

In the instant application not only is the judgment from which the applicant seeks to appeal to the Privy Council not a final judgment but the subject of the dispute is also not of the value prescribed in the rule. The matter in dispute was the claim to be added as a party to the action. That claim has no monetary value. Nor did the appeal involve directly or indirectly a claim or question to or respecting property or some civil right amounting to five thousand rupees or upwards. Rule 1 (b) provides an appeal from other judgments than final judgments, whether they be final or interlocutory, where the grant of leave is at the discretion of the Court, if in the opinion of the Court the question involved in the appeal is one which, by reason of its great general or public importance or otherwise, ought to be submitted to His Majesty in Council for decision. The petitioner does not seek to come under the rule 1 (b) and it is not necessary to consider that limb of rule 1. The application is therefore refused with costs.

We were referred by learned counsel on both sides to several decisions both of this Court and of Courts elsewhere. But it is not necessary for the purpose of this application to refer to them specifically as those decisions rest on the special circumstances of each case.

HERAT, J.—I agree.

ABEYESUNDERE, J.—I agree.

*Application refused.*

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[IN THE COLONIAL COURT OF ADMIRALTY OF CEYLON]

1961

*Present : H. N. G. Fernando, J.*

CARGO AND TANKSHIP MANAGEMENT CORPORATION  
(Broad Street, New York, U.S.A.) and another *v.* THE SHIP  
"VALIANT ENTERPRISE" (presently lying in the Port of Colombo)

APPLICATION No. 13 OF 1960

*Action in rem on a Mortgage*

*Admiralty—Jurisdiction in admiralty of Supreme Court of Ceylon—Mortgage of a foreign ship—Jurisdiction to entertain claim in respect of such mortgage—Admiralty Court Acts (English) of 1840, ss. 3, 4, and of 1861, s. 11—Administration of Justice Act, 1956 (English), s. 1 (1) (c).*

The jurisdiction in admiralty of the Supreme Court of Ceylon is limited to that enjoyed by the English High Court of Admiralty immediately prior to the enactment of the Colonial Court of Admiralty Act, 1890.

The English High Court of Admiralty did not, prior to 1890, have jurisdiction to entertain "claims and causes of action of any person" in respect of a foreign ship, except when the "ship or vessel shall be under arrest by process issuing from the said High Court of Admiralty, or the proceeds of any ship or vessel having been so arrested shall have been brought into and be in the registry of the said court".

**ACTION** *in rem* upon the mortgage of a foreign ship.

H. W. Jayewardene, Q.C., with N. Nadarasa, K. Kandasamy, C. P. Fernando and D. S. Wijewardene, for the plaintiffs.

G. G. Ponnambalam, Q.C., with C. Ranganathan, V. K. Palasuntheram and R. L. Jayasuriya, for Messrs. Gill Amin Steamship Co. Ltd. and Papain Products Ltd., defendants.

S. J. Kadirgamar, with K. Viknarajah, R. Ilayperuma and Sinha Basnayake, for Capt. Metzger, defendant.

*Cur. adv. vult.*

July 3, 1961. H. N. G. FERNANDO, J.—

Warrant for arrest of the s.s. "Valiant Enterprise" of United States Registry issued from this court on 23rd September, 1960, in an action *in rem* instituted by the Government of the United States for the recovery of expenses incurred in the repatriation of the crew of the ship from Colombo to the United States. That action, No. 12 of 1960, was dismissed by my order of 30th June, 1961, for reasons which have been stated in a judgment delivered today<sup>1</sup>. In the present action intituled an "Action *in rem* upon a Mortgage" instituted on 3rd October, 1960, the Plaintiffs averred *inter alia* that the ship is subject to a mortgage duly executed and registered in the United States, that the mortgage has been duly assigned to the Plaintiffs, that the owners of the ship have failed to make payment of moneys due under the mortgage and have abandoned the ship at the port of Colombo, and that the ship was at the time of the institution of this action under arrest in Action No. 12. I considered it unnecessary to call upon the Plaintiffs for proof of these averments, for even if they are proved, this court does not in my opinion have jurisdiction to grant the relief prayed for by the Plaintiffs, the relief substantially claimed being set out in the petition as follows:—

- " (1) Judgment for the principal sum of Rs. 752,336.72 together with interest and expenses ;
- (2) For exclusive possession of the said ship against all others, to have full control over it, to operate it, to sell, transfer or otherwise deal with it, in any manner at any time and at any place solely in their discretion ;
- (3) In the alternative the plaintiffs claim an order of Court to have the said ship sold through Court and the proceeds applied in reduction of their claim, the plaintiffs having the right to bid and being entitled to credit at such sale up to the amount of their claim ;
- (4) If the said ship be sold in any other action pending before this Court then the plaintiffs claim the right to bid at such sale and for credit as abovestated and in the alternative the claim of the plaintiffs is against the proceeds of the said sale, if any ;

<sup>1</sup> (1961) 63 N. L. R. 337.

- (5) For such other and further relief as the nature of the case may require."

The action was dismissed by my order of 3rd July, 1961, and I now state in this judgment my reasons for that order. They are, briefly:—

- (1) In view of the decision of the Judicial Committee of the Privy Council in *The Yuri Maru*<sup>1</sup> which is referred to more fully in my judgment in Action No. 12, the jurisdiction in admiralty of this court is limited to that enjoyed by the High Court of Admiralty immediately prior to the enactment of the Colonial Court of Admiralty Act, 1890.
- (2) The High Court of Admiralty did not at that time have jurisdiction to entertain "claims and causes of action of any person" in respect of any mortgage of a foreign ship, except when the "ship or vessel shall be under arrest by process issuing from the said High Court of Admiralty, or the proceeds of any ship or vessel having been so arrested shall have been brought into and be in the registry of the said court".

In regard to the first of these grounds, I am unable to accede to the argument of counsel for the Plaintiffs that, since under the Admiralty Court Act of 1840 this court did have jurisdiction over claims in respect of a mortgage subject to the condition that the ship must be already under arrest, and since the limitation imposed in that condition is not now operative because of the change in the English law (section 1 (1) (c) of the Administration of Justice Act, 1956), this court now has jurisdiction over the subject matter of mortgages of ships generally. On the contrary I think it is correctly stated in *Roscoe's 'Admiralty Practice' 5th Ed., p. 51* that but for the enactment of section 3 of the Act of 1840, the High Court would have no jurisdiction whatever in respect of the mortgage of a foreign ship. I would hold that it is that same limited jurisdiction which this court still enjoys.

In regard to the second of these grounds, counsel has urged me to hold that since the Plaintiffs have made two claims, one of which is that in terms of the mortgage bond they are entitled to take possession of the ship in the circumstances which in fact have occurred, they are entitled to maintain in this court an action for possession, which under the general maritime law the High Court had jurisdiction to entertain even before the Act of 1840. Counsel referred in this connection to section 4 of the 1840 Act:—

"The said court of admiralty shall have jurisdiction to decide all questions as to title to or ownership of any ship or vessel, or the proceeds thereof remaining in the registry, arising in any cause of possession, salvage, damage, wages or bottomry, which shall be instituted in the said court after the passing of this Act."

<sup>1</sup> (1927) A.C. 906.

I agree that this section 4 did not confer a new jurisdiction, but only a new power to decide questions of title to ships in actions *inter alia* of possession, and that there was pre-existing jurisdiction over claims of possession. But with regard to the argument that a claim of a mortgagee to be placed in possession of a ship, of which he had not previously been in possession, fell within the scope of this pre-existing jurisdiction, it would be more convenient to state my opinion after reference to the English decisions upon which counsel has relied.

In the earliest case, *The Fruit Preserver*<sup>1</sup>, the plaintiff held a bill of sale or conditional transfer of a ship, as security for a debt. The debt being unpaid and the ship being about to sail, the plaintiff moved for warrant of arrest to transfer possession of the ship to himself. This was refused, apparently on two grounds, firstly that a question of adverse title was involved, and secondly that where possession remained with the mortgagor, a mortgagee is not treated as owner except for security. Despite indications to that effect in the brief judgment, I doubt whether there was intention to decide that the plaintiff's action would have succeeded but for the practice that questions of title would not be investigated. It seems to me that the plaintiff was asserting title by virtue of the bill of sale and that even section 4 of the Act of 1840 would not have conferred jurisdiction to entertain the particular action.

The decisions in *The Fertitude*<sup>2</sup> and in *The Fanchon*<sup>3</sup> indicate that where the security is impaired, the court may exercise the jurisdiction in favour of a mortgagee not previously in possession, but particularly in regard to the last mentioned decision I should observe that it was pronounced after the enactment of section 11 of the Admiralty Court Act of 1861 which clearly gave the High Court full jurisdiction over mortgages registered under the Merchant Shipping Act. The *ratio decidendi* would not therefore seem to apply when possession is sought of a foreign ship; but even in cases concerning ships subject to a mortgage registered under the Merchant Shipping Act (*The Blanche*<sup>4</sup>), it appears that a mortgagee not in possession would not be given possession by the court except in special circumstances.

The special provisions relating to mortgages which are contained in section 3 of the 1840 Act and section 11 of the 1861 Act purport to set down comprehensively the jurisdiction then exercisable by the High Court over claims by mortgagees of ships; and I do not agree that the reference in section 4 of the Act of 1840 to a suit of possession includes within its scope the claim of a mortgagee, as such, for possession. It seems

<sup>1</sup> (1828) 166 E.R. 210.

<sup>2</sup> 166 E.R. 736.

<sup>3</sup> 4 Asp. Mar. Cas. 272.

<sup>4</sup> (1887) 6 Asp. Mar. Cas. 272.

to me that the "cause of possession" contemplated in section 4 is of the same nature as the possessory action in respect of land known to our courts under the Roman Dutch law, namely that it is a suit in which a person who has had possession can be restored to possession *if wrongly dispossessed*. Even if a mortgagee so wrongly dispossessed had in a court of admiralty the right of action referred to in section 4; the action before me is not one such, for here the owner had under the bond the right to possess and what is now claimed by the Plaintiffs is a right to take possession from the owner by virtue of the bond. That claim seems to me to be purely a claim in respect of a mortgage, which in the case of a foreign mortgage the High Court of Admiralty would have had no jurisdiction to entertain prior to 1890, except in the special circumstances mentioned in section 4 of the Act of 1840. Accordingly, this court has not the jurisdiction to entertain the present action.

I had held in the order of 3rd July, 1961, that this court should not in its discretion exercise jurisdiction in this action, even if such jurisdiction exists. In Action No. 3 of 1960, one of the present Defendants, Captain Metzger, who had been master of the "Valiant Enterprise" at the time of the abandonment of the ship by the owners, moved for summons and a warrant for the arrest of the ship in order to enforce such claims as he alleged himself to have had in respect of his unpaid wages and other matters. His application was referred by the Registrar of this court to the Chief Justice, who made a minute:

"The captain is a U. S. national and the ship is registered in that country. Questions of foreign law are involved. I am not prepared to issue writ of summons. The captain should seek his legal remedy in America."

The Registrar in consequence declined to issue the writ of summons. It seems fairly clear from the relevant case-law (which is discussed in the judgment in Action No. 12 delivered this day) that, had this court exercised jurisdiction in Action No. 3, the master would in all probability have been entitled to enforce some at least of his claims in his proceeding against the ship. If he had been enabled to do so, it is unlikely that he would or could have dealt with the ship in the manner now alleged by him in his pleadings. But if the court exercises jurisdiction in the present action, adjudication upon the validity of the master's claims and of his subsequent dealings would appear to be necessary, and the master would then be compelled to submit to a jurisdiction which the court declined to exercise when he invoked it.

For these reasons, I think the court should hesitate to enter upon an adjudication upon the contesting claims of the master and the present Plaintiffs, unless special considerations necessitate the assumption of jurisdiction. Such special considerations could probably have been shown to be present if the court did have jurisdiction to entertain Action No. 12: for there, the steps taken by the Government of the United

States, which were alleged to found the cause of action, were taken in Ceylon and were in the public interests of Ceylon and in the interests of comity. But in the circumstances in which the present action has been brought there are not in my opinion any special considerations which should move the court to exercise jurisdiction.

In *The Fortitude* (*ubi sup.*) the court observed that where the question is one of *primae impressionis* costs were not usually given. The question so far as this court is concerned has been one of first impression, and in view of the fact that the Plaintiffs did come into court at a time when the ship was under arrest in Action No. 12 and may reasonably have expected a sale to be ordered in that action, I do not make any order as to costs.

*Action not entertained.*

1962

*Present : Tambiah, J.*

G. E. PREMARATNE, Appellant, and E. SUPPIAH, Respondent

*S. C. 45/1959—C. R. Gampaha, 7563/B*

*Landlord and tenant—Termination of tenancy by abandonment—Proof—Wrongful dispossession of rented premises by landlord—Tenant's action for recovery of possession—Jurisdiction of Court of Requests.*

When a tenant temporarily departs from the rented premises with the intention of returning, such temporary departure does not constitute abandonment terminating the tenancy.

When a tenant who has been dispossessed by his landlord brings an action to be restored to possession of the rented premises, the jurisdiction of the Court to hear the case is determined by the monthly rental and damages claimed and not by the value of the premises. Such an action is based on a breach of contract of tenancy.

**A**PPEAL from a judgment of the Court of Requests, Gampaha.

*H. W. Jayewardene, Q.C.*, with *C. G. Weeramantry, Hannan Ismail* and *N. R. M. Daluwatte*, for the defendant-appellant.

*A. W. W. Goonewardene*, with *K. Charavanamuttu*, for the plaintiff-respondent.

*Cur. adv. vult.*