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

In the matter of a claim under Section 2(1)(1) and/ or Section 2(1)(n) of the Admiralty Jurisdiction Act No. 40 of 1983 being a claim for services rendered/ wages.

Nikolaos Gad,
Markos,
Greece.

Plaintiff

CA/ REM/ 04/ 2013
High Court No:
Action in Rem No: 06/2008 **-Vs-**

1. M.V. "THERMOPYLE SIERRA",
   Now lying at the Port of Colombo
2. SCARLET SHIPPING COMPANY LIMITED,
   No. 284, Arch, Makarios III Ave.,
   Fortuna Court Block B,
   2nd Floor, Limassol, Cyprus.

Defendants

-And Now-

Nikolaos Gad,
Markos,
Greece.

Plaintiff - Appellant

-Vs-

1. M.V. THERMOPYLE SIERRA,
   Now lying at the Port of Colombo
2. SCARLET SHIPPING COMPANY LIMITED,
   No. 284, Arch, Makarios III Ave.,
   Fortuna Court Block B,
   2nd Floor, Limassol, Cyprus.

Defendant - Respondents

Before : **S. Thurairaja PC, J.**

&

A.L. Shiran Gooneratne J.

Counsel : Vinodh Wickremasooriya for the Plaintiff-Appellant.

Murshid Maharoof with Dushantha de Silva and S. Ahamed for the Defendant-Respondents.

Written Submissions of the Plaintiff-Appellant filed on: 08/05/2018

Written Submissions of the Defendant-Respondents filed on: 26/06/2018

Argued on : 05/10/2018

Judgment on : **09/11/2018**

A.L. Shiran Gooneratne J.

The Plaintiff - Appellant (hereinafter sometimes referred to as the Appellant) filed an action in Rem against the 1st and 2nd Defendant-Respondents (hereinafter sometimes referred to as the 1st and 2nd Respondents) in terms of ***Section 2(1)(l) and Section 2(1)(n) of the Admiralty Jurisdiction Act No. 40 of 1983***. The said Sections are as follows;

Section 2(1)(l),

> *"any claim in respect of-*
>
> *i. goods or material supplied or*
>
> *ii. services rendered."*

Section 2(1)(n),

> *"any claim by a master or member of the crew of a ship for wages and any claim by or in respect of a master or member of the crew of a ship for any money or property which under any law in force for the time being is recoverable as wages;"*

In the petition filed in the High Court exercising admiralty jurisdiction, the Appellant submitted that he was requested by the 2nd Respondent to work as a Superintendent Engineer and Supervisor of all maintenance work of the 1st Respondent vessel, and was promised a salary of Euros 1,200 per day. The Appellant claims that he was entitled for a payment of Euros 49,200 for 41 days of service, but was paid only Euros 5000, in breach of the said agreement. Therefore, the Respondent's failed to pay Euros 44,200, a balance payment due to him as

wages for the services he rendered within the scope of his employment. The Respondent's in their answer has denied the Appellant's claim and has made claim in reconvention in a sum of US$ 35,000 for wrongful arrest of the 1st Respondent vessel.

At the conclusion of the trial, the learned High Court Judge delivered judgment on 26/08/2013, dismissing the Appellant's action and also the claim in reconvention without costs. Being aggrieved by the said judgment, the Appellant has preferred this application contending that, the learned High Court Judge,

(a) failed to consider document marked P5, in order to establish the relationship between Scarlet Shipping Company Limited (2nd Respondent) and Thesarco Shipping Company SA. as the registered owner and the parent company, respectively, of the 1st Respondent vessel.

(b) failed to consider that the Respondent's did not contradict the contents of document marked P6, by calling the chief engineer of the 2nd Respondent company.

The Appellant's claim is based on an oral agreement reached between the Appellant and a person named Mr. Sarvanos of the 2nd Respondent company in the presence of Captain Drosos of the 1st Respondent vessel. The Appellant contends that since his evidence was corroborated by Captain Drosos, the Respondent was required to call Mr. Sarvanos to challenge the evidence given by him.

In the said background, I will now deal with the grounds of appeal as noted above.

In the judgment, the learned High Court Judge has arrived at a clear finding that the Plaintiff (Appellant) has failed to establish the relationship between the 2nd Respondent and Thesarco Shipping Company Limited. It is in evidence that the Appellant had met Mr. Sarvano at the 2nd defendant company. According to the findings of the learned Judge, even if there was an oral agreement as stated between the Appellant and the 2nd Respondent, the Appellant has failed to prove/ establish liability of the 2nd Respondent due to the Appellant's failure to prove the relationship between them. The Appellant submits that the answer to this question is reflected in document marked P5.

It is important to note that at the conclusion of the case for the plaintiff, the counsel for the defendant made submissions to Court stating that the documents marked P1 to P7 and P11, P17, P18, and P19, were tendered to Court subject to proof, as such the said documents remain not proved.

Document marked P5, at page 139 of the brief has been downloaded marked page 1 of 1 from the world wide web (www.). The Appellant refers to this document as establishing a relationship between Thesarco Shipping Company SA. as the parent company and Scarlet Shipping Company SA. as the registered owner of the 1st Respondent vessel. It is observed that the said document marked P5, has no reference to the said relationship as stated. The document at page 140 of the brief is also a document downloaded marked page 1 of 1 from the www., in proof

of the said relationship referred to by the Appellant. However, the said document has no marking given by Court to establish that the document was tendered in evidence. Therefore, the said document which stands alone, cannot be considered as a marked document or construed as a continuation of document marked P5, and accordingly should be rejected.

The counsel for the Respondent's submit that, at the time of the Appellant closing their case before the trial judge, the Respondent had objected to document marked P5 among others, on the basis that it was not a proved document. The Appellant concedes that document P5 was marked subject to proof.

The counsel for the Respondents referred to several authorities which deal with the validity of a document tendered to Court by a party to an action.

In ***Samarakoon Vs. Gunasekera and Another (2011) 1 SLR 149,*** Amaratunga, J. held inter alia that;

> *"When a document is admitted subject to proof, the party tendering it in evidence is obliged to formally prove it by calling the evidence necessary to prove the document according to law. If such evidence is not called and if no objection is taken to the document it is read in evidence at the time of closing the case of the party who tendered the document it becomes evidence in the case. On the other hand if the document is objected to at the time when it is read in evidence before closing the case of the party who tendered the document in evidence, the document cannot be used as evidence for the party tendering it."*

According to ***Section 3 of the Evidence Ordinance***, interpretation of the word "proved" is as follows,

> *"A fact is said to be proved when, after considering the matters before it, the court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists."*

In terms of Section 64 of the Evidence Ordinance, documents must be proved by primary evidence except in instances, where the law permits the inclusion of secondary evidence in terms of Section 65 of the Evidence Ordinance.

It is observed that, document marked P5 and P6 had been objected to at the time when it was read in evidence and remains not proved according to law. Therefore, the said documents cannot be used as evidence by Court.

In all the above circumstances, we find that the Appellant has failed to discharge his burden to prove the cause that gives rise to his action, on a balance of probability. Therefore, we uphold judgment dated 26/08/2013, and dismiss the appeal without costs.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

S.Thurairaja PC, J

I agree.

JUDGE OF THE COURT OF APPEAL