

(1870) 05 CAL CK 0013

Calcutta High Court

Case No: None

In Re: Ship "Portugal"

Vs

APPELLANT

RESPONDENT

Date of Decision: May 5, 1870

Judgement

Phear, J.

I think Mr. Phillip's client is entitled to the injunction for which he asks, and that the rule nisi should be made absolute. Hossein Ibrahim chartered the Ship Portugal in December 1868, for a voyage to Jedda and back, calling at certain ports at the charterer's choice, both on the outward and homeward voyages. The ship started on her voyage in February 1869, with Mahomed Hossein as master, and also with her owner on board. She arrived at Jedda in April 1869, and there she met the charterer. At that time it seems to have been found by the owner and the master that they had not sufficient funds to enable them to bring back the ship on her return voyage, and after an advertisement, to which I need not further refer now, an agreement was entered into by the charterer to advance the necessary money, and, on July 12th, what is said to be a bottomry bond, was signed both by the master and owner in favor of the charterer. The ship left Jedda on July in her homeward voyage, and arrived in Calcutta in September. In November the charterer proceeded against the ship in this Court, in its Vice-Admiralty jurisdiction, on the bond of the 12th of July. The ship was arrested; the usual appraisal and sale took place, and a decree was made in favor of the charterer. After this and before any order was made for the payment of the proceeds of the sale out of Court, the master also got the ship arrested at his suit, but no decree was made thereon. After this had taken place, the charterer, without notice to the master, obtained an order of Court for the payment to him of the proceeds of the sale of the ship, and the present application is that he be restrained from taking out the money under that order. I think, as I have already said, he must be restrained, because, in my opinion, the effect of the decree in his favor was merely to put him in possession of the ship, which then existed in the shape of money in Court, and that he had that possession subject to all liens that were prior in rank to his own claim. Mr. Cowell referred me to the case of *The Saracen* 2 Rob, Adm. Rep., 451 and one or two

other cases in support of the contention that the decree made in favor of the charterer gave him priority over all other claims against the ship. I think that these cases are correctly distinguished from the present one by Mr. Phillips, for in them the priority which the decree was allowed to give was simply priority against claimants of co-ordinate rank. It was simply that priority which all Courts of Common Law give to the most diligent suitor. The decree-holder got possession of the ship, and as against all persons with co-ordinate claims which they had been careless of asserting, he was entitled to pay himself in full before they could be considered. But I think this is not so against persons who have claims against the ship of a higher rank and priority to his own. In the case of *The Aline* 1 Rob. Adm. Rep., 111, Dr. Lushington points out very clearly that a party who had obtained a decree against a ship for damages, still held the ship under that decree subject to the lien of a bottomry bond-holder, where the bottomry bond had been entered into after the occurrence of the collision. It appears to me that following the reasoning of Dr. Lushington, I must hold that the possession which the charterer has obtained, by virtue of the decree of this Court, is subject to all liens which are prior to the lien of the bottomry bond-holder, and there is no doubt that the master's claim for wages, during the time when he was engaged in the service of bringing the vessel safe to port, is a claim which is prior to that of the bottomry bondholder. Upon this I think that Mr. Cowell has not made any contest. It follows, therefore, that Mr. Phillips' client is entitled to have the proceeds kept in Court, until he has made out his claim. No doubt, Mr. Cowell did urge that in this case the master had bound himself personally in the bottomry bond, and had in that way waived his claim for wages as against the bottomry bond-holder, or at any rate given the bottomry bond-holder priority. But I think there is no ground for contending in this document that the master has bound himself personally. I think it is extremely doubtful, if it were matter now before me, whether, under the circumstances, the charterer was a party who could advance money on a bottomry bond. He appears to me to have been, pending this voyage, in the position of a temporary owner, and if it had come to be a contest between the parties, whether or not the so-called bottomry bond was in law a bottomry bond, which entitled the owner to proceed against the ship in the Admiralty Court, would be a matter which would require great consideration. I think it right to add that, on the last affidavit (what may be in those I have not read, I do not know) I abstain from saying that the bond-holder did actually advance the money. Be this as it may, as I have already said, the master is entitled to have his claim for wages first satisfied. The rule must be made absolute, and with costs, because the bond-holder ought not to have applied to take the money out of Court without notice to the master. That he had notice of the master's claim Mr. Carapiet's affidavit puts beyond doubt, and as it is a claim which I think is well founded in law, the bondholder must pay the costs of having caused the master to litigate it. I may throw it out as a doubt, however, whether as against the bond-holder the master is entitled to claim for wages after the time when the ship was first arrested; but I think he is certainly entitled to his wages up to that time.