

1977
April 26

[A. LOIZOU, J.]

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PHOENIX
MARINE
CONSULTANTS
LTD.

PHOENIX MARINE CONSULTANTS LTD.,

Applicants,

v.

v.
SPENMAN
MARITIME
CO. LTD.

SPENMAN MARITIME CO. LTD.,

Respondents.

(Application No. 20/76).

Admiralty—Sale of ship—Application for order directing sale of ship in execution of a judgment obtained at the District Court—Ship not under arrest and no order for arrest sought—Application refused because before an order for sale is made the ship must be under arrest—Moreover no statutory or common law provision existing, empowering the Court to order sale in the circumstances applied for and no writ of execution sought—Sections 29 and 81 of the Merchant Shipping (Registration of Ships, Sales and Mortgages) Law, 1963, rules 168 - 171 and 203 of the Cyprus Admiralty Jurisdiction Order and s. 14 of the Civil Procedure Rules not applicable.

Ship—Sale of—See, also, under “Admiralty”.

On July 6, 1976, judgment was given by the District Court of Nicosia in Civil Action No. 1803/76, in favour of the applicants, as plaintiffs, and against the respondents, as defendants, for the amount of £761.967 mils. The respondent company has paid nothing against this amount and had no property in Cyprus.

By means of an *ex parte* application the applicants applied to this Court for an order directing the sale of the ship “Despina S”, which belonged to the defendants and was registered under the Cyprus flag; for an order appointing the Marshal to proceed with the sale; and for an order that the above judgment debt be satisfied out of the proceeds of the sale.

The application was based on section 29 of the Merchant Shipping (Registration of Ships, Sales and Mortgages) Law, 1963 (Law 45/63) on rules 168 - 171 and 203 of the Cyprus Admiralty Jurisdiction Order, 1893 and on section 14 of the Civil Procedure Law, Cap. 6.

The ship in question was not under arrest and no order for its arrest, appraisal and sale was sought by means of the above application.

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5 *Held*, dismissing the application, that before an order for sale will be made the res must be under arrest; that as this Court has not been able to trace any provisions whether statutory or at common law empowering it to order the sale of the ship in the circumstances applied for; and that as the ship
10 in question is not under the arrest of the Court and its arrest is not being sought, the present application will, accordingly, be dismissed. (Sections 29 and 81 of Law 45/63, rules 168-171 and 203 of the Cyprus Admiralty Jurisdiction Order, 1893 and section 14 of the Civil Procedure Rules not applicable).

15 *Application dismissed.*

Cases referred to:

The James W. Elwell [1921] P. 351;

The Joannis Vatis (No. 2) [1922] P. 213.

Ex parte application.

20 *Ex parte* application for (a) an order directing the sale of the ship "DESPINA S" (b) an order appointing the Marshal to proceed with the sale and (c) an order that an amount of £761.967 mils with interest be satisfied out of the proceeds of the sale.

25 *L. Papaphilippou*, for the applicants.

Cur. adv. vult.

The following decision was delivered by:-

A. LOIZOU, J.: By this *ex-parte* application the applicants apply for:-

30 "(a) An order directing the sale of the ship 'DESPINA S' which belongs to the defendants and is registered under Cyprus flag.

(b) An order that out of the proceeds of the sale of the said ship an amount of £761.967 mils with interest on £50.482 mils @ 9% per annum from 12.3.74, and on £49.740 mils @ 9% per annum from 26.3.74 and on £661.729 mils @ 9% per annum from 25.6.74 plus

£36.050 mils adjudged costs and the costs of this application together with the costs of the sale of the said ship be paid out of the proceeds of the sale of the said ship.

- (c) An order appointing the Marshal and/or some other suitable person to proceed with the sale of the said ship and execute all necessary acts and deeds in respect thereof including the signing of a bill of sale. 5
- (d) The costs of this application and the costs of sale of the said ship". 10

By this application, in effect an originating application, the applicants seek the help of this Court in the exercise of its admiralty jurisdiction, to execute a judgment obtained at the District Court of Nicosia, and the reason for seeking the assistance of this Court, is because the property upon which execution is sought to be levied, is a ship registered in Cyprus and belonging to the respondents, a company also registered in Cyprus. 15

The application is based on section 29 of the Merchant Shipping (Registration of Ships, Sales and Mortgages) Law, 1963, (Law 45/63), on rules 168, 169, 170, 171 and 203 of the Cyprus Admiralty Jurisdiction Order, 1893. and on section 14 of the Civil Procedure Law, Cap. 6. 20 25

The facts relied upon as set out in the affidavit accompanying this application, are very simple.

On the 6th July, 1976, judgment was given by the District Court of Nicosia in Civil Action No. 1803/76, in favour of the applicants, as plaintiffs, and against the respondents, as defendants, for the amount and interest as per para. (b) of the prayer hereinabove set out as against which nothing was paid by the respondent company who owe the whole amount thereof. As further asserted in the affidavit, the respondent company has no property in Cyprus. 30 35

Section 29 of our Law which is identical to section 29 of the English Merchant Shipping Act of 1894, follows:-

"29. Where any Court, whether under the preceding

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5 sections of this Law or otherwise, order the sale of
any ship or share therein, the order of the Court shall
contain a declaration vesting in some person named
by the Court the right to transfer that ship or share,
and that person shall thereupon be entitled to transfer
the ship or share in the same manner and to the same
extent as if he were the registered owner thereof; and
the Registrar shall obey the requisition of the person
so named in respect of any transfer to the same ex-
10 tent as if such person were the registered owner”.

15 This is a section that comes under Part VI of the Law
dealing with “Transfers and Transmissions”. It empowers
a Court where it orders the sale of a ship or share therein,
to include in such order, a declaration giving to a person
named therein, the right to transfer that ship or share, in
the same manner and to the same extent as if he were the
registered owner thereof. But for this section to apply,
there must exist a situation whereby the Court is satisfied
20 that it has power to make an order for sale, either “under
the preceding sections of the law or otherwise”. The term
“otherwise” by itself, does not give to this Court a power
to order the sale of a ship and appoint a person to effect
the necessary declarations. It is a generic term and one
has to look behind it and find if there are any legal provi-
25 sions whether statutory or at common law, whereby a
Court has power to order the sale of a ship in the circum-
stances set out in this application and in particular when
such ship is not under the arrest of the Court.

30 Rules 168, 169, 170 and 171 of the Admiralty Order
of 1893 relate to execution of judgments.

Rule 168 makes provision for the mode in which an
application can be made for obtaining the execution of a
judgment or order by sale of movable property or by at-
tachment of movable property.

35 Rule 169 provides that every writ of execution by the
sale of property shall direct in what manner the moneys to
be raised under the writ shall be disposed of.

40 Rule 170 requires that in the writ there must be a sta-
tement as to the amount due under the judgment and a
direction to the Marshal to levy the same together with in-

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terest thereon, at the rate of 9% per annum from the date of the judgment and together with the costs of execution.

Rule 171 provides that every writ of execution for the recovery of money is to be addressed to the Marshal who, after execution, shall return it to the Court endorsed with a statement of what has been done thereunder and of the amount of the costs incurred in such execution.

The aforesaid rules correspond to Order 41 of the Civil Procedure Rules which deals with the execution by seizure and sale of movable property. In England, there is authority to the effect that judgment creditors can proceed to levy execution on a ship by a Sheriff's writ of *fieri facias*, (see *The James W. Elwell* [1921] P. 351 and *The Joannis Vatis (No. 2)* [1922] P. 213). But I need not pronounce on this course, as I am not asked to do so. In fact, learned counsel for the applicants has argued on the supposition that if a writ of movables was to be issued in the District Court and the bailiff was consequently to visit the offices of the judgment-debtor or was to obtain information from the office of the Registrar of Ships as to the whereabouts of the ship and it was found that the ship was in a foreign port, the bailiff would return the writ unexecuted because there would be nothing in this country to be seized. On the other hand, he argued that if the ship is in a Cyprus port the bailiff may not be empowered to seize it, appraise it and sell it because of rules 74 - 77 of the Cyprus Admiralty Jurisdiction Order of 1893. Consequently, it was argued that the proper person under the Rules is the Marshal who due to his experience and his post is the only qualified person to perform this duty. I am not, however, asked to issue a writ of execution to be executed by the Marshal who possesses, as said by counsel, the necessary experience and authority by virtue of his post. What I am asked, is to give authority to the Marshal to sell the ship in a manner unrelated with the execution of a writ for the sale of movables which execution inherently has in it the element of the seizure of the movable to be sold thereunder.

Rule 203 provides that a party desiring to obtain an order from the Court or a Judge shall ordinarily make oral application for the same, but the Court or Judge may direct that the application be made in writing.

The last section relied upon is section 14 of the Civil Procedure Law, Cap. 6. It contains methods of execution. Under sub-section (1) thereof, any judgment or order of a Court directing payment of money may, subject to the provisions of the Law, be carried into execution by all or any of the following means:

- “(a) by seizure and sale of movable property;
- (b) by sale of or making the judgment a charge on immovable property;
- (c) by sequestration of immovable property;
- (d) by attachment of property under Part VII of this Law; or
- (e) imprisonment of the debtor under Part VIII of this Law”.

I need not refer to sub-sections (2), (3) and (4) of the Law, as they have no bearing whatsoever in the present case. If, however, a Court was to act on the powers given to it by section 14(1) and in particular paragraph (a) thereof, the authority derived therefrom for the sale of movable property, is only consequent to the seizure of such property which, again, is not what is sought by the applicants in this case.

Rightly, in my view, rule 74 of the Admiralty Jurisdiction Order has not been invoked by the applicants as it could not help them at all. This is a rule empowering the Court “to appoint the Marshal of the Court or any other person or persons to appraise any property under the arrest of the Court or to sell any such property either with or without appraisal or to remove or inspect and report on any such property or to discharge any cargo under arrest on board the ship”. It is clear that an order under this rule is in respect of “any property under the arrest of the Court” which is not the case.

Furthermore, rule 77 empowers the Court to deduct and retain from the money realised by the sale “of any property under the arrest of the Court”, the amount of all fees, costs, charges and expenses payable or incurred in and about the carrying out of such sale.

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The law on the issues raised by this application is well settled. As stated in the British Shipping Laws, Vol. 1, Admiralty Practice, 1964, para. 382, “the res must be under arrest in the action in which the order for appraisal and sale is asked for and if necessary may be arrested a second time for this purpose”. 5

If any further authority is needed for the proposition that before the sale of a ship is ordered, it must be under arrest, the note to Order 75, rule 22 of the Rules of the Supreme Court, Annual Practice, (1976), supply the answer. It reads: 10

“Res must be under arrest.—The res must be in the hands of the Court before an order for sale will be made (*The Wexford* [1888], 13 P.D. 10) but in special circumstances an order for arrest, appraisal and sale may be made where it is not (*The Berriz* (1905)—Fo. 497). The power of the Court in an Admiralty action to order a Court sale cannot be invoked in an action in *personam*. (*The Lady Tahilla* [1967] 1 Lloyd’s Rep. 591 at 601). 15 20

But again, no order for arrest, appraisal and sale is sought by this application.

Counsel for the applicant has suggested that the provisions of section 81 of the Merchant Shipping (Registration etc.) Law, 1963 will come into play if an order for sale is made. Section 81 speaks of proceedings where any ship has either wholly or as to any share therein become subject to forfeiture under this Law and nothing in this application suggests that the ship in question is subject to forfeiture under this Law. 25 30

For all the above reasons and as I have not been able to trace any other provisions whether statutory or at common law empowering me to order the sale of the ship in the circumstances applied for and not being under the arrest of this Court and its arrest not being sought, and as no writ of execution is applied for, the present application must be dismissed. 35

The question of equitable execution of the appointment of a receiver referred to also by learned counsel for the

applicant does not come into play by the relief sought in this application and no useful purpose will be served to deal with this argument. The ordinary modes of execution against a company registered in Cyprus are open to the applicants' judgment-creditors who may consider resorting to them.

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In the result, the present application is dismissed with no order as to costs.

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Application dismissed.
No order as to costs.

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