

1981 June 13

[A. LOIZOU, J.]

ESSEX OVERSEAS TRADE SERVICES LTD.,

Plaintiffs,

v.

1. THE LEGENT SHIPPING CO. LTD., OWNERS OF
DEFENDANT 2,

2. THE SHIP "GEORGIOS GILLAS", OR "GEORGIOS G",
Defendants,

and

TALMETKA SHIPPING CO. LTD.,

Interveners.

(Admiralty Action No. 155/80).

Civil Procedure—Appeal—Stay of execution pending appeal—Discretion of the Court—Principles applicable—Same both in admiralty and in other proceedings—Appeal against order discharging warrant of arrest of ship—Court's discretion exercised against stay.

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Admiralty—Practice—Warrant of arrest of ship—Discharge—Appeal—Stay of execution pending appeal—Principles applicable—Same both in admiralty and in other proceedings—Court's discretion exercised against stay.

10 *Injunction—Interlocutory injunction—"Mareva injunction"—Whether Court has power to grant a "Mareva injunction"—Section 32 of the Courts of Justice Law, 1960 (Law 14/60) corresponding to section 45 of the English Supreme Court of Judicature (Consolidation) Act, 1925.*

15 After filing a mixed action in rem and in personam against the defendants for damages for breach of contract of carriage of goods the plaintiffs obtained a warrant of arrest of defendant 2 ship. On April 14, 1971, the Court on the application of the alleged owners of the ship, who were allowed to intervene

in the proceedings, discharged* the warrant of arrest on the ground that the admiralty jurisdiction of this Court could not be invoked by an action in rem in the circumstances.

The plaintiffs appealed against the discharge of the warrant of arrest and applied to the trial Judge (see Order 35 rule 19 of the Civil Procedure Rules) for a stay of execution of the order of the Court discharging the warrant of arrest until the hearing and final determination of the appeal; and for an interlocutory order for the preservation of the status quo in relation to the defendant ship pending the hearing and determination of the appeal (see section 32 of the Courts of Justice Law, 1960).

Held, that the granting or refusal of a stay of execution is a matter of judicial discretion and the principles governing its exercise are the same both in admiralty and in other proceedings; that being a matter of judicial discretion this Court has in any event felt that in the circumstances of this case it should not exercise same in favour of a stay (*Grade One Shipping Ltd. (No. 4) v. The Cargo on Board the Ship "Crios II"* (1976) 1 C.L.R. 378 at p. 380 followed).

Application dismissed.

Per curiam:

Assuming that the Court had power to grant a "mareva injunction" (see section 32 of the Courts of Justice Law, 1960 (Law 14/60) and its corresponding section 45 of the English Supreme Court of Judicature (Consolidation) Act, 1925) it would not have granted such an injunction to the plaintiffs as it would have been unjust to keep here a vessel which for all intents and purposes was purchased and its price fully paid by the interveners who have nothing to do with the claim of the plaintiffs against the defendants.

Cases referred to:

Grade One Shipping Ltd. (No. 4) v. The Cargo on Board the Ship "Crios II" (1976) 1 C.L.R. 378 at p. 380;

Katarina Shipping Inc. v. The Cargo on Board the Ship "Poly" (1978) 1 C.L.R. 355 and 486;

* Vide (1981) 1 C.L.R. 142.

London and Overseas (Sugar) Co. and Another v. Tempest Bay Shipping Co. Ltd. and Others (1978) 1 C.L.R. 367;

Rena K [1979] 1 All E.R. 397 at p. 417.

Ex parte application.

5 Ex parte application by plaintiffs for an order restraining and prohibiting the removal and/or departure and/or ordering the seizure of the ship "Georgios Gillas" from Cyprus and keeping same within Cyprus jurisdiction until the hearing and final determination of the appeal filed.

10 X. *Xenopoulos*, for the applicants.

Cur. adv. vult.

A. LOIZOU J. read the following judgment. By this *ex parte* application the applicants/plaintiffs apply for:

15 (a) An order of the Honourable Court restraining and prohibiting the removal and/or departure and/or ordering the seizure of the ship "GEORGIOS GILLAS" or "GEORGIOS G" from Cyprus and keeping same within Cyprus jurisdiction until the hearing and final determination of the appeal filed.

20 (b) Any other remedy or order the Honourable Court would think just.

(c) Costs of this application.

25 Whilst arguing the case, counsel for the applicants/plaintiffs, made it clear that what he was seeking was a stay of execution of the order of the Court discharging the warrant of arrest which had been issued in this case. For that purpose he asked that Order 35 rule 19 of the Civil Procedure Rules be added to those provisions relied upon in support of the application so that, as he put it, by such addition it would be made clear why same
30 was brought before me, the Judge who tried in the first instance the application appealed from and not before the Appeal Court.

The applicants/plaintiffs filed this mixed action in rem and in personam against defendants 1, a Company Limited, and defendant 2, the ship "GEORGIOS GILLAS" or "GEO-
35 RGIOS G" and applied for the issue of and obtained a warrant for her arrest. The Court thereafter was moved by its alleged owners who were allowed to intervene in the proceedings, to

discharge the said warrant of arrest on the ground, *inter alia*, that an action in rem could not be invoked in the circumstances of this case, as on the facts as disclosed in the endorsement of the writ of summons and the affidavit filed in the proceedings, the claim did not arise out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship or come within any of the other provisions of the Administration of Justice Act 1956, sections 1 & 3 and also on the ground that the defendant ship did not belong to defendants 1 having been sold prior to its arrest to them.

On the 14th April, I discharged the warrant of arrest on the first ground as on the material before me at the time the admiralty jurisdiction of this Court could not be invoked by an action in rem. Upon the discharge of the warrant of arrest, an appeal from that order was filed on the 18th April, 1981, together with the present application for a stay. The facts relied upon in support of same are to be found in the affidavit accompanying this application and in all the facts that are to be found in the file of the case which naturally includes the contents of affidavits and the evidence heard in relation to all previous applications.

Paragraphs 5 and 6 of this affidavit read as follows:

- “5. To the best of my belief the Honourable Court erroneously discharged the Warrant for the arrest of the defendant vessel on the ground that the Admiralty Jurisdiction of the Court could not be invoked by an action in rem in the circumstances. Useful reference is hereto referred in paras. 4 and 5 of the Petition filed on the 13th November, 1980.
6. In addition and without prejudice to the above, the Admiralty Jurisdiction of the Court is evidenced by the attached hereto telex addressed from the defendants to the plaintiffs (*exhibit 1*)”.

Paragraphs 4, 5 and 6 of the aforesaid Petition read as follows:-

- “4. It was specifically agreed and/or implied that the above BITUMEN was going to be carried to the destination at Kushka and Termes in Afghanistan/USSR border as above respectively from Galatsi/Reni

in the Romania/USSR border, by the Defendants' 1 vessel 'GEORGHIOS GILLAS', or 'GEORGHIOS G', which was at all material times the only vessel in the ownership of the above Defendants 1.

- 5 5. The route the above transportation would follow was from Galatsi/Reni through the Black Sea and the Bosporus to the Aegean Sea, the Mediterranean Sea, the Suez Canal, the Red Sea to Pakistan and then from Pakistan by Rail to the destination above.
- 10 6. At the time of entering and signing the above agreements Defendants 1 produced and showed to Plaintiffs documental, photographic and other evidence that the above vessel, Defendant 2, was their clear, clean and absolute legal ownership, upon which Plaintiffs signed and entered into the said agreements. Plaintiffs will at the Hearing of the case elaborate as to the time, place, people involved as well as other particulars and the effect of the above Agreements for carriage of the BITUMEN by sea".
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20 The petition, however, was filed on the 13th November, 1980, long after judgment in the application to discharge the order was reserved and I took the view that I could not take into consideration allegations contained in the petition which were not before me at the material time and in addition not

25 substantiated on oath.

Furthermore, the telex dated 10.9.1979 (*exhibit 1*) referred to in para. 6 of the affidavit, in so far as material, reads as follows:

30 "AS FOR THE REST QUANTITY THAT IS AT GALATZI, WE FOUND A GOOD SOLUTION TO TRANSPORT THEM BY VESSEL. PLEASE NOTE THAT WE JUST FOUND A VESSEL FOR YOU AND WE ARE AWAITING YOUR CONFIRMATION FOR MAKING THE NEGOTIATION FOR HAVING A

35 COMPETITIVE OFFER".

This shows that their transportation by vessel was found to be a good solution, at that stage, which suggests, if anything, that there was no question until then of the carriage of these goods in a ship.

In the case of *Grade One Shipping Ltd. Owners of the Cyprus Ship "Crios II" (No. 4) v. The Cargo on Board the Ship "Crios II"* (1976) 1 C.L.R., p. 378, at p. 380, the Full Bench of this Court had to deal with a similar situation. After the filing of an appeal against a decision of a Judge of this Court by virtue of which an order for the arrest of cargo was discharged, the appellants filed an interlocutory application in the appeal seeking an order preserving the status quo in relation to the said cargo until the determination of the appeal. In the alternative, they sought an order staying the execution of the decision appealed from. A similar application for stay of execution had been made to the trial Judge but it was refused. The President of the Court in delivering its judgment at p. 380 said:

"We do not think that there arises, in the circumstances of this case, any question of exercising our concurrent, with those of the trial Judge, powers of granting, under rule 18 of Order 35 of the Civil Procedure Rules, a stay of execution of the aforesaid decision of October 29, 1976, because, actually, there is nothing to be stayed, since the appellants, who are applying for such a stay, are not required by means of such decision to do anything in order to comply with it; it is, simply, a decision which discharges an order of arrest of the defendant cargo which had been previously made on the application of the appellants".

The Court also refused to make an order under section 32 of the Courts of Justice Law 1960 or section 4 of the Civil Procedure Rules, for the purpose of making an order for the preservation of the status quo in relation to the defendant cargo pending the hearing and determination of that appeal.

What was said in the aforesaid case with regard to the order of the stay of execution pending an appeal, applies with equal force to the present case and I feel bound to follow it. I need not deal any further with the principles governing a stay of execution, the matter was dealt in the cases of *Katarina Shipping Inc. v. The Cargo on Board the Ship "POLY"* (1978) 1 C.L.R., 355; *London and Overseas (Sugar) Co. and Another v. Tempest Bay Shipping Co. Ltd. and Others* (1978) 1 C.L.R., 367; and *Katarina Shipping Inc. v. The Cargo now on Board the ship "POLY"* (1978) 1 C.L.R., 486. It is sufficient to say that the granting or refusal of a stay of execution is a matter of judicial

discretion and that the principles governing its exercise are the same both in admiralty and in other proceedings. Being a matter of judicial discretion, I have in any event felt that in the circumstances of this case I should not exercise same in
5 favour of a stay.

The matter, however, cannot rest at that as the applicants/ plaintiffs by the relief sought under para. (a) and their reliance also to section 32 of the Courts of Justice Law 1960, coupled with the arguments advanced by their counsel must be taken
10 as seeking an interlocutory order for the preservation of the status quo in relation to the defendant ship pending the hearing and determination of the appeal.

I shall examine, therefore, whether this is a proper case to grant what has come to be known a Mareva injunction which in England is granted under section 45 of the Supreme Court of Judicature (Consolidation) Act 1925 and which corresponds in all respects to our section 32. In support of the view that this is a proper case to grant such an injunction, I was referred to numerous authorities including the *Rena K* [1979] 1 All E.R.,
15 p. 397. Brandon, J., at p. 417, summed up the position in England as follows:

“The power of the High Court to grant Mareva injunctions under s. 45 of the Supreme Court of Judicature (Consolidation) Act 1925 has been established by a series of recent
25 decisions of the Court of Appeal culminating in *Rasu Maritima SA Perusahaan Pertamina Minyak Dan Gas Bumi Nagara (Pertamina)*. Further, the House of Lords, while reserving the question of the correctness of those decisions, was prepared to assume the existence of
30 the power, in principle, for the purpose of its decision in *The Siskina*.

A Mareva injunction is granted in a case where a plaintiff has brought an action here against a foreign defendant, and the latter has money or chattels within the jurisdiction which, if he were not prevented from doing so, he would
35 be free to remove out of the jurisdiction before the plaintiff could bring the action to trial, and, if successful, obtain and enforce a judgment against him.

The injunction takes the form of an order restraining the defendant, by himself, his servants or agents, from selling,
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disposing of or otherwise dealing with such money or chattels or from removing them out of the jurisdiction, usually until further order. Its purpose is to ensure that, if the plaintiff succeeds in the action, there will be property of the defendant available here out of which the judgment which the plaintiff obtains in it can be satisfied". 5

Brandon, J., after answering the various arguments advanced against the application of the procedure of Mareva injunctions to ships, had this to say at page 419:

" The rights given to the plaintiffs by the Supreme Court of Judicature (Consolidated) Act 1925 and the Administration of Justice Act 1956 are cumulative, not alternative: see particularly s. 43 of the 1925 Act. That being so, I cannot see why the circumstance that the cargo owners cannot (if it be the case) maintain security for their claim by having the ship kept under arrest by the Court in the exercise of its jurisdiction in rem should be a reason why they should not be entitled to obtain alternative security for their claim by means of a Mareva injunction relating to the ship granted by the Court in the exercise of its jurisdiction in personam. On the contrary, the fact that they are unable, in their efforts to ensure security for their claim, to use one of the two methods potentially available for the purpose, seems to me to afford a very good reason why they should be permitted to use the other" 10
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It did not escape, however, his attention a strong point against granting an injunction, namely, that the ship was a trading asset and that if the ship-owners were compelled by an injunction to keep her in port they would lose the benefit of trading her; and after observing that the ship after it had not been used for trading, had this to say at page 420: 30

"In any case there is a certain artificiality about the concept that, if a Mareva injunction had been granted, the ship would have remained here, for it is obvious from what in fact happened that the club would have given a letter of undertaking rather than have allowed their members' ship to be detained here indefinitely". 35

The aforesaid approach, however, was per curiam, as he came to the conclusion, that it had not been necessary for him

to decide whether to grant a Mareva injunction or not. I have thought it useful to quote at some length from the said judgment as these are now matters that frequently come up before us in the exercise of the admiralty jurisdiction of this
5 Court and in fact of the general jurisdiction of the Courts here, because of the similarity of section 32 to the corresponding English section 45 referred to earlier in this judgment.

I need not, however, decide these matters as on the facts of the case, assuming that I had such power, I would not have
10 granted a Mareva injunction to the plaintiffs inasmuch as it would have been unjust to keep here a vessel which for all intents and purposes was purchased and its price fully paid by the interveners who have nothing to do with the claim of the plaintiffs against the defendants.

15 As I dealt with the relevant facts at some length in my decision of the 14th April, 1981, I shall only deal with them now very briefly:

The said ship had been sold by private agreement of sale dated the 16th November, 1978, to the interveners. The
20 signatures on that document were duly certified by the Maritime Counsellor of the Cyprus Embassy in Greece. On the date of its execution, counsel acting on behalf of the vendors submitted to the Officer in charge for the registration of ships in Cyprus an application for the transfer of this ship to them.

25 The application was accepted and instructions were forwarded by cable dated the 17th November, 1978, to the Counsellor of the Republic in Piraeus, Greece, to endorse the certificate of Cyprus registry of the said ship, provided certain conditions were satisfied. On the same day the Maritime
30 Counsellor there endorsed on the appropriate place of the certificate of the Cyprus Registry the interveners as the new owners. Apparently a bill of sale had not been submitted and the registration was not duly recorded in the register. The interveners were asked by the Registrar of Ships to produce such
35 a bill of sale but they failed to do so until after the arrest of the ship when they produced one which it purported to have been signed by the vendors ever since the agreement of sale was concluded but the signatures thereon were certified by the

Counsellor/Consul General of the Republic in Piraeus on the 6th August, 1980. The purchase price had by then been fully paid and the relevant Bills of Exchange have been produced as evidence of same at the hearing of that application. In such circumstances I have come to the conclusion that I would not have exercised my discretion in favour of granting an injunction as it would have been unfair to the interveners. More so as the claims of the plaintiffs are not in any way related directly or indirectly with the said ship. 5

For all the above reasons this application is dismissed but in the circumstances I make no order as to costs. 10

Application dismissed. No order as to costs.