

CASES
DECIDED BY
THE SUPREME COURT OF CYPRUS
ON APPEAL
AND
IN ITS ORIGINAL JURISDICTION

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[DEMETRIADES, J.]

EDDY BREIDI AND ANOTHER,

Plaintiffs,

v.

1. THE SHIP "GLORIANA"
2. THE CARGO LADEN ON BOARD THE SHIP
"GLORIANA",
3. GRUNDING AG,

Defendants.

(Admiralty Action No. 13/80).

*Admiralty—Arrest of ship—Principles applicable—Rule 50 of the
Cyprus Admiralty Jurisdiction Order, 1893.*

5 *Admiralty—Practice—Release of property under arrest—And dis-
charge of bail put up for the release—Proper procedural steps
for—Rule 60 of the Cyprus Admiralty Jurisdiction Order, 1893.*

On January 16, 1980, the plaintiffs issued a writ of summons by means of which they claimed against the defendants the equivalent "amount in Cyprus Pounds of the sum of U.S. Dollars 1,000.000.00 as damages for loss for non-delivery of

cargo, and/or for breach of contract of affreightment and/or for negligence and/or for breach of contract of carriage and/or for breach of contract for the sale of goods now loaded on defendant ship and/or otherwise on or about 14.1.1980". On the same day, after the filing of an ex-parte application by the plaintiff, supported by an affidavit*, the Court ordered the arrest** of the defendant ship together with the cargo laden on her upon the terms***, inter alia, that "the Marshal shall release the ship and the cargo upon directions of the Registrar of this Court on the filing of security bond by or on behalf of the ship in the sum of £200,000.- (Two Hundred Thousand Pounds) for the satisfaction of any order or judgment in favour of the plaintiffs-applicants" and that the plaintiffs shall "file a security bond in the sum of £75,000.- (Seventy Five Thousand Pounds) to be answerable in damages for the defendant ship, her owners and the owners of the cargo".

The plaintiffs, in compliance with the above order, filed a bank guarantee in the sum of C£75,000.- and on the 18th January, 1980, the defendants put up bail in the form of a bank guarantee for £200,000, as a result of which the ship and the cargo were released. The ship sailed away and the cargo, after it was unloaded, was sold by defendants No. 3.

On the 13th February, 1980, defendants No. 1 and on the 11th February, 1980, defendants Nos. 2 and 3, that is after the ship and the cargo were released, filed oppositions to the application for the issue of the warrant of arrest. These oppositions were supported by affidavits****.

In addition to the affidavit-evidence which was adduced in support of the application for the warrant of arrest the plaintiffs adduced oral evidence***** but after this evidence was given neither of the defendants adduced evidence, affidavit or oral, to contradict it.

* The affidavit is quoted at pp. 8-10 *post*.

** The arrest was ordered under rule 50 of the Cyprus Admiralty Jurisdiction Order, 1893 which is quoted at p. 6 *post*.

*** The terms are quoted at pp. 4-5 *post*.

**** The affidavits are quoted at pp. 11-14 *post*.

***** A summary of this evidence, which was given by Mr. Robert Anid, is quoted at pp. 10-11 *post*.

5 *On the oppositions to the application for the issue of the warrant of arrest and on the question of the proper procedural steps that a party has to take when he seeks the release of arrested property or of the security he has put up for the release of the property:*

10 *Held, (1) that in deciding whether the Admiralty Court will issue a warrant of arrest, it is not necessary, at that stage to go into the merits of the action and decide whether the plaintiff's factual or legal contentions are right or wrong; that rule 50 of the Cyprus Admiralty Jurisdiction order gives an absolute right for the arrest of property once the Court is satisfied that there are issues that have to be tried between the parties; that it suffices if it is found that the plaintiff has a right to have those issues tried (see Rigas v. The Ship "BAALBECK" (1973) 1*
15 *C.L.R. 159, 163); that it is abundantly clear that the plaintiffs have a right to have the issues raised by the oral evidence (evidence of Mr. Anid) tried; and that, therefore, they were entitled to have the ship and the goods laden on her arrested; accordingly the oppositions of the defendants should be dismissed.*

20 (2) That the party wishing to have the release of the property arrested must apply to the Court and it is upon him to prove that he is entitled to the release (see rule 60 of the Cyprus Admiralty Jurisdiction Order, 1893); that a party claiming the release of arrested property or the discharge of bail put up for the
25 release of such property, can only succeed if he can prove that the plaintiff's claim or the defendant's counterclaim is frivolous and vexatious; that, similarly, since the arrested property is substituted by the bail, it is upon the party seeking its release to apply to the Court; that in the present case, the defendants
30 have failed to apply to the Court for the discharge of the bail they have put up for the release of the vessel and the cargo and for this reason the release of the bail cannot be ordered; accordingly the bail put up by the defendants shall remain in force until the final determination of the action.

35 *Order accordingly.*

Cases referred to:

Rigas v. The Ship "Baalbeck" (1973) 1 C.L.R. 159 at p. 163;
Schwarz & Co. (Grain), Ltd., v. St. Elefterio ex Arion (Owners)
[1957] 2 All E.R. 374 at p. 377.

Application.

Application for the release of the defendant ship which was arrested on the application of the plaintiffs in the above action.

D. Demetriades, for plaintiffs-applicants.

C. Hadjiloannou, for respondent 1.

L. Demetriades with St. Nathanael, for respondents 2 and 3.

Cur. adv. vult.

DEMETRIADES J. read the following judgment. On the 16th January, 1980, a writ of summons was issued by the plaintiffs, by which they claim against the defendants:

- "A. The equivalent amount in Cyprus Pounds of the sum of U.S. Dollars 1,000,000.00 as damages for loss for non-delivery of cargo, and/or for breach of contract of affreightment and/or for negligence and/or for breach of contract of carriage and/or for breach of contract for the sale of goods now loaded on defendant ship and/or otherwise on or about 14.1.1980. 15
- B. Interest at 9% per annum as from 4.1.1980 to final payment.
- C. The costs and expenses of this Action and of all proceedings herein". 20

On the same day, after the filing of an ex-parte application by the plaintiffs, the defendant ship, which was then lying at the port of Limassol, was arrested, with the cargo laden on her, on the following terms: 25

- "1. Let a warrant of arrest of the ship "GLORIANA", now lying at the port of Limassol, and her cargo, be issued.
2. Notice of such arrest to be served on the Master of the ship. 30
3. The Marshal shall release the ship and the cargo upon directions of the Registrar of this Court on the filing of security bond by or on behalf of the ship in the sum of £200,000.- (Two Hundred Thousand Pounds) for the satisfaction of any order or judgment in favour of the plaintiffs-applicants. 35

4. The plaintiffs-applicants shall comply with the following requirements-
- 5 (a) lodge in Court the sum of £200.- (Two Hundred Pounds) deposit for any expenses which may be incurred by the Marshal in connection with the custody of the ship and her cargo whilst under arrest, subject to this sum being increased later on;
- 10 (b) lodge in Court any further amount that the Registrar of this Court will ask the plaintiffs to pay with regard to the arrest and failing to comply within six days therefrom from the demand, the order of arrest to be discharged;
- 15 (c) file a security bond in the sum of £75,000.- (Seventy Five Thousand Pounds) to be answerable in damages for the defendant ship, her owners and the owners of the cargo.
5. Warrant of arrest not to be drawn up and executed until and unless the plaintiffs comply with sub-para (c) of para 4 hereinabove.
- 20 6. The Marshal is required to report to this Court by the latest at 9.30 a.m. on the 22nd January, 1980 with regard to the arrest of the ship and the cargo, and probable costs to be incurred in connection with such arrest.
- 25 7. This case is fixed for the 22nd January, 1980 at 9.30 a.m. in case it is decided to show cause against the continuance in force of the order of arrest made today ex-parte.
8. Question of costs reserved".

30 The warrant of arrest was issued on the basis of an affidavit sworn by Mr. Pavlos Kakopieros, an advocate in the law office of counsel for the plaintiffs.

35 The plaintiffs, in compliance with term 4(c) of the above order, filed a bank guarantee in the sum of C£75,000.- and on the 18th January, 1980, the defendants put up bail in the form of a bank guarantee for £200.- as a result of which the ship and the cargo were released. The ship sailed away and the cargo, after it was unloaded, was sold by defendants No. 3.

On the 13th February, 1980, defendants No. 1 and on the 11th February, 1980, defendants Nos. 2 and 3, that is after the ship and the cargo were released, filed oppositions to the application for the issue of the warrant of arrest. These oppositions were supported by affidavits sworn by Mr. Stavros Pissarides on behalf of defendants No. 1 and Mr. Hans Seidenschnur, on behalf of defendants Nos. 2 and 3. 5

A warrant of arrest is issued by virtue of rule 50 of the Cyprus Admiralty Jurisdiction Order, 1893, which provides:-

"50. In an action in rem any party may at the time of, or at any time after the issue of the writ of summons, apply to the Court or a Judge for the issue of a warrant for the arrest of property. 10

The party so applying shall before making his application file in the Court an affidavit containing the particulars prescribed by the following rules. 15

Such application shall be in writing signed by the person making the application or his advocate and shall be filed by the Registrar.

The affidavit may be in the Form C in Schedule I hereto". 20

Mr. HadjiIoannou, counsel for the defendant ship, in his able address submitted that it is not necessary, at this stage of the proceedings, for the Court to go into the merits of the case in order to decide whether the warrant of arrest ought to have been issued. It is sufficient, he said, if the plaintiffs prove a prima facie case. 25

Going through our case-law, it appears that in deciding whether the Admiralty Court will issue a warrant of arrest, it is not necessary, at that stage, to go into the merits of the action and decide whether the plaintiff's factual or legal contentions are right or wrong. It suffices if it is found that the plaintiff has a right to have those issues tried (see *Rigas v. The ship "BAALBECK"*, (1973) 1 C.L.R. 159, 163). 30

This, in my view, is the best and safest course to follow or, else, the Court, before deciding on this matter, will have to hear the whole case of the plaintiff or defendant on a counter-claim, in which case the whole concept of the issue of the warrant 35

of arrest, which is an emergency measure, would be defeated. This view is supported by the following extract from the judgment of Willmer J. in the case of *Schwarz & Co. (Grain), Ltd. v. St. Elefterio ex Arion (Owners)*, [1957] 2 All E.R. 374, 377, which reads:

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"If counsel for the defendants is right in saying that a plaintiff has no right to arrest a ship at all, unless he can show in limine a cause of action sustainable in law, what is to happen in a case (and, having regard to the argument I have listened to, this may be just such a case) where the questions of law raised are highly debatable, and questions on which it may be desired to take the opinion of the Court of Appeal or even of the House of Lords? Suppose, for instance, following the argument of counsel for the defendants, that this Court comes to the conclusion, on the preliminary argument held at this stage of the action, that the action is not one that is sustainable in law, it will presumably set aside the writ and the warrant of arrest. It is possible (these things have been known to happen) that a higher Court might take a different view; but in the meantime the ship, which is a foreign ship, has been freed from arrest, has gone, and may never return to this country. It might be that in those circumstances the plaintiffs would have lost their right for ever to entertain proceedings in rem in this country.

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The fact is, and this is the sanction against abuse, that the plaintiffs, if their alleged cause of action turns out not to be a good one, will be held liable for costs, and those costs will include the costs of furnishing bail in order to secure the release of the ship. The defendants can always secure the release of their ship by the simple expedient of furnishing bail. It is perfectly true that if, as they say it will, the action fails, they will probably not recover inter partes the whole of the costs of furnishing the bail; but in that respect I do not know that they are in any different position from other defendants in other types of action".

Turning to the last remark of Willmer J. it must be born in mind that the plaintiffs have already filed a bank guarantee

in the sum of C£75,000.— as security for the claim in the action against the ship, her cargo and defendants No. 3.

It feel that, for the purposes of my judgment, it is necessary to set out hereinunder those parts of the affidavit of Mr. Kakopieros that led to the issue of the warrant of arrest: 5

"3. Plaintiffs opened an irrevocable documentary credit No. DC224 in favour of GRUNDIG AG (above defendants No. 3) for Deutch Marks 3,710.704.

4. This letter of Credit was valid until the 4.1.1980 inclusive and the defendants No. 3 undertook to supply the following documents: 10

A. Commercial invoice made out in the name of Orderers in 5 copies signed by the Seller, including an original copy certified by the Chamber of Commerce.

The invoice must bear the following attestation: 15
'we certify that this invoice is authentic, that it is the only one issued by us for the goods described therein. That shows their exact value without any deduction. We declare also that the origin of the goods is exclusively W. Germany'. 20

B. Full set 'clean on board' Bills of Lading issued to the order of Banque d' Affaires Franco-Arabe S.A. showing freight payable at destination. Notify: MM. Eddy Breidi and Roger Dagher Destination: Beirut 33+9,3 8, 54—, '85. 25

C. Certificate of origin issued by the Commerce in 2 copies.

D. Certificate of weight in 2 copies.

E. Packing list in 2 copies.

F. Letter addressed to Banque d' Affaires Franco-Arabe S.A. Paris issued by beneficiaries certifying that the sets are in accordance with specification (Pal-Secam decoder). 30

G. Trucks consignment not issued in the name of Banque d' Affaires Franco-Arabe S.A. Paris showing: 35

Destination: Ravenna free zone in Transit mentioning freight prepaid and the L/C number.

Notify: Ramar-Ravenna-Via Trieste 48-Transporter Panalpina.

- 5 H. Undertaking from Panalpina to deliver the goods to Ramar at Ravenna free zone only against full set clean on board bill of lading issued to the order of Banque d' Affaires Franco-Arabe S.A. showing freight payable at destination.

- 10 Notify: MM Eddy Breidi and Roger Dagher-Beirut
Destination: Beirut free zone in Transit.

- 15 Freight charges from 'free German border' up to free arrival Ravenna 'Free Zone' are payable at sight to beneficiaries in excess of L/C amount on presentation of documents on the base of max. DDKM1.925,—per container—not to exceed 42 containers totalling DKM 80.850,—max. and against justificative docs.

Evidencing the Shipment of the Following goods:

3.024 Televisions as follows:

- 20 -324 PCS SC 823 Met at DKM 1.198—DKM 387.504,—

- 25 5(1) Plaintiffs by a contract of affreightment for the carriage of above goods agreed with defendants No. 1 and/or her owners and/or her charterers and/or her agents to carry 42 containers containing 3.024 T.V. Sets (20 footer) from Ravenna (Italy) to Beirut Lebanon freight payable at destination.

- 5(2) In fact 42 containers with 3.024 T.V. Sets were loaded on defendant ship at Ravenna, Italy, to be carried to Beirut, and this cargo is still on board.

- 30 6. The defendants No. 3 failed to give to Banque d' Affaires Franco-Arabe S.A. Paris the certificate that the T.V. sets are in accordance with specification (Pal Se-CAM Recorder) and without this Certification these goods could not be sold in Lebanon and this was part of the agreement for the sale of T.V. sets and as a result of their failure to give the relevant certificate to the Bank the Letter of Credit expired on the 4.1.1980.
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7. The plaintiffs were always ready and willing to pay the amount agreed for the goods provided that all documents agreed are delivered to the Banque d' Affaires Franco-Arabe S.A. Paris.
8. Furthermore Defendants were always ready and willing to pay the freight to the carrier ship at the port of destination. 5
9. The Ship without reason whatsoever left Beirut port on the 15th January, 1980 and arrived at Limassol on the same day refusing to deliver aforesaid cargo contrary and in breach of the aforesaid agreement of carriage of the aforesaid cargo from Ravenna (Italy) to Beirut. 10
10. As a result of the breach of contract of sale of goods by defendants No. 3 and especially due to their failure to supply all necessary documents to Banque d' Affaires Franco-Arabe S.A. Paris the plaintiffs suffered irreparable damage which they claim in their aforesaid action. 15
11. The defendants No. 1 failed to deliver the aforesaid goods to plaintiffs as per their contract of carriage of these goods and the said ship is now lying ladjly in the port of Limassol. The said ship is flying the Lebanese flag and will sail at any moment thereby depriving plaintiffs of his security. 20

The aid of the Court is needed for the issue of a warrant of arrest against the ship GLORIANA and her cargo on board". 25

In addition to the affidavit evidence of Mr. Kakopieros, the plaintiffs called Mr. Robert Anid, a merchant in Beirut, whose evidence, in a nutshell, is that he himself negotiated on behalf of the plaintiffs with defendants No. 3 the sale of the T.V. sets, the contract of affreightment of the goods by land from the border of Germany to the port of Ravenna in Italy, and, also, the agreement with the owners of the ship to carry the cargo from Ravenna to Beirut. Mr. Anid further stated that after an agreement was reached with defendants No. 3 as to the price of the goods, he opened, on behalf of the plaintiffs, an irrevocable letter of credit with a Bank in France, namely Banque d' Affaires Franco-Arabe S.A. of Paris, in 30 35

favour of defendants No. 3 and that he paid the expenses for the transportation of the goods from the border of Germany to Ravenna. He further alleged that he had paid the owner of the vessel the sum of 27,000.00 U.S. Dollars on account of the
5 freight of the goods from Ravenna to Beirut.

In reply to Mr. Kakopieros' affidavit, the defendants, as I have said earlier, filed their own affidavits. Mr. Pissarides, in his affidavit, stated among others the following:

10 "2. I have read the affidavit filed on behalf of the plaintiffs in the action under the above title and number in support of their application for the arrest of the ship defendant 1 and I have the following comments to make:

15 (a) Only the allegations contained in paragraphs 5, 8, 9 and 11 of the said affidavit refer to the defendant ship and their contents are denied for the reasons set out hereinbelow.

20 (b) The contents of the rest of the affidavit disclose that there might be a dispute between plaintiffs and defendants 3 a dispute which I am advised and verily believe can best be resolved in Germany or in Lebanon since this Court has no jurisdiction (neither territorial nor effective).

25 (c) Paragraphs 4, 7 and 9 of the affidavit in effect contradict paragraph 5 of same since it is there in effect stated that the plaintiffs received no bills of lading therefore they had no contract of carriage with the defendant ship and the goods loaded on board the ship did not belong to them since they were neither the holders nor the indorsees of any bills of lading covering or relevant to the cargo on board the
30 defendant ship.

35 (d) Paragraph 10 refers to a breach of contract between plaintiffs and defendants 3 by defendants 3 and to the plaintiffs suffering irreparable damage because of such breach. The defendants 1 are not aware of any such facts, and certainly they were not a party to any such alleged contract, and therefore deny them but

- (i) this Court has no jurisdiction to try such dispute and
- (ii) under no circumstances can the defendant 1 be drawn into such dispute or be involved in such dispute or bear the consequences of any breach of any contract between third persons to which they are not a party.

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In the circumstances I verily believe that the defendants 1 ship was wrongly joined as defendants and was wrongly arrested.

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3. The true facts of the case as far as defendants 1 are concerned are as follows:

- (i) On or about the 22.12.1979 the defendants 1 ship received on board at Ravenna 42 containers said to contain T.V. sets and issued on the instructions of the owners-shippers, i.e. defendants 3, Bill of Lading No. 20 (which on the instructions of shippers was later cancelled) photocopy of which is attached hereto marked exhibit 1 and delivered same to the owners-shippers.
- (ii) The said B/L No. 20 evidenced a contract of carriage between the defendants 1 and the holder or indorsee of the Bill of Lading for the carriage of the goods from RAVENA to Beirut-Lebanon.
- (iii) When the ship arrived at Beirut the shippers informed the owners of the ship that they were still the holders of the Bill of Lading and asked them not to discharge the cargo.
- (iv) On the 13th January, 1980 the shippers demanded by telex, photocopy of which is attached hereto marked exhibit 2, that the cargo be carried to Limassol and undertook to pay the extra freight. When the owners of defendants 1 were convinced that the shippers were still the holders of the Bill of Lading the ship sailed for Limassol.
- (v) On arrival at Limassol on the 16.1.1980 the shippers defendants 3 duly authorised attorney one Hans

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Buttner produced the three original Bills of Lading No. 20 and by letter dated 16.1.1980 photocopy of which is attached hereto marked exhibit 3, requested their cancellation and the issue of new Bills of Lading amended as per the aforesaid letter. The new bills of Lading were duly issued with the following particulars: Consignee order: National Bank of Greece Nicosia or Mr. H. Buttner.

Notify address: Mr. Nicos Prastitis Nicosia

Port of discharge: Limassol

Freight and other charges payable at destination USD 168000.00

On the payment of the above freight and on the production of these new Bills of Lading and the instructions of Mr. H. Buttner we as agents of the ship issued our delivery order in the name of Messrs. E.N. Prastitis & Co. Ltd. on the 16.1.80 and the ship commenced discharging operations whence it was arrested by order of the Court".

Mr. Seidenschnur, on behalf of defendants 2 and 3, swore, amongst others, the following:

"3. It is my belief that the ownership in the colour television sets, the subject matter of the present proceedings (hereinafter called the said goods) has always been and still vested in defendants No. 3 and the plaintiffs had no right to claim them unless and until they discharge their obligations under the terms of the sale, which in fact they failed to do.

4. I am advised and verily believe that the defendants 3 have a good defence in the present proceedings and that the plaintiffs' claim is unfounded.

7. In the circumstances, even if the plaintiffs are successful in the present proceedings, the plaintiffs will be entitled only to damages which they can easily recover against defendants 3 who are certainly in a position to satisfy any judgment debt under the present proceedings. No irreparable damage could have possibly been caused to

the plaintiffs if the said ship 'GLORIANA' and its cargo were allowed to leave the jurisdiction of the Court".

Neither of the defendants, after the evidence of Mr. Anid, called evidence, affidavit or oral, to contradict his allegations.

From the above, it is abundantly clear that the plaintiffs have a right to have the issues raised by the evidence of Mr. Anid tried, hence they were entitled to have the ship and the goods laden on her arrested.

Although my above finding disposes of the case put up by the defendants in opposition, it is, I feel, necessary to decide a further issue raised in these proceedings, namely what is the proper procedural step that a party has to take when he seeks the release of arrested property or of the security he has put up for the release of the property.

All the defendants, after their property was arrested, put up security for its release and by doing so the arrested property was substituted by the bail. In my view, rule 50, which I have already quoted above, gives an absolute right for the arrest of property once the Court is satisfied that there are issues that have to be tried between the parties.

The release of the properties involved in this action was effected by virtue of the provisions of rule 60 of the Cyprus Admiralty Jurisdiction Order, 1893, which reads:-

"60. Any party may apply to the Court for the release of any property arrested and the Court or Judge may, by order, direct the release of such property upon such terms as to security or as to payment of any costs of appraisalment or removal or inspection or otherwise as to the Court or Judge shall seem fit."

It is clear from the wording of rule 60 and, in particular, of the words "any party may apply to the Court for the release of any property arrested", which appear also in the Rules of the Supreme Court in England, Order 75, rule 13(4) and in Halsbury's Laws of England, 4th ed., Vol. 1, p. 256, para. 385, that the party wishing to have the release of the property arrested must apply to the Court and it is upon him to prove that he is entitled to the release.

In my view, a party claiming the release of arrested property or the discharge of bail put up for the release of such property, can only succeed if he can prove that the plaintiff's claim or the defendant's counterclaim is frivolous and vexatious. Similarly, since the arrested property is substituted by the bail, it is upon the party seeking its release to apply to the Court.

In the present case, the defendants have failed to apply to the Court for the discharge of the bail they have put up for the release of the vessel and the cargo and for this reason I cannot order the release of the bail.

For all the above reasons, the oppositions of the defendants are dismissed and the bail put up by the defendants shall remain in force until the final determination of the action.

The costs of these proceedings shall be costs against the defendants, to be assessed by the Registrar.

Application dismissed with costs.