Present: The Hon. Sir Joseph T. Hutchinson, Chief Justice and Mr. Justice Middleton.

July 22, 1910

PONNUSAMY *v.* VEERAGATTIPILLAI *et al.*

D. C., Jaffna, 6,799.

Ship—Person effecting repairs acquires no maritime lien—Cannot enforce a claim against ship after sale to third parties—Ordinary lien—Constructive possession—Delivery of ship by order of Court.

A person who has effected repairs to a ship acquires only an ordinary lien and not a maritime lien for the cost of the repairs, and he loses his right to enforce his claim against the ship after he gives up possession of the ship.

THE facts are set out in the judgment of the Chief Justice.

Sampayo, K.C. (with him *Talaivasingham*), for first defendant, appellant.

H. A. Jayewardene (with him *Balasingham*), for plaintiff, respondent.

Cur. adv. vult.

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The second defendant was the owner of a sailing vessel, and the plaintiff was the tindal employed by him on the vessel. The plaintiff in his plaint alleges that in May, 1908, the vessel was unseaworthy and required repairs, which he executed at his own cost at the request of the owner, who was not able to raise the necessary money; that on February 16, 1909, he obtained judgment in action No. 6,077 of the District Court of Jaffna against the second defendant for Rs. 899.23, the cost of the repairs; that he issued a writ on his judgment under which he seized the vessel, when the first defendant claimed it, and the claim was upheld on August 6, 1909, whereupon the plaintiff brought this action on August 18, 1909; that the second defendant, acting in collusion with the first defendant with intent to defraud the plaintiff, transferred the vessel to the first defendant for a sum much below its value on August 22, 1908, during the pendency of action No. 6,077; and that his decree in that action is still unsatisfied. He claims (*a*) that the vessel be declared liable to be seized and sold under the writ in action No. 6,077; and (*b*) that the transfer to the first defendant be declared void as against the plaintiff's claim.

The first defendant in his answer denies that the vessel was unseaworthy or required repairs or that the plaintiff expended any money in its repairs so as to acquire a legal hypothec on it; and denies any collusion or that the transfer to him was fraudulent or for a lower value than the vessel was worth; and he says that by deed dated March 17, 1906, the vessel was mortgaged to him by the second defendant for Rs. 5,000 and interest; that in action No.5,986 of the District Court of Jaffna he sued the second defendant on the mortgage bond and recovered judgment for Rs. 6,142 on August 18, 1908; and that the second defendant by deed dated August 22, 1908, transferred the vessel to him in satisfaction of the sum so decreed, which was a fair price for it.

There were issues as to whether the transfer to the first defendant was made in collusion with the second defendant in order to prevent the plaintiff recovering his debt, and as to whether it was for valuable consideration. The District Judge found on those issues in favour of the defendants, and that finding is not disputed. There was also an issue whether the plaintiff's decree in No. 6,077 was *res judicata;* but it was not a decree *in rem*, and was not *res judicata* as against the first defendant, who was no party to it. The issues with which we are concerned were: (1) Is the vessel subject to a legal hypothec for the amount decreed in No. 6,077 ? (3) Is it bound for the amount so decreed?

The decree in No. 6,077 was only a personal decree for money against the second defendant. The first defendant was not a party to it; and we should therefore treat the first issue as being: Whether the vessel is subject to a legal hypothec for the amount expended by

the plaintiff on repairs? And with regard to the words "legal hypothec," since the law to be applied is, in accordance with Ordinance No. 5 of 1852, the law of England, the actual question is whether the plaintiff has a lien on the vessel for the cost of his repairs. And since a "maritime lien" cannot be set up for repairs, his lien, if he has any, must be the ordinary lien.

Such a lien is lost if the person claiming it has given up possession; and the first defendant says that the plaintiff gave up possession long before this action was instituted. The plaintiff in his evidence given on January 20, 1910, says that he was sent away from the vessel by order of the Court, at the instance of the first defendant. in the first defendant's action No. 5,986, about seven or eight days after he instituted action No. 6,077 (*i.e.*, long before the present action was begun); that he made no objection to the Court; and that the first defendant is now, and has been for about a year, in possession of the vessel. The first defendant deposed that it was at his instance that the plaintiff was sent out of the vessel; that he got an injunction from the Court; and that the plaintiff did not then make any claim for repairs. On these facts the plaintiff's counsel contends that he ought to be considered still to have been in possession at the date of the commencement of the present action. But he was deprived of possession by an order of the Court, and did not then claim any lien; and he acquiesced in the order, and made no claim to have a lien until many months afterwards, when he began this action. In my opinion he has lost his lien.

The decree of the District Court declared the vessel liable to be seized and sold under the decree in case No. 6,077. I think that it should be set aside and the action dismissed, and that the plaintiff should pay the first defendant's costs of the action and of the appeal.

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This case has been tried in the District Court on the theory that the Roman-Dutch Law applied, but, as we held at the argument, it ought to have been determined by English Law (Ordinance No. 5 of 1852, section 1). Under English Law there would be no maritime lien for repairs unless they were secured on a bottomry bond. The plaintiff here, therefore, has to fall back on the doctrine of ordinary lien, and his contention is that he was deprived of his actual possession under that lien by *vis major*, and that in point of law it still exists on the ground of constructive possession.

The Chief Justice has examined the record in D. C., Jaffna, 5,986, an action on a mortgage bond given by the second defendant to the first defendant on the ship in question.

On July 27, 1908, the first defendant here got judgment on his bond against the second defendant here, and on the same day the Sub-Collector of Customs of Jaffna was appointed to take charge of

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the ship on an affidavit alleging that the second defendant here was intending to damage the ship, and that the tindal (plaintiff here) was not taking proper care of it.

On August 18, 1908, a consent decree was entered for the sale of the ship to the first defendant by the second in full satisfaction of the amount due on the decree, and the order appointing the Sub-Collector of Customs was discharged. The transfer of the ship was executed by deed of August 22, 1908. No objection or claim appears to have been made by the tindal, the present plaintiff, and I think it is clear he lost possession upon the order of July 27, 1908, and with it his right of lien founded on such possession. No doctrine of constructive possession on the plea of ouster by *vis major* can be availed of here. The right of lien depends on actual possession, and the plaintiffs ejection from that position was acquiesced in by him for about one year before he brought this action. I think, therefore, that the plaintiff has lost his right of lien, and has no right in that respect over the ship.

The owner of the ship, the second defendant, may have defrauded the plaintiff, but there does not seem to be any reason for supposing that the sale by him to the first defendant was as regards the first defendant a fraudulent one. The plaintiff being in charge of the ship in July, 1908, must have been fully aware of the first defendant's proceedings against his owner, the second defendant, and it seems strange to me that he was not then found asserting his claim in the ship for the repairs, for which he subsequently recovered judgment.

The District Judge seems to suspect that the ship was sold for much less than its actual value to the first defendant. This, however, may have been the case without any fraud on the part of the first defendant. The District Judge holds that no fraudulent collusion is proved between the first and second defendants, and this point was not touched on in appeal.

I agree that the appeal must be allowed, and the judgment of the District Judge must be set aside, and the action of the plaintiff dismissed with costs in both Courts.

Appeal allowed.