

**IN THE COURT OF APPEAL OF THE DEMOCRATIC  
SOCIALIST REPUBLIC OF SRI LANKA**

In the matter of a claim arising under and in terms of Section 2(1)(h) of the Admiralty Jurisdiction Act No. 40 of 1983.

P.T. Bumi Siak Pusako,  
Gedung Surya Dumai, Lt. 6  
Jl. Jendral Sudirman  
No. 395, Pekanbaru 28116.

**Plaintiff**

**CALA 09/2015**

**Action in Rem No. 3/2014**

**Against**

1. M.T. "City Elite"
2. Challenger Maritime Shipping Inc.  
80, Broad Street, Monrovia,  
Liberia.

**Defendants**

**And Now**

1. M.T. "City Elite"
2. Challenger Maritime Shipping Inc.  
80, Broad Street, Monrovia,  
Liberia.

**Defendants – Petitioners**

**Against**

P.T. Bumi Siak Pusako,  
Gedung Surya Dumai, Lt. 6  
Jl. Jendral Sudirman  
No. 395, Pekanbaru 28116.

**Plaintiff – Respondent**

**Before : P.R. Walgama, J**

**: S. Devika de L. Tennekoon, J**

**Council : M. Maharooof with Dushantha de Silva for the  
Defendants – Petitioner.**

**: Chandika Jayasundara with Rohan Almeida for  
Plaintiff – Respondent.**

**Argued on : 17.06.2016**

**Decided on : 09.09.2016**

CASE-NO- CA .LA. 09/2015- ORDER- 09.09.2016

**P.R. Walgama, J**

The instant order concerns an application for leave to appeal made by the Defendants- Petitioners to have the impugned order of the Learned High Court Judge set aside The above said order was made on 4<sup>th</sup>

November 2015, and Learned High Court Judge by the afore said order in the case bearing No. Action in Rem 3/2015 has determined that the application by the Defendant- Petitioner, as per counter claim for an order directing the Plaintiff to provide sufficient security was rejected.

In order to appreciate the issue involved in this application which lies in a narrow compass, it is necessary to set out the relevant in brief infra.

In that it is noted that the Court has issued a writ of summons in rem and a warrant of arrest against the Defendant - Petitioner's vessel 'CITY ELITE' in pursuant to an application made exparte by the Plaintiff.

That the Plaintiff chartered the above vessel to load the cargo to be discharged at the port of Colombo which act commenced on 24.05.2014.

However due to a malfunctioning of the submersible pump belonging to the Ceylon Petroleum Corporation, the discharge of the cargo came to a stand still till the 11.07.2014 and repairs were done and was suitable to discharge the crude oil.

That it was the position of the Plaintiff that it took steps to instruct the owner of the defendant vessel namely the 2<sup>nd</sup> Defendant to commence the releasing of the cargo.

But to the Plaintiff's surprise it was noted that the owner of the Defendant was missing and even the Master of the vessel has not been able to contact the owner of the vessel.

It is also stressed by the Plaintiff that at the said point of time there had been balance cargo to be released and the Ceylon Petroleum Corporation (CPC) was facing a crisis situation as there was a scarcity of refined oil and was anticipating that CPC will claim damages from the Plaintiff.

It is in the above context that the Plaintiff that the Plaintiff filed an affidavit to lead a warrant of arrest against the Defendant vessel and moved the Court to arrest the defendant vessel.

The Learned High Court Judge has also adverted to the fact that although the Plaintiff had made arrangement a ship to ship transfer for the remaining cargo has not materialized due to negligence of owner of the cargo.

It is pertinent to note that at the time the plaintiff supported the affidavit to lead a warrant of arrest the Court too had observed the facts stated below; that

A balance of cargo of 57,707,76. Metric tons was in the vessel, and there is possibility of the CPC instituting action against the Plaintiff for damages,

further there is an out break of the fuel crises and in addition the CPC was ready to receive the cargo from 11.07.2014.

In view of the above the Learned High Court Judge was satisfied with facts placed before him and made order issuing a warrant of arrest and writ of summons in Rem.

It is being noted that after releasing the entire cargo it was the position of the Defendant that the Plaintiff has no claim thereafter and the vessel could be released without any security. But nevertheless the Court below has ordered Rs. US\$ 600,000/ as security prior to the release of the same.

The ground norm of the Defendant's position is that, as per the counter claim that the Defendants are entitled to claim damages for the wrongful arrest of the above vessel and urged the High Court to make order that the Plaintiff to furnish security on the defendant's counter claim.

To buttress the above claim the Defendants thrust on the determination arrived at in the case of MV KALYANI AND ANOTHER .VS. MUTIARA SHIPPING COMPANY- (1998- 2 SLR- 105), wherein His Lordship observed thus;

"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 unusual. 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 malice”(emphasis added).

Hence considering the above determination the pith and substance is that the court before decides whether it should order security on the counter claim should be satisfied that the alleged arrest should not only wrongful and illegal but also malicious.

Therefore the Learned High Court Judge was of the view that the facts of the above case differs from the case in hand and cannot be followed the same in deciding present issue.

In the above factual and legal matrix it is abundantly clear that the affidavit to lead a warrant of arrest is not made out of mala fide and malice.

The Learned High Court Judge in considering the above facts was of the view that the above issue has to be decided only after the parties placed the facts at the trial.

It is noted that the parties had formulated the contentious issues to be tried at the trial. Therefore it is apposite to decide the above issue after the trial.

In addition to the afore said the Learned High Court Judge has also considered the facts stated herein below;

That the owners of the Defendant's vessel have failed to comply with the mandatory provisions of the charter party agreement, and both parties had taken different positions as to the delay in discharging the cargo, that the entire cargo was discharged only on 29.07.2014.

Further it is observed that the owner of the Defendant vessel was not contactable at the time of supporting the affidavit to lead warrant of arrest on 21.07.2014, and there is a possibility of CPC claiming damages from the Plaintiff.

It is seen from the said impugned order the Learned High Court Judge unflinchingly ordered that the Defendant's application is premature and as such should stand dismissed.

When the said impugned order is reviewed in the above back drop this court is compel to arrive at the irresistible conclusion that the application of the Defendant is devoid of merits, thus should be dismissed.

Accordingly the application to leave to appeal is dismissed, subject to a cost of Rs. 10,000.

It is further hereby ordered that the Learned High Court Judge shall proceed with the trial and make a determination accordingly.

**JUDGE OF THE COURT OF APPEAL**

S. Devika de L. Tennekoon, J

I agree.

**JUDGE OF THE COURT OF APPEAL**