MV "KALYANI" AND ANOTHER
v.
MUTIARA SHIPPING COMPANY NY

SUPREME COURT
FERNANDO, J.
DHEERARATNE, J. AND
WADUGODAPITIYA, J.
S.C. APPEAL NO. 100/96
C.A. NO. 253/96
H.C. ACTION IN REM NO. 17 OF 1995
24TH AND 25TH JUNE, AND 7TH OCTOBER, 1997

Admiralty jurisdiction – Admiralty Jurisdiction Act, No. 40 of 1983 – S. 2 (1) (a) – Power of the Court to grant damages for infringement of rights of ownership – Defendant's right to make a counter – claim for malicious arrest of a vessel – Power of the High Court to order plaintiff to give security for the counter-claim.

Per Fernando, J.

> "It seems to me, therefore, that the more reasonable interpretation of section 2 (1) (*a*) is that a plaintiff's claim "to" ownership includes a complaint not only that the defendant has challenged his title, but also that the defendant has interfered with or deprived him of all or any of his rights of ownership. That provision does not limit the relief which the court may grant upon such a claim; it permits a declaration of title, and the restoration of possession, as well as damages for the infringement of the rights of ownership".

Held:

1. Accordingly, in terms of section 2 (1) (*a*) a defendant is entitled to counter-claim for damages for wrongful arrest of a vessel where there was either mala fides or gross negligence which implies malice.

Per Fernando, J.

> ". . . . the power of the court, consistently recognised and exercised over a long period of time to award damages for malicious arrest, is ancillary or incidental to its power to arrest a vessel, and can be exercised in the same proceedings. Such a claim for damages can be made without awaiting the termination of the proceedings."

2. The High Court has the power to order the plaintiff to give security for the defendant's counter-claim for damages for malicious arrest.

Cases referred to:

1. *Abdul Hamidu v. Perera* (1925) 26 NLR 433, 436.
2. *Bawazir v. Acting Master MV Ayesha* (1986) 1 Sri LR 314 at 319-320.
3. *Government of the USA v. The Ship Valiant Enterprise* (1961) 63 NLR 337, 343.
4. *Xenos v. Aldersley (The Evangelismos)* (1858) 12 Moo. PCC 352.
5. *The Walter D. Wallet* (1893) P 202.
6. *The Cathcart* (1867) LR 1 A & E 314.
7. *Churchill v. Siggers* (3 E & B 929, 937).
8. *The Strathnaver* (1875) 1 AC 58, 66 (PC)
9. *The Active* (1862) 5 LT 773.
10. *The Kate* (1864) 9 LT 782.
11. *The Collingrove*
12. *The Numida* (1885) 10 PD 158, 160.
13. *The Margaret Jane* (1869) 20 LT 1017, 1018.
14. *The Orion* (1852) 12 Moo. PCC 356n.
15. *The Nautilus* (1852) 12 Moo. PCC 35n; (1852) Swa. 105.
16. *The Gloria de Maria* (1856) Swa. 106.
17. *The Glasgow* (1852) 12 Moo. PCC 356n.
18. *The John* (1830) 2 Hagg 305.
19. *The Western Ocean* (1870) LR 3 A & E 38.
20. *The Eleonore* (1863) 9 LT 397.
21. *The George Gordon* (1884) 9 PD 46.
22. *The Eudora* (1879) 4 PD 208.
23. *The Cheshire Witch* (1864) 11 LT 350.
24. *The Crimdon* (1900) P 171.
25. *Astro Vencedor SA v. Mabanaft* (1971) 2 QB 588, 595.
26. *Eswaralingam v. Sivagnansunderam* (1962) 63 NLR 396, 398.
27. *Sirinivasa Thera v. Sudassi Thera* (1960) 63 NLR 31.
28. *Cargo (etc.) Management Corp v. The Ship Valiant Enterprise* (1961) 64 NLR 271, 275.
29. *The Carnarvon Castle* (1878) Maritime Law Cases 607.
30. *The Charkieh* (1873) LR 4 A & E 120.
31. *The D.H. Peri* (1862) Lush 543, 167 ER 245.
32. *The Mary (or Alexandra)* (1867) 16 LT (NS) 98.
33. *The Bazias 3, The Bazias 4* (1993) 2 ALL ER 964, 970.
34. *Soleada SA v. Hamoor Tanker Inc* (1981) 1 ALL ER 856.

APPEAL from the judgment of the Court of Appeal.

Chula de Silva P.C with *R. Sri Kantha* and *Murshid Maharoof* for the appellants.

N. Sinnathamby with *D. Philips* for the respondent.

Cur. adv. vult.

27th January, 1998

FERNANDO, J.

Both the plaintiff-petitioner-respondent company (the plaintiff) and the 2nd defendant-respondent-appellant (the defendant) claim ownership of the *MV Kalyani* (the vessel). While the vessel was in the Port of Colombo, in the possession and control of the defendant, the plaintiff instituted this action *in rem* in the High Court of Colombo on 10.4.95, by issuing a writ of summons, in terms of rule 4 of the High Court (Admiralty Jurisdiction) Rules, 1991 (made under Article 136 of the Constitution read with section 11 (3) of the Admiralty Jurisdiction Act, No. 40 of 1983). At the same time the plaintiff applied for and obtained a warrant for the arrest of the vessel, under rule 25, and the vessel was accordingly arrested on 10.4.95. On 21.4.95 the High Court directed the release of the vessel upon the defendant giving security, by means of bank guarantees to the value of US$ 300,000.

In its petition dated 17.5.95, the plaintiff claimed the ownership of the vessel, alleging that it was wrongfully and unlawfully in the possession of the defendant who had no right thereto, and prayed for a declaration that the plaintiff was the owner of the vessel, and:

> "for damages in a sum of US$ 300,000, together with further damages in a sum of US$ 3,000 per day until the vessel . . . is delivered to the plaintiff in good order and condition."

The defendant filed a "statement of claim/answer" dated 25.4.95, and an answer dated 27.6.95, pleading that he was the owner of the vessel; he made three claims in reconvention, of which only one is relevant to the present appeal: that the plaintiff "wrongfully and/or maliciously and/or fraudulently caused the vessel to be arrested" on or about 10.4.95, in consequence of which wrongful arrest the defendant had suffered loss and damage in a sum of US$ 300,000 and continuing damages in a sum of US$ 3,000 per day. He also asked the court to order the plaintiff to deposit security/bail in respect of those counter-claims.

Although somewhat wider issues were argued in the High Court, the questions that now arise are just two. The first is whether the defendant was entitled to make a claim in reconvention for damages

for wrongful and/or malicious and/or fraudulent arrest (which I will for convenience refer to as "malicious arrest"); and it is common ground that this depends upon the interpretation of section 2 (1) (*a*) of the Admiralty Jurisdiction Act, No. 40 of 1983. The second question, which arises only if the Court does have the power to entertain such a claim, is whether the Court can order the plaintiff to give security/bail in respect of that claim in reconvention for malicious arrest.

The High Court answered both questions in the affirmative, and directed the plaintiff to give/deposit security for the claims in reconvention in a sum of US$ 300,000, as a condition precedent to the trial of the action. He held that the larger power, of determining claims to possession or ownership, must be taken to include the lesser power, of awarding damages in the event of a determination by the Court that the arrest was wrongful.

The plaintiff made applications for leave to appeal and for revision to the Court of Appeal, which made an interim order staying the order for the deposit of security. In the course of that order, the Court observed:

> ". . . an action in common law would lie for the wrongful arrest of a ship even in English law. Thus it is to be seen that the defendant is not entitled to make a claim for damages by way of a claim in reconvention in an action instituted by the plaintiff for the arrest of a ship under the provisions of the Admiralty Jurisdiction Act of 1983. The learned High Court Judge . . . . appears to have taken the view that since section 2 (1) (*a*) gives him a jurisdiction to determine any claim in regard to the possession or ownership of a ship that the said jurisdiction necessarily empowers him to decide the question of damages arising on account of a wrongful arrest. This does not appear to us to be tenable and we are of the view that the learned High Court Judge erred in requiring security . . ."

Mr. Chula de Silva, PC, for the defendant, submitted that the Court of Appeal had decided the principal question in issue, and decided it wrongly, on the mistaken assumption that simply because there is a common law remedy, there is no remedy under the statute, and asked for special leave to appeal to this Court.

Both counsel agreed that the question whether there can be a counter-claim for malicious arrest was of general importance and had not been the subject of any decision in Sri Lanka. Special leave was granted on three questions which ultimately became narrowed down to the two questions which I have set out earlier.

I. *"Any claim to the possession or ownership of a ship."*

1. ***Section 2 (1) (a) of the Act.*** This provides:

> "The admiralty jurisdiction of the High Court . . . shall . . . be as follows, that is to say, jurisdiction to hear and determine any of the following questions or claims:
>
> (*a*) any claim to the possession or ownership of a ship or to the ownership of a share therein . . ."

Before considering what claims a defendant may make in reconvention, it is relevant to consider what claims a plaintiff may make under this limb.

Mr. Sinnatamby for the plaintiff contrasted the language of some of the other limbs of section 2 (1) – which refer to any claim *in respect of* a mortgage, any claim *arising out of* any agreement, any claim *in the nature of* pilotage, and any question *as to* possession, etc. – and submitted that a claim *"to"* possession or ownership is much narrower in scope. The effect of this contention is that a claim *"to"* the ownership of a vessel is no more than an assertion that ownership has been denied; such a claim cannot result in anything more than a decree that the claimant is entitled to ownership, and to an order that the vessel be restored to him. This contention attempts to draw a distinction between title and other rights of ownership: and asserts that only the outright denial of title gives rise to a claim *"to"* ownership, while interference with, or deprivation of, other rights of ownership do not give rise to claims *"to"* ownership – and accordingly that there can be no adjudication or relief in respect of the latter. Claims for damages for the deprivation of the possession of a vessel, or of its use, are not to be regarded as claims *"to"* ownership, and are outside the jurisdiction of the High Court. He contended that if the legislature had intended to allow such claims, paragraph (*a*) would have referred to "any claim *in respect of* [or *as to*] ownership".

It was not, argued Mr. Sinnatamby, as if there was no remedy in respect of such other claims: actions could be brought in other Courts, in Sri Lanka or elsewhere, in respect of such claims for damages. That means, however, that if a vessel is hijacked in one jurisdiction, and if some of its equipment is removed and sold in

another, and if it is then arrested in Colombo in an action *in rem* brought by the true owner, the High Court can only give him a declaration of title and restoration of possession; and he would be compelled to institute separate actions, in Colombo or elsewhere, in respect of his other causes of action. Even if the vessel had been completely stripped of its machinery and equipment, so that it became a mere hull, the Court would be powerless to award damages or compensation to the true owner to ensure that he would at least receive the actual value of his vessel. Such an interpretation would result in great inconvenience; would encourage a multiplicity of suits; and may even compel an owner to institute proceedings in another jurisdiction with no real hope of enforcing the judgment. Indeed, that interpretation would seem to exclude the claim for damages which the plaintiff itself made.

Mr. de Silva submitted (citing *Abdul Hamidu v. Perera,*[1]) that the word "any" excludes limitations or qualifications of any kind whatsoever, and signifies that claims of every kind were permissible. A claim for damages in respect of the wrongful or malicious deprivation of possession of a vessel was therefore included in the phrase "any claim to possession". I do not agree with that reasoning. If the word *"to"* does indeed have the effect to restricting permissible claims to bare declarations (and to restoration of possession), and of excluding claims for damages, the undoubted amplitude of the word "any" would have the effect only of allowing "any" claim (i.e. all claims, or each and every claim) falling within the permitted category, but would not in any way eliminate those restrictions, or enlarge the permitted category of claims.

However, I find it difficult to agree with Mr. Sinnatamby that the word *"to"* restricts the category of permissible claims to bare declarations (and restoration of possession). The use of other phrases – such as *in respect of, arising out of, in the nature of,* and *as to* – would make little difference, because it could nevertheless equally well have been argued that a claim *"in respect of"* (or *"as to"*) ownership includes only a declaration, on the ground that a claim for damages for infringements of the rights of ownership is not one *in respect of* (or *as to*) ownership, but arises from *the denial of the rights of* ownership.

In my view this provision must be interpreted in the context of the undoubted purpose of the Act: to enable certain disputes to be resolved by the High Court under and in terms of the special procedures provided. What then are the claims *"to"* ownership which the Legislature had in mind? The rights of the owner of a thing include not only the right to recognition by others that he is the owner – i.e. recognition of title – but also his right to possess, to use, and to enjoy the fruits of that thing. A dispute regarding his ownership can certainly arise if someone else merely claims title to that thing. But such a dispute would also arise – and more often arises – when another interferes with, or deprives him of, any of his other rights of ownership. So when the true owner of a thing asks the Court to decide a dispute regarding his claim *"to"* ownership, that claim will, more often than not, involve assertions that the adverse party has wrongfully interfered with or deprived him of his rights to the possession, use and enjoyment of that thing – and the denial of title will generally be only a matter of inference from those wrongful acts. Obviously, the effective resolution of such a dispute requires not only a declaration of title and an order for the restoration of possession, but also a remedy for the wrongful denial or infringement of other rights of ownership, and that would generally take the form of compensation or damages.

It is therefore more reasonable to interpret the jurisdiction to decide claims *"to"* ownership as not being confined to the academic determination and declaration of title, but as extending to the adjudication of all the questions and issues arising from an alleged infringement of any of the rights of ownership.

Let me turn briefly to claims *"to"* possession. If a person claims that he was entitled to possession of a vessel under an agreement with the owner, but that the owner has wrongfully deprived him of his rights of possession, could it reasonably be argued that his claim *"to"* possession cannot include a claim for damages for the wrongful deprivation of possession? Having regard to the delays in litigation, it may well happen that the agreed period for which he was entitled to possession has expired by the time the action is decided, so that an order for restoration of possession is no longer possible: must he then be content with a decree that he was indeed entitled to possession during that period? Here, too, it is more reasonable to regard his claim *"to"* possession as including a claim that he had been wrongfully deprived of possession, and a claim for compensation.

It seems to me, therefore, that the more reasonable interpretation of section 2 (1) (*a*) is that a plaintiff's claim *"to"* ownership includes a complaint not only that the defendant has challenged his title, but also that the defendant has interfered with or deprived him of all or any of his rights of ownership. That provision does not limit the relief which the Court may grant upon such a claim: it permits a declaration of title, and the restoration of possession, as well as damages for the infringement of the rights of ownership. That interpretation has the added virtue of avoiding incovenience and injustice.

Nothing in the Act denies to defendant the benefit of section 2 (1) (*a*), and so it must follow that the claims in reconvention which a defendant is entitled to make include such claims for damages. I will return to the question whether the defendant's claim for damages for malicious arrest falls within that class of claims, after dealing with the legislative history of the 1983 Act.

At the conclusion of the oral argument, we asked both counsel to cite any decisions interpreting the corresponding English provisions (and similar provisions, if any, enacted in other jurisdictions). The written submissions later filed contained no reference whatever to any such decisions or provisions.

2. **Legislative context and history.** While I think that the language of section 2 (1) (*a*) of the 1983 Act lends itself much more readily to the broader interpretation, consistent with both convenience and justice, than the narrower one for which Mr. Sinnatamby contends, yet I cannot ignore the fact that the 1983 Act – "to amend and consolidate the law" – has a complex legislative history of many decades. Indeed, what Mr. de Silva cited in support of the broader interpretation were three 19th century decisions. It is therefore necessary to consider whether, possibly, the legislative context of the 1983 Act provides any justification for preferring the narrower interpretation. Was it the law before 1983 that such claims could not be entertained, and, if so, is there any reason to think that the Legislature intended the law to remain unchanged?

The history of our Admiralty law, and its dependence on English law, has been traced back to the Charter of Justice of 1833: see *Bawazir v. Acting Master MV AYESHA,*[2] at 319–320 and it is sufficient for me to make a brief reference to just some aspects of that history.

The need to refer to English Law arises because our Admiralty Law prior to 1983 was English Law. Section 2 of the Ceylon Courts of Admiralty Ordinance, No. 2 of 1891, declared the Supreme Court to be a Colonial Court of Admiralty (in terms of the Colonial Courts of Admiralty Act, 1890), having:

> "Jurisdiction, subject to the provisions and limitations contained in the Colonial Courts of Admiralty Act, 1890, over the like places, persons, matters and things as the admiralty jurisdiction of the High Court in England, **whether existing by virtue of any Statute or otherwise,** and such Colonial Court of admiralty may exercise such jurisdiction in like manner and to as full an extent as the High Court in England . . ."

No distinction was made between statutory and common law jurisdictions. It was held in *Government of the USA v. The ship Valiant Enterprise* [3], that the jurisdiction conferred was limited to the admiralty jurisdiction of the High Court of England as it existed at the passing of the Act; accordingly, statutory changes introduced after 1891 and before 1961 were not part of our law.

However, when that Ordinance was repealed by section 3 (1) (*a*) of the Administration of Justice Law, No. 44 of 1973, the High Court (designated in terms of section 23) was given "admiralty jurisdiction", namely:

> "the admiralty jurisdiction **for the time being** of the High Court of England" (section 54),

unless and until the Legislature made contrary provision.

Thus in 1973 the admiralty jurisdiction of the High Court was the same as that of the High Court of England, and included those jurisdictions introduced by statute after 1891, as well as after 1973. Here, too, no distinction was made between statutory and common law jurisdictions.

Immediately before the 1983 Act was enacted, therefore, the admiralty jurisdiction of the High Court was the same as that of the High Court of England.

What then was the admiralty jurisdiction of the English High Court? Or, rather, did that jurisdiction include the power to entertain a claim for damages for malicious arrest?

Mr. Sinnatamby's contentions were summarized thus in his written submissions tendered after the oral argument:

> ". . . there is no justification for adding to the jurisdiction of the Court provided by section 2 (1) of the Act. It is significant that even the English Law – Supreme Court Act, 1981 – does not vest this jurisdiction to entertain claims for wrongful arrest, but assuming, not conceding, that is a common law remedy, the English Law may have left the door open by section [20 (1) (*c*) which brought in 'any other admiralty jurisdiction which it had immediately before the commencement of this Act']. This provision is not in our Act and accordingly it is not open to introduce English Law, more so as the Legislature has considered the matter and in section 12 of our Act expressed the limitation on the use of English Law to matters of procedure as against jurisdiction.
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> . . . none of the Admiralty Law text writers – such as Meeson, Jackson – make any reference to a jurisdiction to try claims for wrongful arrest or [to order] security for counter-claims and neither does Halsbury or the British Shipping Laws make any reference to such a jurisdiction. The *Evangelismos* case is not even referred to by them, though the *Strathnaver* case is referred to [in] Halsbury but not in relation to this but on the aspect of the right of a party to question the acceptance of a surety provided for the release of a vessel."

Section 1 (1) (*a*) of the Administration of Justice Act, 1956, is virtually identical to section 20 (2) (*c*) of the Supreme Court Act, 1981, and to our section 2 (1) (*a*). Section 2 (1) of the 1956 Act makes provision similar to section 20 (1) (*c*) of the 1981 Act, but our 1983 Act has nothing of that sort.

Mr. de Silva relied heavily on the Privy Council decision in *Xenos v. Aldersley (The Evangelismos)*[4]. That was a claim for damage done by collision brought against the *Evangelismos,* which was arrested and detained for some months; the plaintiffs failed to establish that it was the vessel which had caused the damage; the owner of that vessel was therefore dismissed from the suit with costs; and he asked the High Court of Admiralty of England to award damages against the plaintiffs for the damages and losses sustained in consequence of such arrest and detention. The Court refused, as it considered that

the arrest had been made in the *bona fide* belief that it was the vessel which had been in collision with the plaintiffs' vessel. On appeal, the Privy Council said:

> "It appears that there was a defence put in, by which the appellants claimed not only to have the suit dismissed, but to have costs and damages awarded to them for the injury sustained by the detention and demurrage of the ship while under arrest . . .
>
> It is also said that it is the established rule of the Admiralty Court where a party brings an action and succeeds in upholding it, that he is entitled, unless there are circumstances to take it out of the ordinary rule, to have some compensation for the loss he has suffered, which in some cases is very inadequate, but it is the only compensation the Court can award.
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> Their Lordships think there is no reason for distinguishing this case, or giving damages. Undoubtedly there may be cases in which there is either *mala fides,* or that *crassa negligentia,* which implies malice, which would justify a Court of Admiralty giving damages, as in an action brought at Common Law damages may be obtained. In the Court of Admiralty the proceedings are, however, more convenient, because in the action in which the main question is disposed of, damages may be awarded.
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> The real question in this case, following the principles laid down with regard to actions of this description, comes to this: is there or is there not, reason to say that the action was so unwarrantably brought, or brought with so little colour, or so little foundation, that it rather implies malice on the part of the plaintiff, or that gross negligence which is equivalent to it?"

The Privy Council agreed that there were circumstances which afforded ground for believing that the vessel was the one which had been involved in the collision, and affirmed the judgment, and dismissed the appeal.

Mr. de Silva also cited *The Walter D. Wallet*[5], and *the Cathcart*[6]. The former was not an admiralty action *in rem*, but an action at Common Law for the malicious arrest of the vessel. It was held:

> "No precedent, as far as I know, can be found in the books of an action at Common Law for the malicious arrest of a ship by means of admiralty process . . . As Lord Campbell said in *Churchill v. Siggers,*[7]. 'To put into force the process of law maliciously and without any reasonable or probable cause is wrongful; and, if thereby another is prejudiced in property or person, there is that conjunction of injury and loss which is the foundation of an action on the case'. Why is the process of law in admiralty proceedings to be excepted from this principle? It was long ago held that an action on the case would lie for malicious prosecution . . . It can hardly be denied that it would have lain for malicious arrest of a person by

admiralty process in the days when admiralty suits so commenced . . . But if for arrest of a person by admiralty process, why not for arrest of a person's property? I can imagine no answer, and the language of the reasons of the Privy Council in the case of *The Evangelismos* . . . appears to me to treat the existence of such an action at Common Law as indisputable . . . Probably the reason why no example of such an action at common law is to be found, is that superior convenience, though not exclusive jurisdiction, to which the above words refer. As the Court of Admiralty, when setting aside the arrest (which would be the preliminary to a Common Law action) could do full justice to the injured person, he would not, and probably could not, subsequently resort to a Common Law tribunal".

There was no actual damage; the ship was not detained in port by the arrest; nor was her loading interfered with. "Still, the action of the defendants was . . . in common law phrase, without reasonable or probable cause; or, in equivalent admiralty language, the result of *crassa negligentia,* and in a sufficient sense *mala fides.*" One pound sterling was awarded as damages.

That was an action at Common Law. *The Cathcart* (supra) was an action *in rem,* in the Admiralty Court, on a mortgage. The plaintiffs were condemned in costs and damages because:

". . . they had full knowledge of the facts . . . and would have known they had no right to arrest the vessel. Add to this, the arrest of the vessel was on the eve of commencing a profitable voyage, and after a decision of the magistrate adverse to their claim, and [they] have attempted to support the proceeding by making charges of fraud against the defendants which they have quite failed to prove."

Mr. de Silva submitted that in the present case the defendant's counter-claim was the same: damages for a malicious arrest without reasonable or probable cause.

If the question which we now have to decide had arisen at any time after 1891 and before 1973, our Courts would have had to determine what the English Law was in 1891, and I have no doubt that our Courts would have regarded the 1858 decision of the Privy Council (supported by the two subsequent decisions) as correctly stating the English Law. Likewise, in and after 1973, the provisions of the Administration of Justice Act, 1956, and the Supreme Court Act, 1981, would have been regarded as confirming, and not reversing, those three English decisions.

However, in view of Mr. Sinnatamby's very confident assertion that Halsbury and English text-writers do not even refer to *The Evangelismos,* I tried to see whether that was a wayward or now obsolete decision, or whether other decisions either had followed it or were to the like effect. There were numerous relevant references in the English and Empire Digest, volume 1 (of which the 1961 edition is the latest available in the Supreme Court library). In several cases *The Evangelismos* had been applied or approved: *The Strathnaver*[8], *The Active*[9], *The Kate*[10], *The Collingrove*[11], *The Numida*[12], and *The Margaret Jane*[13], are some.

Further, in *The Evangelismos* the Privy Council followed established principles, and did not create a new precedent. Prior to 1858, defendants complaining of wrongful arrest had been awarded "costs, losses, charges, damages, demurrage and expenses caused by the illegal arrest of *"The Orion*[14], "costs and expenses consequent on the arrest of" *The Nautilus*[15], and "costs, damages, demurrage and expenses" caused by the arrest of *The Gloria de Maria*[16], a salvage action which was later abandoned by the plaintiff. Again, in *The Glasgow*[17], a dispute as to ownership which has a resemblance to the present case – the ship was sold by her master without any authority from her owner, and her name was changed; it was then arrested:

> "at the suit of her owner . . . in a cause of possession, and the ship remained under arrest until the cause was heard . . .. the Judge, by his interlocutory decree, dismissed the defendants who had purchased this ship, and condemned . . . her former owner in demurrage and costs."

One of the decisions cited in the argument in the Privy Council was *The John*[18]. The Vice-Admiralty Court of Gibraltar in a cause of possession, decided in favour of the plaintiff, the alleged purchaser of the vessel; that decision was reversed on appeal, and the Court ordered restitution of the vessel to its former possessor:

> ". . . as he has been dispossessed of his vessel, which has been in the hands of [the plaintiff] for two or three years, I should not do full justice if I did not pronounce also for compensation, in the nature of demurrage . . . I am willing to presume that everything has been done for proper motives; but, as I think the

judgment of the Court below is founded on erroneous principles . . . it is my duty to reverse it, and award to the party such relief as may amount to an equitable compensation for the injury which he has sustained."

Damages or wrongful arrest have been awarded, not only in actions for damage done by involving collision, in which the wrong vessel was arrested (as in *The Evangelismos (supra)*), but in many other types of action. Where after obtaining the arrest of a vessel the plaintiff abandoned the suit, in *The Western Ocean* [19], an action to enforce a mortgage – he was ordered to pay the defendant interest on the money paid into Court to obtain the release of the vessel; see also *The Gloria de Maria (supra), and The Eleonore*[20], both salvage actions. In the latter, it was held that the fact that the arrest was made without prior claim and for a sum disproportionate to the value of the property and the services rendered, was evidence of negligence, and that the defendant was entitled to damages.

Apart from abandonment, in salvage actions damages have been awarded where the arrest was improper: *The Nautilus (supra),* where the vessel had been arrested although the sum due had been tendered before the arrest, and *The George Gordon* [21], where the defendant had to provide bail in an exorbitant sum, because the claim was unreasonably excessive, the plaintiffs were ordered to pay all costs and expenses of finding bail. However, damages were not awarded where *mala fides* or gross negligence were lacking: *The Kate (supra), The Strathnaver (supra),* and *The Margaret Jane (supra).* In *The Eudora*[22], the holder of a bottomry bond arrested the secured vessel before the bond was due; the bond was paid at or before maturity; and the shipowner was held entitled to costs, but not to damages in the absence of *mala fides* or gross negligence. *The John* and *The Glasgow* were causes of possession. The dispute in *The Walter D. Wallet, (supra)* had its origin in an agreement to sell the vessel, although the question of damages arose in a subsequent action at Common Law.

In most of these causes damages were awarded for arrest and detention during the period ***before*** judgment. In the *The Cheshire Witch*[21], the vessel was detained for twelve days ***after*** the action had been dismissed, because the plaintiff was considering an appeal, which he then decided against: damages were awarded. In *The John*

(supra) compensation seems to have been awarded even for detention *pending appeal.*

Finally, I must refer to *The Crimdon* [24], which involved R.S.C. Order 29, rules 12 and 18 – which are similar to rules 159 and 163 of our old Admiralty Rules, 1883, which have been re-enacted as rules 141 and 145 of our present High Court (Admiralty Jurisdiction) Rules, 1991:

> "141. Any person desiring to prevent the arrest of any property may file a notice undertaking, within three days after being required to do so, to give bail to any action or counter-claim that may have been, or may be, brought against the property, and thereupon the Registrar shall enter a caveat in the caveat warrant book . . .
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> 145. The entry of a caveat warrant shall not prevent the issue of a warrant, but a party at whose instance a warrant is issued for the arrest of any property in respect of which there is a caveat warrant outstanding shall be condemned in all costs **and damages** occasioned thereby **unless he shall show to the satisfaction of the Judge good and sufficient reason to the contrary."**

Despite an undertaking by the defendants' solicitors, given without qualification, to enter an appearance and to give bail in a sum not exceeding the value of the ship, cargo and freight, and the caveat thereupon entered, the plaintiffs arrested the ship (even without inquiry as to whether the undertaking was satisfactory). It was held that they had failed to show good and sufficient reason for the arrest and were condemned in damages and costs.

For the sake of completeness, I must also refer to our old Rule 129, now re-enacted as Rule 115:

> "115. A party claiming an excessive amount, either by way of claim or set-off or counter-claim, may be condemned in all costs **and damages** thereby occasioned."

If a party having a just claim may be condemned in damages because the amount he claimed was excessive, can a party making a wholly unjust claim escape?

These rules reflect the undoubted jurisdiction of Admiralty Courts to compensate a party for the injury he has suffered by reason of what amounts to the malicious abuse of its process. As observed in *The Kate: (supra)*

". . . redress in the form of costs and damages, is a just remedy approved [in *The Evangelismos*] . . . and has been the undisputed and uniform practice of this court from the beginning down to the present time."

So also in *The Collingrove (supra), The Numida (supra),* the defendant was awarded as damages the commission he paid to obtain bail in order to obtain the release of the vessel and thereby to avert the damage he would have suffered by its continued detention, because:

"It has always been the practice in the Court of Admiralty for the judge to award these damages to the defendant, whereupon the trial the facts have shown that he was entitled to them, without putting him to the necessity of bringing a fresh action for them."

The reason was stated thus in *The Walter D. Wallet: (supra)*

"As the Court of Admiralty, when setting aside the arrest . . could do full justice to the injured person, he would not, and probably could not, subsequently resort to a Common Law tribunal".

In view of this mass of case law, Mr. Sinnatamby's submission that *The Evangelismos* had not been referred to in Halsbury and by text-writers surprised me. I find that Halsbury (volume 45, paras 1378-1379) does refer to that decision, and half a dozen besides, in support of the following:

"1378. An action lies against a person who maliciously and without reasonable and probable cause procures, by means of Admiralty proceedings, the arrest of a ship, if the ship has been released and the proceedings have terminated in favour of the person aggrieved by the arrest.

1379 . . . Where actual damage has been sustained, the Admiralty Court will not, if the facts are properly brought to its knowledge . . . put the injured party to the necessity of bringing a fresh action, *but will, in the original action, award him damages for the wrongful arrest,* usually in the nature of demurrage".

Further, *The Evangelismos* was manifestly approved in *Astro Vencedor SA v. Mabanaft*[25]. In considering whether a claim for damages for wrongful arrest was within the scope of an arbitration (upon charterers' claim for damages against shipowners), Lord Denning said :

"The arrest of the ship was the direct consequence of the charterers' claim for damages against the shipowners. . . The arrest was simply the follow-up to that claim. It was so closely connected with it that the rightness or wrongness of the arrest is also within the scope of the arbitration. This is borne out by the practice of the Admiralty Court. There have not been many claims for wrongful arrest recently. **But the practice of the Court of Admiralty is to deal with a claim for wrongful arrest at the same time as the claim for which the arrest was made.** In *The Evangelismos* . . . the Privy Council said that such procedure is very 'convenient'."

As for omission by text-writers, *The Evangelismos* is in fact referred to in the British Shipping Laws (1971 ed., vol. 2, para 1192; and 1961 ed., vol. 4, paras 399-400 and 445).

I now turn to Mr. Sinnatamby's submission that the jurisdiction, if any, to award damages for malicious arrest is a Common Law jurisdiction which exists in England because it is expressly saved, and is absent in Sri Lanka because our Act lacks a similar saving clause.

In considering whether that was a Common Law jurisdiction, it is necessary to remember that while a jurisdiction granted by statute to a Court cannot be expanded, either by removing statutory restrictions or by extension to other subjects, under the guise of interpretation, yet the grant of such a jurisdiction generally implies the grant of all that is necessary to make it effective.

The decisions discussed above show that the power to award damages for malicious arrest – which is an abuse of the process of the Court – has always, "from the beginning down to the present time", been regarded as ancillary or incidental to the several jurisdictions of the Court of Admiralty, whether in "causes of possession" (as in *The Glasgow), (supra)* or in other actions in respect of mortgages, collisions, salvage, sale agreements, or bottomry bonds; and never as distinct jurisdiction.

It is true that a power of that kind is often expressly given, particularly in relation to *ex parte* orders – as, for instance, interim injunctions (section 667, CPC), and orders for arrest and sequestration before judgment (section 654, CPC). However, in the case of those admiralty actions which commence with an *ex parte* arrest, "the undisputed and uniform practice" of the Court has always been to grant a "just remedy" in the form of costs and damages, "without putting the defendant to the necessity of bringing a fresh action", provided the arrest has been *mala fide* or grossly negligent, thereby

doing "full justice to the injured person". The duty of the court to prevent an injustice, especially where it arises from the act of the court itself, has been recognized (eg. *Eswaralingam v. Sivagnanasunderam*[26], *Sirinivasa Thero v. Sudassi Thero*[27]).

In my view, that power is not a distinct jurisdiction; and certainly not a distinct Common Law jurisdiction – and none of the cases suggests that it has ever been regarded as such. On the contrary, it has been exercised as a power which is necessarily incidental to an admiralty jurisdiction – whether conferred by statute or otherwise –which commences with an arrest because the Court must be able to do full justice, by repairing an injury done to a party by the arrest ordered by the Court, at the instance of the other party in an action "which was so unwarrantably brought, or brought with so little colour, or so little foundation" as to imply malice. To put it another way, when a plaintiff makes a claim, he invokes a jurisdiction; the arrest of the vessel is "simply the follow-up to that claim"; and the "wrongness of the arrest" is a matter within the scope of the original claim, and therefore of the jurisdiction originally invoked.

That may be illustrated by reference to the Admiralty Court Act, 1840, which was enacted to improve the practice and to extend the jurisdiction of the High Court of Admiralty in England. Section IV conferred jurisdiction "to decide all questions as to the title to or ownership of any ship or vessel, or the proceeds thereof remaining in the Registry, arising in any cause of possession, salvage, damage, wages or bottomry, which shall be instituted in the said Court." *The Glasgow (supra)* was one such "cause of possession", decided in 1855, and involved a question as to title to ownership; the arrest was referable to the jurisdiction granted by section IV; and the determination that the arrest was wrongful and the order for demurrage were also referable to that same jurisdiction. Sections III and VI gave jurisdiction in respect of mortgages, salvage, towage, damage to ships, and necessaries supplied, and awards of damages for arrests in such cases were referable to those jurisdictions. A "cause of possession" in one in which a "claim to possession" is made; and "the cause of possession contemplated in section 4 [of the 1840 Act] is of the same nature as the possessory action in respect of land known to our courts under the Roman Dutch law, namely . . . . a suit in which a person who had possession can be restored to possession if wrongly dispossessed": *Cargo (etc.) Management Corp. v. The Ship Valiant Enterprise*[28].

Turning to our old rules of 1883, Form 21 (12) provides specimen pleadings in an action for restitution of a ship: the appropriate claim is for "the restitution of the vessel together with costs **and damages** for the seizure thereof."

I therefore hold that, prior to the 1983 Act, the power of the Courts of Admiralty to award damages for malicious arrest was incidental to their power to arrest vessels in order effectually to exercise their statutory jurisdictions. I find nothing, within the four corners of the 1983 Act, suggestive of a legislative intention to take away that power. While I do consider the more reasonable interpretation of the language of section 2 (1) (*a*) to be that it permits both a claim as well as a counter-claim for damages for interference with of deprivation or the rights of ownership (cf. Form 21 (12)), that, however, is not necessary for the decision of this appeal, because the defendant's claim is more restricted: it is a claim for damages for malicious arrest. I hold that such a claim is permissible; and that any contrary interpretation is unacceptable because of the language of section 2 (1) (*a*) and its legislative history, and the resulting inconvenience and injustice.

3. **The nature of the claim for damages for malicious arrest.** This appeal was argued on the assumption, by bench and bar, that the claim was wholly delictual in nature. However, there can be a delictual claim for "malicious arrest" only in respect of a person. The malicious arrest of a vessel, by admiralty proceedings, it seems to me, would constitute a malicious abuse of legal proceedings, and a cause of action would accrue to a defendant aggrieved by such proceedings only if and when the proceedings terminate in his favour. It follows that until then he can neither institute an action nor make a counter-claim. However, the power of the Court, consistently recognised and exercised over a long period of time to award damages for malicious arrest, is ancillary or incidental to its power to arrest a vessel, and can be exercised in the same proceedings. Such a claim for damages can be made without awaiting the termination of the proceedings.

Answering the first question, I hold that the defendant was entitled to make a counter-claim for damages for a wrongful arrest where there was either *mala fides* or gross negligence which implies malice.

II. *Security for counter-claim*

Mr. de Silva referred to rules 18 and 46, which recognise the right of a defendant to make a counter-claim against the plaintiff, and cited rule 36 in support of his contention that the Court can order the plaintiff to give security in respect of such a counter-claim. He referred to *The Carnarvon Castle*[29], and *The Charkieh*[30]. Rule 36 provides:

> "36 (1). Bail on behalf of a party to an action *in rem* shall be given by bond and shall be [in form 13] and the sureties to the bond must enter into the bond . . . "

However, that rule does not require or authorise the Court to order bail; it only prescribes **how** bail is to be given, if the Court does order bail. **Whether** and **when** the Court can order bail depends on other provisions.

Rule 114, for instance, provides that "if a plaintiff . . . is not resident in Sri Lanka, the Judge may, on the application of the adverse party, order him to give **security for costs.**" *Prima facie,* the express grant of the power to order security for costs and the omission of any power to order security for a counter-claim, gives rise to a legitimate (though not conclusive) inference that the latter is excluded.

Mr. Sinnatamby went much further. "Bail" in rule 36, he submitted, was confined to security for the release of a vessel or other property; "bail" did not include security for other matters; and hence there could be no "bail" for a claim for damages for malicious arrest. Further, under the rules a plaintiff could be required to give security only for costs, and for nothing else; in English Law, exceptionally, security for a counter-claim, he said, "has only been entertained in collision cases where each party sues the other and accordingly it would be unfair to permit one party to arrest a vessel in cases where the other cannot do so as the vessel either does not exist or is not within the Court's jurisdiction". At a more fundamental level, he argued, "not even the District Court under the Civil Procedure Code has the power to require a plaintiff to give security for a counter-claim . . . [and] what is sought to be obtained is an order unheard of in the Civil Law in this country".

Whatever "bail" may mean in other contexts, in our Admiralty Rules "bail" does not have the restricted meaning of security for the release

of property. In my view, our 1883 rules used that term in the wider sense of security: thus rules 128 and 150 referred to "bail for costs" and "bail for costs of appeal", respectively. Accordingly, the sureties' obligation under a bail bond – in Form 16 – arose, *inter alia,* if the plaintiff:

> "shall not pay what may be adjudged against him in the action, with costs (*or* for costs *if bail is to be given only for costs*) . . . "

"Bail" could thus be ordered for costs only, or for the amount of the judgment, even if there was no question of the release of property from arrest. The current rules, too continue to use the term "bail" in the wider sense of security. Form 13 is similar to the old Form 14, but goes on to add a reference to plaintiffs, **"in the case of a counter-claim",** not paying what may be adjudged against them in the action, with costs. Although rule 114 now refers to security (and not bail) for costs, "bail" elsewhere in the Rules continues to be used in the same sense as before. But all this only shows that bail can be given for a monetary counter-claim: it is not helpful as to **when** the Court can order such bail.

Mr. Sinnatamby correctly pointed out that the two cases cited by Mr. de Silva were collision cases, for which English Law long had special provision (such as section 34 of the Admiralty Court Act, 1861, and R. S. C. Order 75 rule 25). However, I find that in an old case, The *D. H. Peri*[31], it was held that a foreign plaintiff will be required to give security for costs, but not for damages for wrongful arrest of the vessel although the defendant filed an affidavit that the plaintiff had arrested his vessel mistaking it for another. Although the note of this decision in the Empire Digest states: *"Semble* : cases may arise in which the security would be extended", the English reports make no mention of any such observation. This decision was followed in *The Mary (or Alexandra)*[32], an action instituted by the United States. Counsel for the defendant referred to three other cases instituted by the United States, involving vessels belonging to the same defendant, in which the Court "during the vacation said it would not hear the United States unless they gave security for both damages and costs". It was held:

"On behalf of the defendants it is argued that, this being a cause of possession, in which by the practice of the court the vessel is not released, damages must accrue to them from the institution of the cause – that is, supposing the cause to have been improperly instituted; that the reasons for requiring a plaintiff out of the jurisdiction to give security for costs apply a *fortiori* to his giving security for damages; and I was referred also to the practice of the Court of Chancery in granting injunctions. I do not deny that there is force in these arguments: but, on the other hand, it has not been the practice of this court to require from a plaintiff out of the jurisdiction security for damages (*D. H. Peri*). The only case to the contrary is a recent one decided in the vacation. I must decline to change the settled practice of the court, and least of all in a case like the present, where there is no reason to suspect the solvency or good faith of the plaintiffs."

The Bazias 3, The Bazias 4,[33] is to the same effect.

However, neither our 1983 Act, nor our rules – old and new contain anything similar to Order 75, rule 25. It might perhaps have been argued that this was a *casus omissus,* which made the English provision applicable by virtue of section 12 of our Act, but the following new Rule 182 – to which I will return in a moment – of our 1991 Rules gives wider powers to the Court :

"Nothing in these rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court."

I will first dispose of the submission that the power to order security for a counter-claim is so extra-ordinary that it must be presumed to have been outside legislative contemplation. Let me recall that a plaintiff bringing an action *in rem* can obtain – by means of the seizure of the defendant's property through an *ex parte* Court order – a pre-judgment security for his claim. That is certainly unusual. But chapter 47 of the Civil Procedure Code does provides for sequestration before judgment, giving the plaintiff a similar pre-judgment security. To deter and to remedy an abuse of that process, section 654 provides that the Court must require the plaintiff (and that is without the defendant even asking for it) to enter into a bond to pay all damages that may be sustained by such sequestration – obviously because a subsequent award of damages may be futile if the plaintiff had given no security.

Apart from such pre-judgment security, when a party obtains – before the final adjudication – an enjoining order or an interim injunction which is detrimental to the rights and interests of the adverse party, section 667 CPC empowers the Court to award reasonable compensation if there was no probable ground for applying for the injunction; and despite the absence of any express provision, in the exercise of their discretion, Courts often order the party asking for an injunction to give security.

An order that security be given for a counter-claim for damages for a wrongful arrest, where a pre-judgment security has been obtained *ex parte,* may be unsual, but I do not think it to be fundamentally contrary either to principle or to practice. Here we are considering an arrest which is alleged to be not merely wrong, but also malicious – i.e. to be an abuse of the process of the Court. On a question of procedure and practice such as this, if there is an omission or an ambiguity, I must lean in favour of an interpretation which permits an order for security.

Rule 182 recognises the inherent powers of the Court to make orders to prevent injustices and abuses of the process of the Court. It would appear from Mr. Sinnatamby's submission that the rationale for the rule in English Law, in collision cases, was to prevent the unfairness which results when the plaintiff has arrested the defendant's vessel and thus has security for his claim, by the defendant is unable to obtain a similar security. In view of article 12 (1) of the Constitution, such concepts of fairness – of equality before the law and the equal protection of the law – must pervade the interpretation of the rules generally, and accordingly there is no reason why the power to order security for a counter-claim should be limited to collision cases. I hold that rule 182 gives the Court a discretionary power to order security for a counter-claim for malicious arrest.

I must now consider how such security is to be calculated. That depends on what heads of damge or compensation the Court can take into account in a claim for malicious arrest.

The decisions I have cited above show that losses, charges, demurrage, and expenses caused can be recovered. The decisions in *The George Gordon, The Collingrove, The Numida, (supra),* and

Soleada SA v. Hamoor Tanker Inc, [34] indicate that damages include the costs and expenses (including commission paid) of finding bail.

In ordering security in a sum of US$ 300,000 the learned High Court Judge appears to have been influenced by the value of the vesel and/or the amount of security provided by the defendant for the release of the vessel. Since the defendant is in possession of the vessel, the value of the vessel is not relevant. I therefore consider, that sum to be excessive. Taking into consideration the possible loss occasioned by detention during the short period which elapsed before the Court ordered the release of the vessel, and the costs of finding bail, the security ordered should not have exceeded US$ 30,000. Of course, looking at the matter today, the defendant has incurred the costs of finding bail for over two years, but that delay would not have been then anticipated; and if I were to order increased security on account of that delay, I must for the same reason, in all fairness, order an appropriate increase in the security which the defendant had to provide.

As for the consequences of not providing security, our attention was not drawn to any provision of the Act or the rules, or to any decision, dealing with the question whether the High Court could dismiss, or stay, a plaintiff's action for failure to provide security for a defendant's counter-claim; nor was any submission made on that question.

Answering the second question, I hold that the High Court had power to order the plaintiff to give security for the defendant's counter-claim for damages for malicious arrest, but that the amount fixed was excessive.

ORDER

For the above reasons, I allow the appeal, set aside the order of the Court of Appeal, and restore the order of the High Court, subject to a reduction in the amount of security. The plaintiff shall provide security in the High Court in the sum of US$ 30,000 by depositing that sum or by means of a bank guarantee, in accordance with the usual practice and procedure in that Court, and upon such terms and conditions as that Court shall determine. If such security is not provided within one month from the date of this judgment, or such extended

period – not exceeding a further two months – as the High Court may allow, fairness demands that the defendant be forthwith released from his obligation to provide security, and the High Court shall so order, but without prejudice to the plaintiff's right to proceed with the action without security.

I make no order for costs.

DHEERARATNE, J. – I agree.

WADUGODAPITIYA, J. – I agree.

Appeal allowed.

Amount of security reduced.