ON APPEAL FROM THE BRITISH COLUMBIA ADMIRALTY DISTRICT

1924
Nov. 19.

BETWEEN:

THE SHIP *PACIFICO* (DEFENDANT).....APPELLANT;

AND

THE WINSLOW MARINE RAILWAY AND SHIPBUILDING COMPANY (PLAINTIFF) ..... } RESPONDENT.

Shipping and Seamen—Repairs—"Necessaries"—Jurisdiction—Interest—Admiralty Court Acts, 1840 and 1861—3-4 Vict., c. 65 and 24 Vict., c. 10 (Imp.)

Held: (Affirming the judgment of the British Columbia Admiralty District (1)) that the purpose of the Admiralty Court Act, 1861, was *inter alia* to extend the jurisdiction of the Court, not to restrict it.

2. That the Exchequer Court in Admiralty for the British Columbia Admiralty District has jurisdiction in actions to recover the price of repairs done to a foreign vessel in a foreign port, even though the ship or her proceeds are not at the time of the institution of such actions under arrest of the Court.

(1) [1924] Ex. C.R. 90.

3. That it was not intended by section 4 of the Admiralty Court Act, 1861, to exclude repairs from the definition of "necessaries" as provided in section 5 of the said Act, but that the intention was to give an additional remedy in claims for building, equipping and repairing where the owner was domiciled in Canada, but only when the ship was under arrest.

4. That where the owner contracts to have certain repairs done to a vessel and agrees to pay for the same thirty days from the completion thereof, the court in giving judgment for the price thereof, will, in the exercise of its equitable jurisdiction, allow interest on such amount from the date when the payment thereof should have been made as agreed.

APPEAL from the decision of the Local Judge in Admiralty of the British Columbia Admiralty District.

September 26th, 1924.

Appeal now heard before the Honourable Mr. Justice Maclean, President of the Court at Vancouver.

N. D. Hossie for appellant.

E. C. Mayers for respondent.

The facts are stated in the reasons for judgment.

THE PRESIDENT, now this 19th day of November, 1924, delivered judgment.

The plaintiff (respondent) sued the ship *Pacifico*, of Norwegian registry, for repairs and necessaries made upon and supplied to, the said ship, at Winslow, state of Washington, U.S.A., in the months of February and March, 1923, and this is an appeal asserted by the defendant ship (appellant), from a judgment of Mr. Justice Martin, Local Judge in Admiralty for British Columbia, allowing the plaintiff's action with interest and costs.

[His Lordship here discusses the evidence as to the costs of repairs, and finds that they were duly authorized, and that the judgment appealed from was correct as to the amount claimed, and then proceeds.]

The defendant contends there was no jurisdiction in this court to arrest the ship and thus adjudicate upon the plaintiff's claim. By section 6 of the Admiralty Court Act, 1840, jurisdiction was given to the Court of Admiralty to decide claims for necessaries supplied to any foreign ship or seagoing vessel; but that statute only applied to foreign ships. By section 5 of the Admiralty Court Act, 1861, it was provided that the Court of Admiralty had jurisdiction over any claims for necessaries, supplied to any ship, elsewhere

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than in the port to which the ship belongs, unless it was shewn that at the time of the institution of the cause, any owner or part owner was within the jurisdiction. Section 4 of the same Act gave jurisdiction to the Court of Admiralty over any claim for the repairing of any ship, if at the time of the institution of the cause, the ship, or the proceeds thereof, was under arrest of the court. The defendant's counsel admitted that under section 6 of the Admiralty Court Act, 1840, there was jurisdiction for the present proceedings, and that repairs to a ship there constituted "necessaries." His submission upon the point was, that under the Admiralty Court Act, 1861, where the necessaries supplied are in the nature of repairs to a ship, there is no jurisdiction unless the ship is under arrest at the instance of a third party, and that the plaintiff in this case having lost its possessory lien, and there being no maritime lien, there was no jurisdiction in this court to arrest the ship, and urged in effect that the Admiralty Court Act, 1861, section 4, cut down the jurisdiction of the Admiralty Court in claims for necessaries by way of repairs to a ship, and that repairs under section 4 of the statute, no longer constituted "necessaries" under section 5 thereof, unless the ship was under arrest at the instance of a third party.

The plaintiff's counsel answered before me that the Act of 1861 did not repeal or cut down any of the provisions of the Act of 1840, but extended the jurisdiction of the Admiralty Court according to its professed intention, and gave jurisdiction not only for necessaries to foreign ships but to ships of any nationality subject to the one condition, that the owner must not be domiciled within Canada. He urged that the jurisdiction of the Court of Admiralty was extended by section 4 of the former Act, in that it gave jurisdiction to the Admiralty Court for necessaries like repairs, even though the owner was domiciled in Canada, provided the ship was under arrest. In substance he argued that the intent of the legislation was to extend the jurisdiction in all cases for necessaries supplied anywhere, to any ship, provided the owner was not domiciled in Canada, and that even if the owner was domiciled in Canada, then jurisdiction was given in claims for equipping and repairing a ship, when under arrest of the court, and that was the extension intended to be enacted by section 4 of the Act of 1861.

I think the plaintiff's contention is sound and must prevail. I do not think that it was intended by section 4 of the Statute of 1861 to exclude repairs from the definition of "necessaries" as provided in section 5 of the same statute, but it was intended to give an additional remedy for claims for building, equipping and repairing a ship when the owner was domiciled in Canada, but only when the ship was under arrest. So far as I can ascertain Admiralty Courts have always considered repairs to be necessaries. In the case of *The Riga* (1) Sir Robert Phillimore said he was unable to draw any distinction between necessaries for the ship, and necessaries for the voyage, and quoted approvingly Lord Tenderton in the case of *Webster* v. *Seekamp* (2), to the effect that whatever is fit and proper for the service in 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 "necessaries" as applied to those repairs done, or things provided for the ship by order of the master for which the owners are liable. I do not think the term "necessaries" admits of so circumscribed a meaning, as contended for by the defendant. I would also refer to *The Albert Crosby* (3); *The Flecha* (4); *Foong Tai & Co.* v. *Buchheister & Co.* (5); *Victoria Machinery Depot Co., Ltd.* v. *The Canada* (6).

The plaintiff claims interest upon the principal sum sued upon and found due. The cost of docking, cleaning and painting the *Pacifico,* and for dismantling the old winches and installing new ones, was for the agreed price of $6,750, the plaintiff stipulating in his offer that the same was to be payable thirty days from completion, and the defendant is I think to be considered as having accepted this condition. The additional work and material, which the master of the ship, and the plaintiff's superintendent thought necessary before the ship should proceed to sea, and which the ship's agent, Mr. Ferrari, apparently agreed to on or about February 23, was a subsequent enlargement

(1) [1872] 3 Ad. & Ecc. 516.
(2) [1821] 4 B. & Ald. 352.
(3) [1870] 3 Ad. & Ecc. 37.
(4) [1854] 1 Spinks Ecc. & Ad. 438.
(5) [1908] A.C. 458.
(6) [1913] 15 Ex. C.R. 142.

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of the contract, but there is no express stipulation as to the time of the payment of the additional repairs or necessaries. Much of this additional work was to be done on a time and material basis, and doubtless for the reason that it was difficult to predicate the ultimate extent of the work when once commenced, it having to do with the electric wiring, boilers, valves, etc.

On March 22, the plaintiff rendered an account to the *Pacifico* and owners for the materials supplied and the work performed, in the sum of $12,346.43, upon which the defendant paid on account, the sum of $7,500, on May 15, 1923, leaving a balance of $4,846.43. In the formal judgment the learned trial judge allowed interest at the rate of 5 per cent from April 5, 1923, such date being approximately thirty days subsequent to the completion of the work. The written reasons for judgment of the learned trial judge, is devoted entirely to the question as to whether the plaintiff was entitled to interest, and he there discusses the question quite exhaustively.

The defendant's counsel contended that the rule in force here as to interest, is the same as in England, and that there the rule of the Admiralty Court, since under the Judicature Act it became a division of the High Court of Justice, is the same as in the High Court of Justice, and that there it was not the practice prior to the Judicature Act or since, and both before and since the passing of the statute, 3-4 Wm. 4th, c. 42, to allow interest in cases similar to the one under consideration. He referred to *London, Chatham and Dover Railway* v. *South Eastern Railway* (1) as conclusive of the matter, though I understood him to admit that if this cause had been tried before the Judicature Act, and before the transfer of the Admiralty jurisdiction to the High Court of Justice, that the doctrine of the Admiralty Court as to interest might be applied in this case.

I cannot find any authority for the submission that the Judicature Act has changed the jurisprudence long established by the Court of Admiralty. The Judicature Acts of 1873 and 1875 amalgamated the English Courts and transferred to the High Court of Justice all the jurisdiction

(1) [1893] 63 L.J. Ch. 93; [1893] A.C. 429.

which had been exercised by the different courts, so that every judge of the High Court exercises every kind of jurisdiction possessed by that court, but these changes neither conferred new Admiralty jurisdiction, nor did it take away from that jurisdiction. It does not appear to me that the Judicature Act by intendment or otherwise, changed the substantive law as administered in Admiralty Courts, and in no way affected the powers of such courts, and that they retain all the powers they had before that Act. The point in controversy is one of substantive law I think, and not of practice or rule.

The enlargement of the original contract for repairs and necessaries, made by the letter of February 20, was no doubt intended by the parties to be subject to the same terms of payment as applied to the original agreement; that the repairs to be made and the material and labour supplied, were to be paid for thirty days after completion of the work. It would appear but equitable that the plaintiff having given this period of credit to a ship of foreign registry, unusual in such cases, is entitled to compensation by way of interest for the delay in payment of the principal sum.

The learned trial judge, as I have already said, has dealt very fully with this point, in his written judgment. He discusses with much clarity and conciseness what seems to be the weight of judicial authority upon the point, and I have not been convinced that he erroneously reached the conclusion he did. It is not necessary for me to review his discussion of the law and the authorities cited by him, as that may be found in the case as reported (1), and I do not think I could illuminate the point by any further discussion.

It is true the reported cases referred to by the learned trial judge, are not as to facts quite that disclosed in this cause, and were not actions for "necessaries," but the question remains, is there any settled principle of law as adopted by the Admiralty Court, or of equity as administered in Admiralty Courts, supporting the conclusion reached by the trial judge. The principle adopted by the Admiralty Court in its equitable jurisdiction, as stated by

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Sir Robert Phillimore in *The Northumbria case* (1), and as founded upon the civil law, is that interest was always due to the obligee when payment was delayed by the obligor, and that, whether the obligation arose *ex contractu* or *ex delicto*. It seems that the view adopted by the Admiralty Court has been, that the person liable in debt or damages, having kept the sum which ought to have been paid to the claimant, ought to be held to have received it for the person to which the principal is payable. Damages and interest under the civil law is the loss which a person has sustained, or the gain he has missed. And the reasons are many and obvious I think, that a different principle should prevail, in cases of this kind, from that obtaining in ordinary mercantile transactions.

I think that in the exercise of the equitable jurisdiction of this court, and in view of the fact that the Admiralty Court has always proceeded upon other and different principles from that on which the common law principles appear to be founded, that the plaintiff is in this case entitled to the claim of interest as allowed by the court below, in its formal order for judgment. I cannot see why a person supplying necessaries upon the credit of a foreign ship, should not be placed in as favorable a position as to interest upon a matured obligation, as in cases of bottomry, where the articles allowed to be covered by the bottomry bond, come within the meaning attached to the word "necessaries." In such cases there is usually a stipulation for interest, and interest has been allowed even where there was no stipulation for interest of any kind, as in *The Cecilie* (2).

The appeal is therefore dismissed with costs.

Judgment accordingly.

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(1) [1869] L.R. 3 Ad. & Ecc. 6. (2) [1879] 4 P. 210.