

Vemb (Plaintiff) v. The Samuel T (Defendant)

Walsh J.—in Admiralty, Halifax, April 23; Ottawa, May 4, 1971.

Admiralty—Shipping—Jurisdiction—Action in rem against ship—Claim to sole ownership by one co-owner because of other co-owner's default in payment for interest in ship—Other co-owner not joined in action—Supreme Court of Judicature (Consolidation) Act 1925 (U.K.) c. 49, s. 22(1)(a)(i) and (ii).

Plaintiff, one of two registered co-owners of defendant ship, brought an action *in rem* against the ship seeking transfer to him of all 64 shares in the ship by reason of his co-owner's default on his contract to pay plaintiff for his half-interest in the ship.

Held, whether the dispute between the co-owners was as to ownership of the ship or as to the settlement of accounts between them, it was implicit in the enactment giving the court jurisdiction (s. 22 (1)(a)(i) and (ii) of the *Supreme Court of Judicature (Consolidation) Act 1925 (U.K.)*) that this action *in rem* against the ship by one co-owner could not be entertained unless the other co-owner was made aware of the proceedings by being joined in them or otherwise.

The Raven, 9 Ex. C.R. 404; *The Seaward*, 3 Ex. C.R. 268, considered.

ACTION

D. Kerr, Q.C., for plaintiff.

No one for defendant.

WALSH J.—The statement of claim in this action, which is brought *in rem* against the defendant vessel and is entitled "Action relating to title to or ownership of a ship" consists of a single paragraph stating:

The Plaintiff, as part-owner of the Motor-Vessel *Samuel T* claims against the said Defendant Vessel for a Declaration as to ownership of the said Defendant Vessel, and for transfer of all sixty-four Shares in the said Defendant Vessel to the Plaintiff, and for Costs.

No appearance having been filed on behalf of defendant within the legal delay the matter came before me in Halifax on April 23, 1971, on an application for an order for judgment in favour of the plaintiff (Vemb), who asks that the order provide further that a commission shall issue addressed to V. Arthur Sibley, a marshal of this court, instructing the said marshal to prepare and deliver to the plaintiff a bill of sale for all 64 shares in the defendant vessel free of encumbrances.

In support of this application an affidavit by plaintiff was filed setting out the circumstances which gave rise to this claim. From this affidavit it appears that in December 1970 and January 1971, as the result of an agreement with a business associate, one John W. Stephens, he was to acquire from the J. P. Porter Company Limited, the registered owner of the Motor Vessel "*Samuel T*", the 64 shares of the said vessel free of encumbrances in return for his conveyance to said Stephens of his half-interest in another vessel which he owned at the time jointly with the said

Stephens. At about the same time he made the acquaintance of and entered into business dealings with one Captain Jim Edwards, then of Dartmouth, Nova Scotia, who had previously purchased other vessels from the said John W. Stephens and as a result of his business dealings with Edwards he agreed to sell a half-interest in the Motor Vessel "*Samuel T*" to Edwards for a consideration of \$2,000 plus spare parts removed by Edwards from the Motor Vessel "*Fundy Prince*" which he owned at the time and which were to be delivered to the Motor Vessel "*Samuel T*" at Edwards' expense. This agreement dated January 12, 1971, specified that the sum of \$2,000 was to be paid on or before February 1, 1971, and then contained a further clause to the effect that Vemb agreed to give Edwards thirty days' grace "on repayment".

Following this agreement, on January 13, 1971, plaintiff arranged with the J. P. Porter Company Limited that the bill of sale for the 64 shares in the Motor Vessel "*Samuel T*" would be made out in the names of Edwards and himself as joint owners and this was done the same day, and the following day the said bill of sale was registered with the Registrar of Shipping in Halifax. At the time of registry, Edwards and plaintiff signed an appointment form whereby plaintiff was appointed as the managing owner of the vessel. The bill of sale and certificate of the Registrar are attached as exhibits to the affidavit.

The affidavit further sets forth that Edwards did not pay the \$2,000 provided or any part of it although asked to do so on several occasions, and although he agreed that plaintiff could proceed with the transfer of the spare parts from the "*Fundy Prince*" to the "*Samuel T*", this was done at plaintiff's expense, costing him about \$400 which he claims was approximately the value of the parts, since Edwards had no funds at the time to hire the necessary labour. Early in March Edwards disappeared and plaintiff sets out the names of the various persons and corporations with whom he has been in touch since, all of whom have advised him that the said Edwards owed them money and that they were also trying to locate him without success. His personal efforts to find him through other contacts have also been fruitless and he believes that because of his substantial debts, Edwards has left the Province. He expresses concern that some of Edwards' other creditors may obtain judgments against him which would jeopardize the Motor Vessel "*Samuel T*" and he contends that because of Edward's failure to abide by the provisions of the agreement or to make any payment towards his interest in the vessel he has no right to be a joint owner and that therefore the court should order the transfer of all shares in the Motor Vessel "*Samuel T*" to him, the said shares being free of all encumbrances.

In bringing the present proceedings *in rem* against the vessel rather than against Edwards with whom plaintiff's conflict really exists, and without even making Edwards a party to the proceedings, plaintiff is attempting to have the contract between him and Edwards set aside and acquire entire

ownership of the shares in the vessel without serving any proceedings either personally or by substitutional service on the said Edwards thereby giving him an opportunity to be heard. Plaintiff's counsel argued that since by Rule 73A(5) "The Court may, on such terms as it thinks just, set aside or vary any judgment entered in pursuance of this rule," (i.e. a default judgment) the said Edwards could, if he subsequently returned and had valid grounds for intervening in the proceedings to contest same, have them re-opened and hence would suffer no irremediable prejudice, but I cannot accept this argument. While it is evidently expedient and desirable for plaintiff to try to get Edwards' name off the register as co-owner of the 64 shares of the vessel before some of Edwards' creditors can seize same as a result of their claims, expediency alone can never be a justification for failure to follow proper legal procedures.

It appears to me to be open to some doubt whether the dispute between plaintiff and Edwards is even properly speaking "a question as to the title to or ownership of a ship" within the meaning of s. 22(1)(a)(i) of the *Supreme Court of Judicature (Consolidation) Act, 1925* (U.K.) so as to give this court jurisdiction under s. 18(2) of the *Admiralty Act*¹, or

any question arising between co-owners of a ship registered at any port in England [substitute Canada for this] as to the ownership, possession, employment or earnings of that ship, or any share thereof, with power to settle any account outstanding and unsettled between the parties in relation thereto, and to direct the ship, or any share thereof, to be sold, or to make such order as the Court thinks fit,

within the provisions of s. 22(1)(a)(ii) of the U.K. Act. It appears to me that plaintiff has two common law remedies, either to sue Edwards for payment of the amount due under the contract, which proceedings he apparently considers would be futile, or to take appropriate proceedings against Edwards to cancel the contract for non-payment of the consideration, although these proceedings might be somewhat complicated by the fact that, as plaintiff himself admits, he has already taken possession of some part of the consideration, namely the spare parts from the "*Fundy Prince*" although he alleges that this cost him what the parts were worth. As a result of a judgment setting aside the contract, he could then have all the shares of the vessel transferred to his name, and the fact that in the interval during the unavoidable delays in obtaining such a judgment some other creditor of Edwards may seize the shares, while regrettable from plaintiff's point of view, cannot justify by-passing this procedure.

While, as I have indicated, there is some doubt in my mind as to whether this court has jurisdiction as the dispute between the parties does not appear to be with respect to the ownership of the ship but rather with respect to payment of the consideration due by Edwards to acquire a half-interest in

¹ R.S.C. 1952, c. 1.

such ownership, which interest he undoubtedly has unless and until the contract by virtue of which he acquired it is set aside, it may be that it has jurisdiction under the broad terms of s. 22(1)(a)(ii) [of the U.K. Act] giving it "... power to settle any account outstanding and unsettled between the parties in relation thereto, . . .". If this court has jurisdiction, then it may be exercised either *in personam* or *in rem*, and in the latter case the ship may be arrested as has been done (*see Mayers Admiralty Law and Practice in Canada*, page 68, which refers to *The Raven*, 9 Ex.C.R. 404, in which an action *in rem* was brought by the plaintiff in an action to account between co-owners. In that case the other co-owner was also made a defendant however. See also *The Seaward*, 3 Ex.C.R. 268, which also permitted an action *in rem* against the vessel and in which the co-owner with whom the dispute existed was not named as a party, but there was an appearance, and the accounts which formed the basis of the claim had arisen out of the employment of the ship).

It appears to me fundamental and implicit in the provisions of s. 22(1)(a)(i) and (ii) of the *Supreme Court of Judicature (Consolidation) Act, 1925* (U.K.) that, whether the dispute between the parties is one as to title or ownership of a ship or as to the settlement of any account outstanding and unsettled between them in relation thereto, if an action *in rem* is brought by one of the co-owners against the ship itself, the other co-owner with whom the dispute has arisen must be made aware of the proceedings by being joined in them or otherwise.

I cannot therefore render judgment as prayed for on the application before me.