

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) (j), (k), (l), and (m) of the
Admiralty Jurisdiction Act No. 40 of 1983.*

SRI LANKA PORTS AUTHORITY
19, Church Street,
Colombo 01.

PLAINTIFF

Action in Rem 9/2006

CA Application No. 01/2012/Rem

Against

Vessel/ Barge "Formentera"

Now lying at the Port of Galle under arrest
in Action in Rem No. 07 of 2005.

MUNDOGAS S.A.
1701, 17th Floor,
57-59 Connaught Road C,
Hong Kong.

DEFENDANT

And now

Vessel/ Barge "Formentera"

Now lying at the Port of Galle under arrest
in Action in Rem No. 07 of 2005.

MUNDOGAS S.A.
1701, 17th Floor,
57-59 Connaught Road C,
Hong Kong.

DEFENDANT-APPELLANT

VS.

SRI LANKA PORTS AUTHORITY
19, Church Street,
Colombo 01.

PLAINTIFF-RESPONDENT

Before: S. Thurairaja PC, J
&
A.L. Shiran Gooneratne J.

Counsel : Avindra Rodrigo with Shanaka Gunasekara & Razali Fernando for
the Defendant-Appellant.

Chandaka Jayasundara, PC with Nigel Bethorlameus & Rehan
Almeda for the Plaintiff-Respondent.

Argument on : 06/07/2018

Written Submissions of the Defendant-Appellant filed on:

11/06/2018, 26/07/2018

Written Submissions of the Plaintiff-Respondent filed on:

26/06/2018, 26/07/2018

Judgment on : 27/09/2018

A.L. Shiran Gooneratne J.

The Defendant Appellant, MUNDOGAS S.A. (hereinafter sometimes referred to as the Appellant) has invoked the jurisdiction of this Court to set aside the Judgment in Action in Rem 9/2006, dated 02/03/2012, delivered by the High Court exercising Admiralty Jurisdiction in favour of the Plaintiff-Respondent, Sri Lanka Ports Authority, (hereinafter sometimes referred to as the Respondent), in a claim under Section 2(1), (j), (k), (l) and (m) of the Admiralty Jurisdiction Act No. 40 of 1983. By Action in Rem 9/2006, the Respondent claimed dockage rent and other port charges from 'Formentera', a Vessel owned by the Appellant for the period the Vessel was under arrest, and presently, which is lying in the Port of Galle.

The Appellant submits that the 'Formentera' (hereinafter sometimes referred to as the Vessel) arrived at the Port of Galle pursuant to a Bareboat Charter entered into between the Appellant and Mundogas Lanka (Private) Limited, (hereinafter sometimes referred to as MLPL) a joint venture company which was incorporated to carry out Mundogas operations in Sri Lanka, which has been set up jointly between the Appellant and Master Divers (Private) Limited. Due to the

cancellation of the said Bareboat Charter, the Appellant, instituted Case No. 843/2004/SPL, in the District Court of Mount Lavinia, and obtained an order to wind-up the joint venture company MLPL. Disputes arising out of the said cancellation has given rise to several actions and counter actions between the parties in this Court and in the High Court exercising Admiralty Jurisdiction.

The parties admit that the Vessel is under arrest in Action in Rem No.7 of 2005, in pursuance of an order made on 09/03/2005, and the said Vessel is presently lying at the Port of Galle. The Respondent instituted Action in Rem 9/2006, on 22/01/2007, claiming a sum of Rupees 5,196,872.50 together with legal interest thereon and costs, and pled for:

- (a) dockage rent prior to and from the date of arrest on 9th March 2005, at a rate of Rs. 161,000.00 per month amounting to a sum Rs. 5,196,872.50 up to September 2006,
- (b) for judgment in a sum of Rs. 161,000.00 per month from 22nd September 2006, as dockage rent until the barge is removed from the area of the Port of Galle,
- (c) further charges in a sum of Rs. 1,988,498.50 for towage, pilotage, navigation and dock charges.

The Court delivered judgment awarding all dues claimed in favour of the Respondent. Being aggrieved by the said judgment dated 02/03/2012, the appellant has preferred this application. At the conclusion of Arguments, directed by Court, both parties filed written submissions.

The main issue of contention raised by the Appellant, is that,

- No cause of action and no action in Personam has been disclosed against the Appellant

Section 2 of the Admiralty Jurisdiction Act to be read with Section 3(4) of the Act, states,

3(4) In the case of any such claim as is mentioned in paragraphs (e) to (q) of subsection (1) of Section 2, where,

- a) the claim arises in connection with a ship; and*
- b) the person who would be liable on the claim in an action in personam ("the relevant person") was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship,*

An action in rem may (whether or not the claim gives rise to a maritime lien on that ship) be brought in the Court against –

- (i) **that ship**, if at the time when the action is brought the relevant person is either the beneficial owner of that ship as respects all the shares in it or the charterer of it under a charter by demise*

.....

Since there was no contractual relationship between the Respondent and the Appellant at any given time, the Appellant contends that there is no cause of action accrued to the Respondent against the Appellant. At the trial before the High Court, the Appellant has raised an issue as to whether, Master Divers

Limited, should be liable to pay the loss and damage suffered by the Respondent or any third party as a result of the arrest of the Vessel, or any consequences in relation to such arrest on the basis that the Vessel continued to remain in the harbour due to the warrant of arrest issued at the instance of Master Divers Limited. Therefore, the Appellant contends that Master Divers be held liable to pay the loss and damage suffered by the Respondent on account of the Vessel remaining in the harbour and not the Appellant.

The Hon. High Court Judge has rejected the said argument on the basis that invoices marked P6(2) to P6(25), were sent to the Appellant by the Respondent, subsequent to the termination of the Bareboat Charter Party by the Appellant. Accordingly, the responsibility to make good the expenses that accumulate from the time of termination rests with the Appellant.

The Respondent submits that subsequent to the termination of the charter, the services provided by the Respondent was for the benefit of the Vessel, and therefore, an action In Personam is maintainable against the Appellant.

It is to be noted that in the instant application, the Appellant describes the cause of action arising under Section 3(4) of the Act against MLPL regarding invoices raised prior to the arrest of the Vessel and that the Marshal of the Court who was in control of the ship is responsible for the invoices raised subsequent to the arrest of the Vessel.

However, the Appellant has not raised any issue before the trial Court shifting responsibility to the Marshal of the Court. The trial proceeded on the basis that

any loss and damage the Respondent may have suffered due to the Vessel remaining in the harbour, should be met by Master Divers Limited and, as such by MLPL. The Appellant takes up the position that before the arrest of the Vessel, the Respondent raised invoices P6(1) and P6(2) to the agent of the charterer for services provided and subsequent to the arrest, the Respondent raised invoices P6(2) to P6(25) against the Marshal of the High Court of Admiralty Jurisdiction, the person who was in control and in charge of the Vessel for services provided. Therefore, the Appellant submits that recovering Port charges from the Appellant is wholly misconceived. The Appellant also claims that in the circumstances, there is no cause of action arising against the Appellant.

The latter argument advanced by the Appellant in this Court is contrary to the stand the Appellant has taken in the High Court, where it was argued that the person who would be liable on the claim in an action in personam was MLPL.

It is important to note that the Appellant is not challenging the actual sums that are payable on the claim made by the Respondent. When deciding on the invoices to be settled, it is noted that the Respondents claim has been based on invoices issued to the Vessel subsequent to the termination of the bareboat charter by the Appellant. Therefore, the argument advanced by the Appellant cannot stand for the reason that subsequent to the arrest of the Vessel, the Vessel was not under the care of MLPL. Accordingly, it is the Appellant who would be responsible to meet such claims.

The argument that the action must be against the Marshal of the High Court against whom the invoices were raised was never pleaded before the trial Judge. As noted earlier, this is a totally divergent and contradictory position taken from what has been placed before the High Court and therefore, should be disregarded. We are in agreement with the submission of the Respondent that the Marshal of the Admiralty Court is an officer of Court and claims directed to the Marshal are claims directed to the Vessel and as such the said officer of Court would not be liable to any such claims in his personal capacity.

For all the reasons stated above the Judgment dated 02/03/2012 is upheld. Accordingly, the Petition is dismissed without costs.

JUDGE OF THE COURT OF APPEAL

S.Thurairaja PC, J

I agree.

JUDGE OF THE COURT OF APPEAL