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

In the matter of a claim arising in terms of Section 2(1)(h) of the Admiralty Jurisdiction Act No.40 of 1983 is a claim arising out of an agreement relating to the carriage of goods in a ship or the use or hire of a ship.

Luna Shipping and Enterprises Ltd.,
P.O. Box 1405, Majuro,
Republic of the Marshall Islands.

C.A. (H.C.) LA NO.10/2017
Action in Rem No.8/2014

Carrying on business at Emmanuel Roides Street, Kirzis Centre
Block A, Office A,
21,3031, Limassol, Cyprus.

Plaintiff

Vs.

1. The Motor Tanker "Agros"
2. Agros Shipping Company Limited
   No.80, Broad Street, Monrovia, Liberia.

Defendants

AND NOW

In the matter of an application for Leave to Appeal under and in terms of (Section 13 of the Judicature Act (as amended), read with the provisions of the Civil Procedure Code.

Luna Shipping and Enterprises Ltd
P.O. Box 1405, Majuro,
Republic of the Marshall Islands

Carrying on business at Emmanuel Roides Street, Kirzis Centre Block A, Office A, 21,3031, Limassol, Cyprus.

Plaintiff-Petitioner

Vs.

1. The Motor Tanker "Agros"
2. Agros Shipping Company Limited,
   No.80, Broad Street, Monrovia, Liberia.

Defendant-Respondents

BEFORE: **PRASHANTHA DE SILVA, J.**
K.K.A.V. SWARNADHIPATHI, J.

COUNSEL: Faiz Musthapha, P.C. with Niranjan Abeyrathna
For the Plaintiff-Petitioner

Nihal Fernando, P.C. with Murshid Maharoof
For the Defendant-Respondent

Date of argument: 29.11.2021

Date of order: 08.11.2022

K.K.A.V. SWARNADHIPATHI, J.

ORDER

When the buoy-mounted pipeline that transferred crude oil from ships to Orugodawatte Oil Storage Terminal suffered damages in 2014, the Sapugaskanda Oil Refinery had to close its operations.

After discussions with the Ceylon Petroleum Co-operation, the Plaintiff-Petitioner was authorised to produce tankers to exercise ship-to-ship transfers of crude oil cargo. At that time, some ships carried crude oil at the Port of Colombo.

According to the agreement, the Petitioner forwarded to the Ceylon Petroleum Co-operation a copy of Interlanka's Slandered Tanker Chartering questionnaire 88 of the M.T. Agros, which the Petitioner had received.

According to questionnaire 88 received by the Petitioner, MT Agro's latest condition Assessment Programme (C.A.P.) rating was "1". C.A.P. 1 was the criteria considered by the Ceylon Petroleum Co-operation for acceptance. The Ceylon Petroleum Co-operation informed the Petitioner, and it was the duty of the Petitioner to be satisfied that the C.A.P. rating of the Hull and Machinery equals the specifications of the Ceylon Petroleum Co-operation which is "O" or "I".

The Petitioner informed the 2nd Respondent of the necessity of all the requirements it should go through. Accordingly, the 2nd Defendant and on behalf of the 2nd Defendant's assurance was given that all conditions had been met. It agreed to face the ship inspection report programme.

According to the Petitioner, on those assurances, Petitioner confirmed the Charter of the M.T. Agros on behalf of Ceylon Petroleum Co-operation.

Later, it was found that the Vessel MT Agros was not ready to undertake a SIRE inspection at Colombo. Due to the breach of chartership, other cargoes waiting in Colombo could not discharge

or deliver their cargoes. The Ceylon Petroleum Co-operation claimed damages from the Petitioner for fixing an unsuitable vessel to carry out the S.T.S. operations and for loss, including loss of profits.

Given what the Petitioner had to undergo, the Petitioner believes that the 2nd Respondent owed the Petitioner a duty of care to ensure that the Petitioner would not suffer loss and damage. The 2nd Respondent's Negligence gives a cause of action against him to the Petitioner to recover all damages suffered by the Petitioner.

The Ceylon Petroleum Co-operation, too, had assigned the Petitioner to claim any damages the Ceylon Petroleum Co-operation had to undergo due to the acts of the 2nd Defendant-Respondent. Given this, the Petitioner instituted an action in Rem No.8 of 2014 at the High Court of Colombo to obtain a warrant of arrest in respect of the M.T. Agros and other remedies.

The High Court of Colombo granted the warrant of arrest pleaded by the Petitioner. On behalf of the 2nd Defendant-Respondent, an application was made for a counterclaim for the wrongful arrest of the vessel and an order from the court against the Plaintiff to furnish security for the owners' counterclaim. The Defendants had pointed out that they suffered immensely as it is a vessel that cannot be used in business due to the wrongful arrest and detain. Before the 2nd Defendant-Respondent filed the counterclaim, the High Court of Colombo released the vessel M.T. Agros on USD one million as security.

By motion dated 05.11.2014, the 2nd Defendant had pleaded to the court to release M.T. Agros without any security and to dismiss the Petitioner's action. The 2nd Defendant filed a counterclaim from the Petitioner.

While the court was proceeding into the trial before the admissions and issues were settled, the Respondents filed papers seeking security for their counterclaim. The Petitioner then filed the statement of objection to the Defendant's application.

Then, without inquiring into the second matter, the court settled the admissions and issues of the main case. After that, the court took up the inquiry regarding the claim for security by the Defendants.

Before delivering the order of that inquiry, the evidence commenced into the main suit before the court. On 06.10.2017, High Court delivered the order of the inquiry in favour of the Defendants and ordered the Plaintiff to deposit a sum of US$ one Million or to furnish a bank guarantee in court.

Aggrieved by the said order of the High Court of Colombo, the Petitioner had filed papers seeking leave to appeal to proceed.

The Petitioner argues that this court should consider the test followed by the High Court. Both parties argued that. MV Kalyani's case. should be considered. The learned High Court Judge had mentioned that the English and Singaporean cases cited by both parties had no bearing on the matter in issue. Therefore, the court had to fall back on the Supreme Court (Sri Lanka) decision of *MV Kalyani and others Vs. Mutiara Shipping Company NY (Supra) case***.** According to the judgment, the Supreme Court had interpreted discretionary power to order security for a counterclaim for malicious arrest under Rule 182 of the High Court Admiralty Jurisdiction.

The Petitioner argued that the learned High Court judge should have conducted the trial to consider whether there was malice or gross negligence on the part of the Petitioner. The 2nd Defendant-Respondent should prove to the court that he had a prima facie case to get an order for security. Suppose the 2nd Defendant succeeded in shifting the mind of the High Court Judge that there is a prima facie case in his favour. In that case, the learned Judge should follow the general principles of ordering security for a counterclaim.

It is essential to ascertain whether the vessel's arrest was necessary. The Plaintiff must show the court that the case cannot proceed without the arrest. In this instance, the vessel's arrest was not shown to be a necessity. Whenever an arrest order is obtained without need, it abuses the court process.

The suit present in court is for the claim, then retaining the vessel and not allowing the owner to generate income must have some rationality. In this instance, Plaintiff had not shown how his case could be proved by retaining the vessel. Therefore, the learned High Court Judge had used his discretion and decided the issue on a low-level test.

Hulse-Rutter and Others V. Godde (4) SA 1336 (S.C.A.), A South African case, discussed the test to be applied.

"The requirement of a *prima facie* case about attachments to find or confirm jurisdiction has over the years been said to be satisfied if an applicant shows that there is evidence which, if accepted, will establish a cause of action and that the mere fact that such evidence is contradicted will not disentitle the Applicant to relief - not even if the probabilities are against him; it is only where it is quite clear that the Applicant has no action, or cannot succeed, that an attachment should be refused".

The learned High Court Judge had followed the low-level test in conjunction with the above findings of the South African case.

As discussed above, the Plaintiff-Petitioner had allegations against the 2nd Defendant that he had misrepresented facts and made Plaintiff believe that the vessel had a C.A.P. 1 rating. According to the 2nd, Defendant only dealt with the Ceylon Petroleum Co-operation through its brokers and had no communication with Plaintiff. The 2nd Defendant maintained that the charter party in question was entered only between the second party and Ceylon Petroleum Co-operation. Plaintiff had no place in that agreement.

The learned High Court judge had observed that there were no papers to show communications between the 2nd Defendant and the Plaintiff regarding this matter. The learned High Court judge had further observed that the E-mails were between the Ceylon Petroleum Co-operation and the Plaintiff but not between the 2nd Defendant and the Plaintiff.

Regarding the document marked as "X35", the learned High Court Judge had observed that even that document does not confirm the power to act as the agent of the Ceylon Petroleum Co-operation to the Plaintiff before the charter party. A perusal of documents marked "X34", "X35", and "X36"

ascertain the findings of the learned High Court Judge that those documents were issued after the incident and just before the case was instituted. Therefore, those documents were to file in this case only.

When perusing the documents, especially "X35", none establishes that the S.T.S. operation failed due to the 2nd Defendant's fault. Those documents do not carry any wordings that can be considered as the loss suffered by Plaintiff was due to misrepresentation made by the 2nd Defendant.

When perusing the charter, the Ceylon Petroleum Co-operation had not made it mandatory regarding the S.I.R.F. inspection. Therefore, the finding by the learned High Court Judge that "Ceylon Petroleum Co-operation has not stated either in the document marked "X35" or in any such document that the M.T. Agros was unable to carry out either the S.T.S. operations due to the lack of C.A.P. 1 rating or SIRE inspection as claimed by the Plaintiff.

There is no document to support Plaintiff's claim that the S.T.S. operation did not occur due to the absence of C.A.P. rating "1" or lack of SIRE inspection" which stands unchallenged. Even in this court, the Plaintiff-Petitioner failed to show otherwise.

Plaintiff had filed this case without giving any notice of dues which amounted because of the conduct of the 2nd Defendant. Therefore, if Plaintiff fails in the leading case since he is not a resident of Sri Lanka, the 2nd Defendant will not be able to recover damages.

It is the court's duty always to think from the view of safeguarding the parties' rights. The learned High Court Judge must consider how to recover damages in a position where the Plaintiff loses. In this case, even though the evidence was evaluated on the face of the document forwarded, the 2nd Defendant has a *prima facie* case. Therefore, the learned High Court Judge must safeguard the claim or counterclaim of the 2nd Defendant. As the learned High Court Judge had observed, since the Plaintiff is not a resident of this country, it is a precaution to order the Plaintiff to furnish security.

In calculating the security, the learned Judge had considered the period the vessel was under arrest and the loss of income and expenses incurred by the 2nd Defendant during the period of the arrest of the ship. Taking into account such expenses, too, is very fair. It is not an arbitrary amount ordered to be furnished by Plaintiff.

The learned High Court judge had come to this decision at his discretion according to the law. He had explained at length the reasoning as to why he came to his conclusion. When considering the plight of the 2nd Defendant, if he succeeds in the suit before the High Court of Colombo, it is very fair for the learned High Court Judge to come to his conclusion. The rules of natural justice also govern this. The Plaintiff-Petitioner had not shown the reasons to decide otherwise in this court.

For the reasons above, we see no reason to grant leave to proceed to the Plaintiff Petitioner.

Judge of the Court of Appeal

PRASANTHA DE SILVA, J.
I agree.

Judge of the Court of Appeal