1981 October 16

[SAVVIDES, J.]

"ERMIS" K. ANAGNOSTOU E.P.E. AND OTHERS,

Plaintiffs,

v.

1. THE SHIP "HOLCOR I",
2. RIMA LINE SHIPPING CO. SARL,

Defendants.

(*Admiralty Actions Nos.* 225/79, 261/79, 262/79 *and* 263/79).

Admiralty—Practice—Jurisdiction—Action in rem and in personam—Claim against ship for repairs, for goods sold and delivered and for provisions supplied—Application to set aside writ of summons and service thereof for want of jurisdiction—Respective contentions of parties set out in affidavits—No oral evidence and no cross-examination of the affiants—Not proper to grant application at this stage without hearing on oath all parties concerned and making findings as to material facts.

By means of actions in rem and in personam the plaintiffs in the above actions claimed various sums for goods sold and delivered and provisions supplied to defendant 1 ship and for repairs carried out on the said ship.

Counsel for defendant 1 ship applied for an order setting aside the writ of summons and service thereof on the said ship on the ground that the action could not proceed in rem against defendant 1 as at the time of the action the ship was owned by persons different than those who owned the ship when the cause of action arose. The plaintiffs opposed the application contending that defendants 2 were the persons who, at the material time when the cause of action arose, were the beneficial owners of the ship in respect of all shares thereof. All the facts relied in support and in opposition of the applications were set out in affidavits sworn by both sides and none of the affiants attended the Court to give evidence and neither party requested for the attendance of any of the affiants for cross-examination.

Held, that the material issue in these applications is whether at the time the action was brought the ship was beneficially owned as respects all the shares therein by the same person who would be liable when the cause of action arose; that in an affidavit sworn by one of the affiants for the respondents–plaintiffs, it is alleged that though the defendant ship was not owned by the same persons, nevertheless, the present defendants 2 were the real owners or the persons who were in possession or in control of the defendant ship when the cause of action arose, and that the ship was beneficially owned as respects all the shares therein by the same persons; that having gone through all the said affidavits this Court has reached the conclusion that without hearing further evidence on oath on the issues before it, it cannot reach a conclusion as to what allegations are true or not; and that, therefore, it is not proper, at this stage, to accede to the applicant's request to set aside the writ of summons at this preliminary stage of the hearing, without hearing on oath all parties concerned and making its findings as to the material facts (*Katarina Shipping* v. *Ship "Poly"* (1978) 1 C.L.R. 271, at p. 284 adopted).

Order accordingly.

Cases referred to:

Katarina Shipping v. *Ship "Poly"* (1978) 1 C.L.R. 271 at p. 284.

Application.

Application by defendant 1 for setting aside the writ of summons and service thereof in an Admiralty Action whereby plaintiffs claimed various sums for goods sold and delivered and provisions supplied to defendant 1 ship and for repairs carried out on the defendant ship.

Fr. Saveriades, for the applicants–defendants.

M. Vassiliou, for the respondents–plaintiffs.

Cur. adv. vult.

SAVVIDES J. read the following judgment. Counsel for the defendant 1 ship in the above actions prays by the present applications, one in each action, to have the writs of summons and service thereof on the defendant ship set aside as being irregular and wrong in law.

All the above actions are actions both in rem against the ship (defendant 1) and in personam against its owners (defendants 2). Service was effected on the defendant ship and a warrant of arrest was issued against her on the application of the plaintiffs. The ship was subsequently released after a bank guarantee was given covering the claims and costs in all actions. Service on defendants 2 has not, so far, been effected. Plaintiff's claim in Action No. 225/79 is for Greek Drachmas 45,721, for goods sold and delivered and provisions supplied to defendant 1. The claim in Action No. 261/79 is for Greek Drachmas 118,656 for goods sold and delivered and provisions supplied to defendant 1. The claim in Action No. 262/79 is for Greek Drachmas 178,170 for repairs carried out on the defendant ship and the claim in Action No. 263/79 is Greek Drachmas 280,000 for repairs and/or materials provided to the defendant 1. It is alleged in all actions that the goods were supplied and the repairs effected by the plaintiffs at the request of defendants 2 acting through their Managing Director.

In view of the fact that common questions of law and fact were in issue in all these applications, the applications were heard together at the request of counsel appearing on both sides. The facts relied upon in support both of the applications and the oppositions thereto, with the exception of the particulars of the claims, are the same in all actions and they are shortly as follows:

As set out in an affidavit dated the 12th November, 1979 sworn by Chrystalla Houry of Limassol, an advocate associated with counsel appearing for the applicant, it is alleged that plaintiff's claim against the defendants refers to a period between 31.10.1978 and 27.12.1978 when the owners of the said ship were Charles Debbas and Fares Elzein from Beirut, whereas the said ship was sold in January, 1979 to defendants 2, who are not in any way liable for any alleged claim against the said ship which had arisen before they became owners of the ship. Therefore, once the owners of the defendant ship at the time when the present action was brought were not the same persons with the owners at the material time when the cause of action arose, no action in rem could be brought against the defendant ship and its present owners.

Counsel for respondents-plaintiffs in support of their opposition relied on an affidavit sworn by Lena Patsalou, an advocate's

clerk at his office. By the said affidavit it is contended that the goods were sold and the repairs effected to the defendant ship previously named "Veewave" at the request of one Melchem Elias Melkon, the Managing Director of defendant 2 Company who, at the material time, when such goods were supplied and repairs effected were the beneficial owners of the said ship and/or had full control of the said ship, irrespective of the fact that it was registered in the name of another firm.

In reply to the above affidavit, Counsel for the applicants by an affidavit dated the 8th March 1980, denied respondents' allegations and attached as *exhibits* an official certificate from the Lebanese Ministry of Public Works and Transport legalized by the Cyprus Consul in Beirut and an attestation of the Harbour Master of the Lebanese Ministry of Public Works to the effect that defendants 2 became registered owners of the defendant ship "HOLCOR I" ex "VEEWAVE" on 29.1.1979; also, a certificate to the effect that on 27.10.1978 the said ship was registered in the name of Charles Debbas and Fares Elzein of Lebanon.

The plaintiffs filed also a supplementary affidavit dated 27.3. 1980 sworn in Greece by Efstathios Marinos Kremos, a mechanical engineer, who alleges that in August and September, 1978 he came to know one Melchem Elias Melkon who told him that he was the owner, Manager and the person administering the affairs of the shipping company Rima Line, of Lebanon who had concluded the purchase of the ship "VEEWAVE" which required repairs to pass the necessary examination by the authorities and which, in the meantime, had been renamed to "HOLCOR I" and who employed him to supervise the repairs and look after the affairs of the ship whilst it was undergoing repairs. According to these allegations, by an arrangement made between Malkoun acting on behalf of the defendants and Charles Debbas and Fares Elzein who were his friends enjoying his trust, the one being a banker and the other his partner, the ship was temporarily registered in the name of the latter persons, whereas, at all material times, the ship remained under the exclusive control, possession and beneficial ownership of defendants 2 who were acting through their Manager Melhem Malkoun. All provisions supplied and repairs effected to the said ship were made under the personal supervision of the affiant on the express instructions of the

said director of defendants 2. Certain invoices concerning the claims were attached to the said affidavit. In some of the said invoices, in addition to the name of the ship, it also appears the name of defendants 2 as the persons jointly responsible with the ship. According to the contentions of the affiant Kremos, when all repairs were effected and the ship was ready to sail, Mr. Malkoum, requested the plaintiffs to allow extension of time of 15 days to enable him to make arrangements for the payment of all accounts, which plaintiffs accepted and thus refrained from taking any legal proceedings before the ship sailed from Piraeus.

No objection was raised by either party for the filing of any supplementary affidavits in addition to the ones accompanying the applications and oppositions and in arguing these applications they refered to the facts set out in all affidavits both the ones filed together with the applications and oppositions as well as those filed subsequently. Furthermore, neither party did ask for the attendance of any of the affiants for cross-examination as to the contents of their affidavits.

Counsel for applicant ship in arguing his case before the Court. submitted that the present action cannot proceed in rem against defendant 1, as at the time of the action the ship was owned by persons different to those who owned the ship when the cause of action arose. He contended that as from September, 1978 till January 1979 the ownership of the ship was in different persons than the present owners who purchased the ship in January, 1979 and who at the time when they bought the ship were not aware of any claims against the ship. He submitted that this was not a case of maritime lien which follows the ship, irrespective of the change of ownership, but it was a case where under the provisions of the Administration of Justice Act, 1956 the plaintiffs had to prove that their claims fall within the provisions of the Act to pursue a claim in rem against the defendant ship, a fact which does not exist in the present case.

Counsel for respondents-plaintiffs, conceded that this is not a case of a maritime lien and if it was proved that the owners or the persons beneficially entitled to the ship at the material time were different from those at the time when the writ of summons was issued, no action in rem could be brought. In the present case, however, defendants 2 were the persons who,

at the material time when the cause of action arose were the beneficial owners of the ship in respect of all shares thereof, and they had the absolute control and possession of the ship. Such services were rendered, counsel contended, at the request of the Manager of defendants 2 whose capacity as Manager is admitted by the applicant in the affidavits accompanying the application. In conclusion he submitted that once it has been proved by the affidavits before the Court that the ship was beneficially owned by the same persons both at the time when the goods were supplied and also at the time of the action, the case falls within the provisions of the Administration of Justice Act, 1956, and an action in rem was properly brought against the defendant ship.

Both counsel based their argument on the provisions of the English Administration of Justice Act, 1956, Part I, under the general heading "Admiralty Jurisdiction and Other Provisions as to Ships", and in particular, to sections 1 and 3, on the assumption that such Act is applicable in Cyprus in admiralty cases.

Before going into the merits of the applications before me, I must consider first whether the English Administration of Justice Act, 1956 in so far as it refers to admiralty jurisdiction is applicable to Cyprus. Under the provisions of section 19(a) of the Courts of Justice Law, 1960, (Law 14/60), this Court in addition to the powers and jurisdiction conferred upon it by the Constitution, has exclusive original jurisdiction as a Court of Admiralty, vested with and exercising the same powers and jurisdiction as those vested in or exercised by the High Court of Justice in England in its admiralty jurisdiction on the day immediately preceding Independence Day. The law to be applied in the exercise of such jurisdiction, as set out in section 29(2) of Law 14/60, is the law which was applied by the High Court of Justice in England in the exercise of its admiralty jurisdiction on the day preceding Independence Day as may be modified by any law of the Republic. The provisions whereby the admiralty jurisdiction of the High Court in England and the manner in which it may be invoked, are governed by the Administration of Justice Act, 1956. In the light of the provisions of section 19(a) and 29(2) of Law 14/60, such Act is extended to and its provisions apply to Cyprus concerning the admiralty jurisdiction of this Court.

Having found so, I come now to consider the provisions of sections 1 and 3 of the said Act to decide whether an action in rem against the defendant ship can be maintained.

Section 1 of the Administration of Justice Act, 1956 defines the admiralty jurisdiction of the High Court and it provides, *inter alia*, as follows:

"1 (1) The Admiralty jurisdiction of the High Court shall be as follows, that is, to say, jurisdiction to hear and determine any of the following questions or claims—

.....

(m) any claim in respect of goods or materials supplied to a ship for her operation or maintenance;

(n) any claim in respect of the construction, repair or equipment of a ship or dock charges or dues;

(o) .....

(p) any claim by a master, shipper, charterer or agent in respect of disbursements made on account of a ship.

.....".

Section 3 under the heading "Mode of exercise of Admiralty Jurisdiction" provides, *inter alia*, as follows:

"(1) Subject to the provisions of the next following section, the Admiralty jurisdiction of the High Court, the Liverpool Court of Passage..... may in all cases be invoked by an action in personam.

(2) The Admiralty jurisdiction of the High Court may in the cases mentioned in paragraphs (a) to (c) and (s) of subsection (1) of section one of this Act be invoked by an action in rem against the ship or property in question.

(3) In any case in which there is a maritime lien or other charge on any ship, aircraft or other property of the amount claimed, the Admiralty jurisdiction of the High Court, the Liverpool Court of Passage..... may be invoked by an action in rem against the ship, aircraft or property.

(4) In the case of any such claim as mentioned in paragraphs (d) to (r) of subsection (1) of section one of this Act, being a claim arising in connection with a ship, where the person who would be liable on the claim in an action in personam was, when the cause of action arose, the owner or charterer or, or in possession or in control of, the ship, the Admiralty jurisdiction of the High Court and (where there is such jurisdiction) the Admiralty jurisdiction of the Liverpool Court of Passage..... (whether the claim gives rise to a maritime lien on the ship or not) be invoked by an action in rem against—

(a) that ship, if at the time when the action is brought it is beneficially owned as respects all the shares therein by that person; or

(b) any other ship which, at the time when the action is brought, is beneficially owned as aforesaid".

It is common ground in the present cases that the question of a maritime lien does not arise, the existence of which would automatically give a right to an action in rem under section 3(3) of the Administration of Justice Act, 1956 and that plaintiffs in bringing these actions against the defendant ship, they rely on the provisions of section 3(4) of the Act. As I said earlier in this judgment all the facts relied in support and in opposition of the applications, are set out in affidavits sworn by both sides, as well as to certain documents attached to the said affidavits. None of the affiants attended the Court to give evidence and neither party requested for the attendance of any of the affiants for cross-examination.

Having gone through all the said affidavits I have reached the conclusion that without hearing further evidence on oath on the issues before me, I cannot reach a conclusion as to what allegations are true or not. The material issue in these applications is whether at the time the action was brought the ship was beneficially owned as respects all the shares therein by the same person who would be liable when the cause of action arose. In an affidavit sworn by one of the affiants for the respondents-plaintiffs, it is alleged that though the defendant ship was not owned by the same persons, nevertheless, the present defendants 2 were the real owners or the persons who were in possession

or in control of the defendant ship when the cause of action arose, and that the ship was beneficially owned as respects all the shares therein by the same persons. I therefore, find that it is not proper, at this stage, to accede to the applicant's request to set aside the writ of summons at this preliminary stage of the hearing, without hearing on oath all parties concerned and making my findings as to the material facts. In this respect, I wish to adopt what was said by Hadjianastassiou, J. in *Katarina Shipping* v. *Ship "Poly"* (1978) 1 C.L.R. 271, at p. 284:

> "I would reiterate once again, that it is not proper to set aside the writ of summons at this preliminary stage of the hearing, without hearing on oath all parties concerned, and with this in mind the action should proceed in the usual way; and at the appropriate time, when the pleadings would be closed and all the facts during the hearing would be ascertained, due consideration would be given to all arguments, or indeed to any further arguments....."

I, therefore, leave this matter to be decided at the hearing, when all the parties concerned are before the Court and after the pleadings would be closed and all the facts will be ascertained during the hearing. Subject to this the present applications are hereby dismissed. The question of costs is reserved to be decided at the end of the trial of the action.

Order accordingly.