BRITISH COLUMBIA ADMIRALTY DISTRICT

1958
Nov. 12 & 13
1959
May 28

BETWEEN:

IWAI & COMPANY LIMITED AND THE GOSHO COMPANY LIMITED ..... PLAINTIFFS;

AND

THE SHIP *PANAGHIA*, COMPANIA DE NAVIERA SAPPHO S.A. AND ANGLO CANADIAN SHIPPING COMPANY LIMITED DEFENDANTS.

Shipping—Practice—Order to rectify name of defendant company—Default judgment set aside.

Held: That an order will go rectifying an error in the name of defendant company and setting aside a default judgment when the plaintiffs have not been prejudiced except as to some loss of time and when to allow the judgment to stand would deprive the shipowners of a hearing as to liability and, if so found, as to quantum.

MOTION for an order rectifying a mistake in the name of defendant company.

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The motion was heard before the Honourable Mr. Justice Sidney Smith, District Judge in Admiralty for the British Columbia Admiralty District at Vancouver.

J. R. Cunningham for the motion.

C. C. I. Merritt contra.

The facts and questions of law raised are stated in the reasons for judgment.

SIDNEY SMITH D.J.A. now (May 28, 1959) delivered the following judgment:

In the unusual circumstances here outlined I grant the plaintiffs' motion to rectify the slip in the naming of the defendant company Sappho. The correct name is *Compania De Navegacion Sappho S.A.* The words *Naviera* and *Navegacion* are substantially synonymous in the Spanish language. This company is the owner of the defendant Panamanian ship *Panaghia* and at all material times the Anglo Canadian Shipping Company Limited was the charterer. I am satisfied that service of notice of the concurrent writ of summons was correctly made in Panama on the shipowners; but I set aside the default personal judgment and all subsequent proceedings against them.

The difficulty arose in consequence of the curious wording of a letter from the shipowners' attorneys in New York to their solicitors here. Their reading of the letter caused the local solicitors to believe, in error, that the notice of the concurrent writ had been served by mail. This was not so. A search of the documents on file did not dispel their error which persisted to the end. This mistaken belief is all the more remarkable since the most ordinary enquiries would have unmasked the true position.

The writ of summons was issued on March 2, 1955 and was served without delay on the defendant Anglo Canadian Company, whose solicitors duly entered an appearance. The claim was for damage to certain shipments of wood pulp carried on the defendant vessel from ports in British Columbia to Japan. No appearance having been entered, counsel for plaintiffs moved on March 14, 1957 for personal judgment against the shipowners, and on

July 4, 1957 obtained judgment by default. Copy of this judgment was later forwarded by plaintiffs' solicitors to the shipowners' solicitors here.

Meanwhile the defendant ship had been in British Columbian ports from September 2 to September 26, 1956. This was not disclosed to me. Had it been so, and apart from all other circumstances pressed upon me by shipowners' counsel, I should not have let the personal judgment go by default. No attempt was made to arrest the vessel. The Court would have granted all proper indulgence to that end. (The ship was again in these waters from January 27 to February 15, 1958—and again without interference.)

Meanwhile, too, the usual course of proceedings *vis-a-vis* the plaintiffs and the defendant Anglo Canadian Company had been followed—defence, discovery of documents, and a commission to examine witnesses in Japan. Upon this examination plaintiffs and the Anglo Canadian Company were respectively represented by counsel and a number of witnesses were examined and cross-examined.

Upon the return of the Commission the Deputy Registrar on June 11 and 19, 1958, at the instance of the plaintiffs, entered upon a reference to assess damages. This was *ex parte*. The Anglo Canadian Company, though notified on June 6, did not appear on the reference. The plaintiffs alone were represented. The learned Registrar heard evidence on June 11 and again on June 19, 1958, and on that day assessed the damages at $31,259.33 plus interest at 4 per cent. On the same day plaintiffs' solicitors moved before me and obtained an order to the effect that the June 6 notice of appointment for the reference be proper notice to the shipowners and to the Anglo Canadian Company; that the final hearing take place on June 23; and that notice of the final hearing be sent to the shipowners on or before June 20. On the same day they filed a "consent" to the same effect signed by both the solicitors for the shipowners and the solicitors for the Anglo Canadian Company. The aforesaid order was made *ex parte* and *per incuriam*. Had the situation been made more manifest I should not have approved for hearing an assessment of damages which was completed that same day. I should also

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have sought enlightenment on why the Anglo Canadian solicitors "consented" to this notice when they had not even appeared on the reference; and what instructions they had to give any consent on behalf of the shipowners in Panama.

It remains to add that on June 23, 1958 the shipowners, by their solicitor, appeared before the Deputy Registrar. He stated that his firm expected instructions to set aside all proceedings against their clients.

The initial mistake of the shipowners' solicitors was deplorable. But it would be more deplorable were I, in these circumstances, to allow the default judgment to stand, and thus deprive the shipowners of a hearing both as to liability and, if so found, as to quantum, especially as the plaintiffs have not been prejudiced except as to some loss of time.

I therefore in my discretion make the order above mentioned and shall deal with all costs on the trial when matters have become clarified.

Order accordingly.