

Freeman Vs. Ss. Calanda and Capt. Yanovsky

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Court : Mumbai

Decided On : May-22-1922

Reported in : (1922)24BOMLR1167; 76Ind.Cas.433

Judge : Marten, J.

Appeal No. : Admiralty and Vice-Admiralty Jurisdiction Suit No. 1 of 1922

Appellant : Freeman

Respondent : Ss. Calanda and Capt. Yanovsky

Disposition : Suit dismissed

Judgement :

Marten, J.

1. This is a notice of motion by Captain Yanovsky the caveator asking for an order that the decree made in Suit No. 1 of 1922 by my brother Crump on April 25, 1922, may be set aside, and that the sale made in pursuance of the said decree be also set aside. The notice of motion states that I have granted an interim injunction against completion of the sale until further order of the Court. That statement is admittedly 'incorrect and should be struck out. All I did was to give leave to serve short notice of motion for last Saturday.

2. The suit itself is a curious one. The application is also a curious one : and it bristles with legal points-points which are of interest from an historical aspect and also on the question of our Admiralty Jurisdiction in this Court. It also carries with it points of interest to all of us in this High Court of Bombay, viz, that the various matters arising in the exercise of the Court's extensive jurisdiction should be carried out in a way which is befitting a High Court and which cannot be commented on adversely either by any other High Courts or by our important business community either in Bombay or England. It is partly for the reason that I am very jealous of the reputation of the Bombay High Court in this respect that I directed the Court to be kept open on Saturday last, a day which is normally a closed day during the vacation, and that I have sat specially today to hear the application, which is stated to be of great urgency and of great importance to the parties before me.

3. To understand the position, I must recapitulate shortly what I stated on the application to expedite the trial of the other suit, No. 2 of 1922. This ship the Calanda was formerly the Russian Volunteer ship Omsk. When she was under the Russian flag, the present caveator, Captain Yanovsky, was the Captain of the ship, and the present Chief Engineer and I think the Third Engineer were also officers on that ship. At that time they earned, so they say, certain sums for commission on freight and so on. The ship was subsequently purchased by a London Shipping Company and transferred to the British registry. I have not seen the ship's certificate, but that is admitted on all sides.

4. In April 1921, there was a statutory ship's mortgage in favour of a London firm of the name of D.L. Flack & Son, who are represented by Messrs. Payne & Co., solicitors in this suit. The ship sailed from Cardiff and Newport in January of this year bound for Porebunder with coal. Its orders were to proceed from there to Australia in ballast and thence home with a cargo of grain. Before the ship sailed the manager of the present British owners gave Captain Yanovsky a letter acknowledging that the English Company took over the liability for the commission, freight and so on which I have mentioned. They have already paid him 500 as part of the commission and there was an undertaking to pay the balance. But the letter concluded with an undertaking by the Captain not to take

any action against the ship, and the letter also provided that the sum in question was to be paid on the return of the ship to the United Kingdom. Similar letters, I think on an earlier date, were given to the Chief Engineer and the Third Engineer. It is on these letters that Captain Yauovsky and the Engineers are suing in the second suit, No. 2 of 1922. They say in that suit that the undertaking at the foot of each letter is inoperative, because the ship has been arrested in Bombay by a third party. In that suit I have expedited the trial and it has been fixed for some day early in June.

5. Now to continue the voyage of the ship, she got as far as Porebunder and there the mortgagees of the ship took possession. I am told they had taken constructive possession in London and they took actual possession in Porebunder, where the English Captain of the ship received a cable from the owners in effect telling him to take proceedings for payment of his wages. I should have explained that when the ship became a British ship, a British Captain was employed as Captain, viz., Captain Freeman, but the former Russian Captain, the caveator, was kept on as the ship's Supercargo.

6. Accordingly the ship under the direction, I gather, of the mortgagees was taken possession of, and having regard to the cable from the owners proceeded to Bombay where these two suits were filed, No. (1) by Captain Freeman on behalf of himself as master and all other the officers and crew of the ship, and No. (2) by the Russian Captain and the Chief and Third Engineers.

7. In this first suit Captain Yauovsky was himself one of the plaintiffs, and his name is entered in the particulars to the plaint as one of the ship's officers to whom wages were due.

8. There was at once a warrant of arrest in Suit No. 1 issued for the arrest of the ship, and it was served in the usual manner by nailing it to the main mast of the ship. Then no appearance having been entered for the ship, the matter came on before Mr. Justice Crump on April 25, 1922, under Rule 14 which provides that-

After the expiration of twelve days from the filing of a Warrant, if no appearance shall have been entered in the suit, the attorney for the plaintiff may cause the suit

to be set down for hearing.

9. Then under Rule 15:

If when the suit comes before the Court, the Judge is satisfied that the plaintiff's claim is well founded, he may pronounce for the claim and may order the property to be sold with or without previous notice and the proceeds paid into the Registry or may make such order in the premises as he shall think Just.

10. When the matter came accordingly before Mr. Justice Crump on April 25, he then passed a decree in favour of the plaintiff to recover a sum of Rs. 86, 696 on behalf of himself as master and other officers and crew of the ship, and also for a farther claim for further wages up to the approximate dates of their repatriation, and then the learned Judge condemned the ship in the amounts claimed without prejudice to other claims against the ship. The decree further ordered:-

That on non-payment of the aforesaid amounts within two days from the date hereof, the said SS. Calanda, her papers, tackle, machinery, apparel and furniture be sold by the Sheriff of Bombay by and under the directions of this Court and the sale proceeds be applied in the first instance in payment of the said claims and costs of the suit without prejudice as aforesaid.

11. Now the caveator had previously entered a caveat against the release of the ship. He had done that under our Admiralty Rule 27. He appeared by counsel before Mr. Justice Crump at the hearing of the suit, but Mr. Justice Crump considered that he had no locus standi, so I am told by his present counsel. Be that as it may, no appeal was filed against that decree, nor was any application made by the caveator to the Court touching the sale of the ship or as to fixing any reserve price or anything of the sort. On the contrary, it would appear that the Captain and his solicitor were fully aware of the sale, and actually attended it. The sale took place in fact on May 18, when the ship was sold for Rs. 52,000. It was not till Friday evening May 19th that an application was made to the Court to interfere in any way with the decree of April 25th or with the sale.

12. As regards the sale it was carried out by the Sheriff under Rule 86 which provides that.-

Every sale under the decree of the Court shall, unless the Judge shall otherwise order, be made by the Sheriff in like manner as a sale of moveable property in execution of a decree in an ordinary civil suit.

13. What has given me anxiety in the present case is that undoubtedly, as far as I can tell, the ship has been sold at a serious undervalue. The mortgage alone on the ship last year was, I think, for 34, 000, and she has now been sold for approximately 8, 500, i.e., nearly one-tenth of the sum. Seeing that her gross registered tonnage is about 7200 and nett tonnage about 4800, even if one puts her value as low as 5 a ton, that would amount on the nett registered tonnage to about 24,000. Prima facie, therefore, it would appear that the ship should have fetched a great deal more than she has in fact fetched. Really the price realized is approximately one which shipbuilders are asking in Bombay for up-to-date motor launches, and it is really not very much more than an expensive motor car. That is the one point of substance here on the facts, although curiously enough there is no expert evidence as to the real value of the ship.

14. Now as to the numerous points of law, I must start by picking out the one about the non-service of the writ. It is alleged by the caveator that this decree ought to be set aside on the ground that the writ in the suit has never been served on the ship, and that consequently the whole decree and the subsequent sale are void.

15. The answer made to this is that we are dealing here with a special jurisdiction, viz., the Admiralty Jurisdiction, and with special Rules set out on pages 319 to 325 of our Bombay High Court Rules: and that those rules in effect follow the old English Admiralty procedure under which you had a warrant of arrest and not a writ. It is said that the writ is an innovation so far as the English Admiralty Court is concerned, and was only introduced by the Judicature Acts 1873-1875 and that we in Bombay have kept to the old practice which existed before the English Judicature Acts. It is further argued that there is still less reason for us to change our practice seeing that even now in our ordinary civil jurisdiction we do not begin

suits by a writ, we begin by a plaint just as they used to in the old days and it is only after the plaint has been issued that we have a writ. Consequently our present procedure is an ordinary procedure. It is totally unlike that which now prevails in England.

16. This argument has led to what is always of interest to me, viz., the investigation of the history of Bombay and of this High Court in particular. I regret that in a week end during the vacation when the Library is shut, I have been unable to make the enquiries which I should like to have done, and the case is too urgent for me to do so now. But it is to my mind perfectly clear that what Mr. Campbell has stated as to the old practice of the English Admiralty Court is undoubtedly the fact. It is perfectly clear that the old English Admiralty practice was that in general you commenced your proceedings by a warrant of arrest and not by writ.

17. In *The Nautik* [1895] P. 121 Mr. Justice Bruce had to consider the *Converse* case after the date of the Judicature Act. There a writ had been served but no warrant of arrest, and the question arose whether the Court could proceed to a decree without there being a warrant of arrest. The Court held that it had jurisdiction. The learned Judge there said at page 124:-

The question arises whether, the property not having been under the arrest of the Court, the Court has jurisdiction to pronounce judgment by default. I am of opinion that it has. Service of a writ in rem, upon property within the jurisdiction of the Court, is notice to all persons interested in the property of the claim indorsed upon the writ. It is quite true that, according to the older practice, a suit in rem was commonly commenced by a warrant arresting the property, just as, in still earlier practice, a suit in personam was commonly commenced by a warrant arresting the person. But all that is necessary to found jurisdiction is to give formal notice to the persons interested that a claim is made against them or against their property in a Court of competent jurisdiction, and that, if they do not appear to vindicate their rights, judgment may be given in their absence.

The Rules of the Supreme Court directed that actions in rem should be commenced by writ, and I think the service of the writ on the property has the

same effect, so far as notice to the persons interested in the property is concerned, as service of a warrant had under the former practice. To confer jurisdiction it is not, I think, necessary that the property, the subject-matter of a suit, should be actually in the possession of the Court or under the arrest of the Court; it is enough that it should, according to the words of Lord Chelmsford, in the case of *Castrique, v. Imrie* (1869) L.R. 4 H.L. 414 'be within the lawful control of the State under the authority of which the Court sits.'

18. A similar note about the practice will be found in Halsbury's Laws of England, Vol. I, at page 60, the article of which is in fact written by the same learned Judge Mr. Justice Bruce.

19. Then if one turns to the modern English Rules of the Supreme Court, Order I, Rule 1, says :

All actions which, previously to the commencement of the Principal Act (the Judicature Act) were commenced by writ in the superior Courts of Common Law at Westminster, or in the Court of Common Pleas at Lancaster, or in the Court of Pleas at Durham, and all suits which, previously to the commencement of the Principal Act, were commenced by bill or information in the High Court of Chancery, or by a cause in rem or in personam in the High Court of Admiralty, or by citation or otherwise in the Court of Probate, shall be instituted in the High Court of Justice by a proceeding to be called an action.

20. Then in Order II, Rule 1 it is provided that 'Every action in the High Court shall be commenced by a writ of summons.'

21. Now turning for a moment to our own Admiralty Rules, Rule 3 provides that.-

A suit shall be commenced by a plaint drawn up, subscribed and verified according to the provisions of the Code of Civil Procedure.

22. I am reading the rules which were approved by Her late Majesty in Council on January 29, 1894. Rule 4 :

If the is in rem, the Attorney may, on the plaint being filed, on filing a proceipe and an affidavit, take out a warrant for the arrest of the property proceeded against.

23. There is not a word there as to the necessity of issuing a writ of summons. Then, as I have already pointed out, Rules 14 and 15 provide for the suit being set down for hearing and also for judgment being given after the expiration of twelve days from the filing of the warrant.

24. If, however, one turns to Rules 10, 11 and 12, there undoubtedly one will find a reference not only to a warrant but also to a writ. It is called a writ in; a summons in Rule 11; a writ of summons in Rule 1 Rule 102 ; and a writ or warrant in Rule 13.

25. Particular stress is laid by the caveator on Rule 10 which provides that.-

In suits in rem no service of writ or warrant shall be required when the attorney of the defendant agrees to accept service and to give security or to pay money into Court.

26. It is said that is the only case where you can dispense with service of the writ.

27. Then if I may refer for one moment to the Code of Civil Procedure, if that has any particular bearing on the point, it provides in Order V, Rule 1, that-

When a suit hag been duly instituted a summons may be issued to the defendant to appear and answer the claim on a day to be therein specified.

28. There, it will be seen that the word is 'may' and not 'must.'

29. Further, under earlier sections of the Code, Section 4 provides that-

In the absence of any specific provision to the contrary, nothing in thin Code shall be deemed to limit or otherwise affect any special or local law now in force or any special jurisdiction.

30. Then under Section 122 the High Courts have power to vary the rules in the First Schedule. Section 128 enables special rules to be made on various matters

including (Sub-rule (j)):

All forms, registers, books, entries and accounts which may be necessary, or desirable for the transaction of the business of Civil Courts.

31. Section 129 enables the High Courts to make such 'rules not inconsistent with the Letters Patent establishing it to regulate its own procedure in the exercise of its original civil jurisdiction as it shall think fit, and nothing herein contained shall affect the validity of any such rules in force at the commencement of this Code'.

32. It seems to me that the Admiralty Jurisdiction that we possess in Bombay is a special jurisdiction. Obviously in inland High Courts in India, such as Allahabad or the Punjab, they have no such jurisdiction. Still less is it possessed by the mofussil Courts in our Presidency. This jurisdiction is conferred on us because Bombay is one of the great sea-ports of India.

33. When I come to see how our jurisdiction arises, I find myself taken back to the Supreme Court Charter of 1823. I have not had the time to go through all the numerous Acts, but I had a somewhat similar point to consider in another case about the exercise of our equitable jurisdiction, and there I came to the conclusion that I had to decide a certain case in accordance with the equitable jurisdiction still remaining in this Court under the Supreme Court Charter, and that this was the conjoint effect of Section 130 of the Government of India Act 1915; Sections 8, 9 and 11 of the Indian High Courts Act 1861; Section 18 of the Original Letters Patent of 1862; Section 19 of the Amended Letters Patent of 1865; and certain other clauses of the Supreme Court Charter 1823 *Advocate General of Bombay v. Yusufalli* (1921) 24 Bom. L.R. 1060. This is rather a cumbrous mode of ascertaining jurisdiction, but it appeared in that case to be the effect of legislation by reference extending over nearly a century.

34. Turning next to the Supreme Court Charter of 1823, one finds from the preamble that in 1753 or earlier⁽²⁾ the Mayor's Court of Bombay was established ; and that in 1797 there was a Recorder's Court which was given full power, amongst other things, 'to exercise Admiralty Jurisdiction.' Then under the Act of 1823 or 1824 a Supreme Court at Bombay was established with full power to

exercise, inter alia, Admiralty Jurisdiction, and then comes the Letters Patent under that Charter.

35. It would rather seem from these Letters Patent that the home authorities wished to be very careful to point out the proper procedure for this new Court. They set out the general jurisdiction of the Court under Clause 23 of the Charter. I should say that the clauses are not numbered in the original Charter, but I have numbered them beginning from the operative part and leaving out the preamble. Clause 26 provided that proceedings should be commenced by a 'plaint or bill in writing,'...' whereupon the...Court shall...issue a summons, or precept in nature of a summons, in writing, to be prepared in manner above mentioned, directed to the said Sheriff, and containing a short notice of the cause of action set forth in the said plaint, and commanding the said Sheriff to summon the person against whom the said plaint shall have been filed, to appear &c.;

36. Then Clause 31 gave power to the Court to order the Sheriff to arrest parties in suits above Rs. 150. I gather this was forthwith after the plaint, and if so it carries out what Mr. Justice Bruce said in the case I have already cited.

37. Then Clause 48 provided: 'That the said Supreme Court of Judicature at Bombay shall be a Court of Admiralty, in and for the said 'Town and Island of Bombay, and the limits thereof ' and it gives the Court full power and authority to hear and determine all causes and so on, the cognizance whereof doth belong to the jurisdiction of Admiralty, and to 'proceed summarily therein, with all possible dispatch, according to the 'Course of our Admiralty of...England, without the strict formalities of law, considering only the truth of the fact and the equity of the case '.

38. Then under Clause 49 there was also power 'to arrest or cause or command to be arrested, according to the civil law, and the ancient customs of our High Court of Admiralty...of...England, all ships, persons, things, goods, wares, and merchandizes, for the premises, and every of them, and for other causes whatsoever concerning the same wheresoever they shall be met with or found, in or throughout the said districts and jurisdictions aforesaid ; and to compel all manner of persons in that behalf, as the case shall require, to appear' &c.;, and 'to compel witnesses, ... to give evidence...and to proceed in such cause or causes,

according to the civil and maritime laws and customs, as well at the instance of promotion of parties as of office, mere or mixed, as the case may require ; and to promulge and interpose all manner of sentences and decrees, and to put the same in execution, according to the Course and order of the Admiralty, as the same is now used in...England '.

39. We know that in the year 1861 or thereabouts the Supreme Court and the East Indian Company's Courts were amalgamated and became our present High Court. And then began the Indian High Courts Acts and the Charters which I have referred to. They will be found to continue in effect our Admiralty Jurisdiction, and there are clauses, I think, keeping alive our previous jurisdiction under the Supreme Court's Charter at any rate in certain particulars. I may refer in particular to Sections 106 and 130 of the Government of India Act 1915, and to Clauses 32 and 33 of the Amended Letters Patent of 1865.

40. Accordingly, I have been referred to some old Admiralty Rules of this Court of 1867, some of which are very much to the same effect as what we now have, viz., Rule 3: 'Suit shall be commenced by a plaint ' : Rule 4 about taking out a warrant for the arrest : and then there are provisions in Rules 12, 13 and 14 for the sale and so on.

41. Many years later came the Colonial Courts of Admiralty Act 1890. Our present rules were approved by the Privy Council in 1894.

42. I think, therefore, that it is quite natural to find that our Courts should maintain the old Admiralty procedure and should not think it necessary to provide that in all Admiralty cases a writ should be issued in addition to a warrant for arrest. There was no reason for making that change here, because, as I have already pointed out, suits even now do not begin here by writ but by plaint. Therefore a warrant for arrest was notice to all the world- and certainly notice to the ship's agents. It is perhaps as good a notice as you can effect for the agents or owners find the ship seized by the Sheriff. Further the warrant for arrest provides for a citation calling upon all parties interested to appear before the Court and prosecute their claims. So, apart from the one being called a writ and the other being called a warrant, what is actually effected is in every way as good as any writ.

43. Under these circumstances, I think, that we are not bound by the provisions of the Civil Procedure Code in this case. We are governed merely by our own Rules dealing with our own special Admiralty Jurisdiction. In my judgment it is not essential under our Admiralty Rules to issue a writ of summons, in addition to issuing a warrant for arrest, Rules 3, 4, 14 and 15 do not say so. And the explanation of the reference to a writ in Rules 10 to 14 is, I think, that they have been taken bodily from the present English Rules Order IX, Rules 10' 12, 13 and 14, and that the draftsman has been careless in repeating the reference to writs, A similar mistake has been made in Rule 127 dealing with Third Party Procedure in ordinary suits, where the English High Court Rules have been copied including a reference to a Statement of Claim which does not exist in Bombay, and on the supposition that an action is commenced by writ which is not the fact here. As regards our Admiralty Rules, the Bombay draftsman has added some new English rules to our old 1857 rules, and has omitted to make the former entirely consistent with the old rules which are the (sic) found in English Admiralty Practice (see Halsbury's Laws of England, Vol. I, p. 123, para 268). Nor has he thought it advisable to grant any delay in payment of the purchase money. The conditions at the auction were that any purchaser had to pay down cash at once. But although from a business point of view the result may be regrettable, and although it may afford grounds for consideration by the Rule Authorities as to whether these rules should not be altered in this respect I cannot say that there is any irregularity of such a character that I ought to set aside this sale.

44. On the contrary, one knows that under our ordinary provisions (I am referring for a moment to the Code) where moveable property is sold by the Court by public auction, Order XXI, Rule 77, says:-

On payment of the purchase money, the officer or other person holding the sale shall grant a receipt for the same, and the sale shall become absolute.

45. Then Rule 78 says:

No irregularity in publishing or conducting the sale of moveable property shall vitiate the sale; but any person sustaining any injury by reason of such irregularity at the hand of any other person may institute a suit against him for compensation

or (if such other person is the purchaser) for the recovery of the specific property and for compensation in default of such recovery.

46. It is also clear from the cases set out in Mulla's Civil Procedure Code, 7th Edition, at page 181, that, speaking generally, the Court does not interfere with a sale under a decree of the Court. For instance, if a sale has been made under an original decree of the Court, it will still hold good and will not be set aside notwithstanding that the decree may subsequently be reversed on appeal.

47. Mr. Wadia also cited to me out of the English and Colonial Digest a case of *The Tremont* (1841) 1 W. Rob. 163 which stated that a decree of the Court affecting the sale of a ship was valid irrespective of an entry in the registry.

48. It did occur to me whether I ought to set aside this sale under Section 151 of the Civil Procedure Code which enables the Court in the exercise of its inherent jurisdiction to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. I say this because I cannot overlook the fact that in the practice which I am more familiar with, viz , sales of real estate by the Court, the practice is for the Court to fix a reserve price and also to approve the conditions of sale. Further, the sale is not absolute until it has been confirmed by the Court. That is cur practice in Bombay as also in the Chancery Division in England.

49. But I have got to take the Bombay Admiralty Rules as I find them, and Rule 36, which I have mentioned, is not a new and untried rule. It is in almost exactly similar terms to Rule 39 of the old rules of 1867.

50. Under the above circumstances I am not prepared to exercise any jurisdiction I may have to set aside this sale on the ground of any irregularity, or on the ground of the sale being at an undervalue. Even if I was disposed to exercise this discretionary jurisdiction, I should only do it if I had some security, if not for the payment of the purchase money corresponding to what has been paid by the purchaser, at any rate for some substantial amount towards costs and the demurrage of the ship. But, as I have already pointed out, I am absolutely without any financial help from anybody whatever in this Court in that respect, should such

an order be made.

51. Then as regards the point about the caveat and that the Sheriff had no right to abandon possession of the ship without the caveat being discharged, I am of opinion that the caveator is not entitled to raise that point. He was in fact present before the Court: he was actually one of the plaintiffs who obtained this decree: and I do not think it is open to him now to contend that this decree of the Court which purported at any rate to be a decree free from incumbrances was in effect subject to the claim which he has put forward.

52. In the result, therefore, the motion will be dismissed with costs.

(1) Advocate General of Bombay v. Yusufalli (1921) 24 Bom. L.R. 1060.

(2) Judge's Note.-The Charter Says 1753, but the Prothonotary (Mr. Malabari) has been good enough to show me from the High Court records an old Volume of 1727-8 containing a record of proceedings in 1727, and stating that the Mayor's Court was established by virtue of a Charter granted by King George the first.-A.B.M.

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