

## APPEAL FROM ORIGINAL CIVIL.

*Before C. C. Ghose A. C. J. and Mallik J.*

1933

June 28.

NIPPON YUSEN KAISHA

v.

“MARIENFELS.”\*

*Admiralty—Collision—Limitation of action—Extension of time—Maritime Conventions Act, 1911 (1 & 2 Geo. V. c. 57), s. 8.*

On the 16th March, 1930, a collision took place between two ships, namely “Malacca Maru”, belonging to the plaintiffs, and “Marienfels”, belonging to the defendants. The plaintiffs first called on the defendants to admit liability. The defendants repudiated liability and held the plaintiffs responsible. The plaintiffs, thereupon, suggested arbitration. The defendants replied refusing to do anything until the Marine Court of Enquiry had been held. The Marine Court made a report on the 16th November, 1930, but the findings were not communicated to the parties until June, 1931. The plaintiffs, thereafter, suggested settlement on the basis of both parties being at fault equally but the defendants rejected it. Negotiations continued between the underwriters of the parties and, on the 12th November, 1931, the defendants intimated to the plaintiffs that they had given instructions to institute legal proceedings immediately. The defendants filed their suit in Admiralty on the 12th March, 1932. The plaintiffs filed their cross-suit on the 25th April, 1932. On the defendants taking the plea of limitation, the plaintiffs applied for extension of time under section 8 of the Maritime Conventions Act, 1911.

*Held* by the trial Judge (Lort-Williams J.) that no sufficient excuse had been given by the plaintiffs for their failure to bring a suit during the period from the 12th November, 1931, till 15th March, 1932, and extension of time could not be granted.

*Held*, on appeal, that, as the learned Judge had not exercised his discretion on wrong principles, the court of appeal will not interfere with the order.

*The Kashmir* (1) and *The James Westoll* (2) relied on.

APPEAL by the plaintiff company.

The facts of the case and arguments of counsel appear sufficiently from the judgments below.

The judgment of the Court of first instance (dated 5th December, 1932) was as follows :

LORT-WILLIAMS J. In this case a collision took place on 16th March, 1930, on the river Hooghly, between the “Marienfels”, a ship belonging to the defendants, and the “Malacca Maru”, belonging to the plaintiffs. In

\*Appeal from Original Order, No. 14 of 1933, in Admiralty Case No. 2 of 1932.

respect of this collision, the defendants on the 12th March, 1932, instituted a suit against the plaintiffs, in this Court in its Admiralty Jurisdiction, being Suit No. 1 of 1932. On the 25th April, 1932, the plaintiffs filed the present cross-suit.

Section 8 of the Maritime Conventions Act of 1911 provides that no action shall be maintainable to enforce any claim or lien against a vessel or her owners in respect of any damage or loss to another vessel, unless proceedings therein are commenced within two years from the date when the damage was caused, provided that any court having jurisdiction to deal with an action to which the section relates may extend such period to such extent and on such conditions as it thinks fit.

The plaintiffs ask that the period may be extended in order that their suit may be treated as being brought within the period of limitation.

I have been referred to several cases in which the principles upon which the court is to act have been dealt with. In the case of *The Cambric* (1), the learned President was apparently influenced by the fact that the nominal plaintiff in the action was the Minister of Marine for His Majesty the Sultan of Turkey and that it was common knowledge that Turkey had been in difficulties for some time during which the two years were drawing out. The fact that there had been some negotiations between the parties also influenced him nor was he satisfied that the defendants would be prejudiced if time were extended.

The case of *The "Arraiz"* (2) shows that the court has full discretion in the matter and the exercise of that discretion will not be interfered with on appeal so long as it has proceeded upon correct principles. In that case proceedings had been brought by the owners of the "Arraiz" in the New York District Court. In those proceedings the defendants, the United States Shipping Board, filed a cross claim and demanded security. An order requiring security to be given was made and the proceedings instituted by the owners of the "Arraiz" were stayed till security was given. No security was given and an order was made, without opposition, discontinuing the action. That was on 17th August, 1923. On the 16th April, 1924, an order was made by Mr. Justice Hill giving leave to the Shipping Board to maintain an action against the "Arraiz" and the writ was issued on 23rd June. Mr. Justice Hill considered that in view of the proceedings before the district court he would undoubtedly have extended the time if the Shipping Board had come to him in September, 1923, and he came to the conclusion that that being so he ought not to refuse the application when they came to him in the following April. The court held that the Judge had exercised his discretion upon correct principles and within the proper limits and that it was not for them to interfere with a discretion properly exercised.

In *H. M. S. "Archer"* (3) a collision occurred in 1915 between the plaintiff's vessel, a Dutch trawler, and *H. M. S. "Archer"*. Diplomatic correspondence ensued and in 1916 the plaintiff was informed that the Admiralty would not admit his claim, but he continued to make diplomatic representations, and on 21st February, 1918, he was informed through the Dutch Minister that the Foreign Office could not re-open the matter. An application for leave to commence proceedings against the Officer Commanding *H. M. S. "Archer"* was made on 21st October, 1918. Leave was granted *ex parte*. On motion to set aside the order it was held that having regard to the delay in making the application which occurred after 21st February—the latest date on which it might be urged in the plaintiff's favour that the case was still under consideration—the court ought not to extend the time,

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(1) (1912) 29 T. L. R. 69.

(2) (1924) 132 L. T. 715.

(3) [1919] P. 1.

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and the order obtained *ex parte* must be set aside. The learned Judge Mr. Justice Hill says in his judgment *inter alia* : "The highest the plaintiff can put is that he was lulled into not bringing his action because of the negotiations between his Government and the British Government.

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But assuming in the plaintiff's favour that the British Government were considering the matter, it cannot be put more favourably than that this continued up to 21st February last, when it was clearly brought to the plaintiff's notice that the British Government would not admit any claim".

In the present case the collision having occurred in March, 1930, correspondence took place between the parties. The plaintiffs in the present suit called on the defendants to admit liability. The defendants on the contrary repudiated liability and held the plaintiffs responsible. The plaintiffs thereupon suggested arbitration. This was immediately rejected by the defendants. In July, 1930, Bail Bonds were exchanged. In November, 1930, a Marine Court found that the pilot of the "Malacca Maru" committed a breach of the rules of the road on the river Hooghly, and this finding came to the knowledge of the defendants in June, 1931. In July they called upon the plaintiffs to pay. In August the plaintiffs refused to accept the Marine Court report and offered to settle on the basis of both ships being to blame. On the 10th August the defendants rejected this offer and demanded payment in full. On the 18th August the plaintiffs again offered to settle on the basis of both parties being to blame, and on the 20th the defendants again refused the offer and said that there would be nothing left to them but to instruct their representatives in Calcutta to lodge an action against the plaintiffs. On the 24th August the plaintiffs acknowledged receipt of this letter and said that they regretted to learn that the defendants refused their offer. They said further that they were referring the matter to their underwriters and to their Principals in Tokyo and would refer to the matter in due course. After that the matter went into the hands of the underwriters and letters passed between the representatives of the underwriters on both sides on the 2nd and 6th of November, 1931. These two letters proceeded very much upon the basis of the correspondence which had taken place between the plaintiffs and the defendants. Finally on the 12th of November, 1931, the defendants' representative Brickman wrote to Dr. Reinhard Reme, the plaintiffs' representative, saying that he noted "that the insurers of 'Malacca Maru' did not see their way to accept the offer of compromise made by us". Further he said that he had informed the defendants of this and that they had given instructions to institute legal proceedings in Calcutta immediately. He thought it appropriate to advise you, the plaintiffs' representative, of this.

It is, therefore, quite clear that the negotiations had come to an end on 12th November and that the clearest possible indication had been given by the defendants to the plaintiffs that they rejected the offers of settlement which had been made and intended to institute proceedings against the plaintiffs. It was not until the 12th March—four months afterwards—that they instituted their suit against the plaintiffs in this Court.

I am satisfied that no sufficient excuse has been given by the plaintiffs for their failure to bring a suit during these four months and I do not feel that I should be justified in granting the extension asked for.

The application, therefore, is dismissed with costs. Certified for counsel.

A. K. Roy, Officiating Advocate-General, and  
Isaacs for the appellants.

S. M. Bose, Officiating Standing Counsel, and Clough for the respondents were not called upon by their Lordships.

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GHOSE A.C.J. This appeal arises out of an application made by the plaintiffs in suit No. 2 of 1932 in the Admiralty Jurisdiction of this Court and the facts which gave rise to that application, shortly stated, are as follows :

It appears that, on the 16th March, 1930, two steamships, namely, the "Marienfels", belonging to the Hansa line, and the "Malacca Maru," belonging to the Nippon Yusen Kaisha, were proceeding down the Hooghly and that, at a point named Pukuria Point, where it is alleged that the waters are of a shallow character, a collision took place between the "Marienfels" and the "Malacca Maru." The "Marienfels" was in charge of Mr. King as pilot and the "Malacca Maru" was in charge of another pilot named Mr. Halford. The collision having taken place on the 16th March, 1930, the "Marienfels" alleged that the "Malacca Maru" was to blame. The "Malacca Maru," on the other hand, alleged that the "Marienfels" was to blame. On the 7th May, 1930, the owners of the "Malacca Maru" wrote to the owners of the "Marienfels" asking for admission of liability for damages. On the 9th May, 1930, the "Marienfels" replied denying liability and holding the "Malacca Maru" responsible for the damages caused as the result of the collision. On the 15th May, 1930, the "Malacca Maru" suggested that the parties should go to arbitration. On the 24th May, 1930, the "Marienfels" stated that their underwriters were not prepared to admit liability or to do anything whatsoever until the Marine Court of Enquiry had been held and had reported. It appears that the Marine Court of Enquiry reported on the matter on the 16th November, 1930, and it is said that the finding of the Marine Court of Enquiry was not communicated to the parties till some time in

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June, 1931. On the 7th July, 1931, the "Marienfels" wrote to the "Malacca Maru" putting forward their claim for damages to the "Marienfels" as a result of the collision. On the 5th August, 1931, the "Malacca Maru" wrote to the "Marienfels" stating that the owners of the former did not agree with the findings of the Marine Court of Enquiry and suggesting a settlement on the basis that both the vessels were equally to blame and that both should pay their own damages. On the 10th August, 1931, the "Marienfels" wrote to the "Malacca Maru" asking for payment of their claim for damages in full. On the 18th August, 1931, the "Malacca Maru" refused to admit the claim of the "Marienfels" for damages and renewed their suggestion that, inasmuch as, in their view, both parties were equally to blame, both sides should pay their own damages. On the 20th August, 1931, the "Marienfels" stated in reply to the last communication of the "Malacca Maru" that they were not prepared to agree to have the matter disposed of on the basis suggested by the "Malacca Maru" that both sides were to blame and that both sides should pay their own damages and they threatened legal proceedings. On the 24th August, 1931, the "Malacca Maru" said that they were referring to their underwriters the question raised by the "Marienfels." On the 6th November, 1931, Dr. Reinhard Remé, representing the re-insurers, wrote to the underwriters of the "Marienfels" offering settlement, but, at the same time, stating that, if the Hansa line took legal proceedings, the owners of the "Malacca Maru" would put forward a claim for damages. On the 12th November, 1931, there was a very important letter from the underwriters of the "Marienfels" to Dr. Reinhard Remé representing the re-insurers of the "Malacca Maru" and it was in these terms :

With reference to the above, I herewith confirm, with thanks, receipt of your letter of 6th instant. I note from your letter that the insurers of the "Malacca Maru" did not see their way to accept the offer of compromise made by us. I have informed the Deutsche Dampfschiffahrts-gesellschaft "Hansa" of this, who have then given instructions to institute legal proceedings in Calcutta immediately. I thought it appropriate to advise you of this.

It appears that nothing further was done and that, ultimately, on the 12th March, 1932, a bill in the Admiralty Jurisdiction of this Court was filed by the owners of the "Marienfels," being Admiralty Suit No. 1 of 1932, in which the owners of the "Marienfels" claimed recovery of a sum of Rs. 64,870-1-11 as damages caused to the "Marienfels" by the "Malacca Maru" during the collision in the river Hooghly on the date referred to above. The writ of summons, we are informed, was served some time about the 23rd March, 1932, and, thereafter, on the 25th April, 1932, a second bill in the Admiralty Jurisdiction of this Court, being Suit No. 2 of 1932, was filed by the owners of the "Malacca Maru," claiming damages to the extent of £6,000 against the owners of the "Marienfels" for damages to their vessel on the occasion of the collision referred to above. The bill was filed, as stated above, on the 25th April, 1932, and the answer of the "Marienfels" was filed on the 15th June, 1932. One of the points taken in the answer of the "Marienfels" was that Suit No. 2 of 1932 filed by the "Malacca Maru" was out of time, having regard to the provisions of section 8 of the Maritime Conventions Act, 1911 (1 & 2 Geo. V. c. 57). The section relied upon by the "Marienfels" runs as follows :

No action shall be maintainable to enforce any claim or lien against a vessel or her owners in respect of any damage or loss to another vessel, her cargo or freight, or any property on board her, or damages for loss of life or personal injuries suffered by any person on board her, caused by the fault of the former vessel, whether such vessel be wholly or partly in fault, or in respect of any salvage services, unless proceedings therein are commenced within two years from the date when the damage or loss or injury was caused or the salvage services were rendered, and an action shall not be maintainable under this Act to enforce any contribution in respect of an overpaid proportion of any damages for loss of life or personal injuries unless proceedings therein are commenced within one year from the date of payment :

Provided that any court having jurisdiction to deal with an action to which this section relates may, in accordance with the rules of court, extend any such period, to such extent and on such conditions as it thinks fit, and shall, if satisfied that there has not during such period been any reasonable opportunity of arresting the defendant vessel within the jurisdiction of the court, or within the territorial waters of the country to which the plaintiff's ship belongs or in which the plaintiff resides or has his principal place of business, extend any such period to an extent sufficient to give such reasonable opportunity.

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Thereafter, the answer of the "Marienfels," having been filed on the 15th June, 1932, a summons was taken out by the "Malacca Maru" dated the 28th July, 1932, giving notice of an application to be brought on on Friday, the 29th July, 1932, on the part of the Nippon Yusen Kaisha for an order that "this Court may be pleased to give them "leave in accordance with the provisions of section 8 "of the Maritime Conventions Act, 1911, to maintain "the suit herein by extending the time for the filing "of the said suit until some date after the filing of the "plaint herein." It appears that, although summons had been taken out on the 28th July, 1932, the matter, apparently, was not brought on for decision before the learned Judge on the Original Side till the 5th of December, 1932. Mr. Justice Lort-Williams, who heard the application, went into the matter of the correspondence which had preceded the filing of the said Suit No. 1 of 1932 and finally came to the conclusion that, in the circumstances disclosed, no case had been made out for exercising the discretion referred to in section 8 of the Maritime Conventions Act, 1911, in favour of the applicants, the Nippon Yusen Kaisha, and he, thereupon, dismissed the application. The present appeal is from that order.

Before I go into the facts and dispose of this appeal, it may be desirable, at the outset, to state that, according to the law, as settled in England, the court of appeal will not interfere with the Judge's discretion except upon very strong grounds. Where the Judge has proceeded upon no incorrect principle, the court of appeal will not and ought not to interfere with his discretion. See in this connection *The Kashmir* (1). To the same effect is the decision of Lord Sumner in the case of *James Westoll* (2), decided on October 31, 1913. Bearing these principles in mind, we have got to consider in this case whether the discretion vested in the learned Judge by the proviso to section 8 of the Maritime Conventions Act, 1911,

(1) [1923] P. 85.

(2) [1923] P. 94.

has been exercised on correct principles and whether there is any justification whatsoever for the Nippon Yusen Kaisha coming to this Court and asking that that discretion should be reviewed and that time should be extended in the circumstances which have happened. I have set out briefly—almost too briefly—the effect of the correspondence between the parties subsequent to the 16th March, 1930, when the collision in question took place. It is said that considerable time was wasted by reason of the report of the Marine Court of Enquiry being not made till some time in December, 1930, and by the finding of the Marine Court of Enquiry being not made available to the parties till some time in June, 1931. It is well-known that the Marine Court of Enquiry is only concerned with the question, whenever there is a case of collision, as to which of the two pilots in charge of the two ships, between which the collision takes place, is to blame. But, be that as it may, there was plenty of time between June, 1931, and the 15th March, 1932, when the time expired according to section 8 of the Maritime Conventions Act, 1911, for the Nippon Yusen Kaisha to come to a conclusion, one way or the other, as to whether they should prosecute their claim for damages by filing a suit or bill in the Admiralty Jurisdiction of this Court. It is said, however, that correspondence went on down to the 12th November, 1931, and that, in view of that correspondence, it was not considered wise or desirable on behalf of the Nippon Yusen Kaisha to start legal proceedings. Assuming that time was consumed till the 12th November, 1931, but not admitting that time was profitably consumed, there was plenty of time from the 12th November, 1931, to the 15th March, 1932, for the Nippon Yusen Kaisha to put a plaint on the file in the Admiralty Jurisdiction of this Court. It is alleged, however, that the “Marienfels” had tricked the “Malacca Maru” and the position ultimately in which the “Malacca Maru” found herself in was that time had expired and they had to ~~come to this Court~~

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for extension of time. I regret the observation that the "Marienfels" had done anything in the nature of a trick. As far as I can see from the correspondence, they had all along repudiated their liability for damages to the "Malacca Maru," they had insisted consistently that damages had ensued to the "Marienfels" by reason of negligent navigation on the part of the "Malacca Maru" and that they were taking steps to enforce their claim for damages. The "Marienfels" had further refused to recognize the justice of any claim to go to arbitration, such as was put forward on behalf of the "Malacca Maru," or the justice of the claim put forward on behalf of the "Malacca Maru" that both sides should be agreeable to dispose of the matter on the basis that both sides were to blame and that both sides should pay their respective damages. The "Marienfels," having taken up this attitude consistently, a final intimation was given by the underwriters of the "Marienfels" that nothing could be done in the matter of adjusting the differences that had arisen between the owners of the two steamships and that the "Marienfels" were about to take legal proceedings immediately. Now, the word "immediately" must be considered having regard to the date of the letter and the date of the letter was the 12th November, 1931. It is further alleged that, although they had said they were going to take legal proceedings immediately, they waited till the 12th March, 1932, in order to put their plaint on the file. It is impossible to allow the Nippon Yusen Kaisha to make a virtue of the time taken by the "Marienfels" to put their plaint on the file on the 12th March, 1932. Supposing the "Marienfels" had not put in their plaint, then the result either would have been that the "Malacca Maru" would have to come to Court within the time limited by section 8 of the Maritime Conventions Act, 1911, or to waive giving effect altogether to their claim for damages against the "Marienfels." But it is impossible to allow negligent plaintiffs to turn round and say that, inasmuch as the

defendants have been late in coming to Court, although within the statutory period of limitation, extension of time should be allowed to them, namely, to the negligent plaintiffs, in order that they may prosecute their claim whatsoever. No doubt the widest discretion has been given to the Court in applications for extension of time under section 8 of the Maritime Conventions Act, 1911, but I am not satisfied that the learned Judge on the Original Side has exercised his discretion on wrong principles; nor am I satisfied that the merits of the case is such that we ought to consider it our bounden duty to review the discretion exercised by the learned Judge and come to a different conclusion. It is said further that no prejudice will be caused to the defendants. That is an argument which is always put forward on behalf of a negligent plaintiff whenever there is any application for extension of time either under the provisions of the Indian Limitation Act or under any other statute of limitation. The four months' delay from the 12th November, 1931, is just as good as four years' delay and there is a very high authority in support of the statement which I have just made.

In this view of the matter, taking into consideration all the circumstances, we do not think there is any substance, whatsoever, in this present appeal and as such it must be dismissed with costs.

MALLIK J. I agree.

*Appeal dismissed.*

Attorneys for appellants: *Clarke Rawlins Ker & Co.*

Attorneys for respondents: *Morgan & Co.*

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