

M. A. RAZAK & CO. LTD

v.

LANKA WALLTILES LTD

SUPREME COURT
DHEERARATNE, J.
WADUGODAPITIYA, J. AND
BANDARANAYAKE, J.
S.C. APPEAL NO. 39/99
CA NO. 316/88 (F)
DC COLOMBO NO. 82984 M
4th NOVEMBER, 1999

Admiralty jurisdiction - Applicable law during the period 2.7.79 (coming into force of the Judicature Act of 1978) and 31.10.83 (coming into force of the Admiralty Jurisdiction Act of 1983) - Claim relating to carriage of goods in a ship - Jurisdiction of the District Court - Section 19 of the Judicature Act, No. 2 of 1978.

The plaintiff - respondent (the plaintiff) was a manufacturer and exporter of ceramic tiles and the defendant - appellant (the defendant) was the licensed shipping agent of the vessel MV Falak. The defendant obtained from the Central Freight Bureau shipping space for the plaintiff on the said vessel sailing in July 1979 for approximately 340 metric tons of ceramic tiles. Thereafter, on the invitation of the defendant, 333 - 31 metric tons of ceramic tiles belonging to the plaintiff were loaded in MV Falak. Soon thereafter the plaintiff became aware that the vessel was incapable of moving on its own steam and was under arrest in consequence of an order made by the Admiralty High Court of Colombo. The plaintiff promptly moved the High Court and in consequence of an order obtained from court, managed to get the cargo off loaded from the vessel. The plaintiff claimed that the operation of off loading cost him Rs. 333,310/=. The plaintiff alleged that at the time accepted for loading the defendants were aware that the ship was under seizure on a court order and that its agents and servants fraudulently or negligently failed to notice that fact to the plaintiff. The plaintiff filed an action in the District Court and obtained judgement for the recovery of the sum of Rs. 333,310/=. The action was filed on the 13th July 1979 after the Judicature Act, No. 2 of 1978 came into force on 2.7.79 and before the Admiralty Jurisdiction Act, No. 40 of 1983 was brought into operation on 1.11.83.

Held :

1. The High Court sitting in the Judicial Zone of Colombo had admiralty jurisdiction during the period between 2.7.79 and 31.10.83 in terms of section 13 (1) of the Judicature Act read with section 3 (2) of the Administration of Justice Law No. 44 of 1973 which had not been repealed by the AJL and which kept in force the Admiralty Rules of 1883.

2. Section 13(1) of the Judicature Act does not confer exclusive jurisdiction on the High Court in Admiralty matters. In England an aggrieved party may institute proceedings in the Queens Bench Division in respect of certain matters within admiralty jurisdiction. Similarly, the District Court had concurrent jurisdiction to hear and determine the plaintiff's action which entailed consideration of a contract of carriage of goods in a ship. This view is supported by the wording of section 19 of the Judicature Act.

Cases referred to :

1. *Antonis P Lemos (HL)* 1985 (1) All E R 695
2. *Mohamed Saleh Bawzir v. MV Ayesha EX Pardesi and another (C.A)* (1986) 1 Sri LR 314
3. *P. B. Umbichy Ltd. v. MV Shantha Rohan* SC No. 32/91A SC minutes 27th July 1993.
4. *The Government of United States of America v. The ship "Valiant Enterprise"* (1961)63 NLR 337
5. *Snia Viscosa Societa Nazionale Industria Applicazioni Viscosa v. The Ship Yuri Maru* 1927 AC 906
6. *Hendrik Appuhamy v. John Appuhamy* (1966) 69 NLR 29

APPEAL from the judgement of the Court of Appeal

Sanjewa Jayawardena for defendant - appellant.

Bimal Rajapaksa with G.S.K. Hirimuthugoda and Ajith Anawatta for plaintiff - respondent.

December 8, 1999

DHEERARATNE, J.

At the time material to this action the plaintiff - respondent (plaintiff) was a manufacturer and an exporter of ceramic tiles and the defendant appellant (defendant) was the licensed shipping agent of the vessel MV Falak. The plaintiff requested the Central Freight Bureau (CFB) for allocation of shipping space on a vessel calling on the ports of Doha and Qatar for approximately 340 metric tons of ceramic tiles. On the strength of representations made by the defendant to the CFB, the CFB informed the plaintiff that shipping space was available on MV Falak sailing in July 1979. The defendant through its servants or agents, too informed the plaintiff that the said vessel was ready to accept cargo for shipping and to make available the cargo for loading. Accordingly, 333-31 metric tons of ceramic tiles belonging to the plaintiff were loaded on mv Falak. Soon thereafter, the plaintiff became aware that the vessel MV Falak was incapable of moving on its own steam and was under arrest pursuant to an order made by the Admiralty High Court of Colombo. The plaintiff promptly moved the High Court and in consequence of an order obtained from Court, managed to get the cargo off loaded from the vessel. According to the plaintiff, the operation of off loading cost him a sum of Rs. 333,310/=. The plaintiff alleged that at the time the cargo was accepted for loading, the defendant was fully aware that the ship was under seizure by order of Court and that its servants and agents fraudulently or negligently failed to notify that fact to the plaintiff. The plaintiff thereafter filed this action against the defendant in the District Court of Colombo seeking inter alia the recovery of the said sum of Rs. 333,310/=. The District Court gave judgment in favour of the plaintiff and on appeal by the defendant, the Court of Appeal affirmed that judgment. The defendant has now appealed to this Court. If one were to look at the nature of the plaintiff's cause of action, it is a claim arising out of an agreement relating to carriage of goods in a ship or to the use or hire of a ship, which attracts admiralty law. An action founded on the law of delict could fall within such a claim. See *Antonis P Lemos* (HL)⁽¹⁾.

The only matter, argued before us, quite rightly too, was the interesting question as to whether the District Court had jurisdiction to hear and determine the action of the plaintiff as an action based on delict or whether the High Court of Admiralty had exclusive jurisdiction as an action relating to admiralty law. It is material to observe in this connection, that the action was filed on 13th July 1979, before the Admiralty Jurisdiction Act of 1983, currently in force, came into operation. It is unnecessary for the decision of this case to trace the history of the Admiralty jurisdiction of this Island: that has been admirably done by the Court of Appeal in the case of *Mohamed Saleh Bawazir Vs. MV Ayesha Ex Pardesi and another*⁽²⁾. In order to examine the state of admiralty law that was applicable to Sri Lanka, at the time the present action was filed, namely on 13th July 1979, some reference to the legislation on the subject enacted earlier, becomes necessary.

Rules were made by the Order in Council dated 23.8.1883 under the Vice Admiralty Courts Act 1863 of the UK and were made applicable to this Island by Government Gazette of 7.12.1883. Subsequently, the local Ceylon courts of Admiralty Ordinance No. 2 of 1891 was enacted and by virtue of section 23 of that Ordinance, the admiralty rules already promulgated were kept alive. (These rules were later reproduced in Volume I of the 1956 Subsidiary Legislation). The Administration of Justice Law No. 44 of 1973 (AJL), by its subsection 3 (1), repealed among several enactments, the Ceylon Courts of Admiralty Ordinance, but by its subsection 3 (2), all rules in force relating to the exercise of jurisdiction of Courts established under the several enactments repealed by that Law, were kept in force. Section 54 of the AJL defined "admiralty jurisdiction" to mean "unless otherwise provided for by written law the admiralty jurisdiction for the time being of the High Court of England." This provision attracted the application to Sri Lanka of the Administration of Justice Act of 1956 of the United Kingdom (later substituted by the Supreme

Court Act of 1981). The Judicature Act No. 2 of 1978 of Sri Lanka, by its section 62 repealed Chapter 1 of the AJL which contained section 54 but not subsection 3 (2,) thus the admiralty rules of 1883 were kept in force. See the case of *Mohamed Saleh Bawazir* (supra).

The Judicature Act No. 2 of 1978 is the source of the jurisdictions of the several Courts of First Instance. Subsection 13 (1) reads "Admiralty jurisdiction is hereby vested in the High Court and shall be ordinarily exercised by a judge of the High Court sitting in the judicial zone of Colombo" (Proviso is omitted). Subsection 13 (2) reads "The admiralty jurisdiction vested in the High Court shall be as provided for by the law for the time being in force". By the repeal of section 54 of the AJL, the Judicature Act of 1956 of the United Kingdom which specified "the admiralty jurisdiction for the time being of the High Court of England", ceased to be applicable to Sri Lanka; and until the Admiralty Act No. 40 of 1983 came into force there was no law as "provided for by the law for the time being in force" in terms of subsection 13 (2) of the Judicature Act of 1978. Was there any admiralty law in operation in Sri Lanka between the period 2.7.79 (coming into force of the Judicature Act of 1978) and 31.10.83 (coming into force of the Admiralty Jurisdiction Act No. 40 of 1983)? This question was considered by this Court in the case of *P.B. Umbichy Ltd., Vs. MV Shantha Rohan*⁽³⁾ which reversed the decision of the Court of Appeal reported in 1994 (3) SLR 54, the latter of which held that there was no admiralty law applicable to Sri Lanka during that period.

In that case Mark Fernando J. stated "section 13(1) vested 'admiralty jurisdiction' in the High Court. That section, taken as a whole, is capable of 2 constructions. The first view is that admiralty jurisdiction is exhaustively defined by sub section (2), i.e. as being such jurisdiction and only such jurisdiction, as is provided for by law for the time being in force; there being no such law in force on 31.8.83, the High Court had no jurisdiction. However, section 13(2) seems somewhat wider than the

usual (exhaustive) definition clause, which would have provided that admiralty jurisdiction in section 13(1) 'means such jurisdiction as is conferred on [or provided for] by the law of the time being in force.' Had there been a statute which provided for admiralty jurisdiction, such statute would have applied, even if section 13(2) had been omitted; to that extent section 13(2) is superfluous. In any event, even if it be regarded as a definition clause, it is more in the nature of an inclusive, rather than an exhaustive definition.

The 2nd interpretation is that 'admiralty jurisdiction' in section 13(1) did have a meaning, independently of subsection (2); namely, the ordinary meaning of the phrase considered in the context of the preceding one hundred years; the special characteristic of admiralty jurisdiction, as commonly understood, was that it recognised an action in rem wherein a vessel could be arrested, or seized, as security for the satisfaction of the claim if successful; and the nature and extent of that jurisdiction could also be ascertained by a consideration of the powers conferred or recognized by the Admiralty Rules. That interpretation, however, renders section 13(2) superfluous, as even without it Parliament could later have amended or added to the admiralty jurisdiction of the High Court.

I have therefore to choose between an interpretation which renders section 13(1) a futility, and another which renders section 13(2) superfluous. Considered in isolation, the first interpretation seems more logical. But considering the history of admiralty jurisdiction and the purpose of the Judicature Act, one cannot discover a legislative intent to take away a jurisdiction recognised for almost a century; and the fact that Admiralty Rules were kept in force contradicts any such intention. The Judicature Act was intended to ensure or regulate the smooth working of the judicial system, and the alternative interpretation which will introduce uncertainty, friction or confusion into the working of the system must be rejected (*Shannon Realities Ltd., Vs. Ville de St. Michel* 1924 AC 185 192-3). Had section 13(1) stood alone, 'admiralty

jurisdiction' would have had to be given a meaning, and there is no doubt that it would have included a claim for loss of or damage to the goods carried in a ship or a claim arising out of any agreement relating to the carriage of goods in a ship."

I am in respectful agreement with the abovementioned dicta of Mark Fernando J. However, I am inclined to think that the substantive English admiralty law was applicable during the period in question also for a different reason. The admiralty rules, as observed earlier were kept alive, which were mainly procedural in nature. Section 2 of the Civil Law Ordinance No. 5 of 1852 (as amended) reads :- "The law to be hereafter administered in Sri Lanka in respect of all contracts of questions arising within the same relating to ships and to the property therein, and to the owners thereof, the behaviour of the master and mariners their respective rights, duties, and liabilities, relating to the carriage of passengers and goods by ship, to stoppage in transitu, to freight, demurrage, insurance, salvage, average, collision between ships, to bills of lading, and generally to all maritime matters, shall be the same in respect of the said matters as would be administered in England in the like case at the corresponding period, if the contract had been entered into or if the act in respect of which any such question shall have arisen had been done in England, unless in any case other provision is or shall be made by any enactment now in force in Sri Lanka or hereafter to be enacted."

I see no reason why, during this period where there was no substantive enactment with regard to admiralty law, that on the application of the Civil Law Ordinance, the corresponding English Law did not apply to Sri Lanka. I find support for this view from the illuminating judgment of H.N.G. Fernando J. (as he then was) in the case of *The Government of United States of America Vs. The ship "Valiant Enterprise"*⁽⁴⁾ Rejecting the argument, that section 2 of the Civil Law Ordinance, which I have cited above, rendered inapplicable to this Island, the

decision of the Privy Council in *Snia Viscosa Societa Nazionale Industria Applicazioni Viscosa Vs. The Ship Yuri Maru*⁽⁵⁾. H.N.G. Fernando J. at page 343 stated "That provision only means in my opinion that this Court must administer the substantive law which would at the given time be administered in the maritime matters by the High Court, provided of course that this Court has aliunde the jurisdiction to entertain a suit in respect of the particular matter involved." So much as regards the substantive law of admiralty applicable during the period in question.

The relevant part of section 19 of the Judicature Act which confers the jurisdiction of the District Court states :- "Every District Court shall be a court of record and shall within its district have unlimited original jurisdiction in all civil, revenue, trust, insolvency and testamentary matters except such of the aforesaid matters as are by this Act or any other written law **exclusively** assigned by way of original jurisdiction to any other court or vested in any other authority" (emphasis added) It could be observed that section 13 does not seem to confer exclusive jurisdiction to the High Court. Learned counsel for the defendant, quite forcefully contended, that we should apply the ratio in the case of *Hendrick Appuhamy V. John Appuhamy*⁽⁶⁾. He submitted that where the legislature has provided for special machinery to which a party should resort to in order to obtain relief, he cannot resort to any other forum. In the instant case, one cannot contend that any new rights have been created by admiralty law. As Sansoni C.J. observed in that case "it seems clear that special rights have been conferred by the Act [Paddy Lands Act] upon tenant cultivators and special liabilities have been imposed on landlords, quite distinct from their common law rights and liabilities. The Act make special provision for what is to happen in case of any breach of the provisions. Most significant, for the purpose of this appeal are the special rights conferred upon the tenant cultivators with regard to the quiet and undisturbed possession of their extents of paddy land and their restoration

to possession if evicted. It is clear that since the Act was passed, the landowner of a paddy land no longer has the freedom he previously enjoyed in regard to the use and occupation of that land or the manner of dealing with it. His common law rights have been considerably curtailed, no doubt in the interest of good paddy cultivation and the country's food supply." There is no creation of such new rights and liabilities in the instant case and the case of Hendrick Appuhamy has no application.

It would appear that even in the United Kingdom, unless a party desires to gain advantage of the procedure by way of obtaining an admiralty writ, he is free to invoke the jurisdiction of the Queen's Bench Division to obtain relief. British Shipping Laws - Admiralty Practise by Hewson, Colinaux and McGuffie Vol. 1 (1964) page 43 states, "In cases where the plaintiff wishes to sue the English defendant, the main question to be considered is whether, assuming that the cause of action is within the list set out in section 1(1) of the Administration of Justice Act, 1956, any advantage is obtainable by issuing an Admiralty writ."

I shall pause here to mention that section 1(1) enumerates the several admiralty matters over which the Court has jurisdiction, one being "any claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship."

The aforesaid authority continues "There are, of course, certain matters within Admiralty jurisdiction of the High Court which must be assigned to the Admiralty Division, these normally being (a) the actions which come under the heading of "collision" and (b) limitation actions under section 504 of the Merchant Shipping Act, 1894. The majority, however, of the various actions are within the Admiralty jurisdiction *in personam* of the High Court could be tried in the Queens Bench Division.

As will be observed later, there is no procedure in an Admiralty action in rem equivalent to that under Order 13, rule 1 et seq: for obtaining judgment in default of appearance, or that under Order 19 rule 2 et seq: for obtaining judgment in default of defence (nor it is possible in Admiralty to apply for summary judgment under Order 14, and this applies whether the action is in rem or in personam). The equivalent in an Admiralty action in rem is an application by motion for judgment in default under Order 75, rule 20, which must necessarily take longer. Consequently if urgency is important, it may be better to institute the proceedings in the Queen's Bench Division, provided that service of the writ can be effected and effected quickly, in order to take advantage of the quicker default procedure where it is known that the defendant has no defence and is unlikely to employ delaying tactics. On the other hand, if the cause of action is one which could be taken in either division and the defendant has a ship or other property (usually cargo or freight) in this country which could be arrested, the plaintiff by suing in rem has the advantage of being able to effect service of his writ without any difficulty or delay and to obtain security for his claim at the very beginning of the action. This, however, is subject to other considerations which will be mentioned later.

If the intended plaintiff's claim is one which will involve a consideration of technicalities of the navigation of ships or the ownership or the mortgage of ships, then quite clearly the plaintiff's choice would be the Admiralty Division. If, however, the case is one involving a claim for loss of or damage to cargo, or entails consideration of contracts of carriage of goods in a ship, or concerns a claim to recover a general average contribution, then the choice may be to institute proceedings in the Queen's Bench Division and transfer to the Commercial List."

I hold that the District Court had concurrent jurisdiction to hear and determine the plaintiff's action. For the above

reasons I affirm the judgment of the District Court and dismiss the Appeal. The appellant will pay the respondent a sum of Rs. 25,000/= as costs of this Court.

WADUGODAPITIYA, J. - I agree.

BANDARANAYAKE, J. - I agree.

Appeal dismissed.