs are necessities. Repairs are the subject of the present claim. These necessities were supplied elsewhere than at the port to which the ship belongs and, therefore, *prima facie* under sec. 5 of the Admiralty Court Act this Court has jurisdiction. There is a limitation of jurisdiction. The court has jurisdiction in these circumstances unless it is shown to the satisfaction of the court that at the time of the institution of the cause, any owner or part owner of the ship was domiciled in England or Wales. It is proved that the ship belongs to Poole and nobody has thought it worth while to appear to show whether or not an owner was or was not, at the time of the institution of the cause, domiciled in England or Wales. There is therefore, nothing to displace the *prima facie* jurisdiction of the court.

15. It is well settled by these decisions that the term "necessaries" used in section 5 of the Act ought not to be given a restricted meaning and as this expression includes "repairs" the Court of Admiralty has *prima facie* jurisdiction to try an action in rem for repairs u/s 5 of the Admiralty Court Act, 1861 notwithstanding section 4 of the Act.

16. The Supreme Court at Fort William in Bengal was established by the Charter of 1774 and Clause 26 of that Charter conferred the Admiralty jurisdiction "of the

widest amplitudes" on that Court is the decision of our Court of Appeal, in its judgment dated November IV, 1972 in the case of Anil Kumar Samanta v. Sankar Shipping Co. Pvt. Ltd. and ors., being Original Civil Appeal No. 194 of 1964 of this Court. The High Court of Judicature of Fort William in Bengal was established by the Letters Patent of 1862 and with its establishment the Supreme Court at Fort William was abolished but clause 31 of this Charter has vested in this Court all such civil and maritime jurisdiction as was being exercised by the Supreme Court as a Court of Admiralty and this Admiralty jurisdiction of this High Court has been retained by Clause 32 of the Letters Patent of 1865 and also by our constitution.

17. The "Neptune" (supra) took away the Admiralty jurisdiction in the case of necessities and thereafter, the Admiralty Court Act, 1840 was passed to retain this jurisdiction of the Admiralty Court of England. This Act, however, did not apply to this Court and then came the Admiralty Court Act, 1861 and that too did not apply to this Court. Then the British Parliament enacted the Colonial Courts of Admiralty Act, 1890 and after that the Imperial Legislature at Delhi passed the (sic) Courts of Admiralty Act, 1691 by declaring that this Court shall have "original unlimited civil jurisdiction" within the meaning of that expression used in sub-sec. (1) of Sec. 2 of the Colonial Courts of the Admiralty Act, 1890, with the result the Admiralty jurisdiction of this Court became coextensive with the Admiralty jurisdiction of High Court in England "whether existing by virtue of any statutes or otherwise" in terms of clause (2) of Sec. 2 of Colonial Courts of Admiralty Act, 1890 and, thus, this Court regained the Admiralty jurisdiction in case of necessities in terms of sec. 5 of the Admiralty Court Act, 1861. And it has been held by this Court in its judgment dated May 17, 1974 in the case of The Commissioners for the Port of Calcutta v. Alliens Jute Mill Co. Ltd., being suit No. 430 of 1966, (since reported 79 C.W.N. p. 188) that this Court exercises exclusive Admiralty jurisdiction in all maritime actions in rem and in personam so far as this state is concerned.

18. Mr. Justice Best has said that "no prudent owner would proceed to sea without the topmost of his vessel and I say that no prudent owner would ever sail with his motor tanker without repairing her boilers, condensers, pumps and the refrigeration plant. The "Stolt Argobay" is a motor tanker and is a foreign vessel. Her owners are all foreigners and domiciled in foreign countries. The plaintiffs have repaired the boilers, condenser, pumps and the refrigeration plant of this vessel and have supplied spares and accessories in connection with these repairing works as stated in the plaint read with the particulars set out in its annexures. These repairs done and the accessories supplied are prima facie necessities within the meaning of that expression used in section 5 of the Admiralty Court Act, 1861 and, therefore, this Court, notwithstanding section, 4 of this Act, has prima facie Admiralty jurisdiction to entertain this action in rem and nothing has been shown by Mr. Roy Mukherjee to displace the prima facie Admiralty jurisdiction of this Court. Hence my answer to this issue is in the negative. The plaintiffs have succeeded on this preliminary issue and therefore in

terms of the consent order dated September 2, 1974, I pass this preliminary decree by appointing Mr. Bhaskar Sen. Barrister-at-law, as the Special Referee on a remuneration of 7 G. Ms. per sitting, irrespective of the 5 hours rule of this Court, to enquire and to file his report within January 5, 1975 in Court as to the amount payable by the defendants to the plaintiffs on the basis of the repairing works done and the materials supplied by the plaintiffs to the defendants. The Special Referee and all parties shall act on a signed copy of the minutes and the parties will be at liberty to file in the Reference all documents exhibited in Court. Leave is given to the Special Referee to appoint a clerk on a salary of Rs. 100/- per month. The remuneration of the Special Referee and the salary of his clerk shall be paid by the plaintiffs at the first instance. The cost of Reference is reserved but the plaintiffs shall get the costs of this suit unto this date from the defendants. Certified for two counsel. Prayer for stay of operation of this decree is refused.