

[COLONIAL COURT OF ADMIRALTY OF CEYLON]

1969

Present : Siva Supramaniam, J.

P. J. DAVID (carrying on business under the name and style of the Mobile Marine Engineering Co.) v. THE SHIP "PERIOLOS"

ACTION *in rem* No. 1 of 1968

*Motion by the Receiver of Wrecks, Colombo*

*Admiralty Court—Damaged ship which is not under the immediate control of a Master or crew—Forcible seizure of it by receiver of wrecks—Legality—Meaning of term "wreck"—Wrecks and Salvage Ordinance (Cap. 267 of Legislative Enactments, 1938 edn.), ss. 3 to 10, 12 to 15, 22 (b), 23, 24—Whether action in rem lies against the ship for value of necessaries supplied.*

The receiver of wrecks, purporting to act under sections 5 and 14 of the Wrecks and Salvage Ordinance, took forcible possession of a damaged ship which was grounded on a reef and compelled the agents of the owners of the ship to deliver to him the keys of the cabins and other rooms in the ship. It was contended on his behalf that his action was justified on the ground that the ship was a "wreck".

*Held*, that the ship was not property that was cast ashore and was not "wreck" within the meaning of the Wrecks and Salvage Ordinance. The receiver, therefore, had no right to take possession of the ship. Even if the term "wreck" could be given a wider meaning so as to include a totally damaged ship, there was no provision in the Ordinance to take forcible possession of the ship after it had been grounded and had become non-navigable.

*Held further*, that an action *in rem* for the value of necessaries supplied lies, and a warrant of arrest can issue, against a ship which is totally disabled and which is not under the immediate control of a Master or crew.

ORDER made in the course of an action *in rem* instituted by the plaintiff against the motor vessel "Periolos".

*R. D. C. de Silva*, for the plaintiff.

*J. W. Subasinghe*, with *T. Wickramasinghe*, for the owners of *m. v. "Periolos"*.

*Mervyn Fernando*, Crown Counsel, for the Receiver of Wrecks.

*Cur. adv. vult.*

February 21, 1969. SIVA SUPRAMANIAM, J.—

This is an action *in rem* instituted by the plaintiff on 25th March 1968 against the motor vessel "Periolos" which is at present grounded on a reef within the territorial waters of Ceylon. The plaintiff claims a sum of Rs. 35,486.40 as value of necessaries supplied and cost of repairs effected and services rendered. On the application of the plaintiff a writ of summons and warrant of arrest issued and the vessel was arrested on 12th June 1968.

On 25th June 1968 the receiver of wrecks, Colombo (hereinafter referred to as the receiver) filed an affidavit and moved that the warrant be withdrawn and the vessel be released from arrest. The owners of the ship—Palizada Compania Naviera S. A.—have entered an appearance and they, as well as the plaintiff, have objected to the motion of the receiver. The present enquiry is into that motion.

The relevant facts, as they appear from the documents produced by the parties, may be summarised as follows :—

- (a) The vessel is of Greek origin and is owned by Messrs Palizada Compania Naviera S. A. (hereinafter referred to as the owners). She arrived at the port of Colombo on 31st August 1967 from Madras for repairs and was lying in the harbour after repairs were effected. On 16th October 1967 the Master Attendant ordered her to be moved to anchorage outside the harbour to make room for another vessel. On the night of 20th October there was a heavy storm during which the vessel broke her moorings. The master was unable to steer her into the high seas and she was grounded on a reef. On 31st October the crew were repatriated and on the 17th December the master left Ceylon.
- (b) During the relevant period Pegasus Ocean Services Ltd. of London were agents of the owners of the ship. McLaren & Co. of Colombo (hereinafter referred to as McLarens) were the agents in Colombo

of Pegasus Ocean Services Ltd. and attended to the requirements of the ship and paid the customs and other dues when she entered the port on 31st August for repairs. After the ship was grounded on 20th October, McLarens were in general charge of her and attended to the repatriation of the crew. They also employed watchmen to keep watch on the ship until 17th February 1968.

- (c) On 25th January 1968, by letter X1, the Principal Collector of Customs who was also the Superintendent of Wrecks directed McLarens to hand over to the receiver the articles that had been removed by them from the ship and also requested them, *inter alia*, "to produce evidence of the title to the ship claimed by the owners".
- (d) On 17th February 1968 the services of the watchmen were discontinued by McLarens on instructions received from Pegasus Ocean Services Ltd. in view of the heavy expenditure incurred on account of their wages. On the same day, by letter O 20, McLarens informed the receiver of the instructions received by them to discontinue the watchmen. The receiver, while acknowledging that letter, informed McLarens by letter O 22 that he was taking steps to appoint watchmen "to guard the wreck". On 23rd February 1968 naval personnel were appointed to watch the ship on behalf of the receiver.
- (e) A notice under date 23rd February 1968 (X 9) was published in the *Government Gazette* of 8th March 1968 by the receiver stating that under Section 14 of the Wrecks and Salvage Ordinance (Cap. 267) (hereinafter referred to as the Ordinance) he had taken possession of the "wrecked vessel". Before the Gazette notice appeared, by letter O 25 of 25th February 1968 McLarens informed the receiver that they, as agents of the owners, had not abandoned the ship.
- (f) In November 1967 the Captain of the Navy wrote letter O 8 to McLarens intimating the desire of the Royal Ceylon Navy to salvage the vessel on a "no cure-no pay" basis and requesting permission for two Naval personnel to visit the vessel for purposes of inspection. McLarens accepted the offer and sent the necessary permits. On 12th January 1968 by letter O 15 the Captain of the Navy informed McLarens that the salvage team was of opinion that the vessel could be safely salvaged. On 24th January 1968 by letter O 17 Pegasus Ocean Services Ltd. authorised McLarens to have the vessel salvaged by the Royal Ceylon Navy on a "no cure-no pay" basis. By letter O 18 of 31st January 1968 McLarens instructed the Captain of the Navy to undertake the salvage operation. By letter O 23 of 23rd February 1968 the Captain of the Navy informed McLarens that

he understood that the vessel was being abandoned and his offer to salvage the ship may be treated as cancelled. On the next day by letter O 24 McLarens informed the Captain of the Navy that they were surprised to hear from him that the vessel was abandoned and affirmed that they "as agents for the owners of the *Periolos* have not abandoned the vessel".

- (g) Although McLarens were negotiating with intending purchasers to sell the vessel on behalf of the owners, the naval personnel who were watching her on behalf of the receiver refused to permit anyone to inspect her. A complaint in regard to this matter made by McLarens to the receiver was ignored by the latter who called upon McLarens to deliver to him whatever keys that were in their custody to the cabins and rooms of the ship and to furnish the information called for by letter X1 of 25th January 1968.
- (h) By letter X 13 dated 11th March 1968 the receiver informed McLarens that he was unable to accept them as agents of the owners in the absence of proof of ownership and of agency and that he had taken possession of the "wrecked vessel" under Section 14 of the Ordinance and his demand for the keys was under Section 5 of the Ordinance.
- (i) On 25th March 1968 McLarens forwarded the keys to the receiver along with letter X 16 stating that they were handing the keys "as agents to the owners of the S.S. *Periolos* without prejudice to the owner's rights of ownership and possession". Since 23rd February 1968 the vessel has remained in the possession of the receiver.

Although several grounds were set out in the affidavit, learned Crown Counsel pressed his motion on the following grounds:—

- (1) That the vessel *Periolos* is a wreck and is in the lawful possession and control of the receiver in terms of the provisions of the Ordinance.
- (2) That section 529 of the Merchant Shipping Act of 1894 of England is applicable to Ceylon and in view of the provisions of that section this Court has no jurisdiction to issue a warrant of arrest against the said "wreck".
- (3) That no action *in rem* lies and, in any event, no warrant of arrest can issue against a vessel which is not navigable and which is not under the immediate control of a Master and crew.

I shall now proceed to examine the said submissions but, before doing so, I should record that on the facts set out above I find that when the receiver took possession of the vessel on 23rd February 1968, McLarens were in constructive possession of her on behalf of the owners and that at no stage did they abandon such possession.

The first question for consideration is whether the receiver was empowered under the Ordinance to take possession of the damaged ship and to compel the agents of the owners to deliver to him the keys of the cabins and other rooms in the ship. Sections 3 to 10 of the Ordinance set out the powers and duties of the receiver when he receives information that "any ship or boat is stranded or is in distress at any place on the shore of the sea or of any tidal water within the limits of Ceylon". Section 3 casts on him the duty to "forthwith proceed to such place and take the command of all the persons present, and assign such duties to each person and issue such directions as he may think fit, with a view to the preservation of such ship or boat, and the lives of the persons belonging thereto, and the cargo and apparel thereof". But it is not lawful for him "to interfere between the Master of such ship or boat and his crew in matters relating to the management thereof unless he is requested so to do by such master". Section 5 provides that "all cargo and other articles belonging to such ship or boat as aforesaid that may be washed on shore, or otherwise be lost or taken from such ship or boat, shall be delivered to the receiver" and empowers the receiver, *inter alia*, "to take such cargo or article by force from the person refusing to deliver the same" to him. This section, however, has no application to a case where an owner or his agent who is in possession of such ship removes anything therefrom. In the group of sections 3 to 10 there is none which empowers the receiver to take possession of the ship in the circumstances in which it was taken over by him in the instant case.

Learned Crown Counsel did not rely on any of the aforesaid sections to justify the action of the receiver in taking over the possession of the ship. His submission was that the ship was a "wreck" within the meaning of the Ordinance and that the receiver was entitled to take possession of any "wreck" within the territorial waters of Ceylon. Sections 12 to 15, 22 (b) 23 and 24 of the Ordinance deal with the powers and duties of the receiver in regard to "wrecks". Section 12 sets out the rules to be observed by "any person finding or taking possession of wreck within Ceylon". If the person is the owner of the wreck he is required to give notice to the receiver that he has found or taken possession of the same; if he is not the owner, he is required to deliver the same to the receiver. Where "wreck" is secreted or is in the possession of some person who is not the owner or is otherwise improperly dealt with, Section 13 empowers the receiver to obtain a warrant from a Justice of the Peace and to search for, seize, and detain such wreck. Section 14 requires the receiver, within 48 hours after taking possession of any wreck, to cause to be posted up in the nearest custom house a description of the same and to give further publicity as directed by the Principal Collector of Customs. Under Section 24, if no owner establishes his claim to the wreck before the expiration of a year from the date at which the same came into the possession of the receiver, the receiver is authorised to sell the wreck. Sections 22 (b) and 23 empower the receiver to detail and sell, if necessary, a wreck to pay salvors where salvage is due and is not paid by the party liable.

In order to determine whether any of the aforesaid sections apply to the instant case, it is necessary to examine, in the first instance, whether the vessel in question was a "wreck" within the meaning of the Ordinance. According to the interpretation section contained in the said Ordinance "wreck" includes jetsam, flotsam, lagan, and derelict found in or on the shores of the sea or any tidal water". The definition is intended to give a wider interpretation to the word "wreck" than its ordinary connotation. The ship in the instant case did not, of course, fall within the category of jetsam, flotsam, or lagan. Nor did it fall within the category of a derelict. To constitute a derelict there should be an abandonment of the ship at sea by the master and crew without hope of recovery. "There must be no *spes recuperandi* and no *animus revertendi* and this depends on the state of mind of the master and crew at the time when they quitted the vessel". (Vide the speech of the Lord Chancellor in *Bradley and others v. Newsum Sons & Co. Ltd.*<sup>1</sup>)

It was decided in *Sir Henry Constable's case* (English Reports 77 King's Bench 218) that "nothing shall be said 'wreccum maris' but such goods only which are cast or left on the land by the sea . . . . and none of these goods which are called jetsam, flotsam, or lagan are called wreck as long as they remain in or upon the sea; but if any of them by the sea be put upon the land, then they shall be said wreck". Coke in his Institutes (vol. 2 page 167) says "wrecke of the sea in legal understanding is applied to such goods as after shipwreck at sea are by the sea cast upon the land. . . ."

Learned Crown Counsel submitted that the aforesaid definition of wreck may have been appropriate in the Elizabethan era but cannot be applied in modern times. I find myself unable to agree. The Ordinance was passed in 1861 and the provisions contained therein are taken over mainly from the English Merchant Shipping Act of 1854. In the English Statute the word is used in its common law meaning. The definition of "wreck" in *Constable's case* was adopted with approval by Brett L. J. in the course of his judgment in the case of *Cargo ex Schiller*<sup>2</sup>. The Statute 17 & 18 Vict. c. 104 which Brett L. J. was construing in that case gave to the term "wreck" the identical meaning given in the Ordinance. Halsbury (3rd edition Vol. 35 page 721) says "wreck may be defined as property cast ashore within the ebb and flow of the tide after shipwreck". The ship in the instant case was not property that was cast ashore and was not "wreck" within the meaning of the Ordinance. The receiver had accordingly, no legal right to take possession of her.

Even if the term "wreck" is given a wider meaning than the one given to it under the common law and is interpreted to include a totally disabled ship, as contended for by learned Crown Counsel, there is no provision in the Ordinance which empowered the receiver to take possession of the vessel in question after it had been grounded. Section 12 of the Ordinance

<sup>1</sup> 119 *Law Times* 239 at page 241.

<sup>2</sup> (1876-1877) *Probate Division Vol. 2 p. 145.*

which refers to a person "finding or taking possession of wreck within Ceylon" can have no application to a case where the owner of a ship which had become a "wreck" continues to be in possession of it through his agent. The provisions of section 14 of the Ordinance requiring the receiver to give publicity to a description of the wreck that had been taken possession of by him are obviously intended to enable the owner to establish his claim under Section 24. This procedure would be meaningless where the wreck has been taken possession of by the receiver from the owner or his agent. Section 13 of the Ordinance which gives the receiver the power to seize concealed wreck expressly excludes the case of a wreck which is in the possession of a person who is the owner thereof.

If it was the intention of the Legislature that the receiver should take possession of as "wreck" a ship that is grounded and is non-navigable even though such ship is in the possession or custody of the owner or his agent, express provision would have been made in the Statute to that effect and the procedure to be adopted in regard to the disposal of such wreck would have been prescribed. There is express provision in the Ordinance empowering the receiver to detain a wrecked ship and to sell her if necessary, in cases where salvage is payable to anyone in respect of saving her and the owner or other person responsible has failed to make such payment. In the instant case there was no question of a claim by anyone for salvage. The receiver himself had incurred no expenses in respect of the ship until after he took possession of it.

The receiver appears to have been misled by the intimation given to him by McLarens on behalf of the owners that they were withdrawing the watchmen but he was not justified in ignoring the further intimation given by them that their withdrawal of the watchmen should not be interpreted to mean that they were abandoning the ship. I find that the receiver had no lawful authority to take possession of the vessel in question and to demand from McLarens the surrender of the keys. Sections 5 and 14 of the Ordinance on which the receiver relied have no application to the facts in this case.

In view of the aforesaid finding it is unnecessary to consider the question whether Section 529 of the Merchant Shipping Act of 1894 of England applies to Ceylon and, if so, whether that section is a bar to this Court exercising jurisdiction and issuing process against a ship which is a "wreck".

There remains to be considered the last submission of learned Crown Counsel that no action *in rem* lies and, in any event, no warrant of arrest can issue against a vessel which is totally disabled and which is not under the immediate control of a Master or crew. No authority was, however, cited in support of that proposition. The nature and scope of an

action *in rem* in maritime law make it clear, on the other hand, that that proposition is untenable. McGuffie, Fugeman and Gray in their treatise on Admiralty Practice (British Shipping Laws vol. 1) state at para. 69 :

“ *Res* against which an action *in rem* may be brought include :

(a) In all cases : a ship, that is to say any description of vessel used in navigation, and all her equipment *and wreck of the ship or equipment including flotsam, jetsam, lagan and derelict.*”

As regards the issue of a warrant of arrest, the same authors state (*Ibid* para. 231.) :

“ The basic principle of an action *in rem* is that a *res* may be arrested.”

Halsbury states : “ When a plaintiff has duly procured the issue of a writ of summons, he may even before the service of a writ apply for a warrant for the arrest of the property against which the action has been brought.” (Laws of England, 3rd Edition vol. 1, page 74.)

In the instant case, the plaintiff, who sues *inter alia* for the value of necessaries supplied, is entitled to maintain the action *in rem* and to have the *res* arrested until his claim is settled.

The motion of the receiver is accordingly refused with costs. The action will proceed as between the plaintiff and the defendant.

*Motion of the receiver of wrecks refused.*

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