1962
Sept. 28
Oct. 17

BETWEEN:

WESTMINSTER SHOOK MILLS LIMITED
Appellant (PLAINTIFF),

AND

THE SHIP *STORMER* ....Respondent (DEFENDANT).

Shipping—Action in rem does not lie where registered owner of ship domiciled in Canada—Admiralty Act, R.S.C. 1952, c. 1, s. 18, s-ss. 3(a)(i) and 4—"Use" or "hire" of a ship—Appeal from District Judge in Admiralty dismissed.

Plaintiff brought its action against defendant ship claiming damages for loss sustained by it through the breaking of booms of logs which defendant had contracted to tow from one point to another in British Columbia waters, alleging such breaking of the booms was due to insufficient power of defendant ship to tow the logs in safety.

The action was dismissed by the District Judge in Admiralty for the British Columbia Admiralty District and from that judgment plaintiff appeals to this Court.

Held: That no action in rem lies where the registered owner was domiciled in Canada at the date of the institution of the action as per the *Admiralty Act,* R.S.C. 1952, c. 1, s. 18, s-ss. 3(*a*)(i) and 4.

2. That the oral agreement entered into between the parties related to the use or hire of a ship as per s. 18, s-s. 3(*a*)(i) of the *Admiralty Act.*

3. That the appeal must be dismissed.

APPEAL from the judgment of the Honourable Mr. Justice Norris, District Judge in Admiralty for the British Columbia Admiralty District.

The appeal was heard before the Honourable Mr. Justice Dumoulin at Victoria.

G. F. McMaster for appellant (plaintiff).

John C. Bouck for respondent (defendant).

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

DUMOULIN J. now (October 17, 1962) delivered the following judgment:

This is an appeal from a decision dismissing with costs, plaintiff's action, rendered November 29, 1961, by the Honourable Mr. Justice T. G. Norris, District Judge in Admiralty for British Columbia.

The pertinent facts, outlined in a Statement of Facts Agreed by Counsel, relate that:

1. During September, 1956, the Plaintiff ..... contracted with R. L. Richardson, operating as Howe Sound Towing Company, for the towage of about 36½ sections of logs from Clam Bay to New Westminster for reward.

* * *

5. R. L. Richardson was aware that the power of the Defendant ship was insufficient to tow the said logs in safety.

6. At or about 1:00 p.m., the said booms struck Race Point and were broken up, allowing many of the logs to escape.

* * *

8. The loss and damage (i.e. expense incurred for the recovery and rebooming of the drifting or grounded logs by Gulf Log Salvage Association) were due to the fact that Defendant ship did not have sufficient power to overcome the normal tide and current encountered on the route taken which was the customary one for the purpose.

A personal action was instituted on January 30, 1958 against R. L. Richardson and Howe Sound Towing Company for damages arising out of "the negligent use of the Ship *Stormer*" (cf. Agreed Statement of Facts, s. 9), and, the same day, a Consent Judgment for $7,191.56, was entered against R. L. Richardson and the Company. On the said judgment no more than $50 have been recovered.

With a comprehensible hope of bringing about a better result, the plaintiff, on May 27, 1960, resorted to this action against the ship *Stormer*, her owners and all others interested.

Against this would-be remedy, respondent objects that s. 18, s-s. (3)(*a*)(i) and s-s. (4) of the *Admiralty Act*, 1952, R.S.C. c. 1, precludes any recourse to an action *in rem*, since all parties admit the Canadian domicile of the ship's owners at the material time. The relevant provisions just mentioned read as follows:

18. (3) Notwithstanding anything in this Act or in the Act mentioned in subsection (2), the Court has jurisdiction to hear and determine

(*a*) any claim

(i) arising out of an agreement relating to the use or hire of a ship,

(4) No action "in rem" in respect of any claim mentioned in paragraph (*a*) of subsection (3) is within the jurisdiction of the Court unless it is shown to the Court that at the time of the institution of the proceedings no owner or part owner of the ship was domiciled in Canada.

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Dumoulin J.

The plaintiff's contention, on the other hand, is that the oral contract at issue was not for the "use or hire of a ship" but merely for the towing of logs, with the consequent inference that this disabling section would not apply.

To start with, it would seem odd that a case devoid of any factual connexity whatsoever with the use or hire of a ship for towing those logs could ever see the light of day in an Admiralty Court.

Furthermore, the appellant company has explicitly entertained a truer appreciation in paragraph 9 of the "Statement of Facts Agreed by Counsel" wherein it unreservedly agreed to qualify its action as one "for damages *arising out of the negligent use of the Ship Stormer* by R. L. Richardson in the towing of logs . . ." (italics are mine).

Lastly, if the logs were not towed for a certain distance through the medium of the ship *Stormer,* used and hired for such a purpose, then this Court is left in total ignorance of the hauling power that brought them opposite Race Point. This Court, therefore, fully concurs with the learned trial Judge's finding that the oral agreement entered upon by the contending parties related to the use or hire of a ship as foreseen in s-s. (3)(*a*)(i) of s. 18.

Accessorily, appellant submitted that, whatever the outcome of its main argument might be, s-s. (2) of 18, integrating under the style of Schedule "A", s. 22 of the *Supreme Court of Judicature (Consolidation) Act,* 1925, of the Parliament of the United Kingdom as part of our own *Admiralty Act,* prohibits the applicability of s-s. (4) aforesaid.

The Court can no more agree with this submission than with the former one, since s-s. (2) in its six first lines, enacts that:

> (2) Without restricting the generality of subsection (1) of this section, *and subject to the provisions of subsection (3) thereof,* section 22 of the Supreme Court of Judicature (Consolidation) Act, 1925, of the Parliament of the United Kingdom, which is Schedule A to this Act, shall, *in so far as it can,* apply to and be applied by the Court, . . . (italics are mine).

Now, we have seen that, pursuant to s-s. (4) of our s. 18, no action *in rem* lies "in respect of any claim mentioned in paragraph (a) of s-s. (3)", when, as admitted here, an owner or part owner of the ship is domiciled in Canada at the time the proceedings were instituted.

An express reference of this nature merges s-s. (4) with s-s. (3), both these provisions thereby becoming, so to say, a common hyphenated text, superseding Schedule A, as clearly stipulated in s-s. (2). This subsidiary plea also remains unavailing; it only enhances the manifest exclusion in the instant case, of an action *in rem*.

For the reasons previously given, the appeal is dismissed and the judgment of the learned trial Judge affirmed in all of its several conclusions.

The Court doth further order and adjudge that the respondents do recover from the appellant all costs incurred in both this Court and the one below after taxation thereof.

Judgment accordingly.