

**m.v. "OCEAN ENVOY" AND ANOTHER  
v.  
AL-LINSHIRAH BULK CARRIERS LTD**

COURT OF APPEAL  
KULATILAKE, J. AND  
FERNANDO, J.  
CALA NO. 02/99  
ACTION IN REM NO. 47/96  
AUGUST 22, 2001  
NOVEMBER 08, 2001

*Admiralty Jurisdiction Act, No. 40 of 1983 – Section 12 – Rules thereunder –  
Judicature Act, No. 2 of 1978 – S. 13 (1) and 48 – Trial concluded – New Judge  
– Application to have trial de Novo – Applicable Law when the Act and English  
Law is silent – Cassus omissus.*

Action was instituted in the High Court of Colombo invoking its admiralty jurisdiction to recover a certain sum and arrest of the ship as security in respect of detention due to the plaintiff-respondent. After the evidence was concluded the High Court Judge was elevated as a Judge of the Court of Appeal. On an application made for a trial *de novo*, the High Court dismissed the application for trial *de novo*, stating that the whole case rests on documents.

On leave being sought –

**Held:**

- (1) The Law relating to Admiralty matters is contained exclusively in the Admiralty Jurisdiction Act and the Rules set out in the *Government Gazette* No. 672/7 of 24. 07. 1991.
- (2) Section 12 provides that where there is no provision or inadequate provision in the Act, the Admiralty Court shall have the power to make such order/directions for which the Court exercising admiralty jurisdiction in England had power to make.
- (3) If the Act is silent and if there is no provision in the Law of England for *de novo* trials specially when the trial has been concluded, it is for the Judge of the Admiralty Court to use his judicial discretion and decide whether an application for a trial *de novo* should be allowed or not.

- (4) The evidence rests mainly or if not wholly on documents and as such demeanour and deportment of the witnesses will have no bearing on the adjudication of the case.

**APPLICATION** for Leave to Appeal from an order of the High Court of Colombo, exercising Admiralty Jurisdiction.

**Case referred to :**

1. *Elcara S. A. v. Oilborne Shipping Co. Inc* (1978-79) 2 SLR 293.

*Shibly Aziz*, PC with *Mrs. P. Gunaratne*, for appellants.

*N. Sinnethamby* with *S. Phillips* for respondent.

*Cur. adv. vult.*

January 04, 2002

**P. H. K. KULATILAKE, J.**

Action was instituted in the High Court of Colombo invoking its admiralty jurisdiction to recover a sum of US \$ 142,164.29 and arrest the ship m.v. "OCEAN ENVOY" as security in respect of detention due to the plaintiff-respondent at the Port of Marmugoa in respect of the vessel "CHKALOVSK" and interest at the rate of 5% from 5 July, 1992.

Pleadings were filed by the plaintiff-respondent as well as the defendants-appellants and thereafter trial went on for a number of dates namely, 3rd, 5th and 8th September, 1997, 21st January and 26th February, 1998.

At the trial Zahid Shafeek Vohra, Director of the plaintiff-respondent<sup>10</sup> who had come all the way from the United Kingdom had given evidence on behalf of the plaintiff-respondent. There was a lengthy cross-examination of this witness by the counsel for the defendants-appellants. Mohamed Hardis, Manager I & C gave evidence on behalf

of the defendants-appellants. After the evidence was concluded written submissions had been tendered by both parties. Shortly thereafter, the learned High Court Judge who had heard the evidence was elevated as a Judge of the Court of Appeal. Thereafter, the case was taken up for oral submissions of counsel before the High Court Judge who succeeded the earlier Judge who heard the evidence. 20

When the case was taken up for oral submissions, counsel for the defendants-appellants moved for a trial *De Novo* in terms of section 48 of the Judicature Act. Since the learned counsel for the plaintiff-respondent objected, the learned High Court Judge had directed both parties to file written submissions. In their written submissions the plaintiff-respondent has objected to the application for trial *De Novo* and moved Court to act on the evidence already recorded by his predecessor. The learned Judge having considered the submissions made by both parties was of the view that since the whole case rests on documents for the reason that the claim arising out of the charter 30 party has to be determined on the documentary evidence and no useful/fruitful purpose would be achieved by summoning witnesses and commencing the proceedings afresh.

The learned High Court Judge giving reasons delivered the order dated 18 December 1997, dismissing the defendants-appellants' application for a trial *De Novo*. Leave to appeal and stay order of the High Court of Colombo in Rem 47/96 was granted by this Court.

At the argument before us counsel appearing for both parties filed their written submissions and thereafter oral submissions were made on 08 November, 2001. The learned President's Counsel for the 40 defendants-appellants submitted that Admiralty Jurisdiction is vested in the High Court by the Judicature Act, No. 2 of 1978 and several procedural provisions pertaining to the said admiralty jurisdiction are enumerated in the same Act. Admiralty Jurisdiction is vested in the High Court by section 13 (1) in the following terms:

"Admiralty Jurisdiction is hereby vested in the High Court and shall ordinarily be exercised by a Judge of the High Court sitting in the judicial zone of Colombo."

Section 13 (3) of the Judicature Act provides for the manner in which appeals may be preferred from an order made in the exercise of Admiralty Jurisdiction to the Court of Appeal. It reads thus:

"Every appeal to the Court of Appeal and every application for leave to appeal shall be made as nearly as may be in accordance with the procedure prescribed in the Civil Procedure Code."

Therefore, the counsel's position was that the proviso to section 48 of the Judicature Act will apply and either party may demand that the witness be resummoned and reheard in which case the trial shall commence afresh.

However, the learned counsel for the plaintiff-respondent submitted that the Judicature Act, No. 2 of 1978 only provides for the admiralty jurisdiction to be vested in the High Court of Colombo and the manner in which appeals should be made from an order of the High Court Judge to the Court of Appeal. The law relating to admiralty matters is contained exclusively in the Admiralty Jurisdiction Act, No. 40 of 1983 and the rules set out in *Gazette Extraordinary* No. 672/7 dated 24th July, 1991. If one goes outside, it is to invoke the English Law rules of procedure which is specifically provided for, by section 12 of the Admiralty Jurisdiction Act, No. 40 of 1983. That section provides that where there is no provision or inadequate provision in the Act No. 40 of 1983 the Admiralty Court shall have the power to make such order and directions for which the Court exercising admiralty jurisdiction in England had power to make as long as is not inconsistent with any provisions made under the Act or other enactment or any rule.

In *Elarca S.A. v. Oilborne Shipping Co. Inc.*<sup>(1)</sup> Tambiah, J. observed at page 298—

"It seems to me that the admiralty courts were exercising a special Jurisdiction and admiralty proceedings had a special procedure of its own."

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At page 303 he went on to say —

"It would seem that none of the provisions of the Civil Procedure Code are made applicable to admiralty proceedings in the High Court (Admiralty Jurisdiction)."

Having considered the submissions made by both counsel we are of the view that submissions made by counsel for the plaintiff-respondent should succeed. Therefore, in case where there is *cassus omissus* the Admiralty Court should look into the power to make such orders and directions which the Court exercising admiralty jurisdiction in England had as long as it is not inconsistent with any provisions made under Act No. 40 of 1983.

The learned counsel for the plaintiff-respondent further submitted that there is no provision in the Laws of England to provide for *De Novo* trials specially when the trial has been concluded and judgment is to be pronounced.

In the absence of any provision for trial *De Novo* in a situation like this either in the provisions of the Admiralty Jurisdiction Act, No. 40 of 1983 and its rules or the Laws of England, it is for the Judge of the Admiralty Court to use his judicial discretion and decide whether an application for a trial *De Novo* should be allowed or not in the attendant circumstances of the case.

The counsel appearing for the plaintiff-respondent submitted to Court that the evidence of witness Zahid Shafeek Vohra rest mainly

or if not wholly on documents and as such the demeanour and deportment of the witness will have no bearing on the adjudication of this case. Further, learned counsel submitted that great hardships and financial commitments will have to be borne by the plaintiff-respondent, if this witness is to be resummoned to give evidence. Since all the documents and the evidence relating to the documents are available on record no prejudice would be caused to the defendants-appellants by the Court adopting the proceedings and continue with the case. In fact, the learned Judge has given his mind to these matters. It is to the following effect:

"Unlike in a criminal case or any other case where the issue can be decided not only on oral evidence but also on the demeanour of witnesses, this case appears to be dependent on the above documents."

In the circumstances we see no reason to interfere with the order made by the learned High Court Judge dated 18 December, 1997. Hence, we proceed to dismiss the appeal.

**FERNANDO, J.** – I agree.

*Application dismissed.*