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In re LAKHMIDA'S HANZRA'J.

PER CURIAM (COUCH, C. J., and ARNOULD, J.) :—Notes must be taken by an officer of the Court in Insolvency to enable a party to appeal. Vacation is to be computed in the time allowed for appealing, unless the time expires during the vacation, in which case the petition should be presented to the Court or a Judge on the first day after the vacation.

Admiralty Side.

April 28.

The Proceeds of "The Asia."

HORMASJI AND UKARJI.....*Plaintiffs.*

Jurisdiction—Admiralty — Necessaries—Foreign Ship—Discretion—7 Geo. I., c. 21, Sec. 2—3 & 4 Vict., c. 65, Sec. 6—24 Vict., c. 10.

The Stat. 7 Geo. I., c. 21, Sec. 2 (which declared void all contracts by way of bottomry made by any subject of His Majesty on any ship in the service of foreigners bound, or designed to trade, to the East, and all contracts for loading or supplying such ships with goods, &c., or with any "provisions, stores, or necessaries," &c.), is repealed by implication.

The Stat. 3 & 4 Vict., c. 65, Sec. 6, does not confer jurisdiction upon the High Court of Bombay on its Admiralty side to entertain causes for necessaries supplied to foreign ships, that statute not extending to India.

The Stat. 24 Vict., c. 10 (Admiralty Act of 1860), does not extend to India.

The jurisdiction of the High Court on its Admiralty side is the same as that exercised in the Court of Admiralty in England prior to the passing of the above statutes.

The extent and nature of that jurisdiction considered and explained.

When a suit is brought by material men for necessaries supplied to a foreign ship against the surplus proceeds of such ship lying in the registry of the court, and there is no opposition on the part of the owners of those proceeds, the Court has a discretionary power to allow the claim of the material men to be paid out of such unclaimed proceeds.

THIS suit, filed on the Admiralty side of the High Court, was heard before WESTROPP, J., in a Division Court.

Farran for the plaintiffs.

There was no appearance on behalf of the owner.

The facts, pleadings, and cases cited are fully reviewed in the judgment of the Court.

Cur. adv. vult.

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WESTROPP, J.:—This suit, at the Admiralty side of this court, to recover Rs. 2,402-3-5, "for necessaries supplied to, and necessary expenses incurred in respect of, the ship 'Asia' on the credit of the said ship," whilst lying in Bombay Harbour, was commenced on the 10th of December 1867. The plaint stated that another suit (No. 5 of 1867) at the same side of this court had been brought by the seamen of the same ship (which was a Portuguese vessel) for wages; and that on the 9th of October 1867 it was decreed in that suit that she should be sold, and that the wages due to the seamen, and their costs, should be paid out of the proceeds, and that the surplus should be paid into court. The present plaintiffs prayed for payment of the amount of their claim out of those surplus proceeds.

The Portuguese Consul, Mr. Fernandez, had due notice of both suits, * and, by order of the court, the sale of the ship in Suit No. 5 of 1867 was conducted, under his superintendence, by the Sheriff.

The first point which arose was, whether the Stat. 7 Geo. I., c. 21, which (*inter alia*) declares to be void all contracts by way of bottomry made by any subject of His Majesty on any ship in the service of foreigners bound, or designed to trade, to the East, and all contracts for loading or supplying her with goods, &c., or with "any provisions, stores, or necessaries," &c., is still in force. The case of *The India* (No. 2) (*a*), decided by Dr. Lushington in January 1864, happily disposes of that question in the negative. Although it is not in terms repealed by any statute, he, on grounds which are quite conclusive, held it to be repealed by implication, because its continuance would be inconsistent with the state of trade as established by subsequent enactments. He referred to the Stat. 3 Geo. III., c. 117; Hertslet, Vol. 6, p. 535; Acts VI. of 1848 and V. of 1850 of the Government of India; and Stat. 3 & 4 Wm. IV., c. 93, s. 2.

* NOTE.—As to the necessity for notice to the Consul *vide* "*The Nina*," L. R. 2 Privy Council App. 38.—ED.

(*a*) 33 L. J., N. S. Admiralty, p. 193 S. C.; 12 L. T., N. S.; and 2 Pritchard 1073.

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The next point was, whether the Stat. 3 & 4 Vict., c. 65, Sec. 6 (passed in the year 1840), confers jurisdiction upon this court at its Admiralty side to entertain causes for necessaries supplied to foreign ships. And this I think it does not: 1*st*, because, as a general rule, Imperial statutes in which India is not named or indicated, generally speaking, are not applicable here; 2*ndly*, because that statute purports to apply to the High Court of Admiralty of England only, and contains provisions wholly inconsistent with its application to Admiralty Courts out of Great Britain. I find that in *The Australia* (*b*), which was an appeal from the Vice-Admiralty Court at Hongkong, Dr. Lushington, in giving the judgment of the Privy Council, and after declaring that the decree below must be reversed, said: "I ought to have said one word with respect to the jurisdiction in cases of this kind. Their Lordships have decided this case upon its merits, because it appeared to them that it would be more satisfactory on the whole so to do; but the state of the law must be taken to be this. A Vice-Admiralty Court has no more than the ordinary Admiralty jurisdiction. That jurisdiction is the jurisdiction which was possessed by Courts of Admiralty antecedent to the passing of the statute (*c*) which enlarged it. What is the nature of that jurisdiction in a cause of this description will be seen from the judgments of Lord Stowell upon that subject, which are collected together in Mr. Pritchard's Digest." The question there was one of title, and, as Dr. Lushington thought, not within the jurisdiction of a Vice-Admiralty Court. In *The Rajah of Cochin* (*d*) the same learned Judge, in the Court of Admiralty, said: "I am of opinion that by statute, and for other reasons, the Vice-Admiralty Courts in our Colonies properly constituted exercise the same jurisdiction as this court, with one exception, and that is, where particular powers are conferred upon this court by name, and not upon the Vice-Admiralty Courts; and there are instances to that effect. I need not look to the Merchant Shipping Act alone

(*b*) Swabey R. 480—488, decided in 1859.

(*c*) 3 & 4 Vict., c. 65; and see especially Sec. 4, as to trying questions of title.

(*d*) Swabey R. 475.

for this position; there is also the Stat. 2 Wm. IV., c. 51 (*e*), one special object of which was to obviate doubts as to the jurisdiction of the Vice-Admiralty Courts." He then proceeds to show that Sec. 191 of the Merchant Shipping Act applied in direct terms to Vice-Admiralty Courts.

In both of those cases the remarks of Dr. Lushington were made with respect to *Vice*-Admiralty Courts, but the principle contained in them seems equally applicable to the Admiralty jurisdiction of this court.

The Admiralty jurisdiction of this court is the same as that of the Supreme Court (*f*). The Admiralty Civil jurisdiction of that court is contained in Sec. 53 of its Charter (see 2 Morley Dig. O. S. 673), which empowered that court to take cognisance of and determine all causes civil and maritime, and many other matters voluminously enumerated in that section, but strictly limited by the following provision:—"The cognisance whereof doth belong to the jurisdiction of the Admiralty, as the same is used and exercised in that part of Great Britain called England, together with all and singular their incidents &c., and to proceed summarily therein, with all possible despatch, according to the course of our Admiralty of that part of Great Britain called England, without the strict formalities of law, considering only the truth of the fact and the equity of the case." The language of the 26th section of the Charter of the Supreme Court at Calcutta is very nearly the same. If it had been intended that the Admiralty jurisdiction in Bombay should expand *pari passu* with the jurisdiction of the High Court of Admiralty in England, as enlarged from time to time by legislation, I should have expected to find in the Charter a provision similar to that in the Indian Insolvent Debtors' Act, 11 & 12 Vict., c. 21, Sec. 40, which gives to the Insolvent Debtors' Court power to admit proof of debts to the same extent as might be done in England under the Bankruptcy Acts then in force, *or which thereafter might be passed*,

(*e*) Sec. 6.

(*f*) *See* Charter 28th Dec. 1865, Secs. 32, 33; and Charter 26th June 1862, Secs. 31, 32.

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The case of *The Hoogly Steam Tug Company* v. *The Indian*, stated to have been decided on the 30th of January 1866 on the Admiralty side of this court, was mentioned to be a suit for towage,—whether for ordinary towage, which was provided for in England by the Stat. 3 & 4 Vict., c. 65, Sec. 6, or salvage by way of towage, and so a case within the ancient jurisdiction of the High Court of Admiralty, I do not know, nor is it of importance to consider, as the decree was by consent, and, therefore, cannot aid the Court on the question of the applicability of that Act. The case of *Soomarkhan Mahomed & Co.* v. *The Steamer Sir James Rivett Carnac*, which has been also mentioned by Mr. Farran in his excellent argument for the plaintiffs, was an action for coals supplied to a steamer, and there was a decree *in rem* for a sale of the steamer, pronounced on the 10th of January 1868, at the Admiralty side of this court, but there was neither any argument, nor any appearance for the owner, and the attention of the Court does not seem to have been drawn to the question of jurisdiction.

For reasons analogous to those already given, I lately, and with some reluctance, held, in an original suit, No. 4 of 1867, brought by Sir Charles Forbes & Co. against this same Portuguese ship, "The Asia," in respect of the non-delivery of timber pursuant to a bill of lading made at Moulmein, that such an action would not lie *in rem* at the Admiralty side, the High Court of Admiralty in England not having had in 1823, or until 1861, any jurisdiction to take cognisance of such a suit. That jurisdiction, together with other new and very useful powers, was conferred upon the High Court of Admiralty in England by the Admiralty Court Act of 1861 (24 Vict., c. 10), which statute, for reasons similar to those given with respect to the Stat. 3 & 4 Vict., c. 65, does not, I think, apply to India, or operate to extend the Admiralty jurisdiction of this court. I should mention that in *Murray* v. *Langford* (*g*) Mr. Leith moved at the Plea side of the Supreme Court at Calcutta, in November 1842, for a prohibition to the Admiralty side of it to prohibit it from proceed-

(*g*) Fulton R. 95.

ing with a suit *in rem* for stores supplied to *The Henrietta*. Mr. Leith said that the Admiralty Court had no jurisdiction, as the party could not proceed against the ship for stores. Peel, C. J., said that "the Court could not grant this prohibition, as it will be a prohibiting of themselves. The best plan will be for the parties to come in on the Admiralty side and move to take the libel off the file, or to set aside the order and the proceedings had thereunder by which the ship has been seized." Eventually, however, on the 26th of January 1843 (*h*), the court stayed the proceedings, on the ground that it had no jurisdiction, for the vessel was stated to belong to Liverpool, and the contract to have taken place there, Peel, C.J., adding: "The contract, therefore, having been entered into in a place out of the local jurisdiction of this court on its Admiralty side, it is not necessary to inquire whether a prohibition would issue from the Queen's Bench in England, *though it appears to us that it would*. This being a case in which there is a defect in the court, the moment it appears, the court should stay the proceedings, but we are not at present prepared to say that the libel should be taken off the file. Some summary mode like this must exist, and each party must pay his own costs," &c.

It is evident, I think, from these remarks, that Sir L. Peel and his colleagues thought that, independently of the objection as to the locality in which the necessaries were furnished, the Admiralty Side of the Calcutta Supreme Court had not any authority to entertain a suit for necessaries *in rem*. That case occurred in 1842-43; the Stat. 3 & 4 Vict., c. 65, received the Royal assent on the 7th of August 1840, and the Report does not show that either the Court or the counsel suggested that *that* enactment could be brought in aid of the jurisdiction.

"Suits for necessaries" against vessels have been, I think, inadvertently introduced by us in No. 6 of our recently made Admiralty Rules. Those rules were, in the main, copied from the English rules, a circumstance which well accounts for the slip. Of course the mention of such suits

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in that rule cannot give us jurisdiction, if we have it not *aliunde*.

It becomes necessary, therefore, to ascertain what was the jurisdiction of the High Court of Admiralty in England, previously to its extension by the Statutes 3 & 4 Vict., c. 65, and 24 Vict., c. 10, with respect to repairs executed and necessaries furnished on the credit of the ship, and what were the rights, as regards lien on the ship, of the persons who make repairs and supply necessaries, and who, in the archaic phraseology of that court, bear the appellation of material men.

By the general maritime law of Europe, which adopted the Roman Law, persons who repaired, or furnished necessaries for a ship, or lent money for that purpose, had, independently of any express contract, a lien on the ship.

In the earlier days of the Court of Admiralty it would appear to have adopted that rule, and, notwithstanding some statutes * unfavorable to its jurisdiction in that particular, to have entertained suits for the enforcement of such liens.

In *The Zodiac* (*i*) Lord Stowell said: "In most of those countries governed by the Civil Law, repairs and necessaries form a lien upon the ship herself. In our country the same doctrine had for a long time been held by the Maritime Courts, but after a long contest it was finally overthrown by the Courts of Common Law, and by the highest judicature of the country, the House of Lords, in the reign of Charles II."

It must be noted, however, that a shipwright, who has taken a ship into his possession to repair it, is not bound to part with his possession, until he is paid for the repairs. But if he have once parted with it, or not taken possession, he has no lien on the ship by the Law of England (*j*). In 1846 the Supreme Court of Calcutta, in *Stalkartt* v.

* 13 Ric. II., c. 5; 15 Ric. II., c. 3; 2 Hen. IV., c. 11.

(*i*) 1 Hagg. Adm. R. 325.

(*j*) The authorities are collected in Abbott on Shipping, Part II., Chap. III. (p. 116 of the 9th Ed.)

Mackay (*k*), an Equity Suit, held that they could not sell a British ship at suit of a party who had a simple lien on the possession for repairs.

From the reign of Queen Anne, at latest, the Maritime Courts of England ceased to attempt to proceed *in rem* against *the ship herself* for repairs made or necessaries furnished to British ships in England (*l*). In 1818 the Supreme Court of Calcutta, following that course, declined to entertain an original suit *in rem* at its Admiralty side for repairs done to a ship in Calcutta, of which the owner resided also in Calcutta: *Henriquez* v. *The Admiral Moore and W. T. Bennett* (*m*).

A distinction, however, was taken between original suits by material men against the ship herself, and suits against surplus proceeds remaining in the Registry after a sale of the ship at the suit of mariners for their wages, or in other suits properly maintainable *in rem*. That distinction, upon the authority of *The Adventure*, decided in 1763, and quoted by Lord Stowell, was recognised by him in *The John* (*n*), which was, however, a foreign (American) ship, a circumstance which he likewise noted. In another case, relating to the surplus proceeds of the same vessel (*o*), he also held that where the demand itself is a subject of dispute, the Court of Admiralty would not interfere.

In the cases of *The Wharton*, *The Barbara*, *The Harmonia*, *The Bombay*, and *The Unity*, mentioned in a note in 3 Hagg. Adm. Rep. 148, and also in 3 Knapp P. C. C. 110, material men were paid out of surplus proceeds remaining in the Registry; but in three out of those five cases there was no appearance given for the owners, or opposition by any person; and in the two others (*The Harmonia* and *The Bombay*) the opposition at first made was eventually withdrawn.

The Portsea (*p*) was a case in which a mortgagee who had never been in possession, but the *bona fides* of whose mort-

(*k*) Montriou R. 227. (*l*) 3 Hagg. 144.
(*m*) East's Notes No. 86; 2 Morley's Dig., p. 156.
(*n*) 3 C. Rob. 288. (*o*) *Ibid.* 291. (*p*) 2 Hagg. Adm. Rep. 84.

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gage (which was under seal) was not denied, failed, on the opposition of the executor of the owner, to obtain payment out of surplus proceeds. It was argued for the mortgagee, but denied by the Court, that his case was like that of material men.

In *The Maitland* (*q*), which was the case of a Calcutta ship, material men sought for payment out of surplus proceeds; their application was opposed by the owners, and the accounts were disputed. It was argued that the principle which was adopted in *The John* applied to British, as well as to foreign ships. Dr. Lushington, for the owners, replied that *The John* was foreign, and there was no opposition. Sir C. Robinson refused the application, and denied that there was "any solid distinction between original suits, and suits against proceeds in cases that are opposed" (*r*). I shall presently again refer to his judgment.

The Neptune (*s*) was the case of a British ship, and it was held in the Privy Council, on appeal from, and reversing the decree of Sir J. Nichol in the Admiralty, that material men in England have no lien for supplies furnished in England on surplus proceeds remaining in the Registry after sale of the ship, under a decree of the Admiralty Court for payment of seamen's wages. There the mortgagee, who had been in possession when the ship was arrested, at the suit of the crew, opposed the suit of the material men, and was held, for that purpose, sufficiently to represent the owner (*t*), and the surplus proceeds were paid over to him in respect of his mortgage claim. That decision has been followed in *The New Eagle* (*u*). The observations of Dr. Lushington incidentally made in his judgment in *The Pacific* (*v*) are to the same effect.

Until the passing of the statute, which I shall next mention, the same doctrine was applicable to suits for necessaries against foreign ships (*w*).

(*q*) 2 Hagg. Adm. Rep. 253.
(*r*) *Ibid.* 255.
(*s*) 3 Knapp P. C. C. 94.
(*t*) *Ibid.* 120.
(*u*) 10 Jur. 623, S. C. 4; Notes of Cases 426.
(*v*) 10 Jur. N. S. 1110.
(*w*) See *The Comtesse de Freyeville*, 1 Lushington 332; *The Ocean*, 2 W. Rob. 371; *The Wataga*, Swabey 166.

The Stat. 3 & 4 Vict., c. 65, s. 6, assimilated the law of England to the maritime law of the Continent, so far as to confer on the High Court of Admiralty in England jurisdiction to entertain suits *in rem* in respect of necessaries provided for *foreign* ships: *The Fecha* (*x*), *The Perla* (*y*), *The Wataga* (*z*), *The Alexander* (*a*).

The Admiralty Court Act of 1861 (Stat. 24 Vict., c. 10) was a further extension of the powers of the High Court of Admiralty in England. Sec. 4 gave it "jurisdiction over any claim for the building, equipping, or repairing of *any ship*, if, at the time of the institution of the cause, the ship or the proceeds thereof are under arrest of the Court." Sec. 5 gave it "jurisdiction over any claim for necessaries supplied to *any ship* elsewhere than in the port to which the ship belongs, unless it is shown to the satisfaction of the Court, that at the time of the institution of the cause, any owner or part-owner of the ship is domiciled in England or Wales," &c. * That enactment, it has been held, did not curtail or affect the Stat. 3 & 4 Vict., c. 65, Sec. 6: *The Ella A. Clark* (*b*).

I have already stated that neither of these enactments is, in my opinion, applicable to this court, but as neither the owner, nor any other party interested in "The Asia," has appeared, or opposed this suit against the surplus proceeds remaining after the sale and satisfaction of the decree in the wages suit; and as Mr. Fernandez, the Portuguese Consul, who throughout this suit has had full knowledge of it, has,—as I think, very properly,—abstained from any opposition, knowing, I presume, that, according to the general maritime law of the continent of Europe, a proceeding *in rem* would, pursuant to the Civil Law, be allowed in such a case, I think that, independently of the Stat. 3 & 4 Vict., c. 65, s. 6,

(*x*) 1 Spinks Ecc. & Adm. Rep. 441. (*y*) Swabey 354.

(*z*) Swabey 165, which case shows that a suit may, under the statute, be maintained *in England* for necessaries supplied in a *Colonial* port to a *foreign* ship. But neither that statute, nor the Admiralty Courts' Act, 1861, Sec. 5, is applicable to repairs to a *foreign* ship in a *foreign* port: *The India*, 9 Jur. N. S. 418.—ED.

(*a*) 1 W. Rob. 288 S. C.; 1 Notes of Cases 188.

* See also Sec. 35. (*b*) 9 Jur. N. S. 312.

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the Court is, on the English authorities, warranted in sanctioning a payment out of the surplus proceeds to the plaintiffs of such amounts as fairly comes under the head of necessaries supplied by them. In the case of *The Maitland*, already mentioned, there is a passage in the judgment of Sir C. Robinson, which is quoted apparently with approbation by the learned Judge who pronounced the judgment of the Privy Council in *The Neptune*. It is this: "There does not seem to be any solid distinction between original suits and suits against proceeds in cases that are opposed; whereas in cases unopposed, the exercise of a judicial discretion by the Court in permitting bills of this kind to be paid out of unclaimed proceeds, instead of being indefinitely impounded, may be a sound discretion, and capable of being justified to that extent, notwithstanding the general prohibition" (*c*). In *The John*, Lord Stowell, as we have seen, rested his decree on the grounds that the ship was foreign (which circumstance standing alone would not be sufficient), and the claim of the material men being unopposed. In *the Afina Van Linge* (*d*), which was an action for necessaries brought subsequently to the passing of the Stat. 3 & 4 Vict., *c.* 65, s. 6, the action went by default, the ship was sold, the proceeds were paid into the Registry, and the Surrogate, by interlocutory decree, found a sum due to the plaintiffs. On a motion for payment of that sum, out of the proceeds, to the plaintiffs, Dr. Lushington, after noticing that the necessary moneys had been advanced partly within, and partly *without*, the jurisdiction of the court, said: "It must be well understood that, if such a motion were opposed, the Court would have considerable difficulty in making the order. But as on this occasion the shipowner has not interposed to protect his interest, I shall grant the motion, and I order the money to be paid out, as prayed."

Had there been any opposition by the owner in this present suit, or by any person occupying such a position as would justify him in opposing, I should be compelled to

(*c*) 3 Knapp P. C. C. 119, 120; and see 2 Hagg. Adm. Rep. 255.
(*d*) Swabey 514.

decree against the plaintiffs. But as there is not any such opposition, I decree that a sum of Rs. 2,312-3-5 be paid out of the surplus proceeds to the plaintiffs, which amount is less, by Rs. 90, than that claimed by them, as, although the late Master of the vessel has given evidence in support of the whole of their claim, I have disallowed the item of Rs. 90 for "dingy hire," because I think he ought to have used the ship's boat. I have passed the item of Rs. 50 for "carriage hire," as it is a necessary in this climate for a master when going about, as he did, upon the ship's business. The Portuguese Consul, Mr. Fernandez, is, therefore, to pay to the plaintiffs, or their attorney properly authorised, the sum of Rs. 2,312-3-5 and their taxed costs of this suit, out of the surplus proceeds, in his hands, of the said ship, and then forthwith to pay to the Accountant General the balance of such proceeds left in his hands. The same to be invested by the Accountant General to the credit of Admiralty Suit No. 5 of 1867.

It may not, I venture to hope, be considered presumptuous on my part to say that the interests of commerce in the East would be advanced, were the Legislature to confer upon the Admiralty Side of the High Courts in India some of the powers given, in 1840 and in 1861, to the High Court of Admiralty in England, by the Statutes 3 & 4 Vict., c. 65, and 24 Vict., c. 10.

Decree for the plaintiffs.

Attorneys for the plaintiffs: *Keir, Prescot, and Winter.*