

**IN THE SUPREME COURT OF THE DEMOCRATIC
SOCIALIST REPUBLIC OF SRI LANKA**

1. Wijsmuller Salvage B.V.
Sluisplein 34
1975 AG Ijmuiden
The Netherlands

2. Sri Lanka Shipping Company Limited
46/5, NawamMawatha
P.O. Box 1125
Robert Senanayaka Building
Colombo 2

Plaintiffs-Petitioners-Petitioners

SC Appeal 87/2011

SC Spl. LA No.69/2011
Court of Appeal
Revision Application No.CA (PHC) 45/2006
High Court Action in Rem No.1/2006

Vs

1. The Bangladesh Motor Vessel
'M.V. JAMMI currently lying in the
Port of Colombo
2. Midlands Shipping lines Limited
1st Floor, HBFC Building
Agrabad, Commercial Area
Chittagong 4100
Bangladesh

Defendants-Respondents-Respondents

1. Sri Lanka Ports Authority
19. Church Street, Colombo 1
2. Sea Consortium Lanka (Private ltd)
256, Srimath Ramanathan Mawatha
Colombo 15.

Intervenient-Defendants-Respondents-Respondents

Before : Eva Wanasundera PC J
Sisira J De Abrew J
NalinPerera J

Counsel : Murshid Maharoo with Dushantha De Silva instructed by
Julius Creasy for the Plaintiffs-Petitioners-Petitioners

Canishka G Witharana with Medha N Gamage for the 1st and 2nd
Defendant-Respondent-Respondents
Vicum De Abrew DSG with Manohara Jayasinghe SSC
For the 1st Interventient-Defendant-Respondent-Respondent

Argued on : 22.2.2017

Written Submissions

tendered on : By the Plaintiffs-Petitioners-Petitioners on 23.2.2017

By the 1st Interventient-Defendant-Respondent-Respondent
on 22.3.2017

Decided on : 22.6.2017

Sisira J De Abrew J.

This is an appeal filed by the Plaintiff-Petitioner-Petitioners against the judgment of the Court of Appeal dated 7.3.2011 wherein the Court of Appeal refused an application of the Plaintiff-Petitioner-Petitioner to charge the relevant persons for contempt of Court of Appeal. Being aggrieved by the said judgment of the Court of Appeal the Plaintiff-Petitioner-Petitioners have appealed to this court. This court by its order dated 29.6.2011 granted leave to appeal on questions of law set out in paragraphs 10(a) to 10(h) of the petition dated 6.4.2011 which are set out below.

- a. The Respondent Shipowners are not entitled in Admiralty Law and the rules to seek any disbursement of the sales proceeds of the vessel, irrespective of

whether there is any Stay Order preventing such disbursement or any undertaking by the vessel owners not to seek such disbursement. Such disbursement could only be done upon the conclusion of all the connected Actions *in Rem*, which would also include the conclusion of the CA (Revision) Application No. 45/2006 to set aside the Order dismissing the Action *in Rem* No.1/2006, and thereafter, in terms of the Rules prescribed under the Admiralty Jurisdiction Act giving rightful place to priorities.

- b. The Respondent shipowners are not entitled to any proceeds of the sale of the said vessel in view of the claims of the Judgment creditors in Action *in Rem* No. 11/2005 (i.e. SLPA) and Action *in Rem* No. 15/2005 being greater than the said sales proceeds of the said vessel, and in the event the Petitioners succeed in CA (Revision) Application No. 45/2006, as the Petitioners' claim for salvage services rendered to the vessel taking precedence over all other claims, which claim is also greater than the said sales proceeds.
- c. The Power of Attorney Holder of the Respondent Shipowners had surreptitiously obtained the release of the said moneys in Action *in Rem* No. 15/2005, by merely tendering a letter to the High Court Registry and without notice to the other interested parties, including the Petitioners, who were entitled in law to such notice, despite the fact that the said moneys were lying in the connected Action *in Rem* No. 9/2005, and there were Orders by the High Court (Vide the documents marked X1 and X2 to the document marked Y2 hereinbefore) which clearly stated that no disbursement was to be effected other than in terms of Rules laid down in the Admiralty Jurisdiction law.

- d. The pervious surreptitious applications by the Power of Attorney Holder of the Respondent Shipowners to unilaterally obtain the release of the said sales proceeds which culminated in the Order dated 11th December 2006 of the Court of Appeal (Vide: the document marked X3 to the SLPA's Motion marked Y2) and that this Order was extended and/or reiterated by the Court of Appeal on 6th February 2007 (Vide: the document marked X4 to the SLPA's Motion marked Y2). And the fact that the Order dated 25th June 2008 of the Court of Appeal was made consequent to a further application by the Power of Attorney holder of the Respondent shipowners seeking an unlawful release of the sales proceed from the said Action *inRem* No. 9/2005 (Vide: the document marked HCR 1 (b) to the Petitioners' Motion marked Y5 hereinbefore)
- e. The firm undertaking given by Counsel in open Court on behalf of his clients not to seek any disbursements pending the determination of this matter in the Court of Appeal and acted upon by court and formally recorded as an order of Court are not to be disregarded and in view of such undertaking and the subsequent order of court there was no necessity to formally support a stay order to prevent the disbursement of the sales proceeds of the vessel. The Respondent shipowners through their Counsel and Power of Attorney holders had been represented in Court on all occasions when such undertakings were given or extended.
- f. The non availability of the minutes of 6th February 2007 of the Hon. Court of Appeal in CA (Revision) Application No. 45/2006, (wherein all Counsel had given a firm undertaking not to seek the disbursement of the sales proceeds

of the said vessel) was a matter beyond the control of the Petitioners. Its non availability should not have been decided to the disadvantage of the Petitioners as,

- i. *Ex facie* the Order dated 25th June 2008 of the Hon. Court of Appeal (Vide: the document marked HCR 1 (b) to the Petitioners' Motion marked Y5) clearly show that the Court seem to have had the benefit of referring the said minutes of 6th February 2007.
 - ii. The SLPA's Motion marked Y2 contains a certified copy of the said minutes of 6th February 2007 (vide: the document marked X4 thereto) issued by the Registry of the Court of Appeal.
- g. The High Court and its Registrar had notice of all the relevant Orders and undertakings in the Court of Appeal as regards the said matters and the High Court and its Registrar could not have been unaware of the Petitioners' lawful concerns as to the safety of the sales proceeds of MV Jaami. However, other than the filing of the High Court Registrar's Report in Action *in Rem* No. 15/2005, confirming the removal of the said moneys by the Power of Attorney holder of the Respondent shipowners, there was no further action by the High Court to remedy the gross prejudice caused to the interest of the Petitioners as well as the other claimants by the said unlawful removal of moneys from the sales proceeds of the vessel.
- h. The manifest conduct of the power of attorney holder of the Respondent shipowners, in surreptitiously seeking and obtaining the release of the said

moneys, is at variance with the clear provision in the Admiralty law as to priority of claims, and such conduct is an abuse of the process of Court and a fraud perpetrated on Court.

In my view, there are no specific questions of law set out in the said paragraphs. When submissions of counsel are considered, the most important question of law that must be considered in this case can be stated as follows.

“When a party to an action violates an undertaking given to court by him, can such party be charged for contempt of court.”

The Plaintiff-Petitioner-Petitioners (hereinafter referred to as the Plaintiff-Petitioners) filed action in Rem No.1/2006 in the High Court in the High Court of Colombo seeking, inter alia, for an order of arrest and detention of Motor Vessel MV JAAMI lying in the port of Colombo. The learned High Court Judge by her judgment dated 28.2.2006 dismissed the action of the Plaintiff-Petitioners. Being aggrieved by the judgment of the learned High Court Judge, the Plaintiff-Petitioners on 15.3.2006 filed a Revision Application No.45/2006 in the Court of Appeal seeking, inter alia, the following reliefs.

1. To act in revision and grant interim relief by issuing an interim order and stay order staying the operation of the order of the learned High Court Judge dated 28.2.2006.
2. To act in revision and grant interim relief by issuing an interim order and stay order staying the disbursement of the sum of US\$ 1,615,000/- credited to the Admiralty Account of the High Court of Colombo, being the purchase consideration of the said vessel (MV JAAMI) which is lying to the credit of the Admiralty Account of the High Court of Colombo and arises from the sale of the said vessel MV JAAMI until the final determination of the Application in Revision.

3. To act in revision and set aside the order of the learned High Court Judge dated 28.2.2006.

The Court of Appeal in Revision Application No.45/2006 made an interim order on 6.2.2007 (marked as X4 in Y2) which reads as follows.

“All Counsel agree that they will not seek any disbursement of the sale proceeds of MV JAAMI lying in the High Court without prejudice to the rights of parties to proceed with the trial. As this order relates to 15/2005 and 11/2005, Registrar is ordered to issue copy of this order to the Registrar of the High Court of Colombo.”

According to the order of the Court of Appeal dated 25.6.2008, the Deputy Registrar of the Court of Appeal on 7.2.2007 had communicated the said order to the Registrar of the High Court of Colombo.

The Court of Appeal on 25.6.2008 in Revision Application No.45/2006 made a further order (marked as X5 in Y2) which reads as follows. On this day all parties were represented by their lawyers.

“In accordance with the order dated on 6.2.2007 as stated earlier all counsel agreed that they would not seek any disbursement of the sale proceeds of MV JAAMI lying in the High Court without prejudice to the rights of parties to proceed with the trial as this order relates to 15/2005 and 11/2005. As the Registrar of this court has already issued a copy of this order to the Registrar of the High Court of Colombo, this court is of the firm belief that the aforesaid order made by this court should not be violated unless a contrary order is made by a Superior Court. As this matter is pending before this court, the Registrar is directed to inform the Registrar of the High Court that any application pertaining to the disbursement of the sale proceeds should not be entertained pending the application before this court.”

When the above orders were in operation PPJ Hewawasam, the Power of Attorney holder of the 2nd Defendant-Respondent-Respondent (hereinafter referred to as the 2nd Defendant-Respondent made an application to the High Court to

release US\$ 337,553 from the sale proceeds of vessel MV JAAMI. The High Court ordered the release of the money and as a result of the said order, PPJ Hewawasam, the Power of Attorney holder of the 2nd Defendant-Respondent received Rs.33983850/95 (cheque No.648824). It appears that PPJ Hewawasam, the Power of Attorney holder of the 2nd Defendant-Respondent has made the above application to the High Court for the release of the money when the orders of the Court of Appeal dated 6.2.2007 and 25.6.2008 were in operation. It appears from the said orders of the Court of Appeal that on 6.2.2007 and 25.6.2008 the 2nd Defendant-Respondent had been represented in the Court of Appeal by counsel and that both orders had been communicated to the High Court (vide document marked CR1a). Learned counsel for the Plaintiff-Petitioners contended that the 2nd Defendant-Respondent and or his Power of Attorney holder had committed contempt of Court of Appeal when the said application for the release of money was made to the High Court on 18.12.2009. The Plaintiff-Petitioners filed papers in the Court of Appeal alleging that the 2nd Defendant-Respondent and or his Power of Attorney holder had committed contempt of Court of Appeal when the said application for the release of money was made to the High Court on 18.12.2009. The Court of Appeal, after hearing submissions of both parties on the said application of the Plaintiff-Petitioners, delivered its judgment on 7.3.2011. The Court of Appeal by its judgment dated 7.3.2011 decided that the order of the Court of Appeal dated 25.6.2008 was a per-incuriam order and therefore refused to inquire into the charges of contempt of court. Learned counsel for the Plaintiff-Petitioners contended that the said judgment of the Court of Appeal was wrong. I now advert to this contention. The Court of Appeal by its order dated 25.6.2008 (marked as X5 in Y2) observed that all counsel on 6.2.2007 had agreed not to seek any disbursement of the sale proceeds of MV JAAMI lying in the High Court. The Court of Appeal in the said order dated 25.6.2008 also observed that the order of

the Court of Appeal dated 6.2.2007 should not be violated by the parties. When this order made on 25.6.2008 was in operation how did the Power of Attorney holder of the 2nd Defendant-Respondent made an application on 18.12.2009 to get the money released from the sale proceeds of M.V. JAAMI lying in the High Court. He received Rs.33983850/95 from the sale proceeds of M.V. JAAMI. When I consider the above matters, it appears that there is material to consider that the 2nd Defendant-Respondent and/or his Power of Attorney holder had committed the offence of contempt of Court of Appeal.

The Court of Appeal by its order dated 7.3.2011, decided that order of the Court of Appeal dated 25.6.2008 was a per-incuriam order and that therefore refused to inquire into the charge of contempt of Court of Appeal. When the Power of Attorney holder of the 2nd Defendant-Respondent made the above application on 18.12.2009, was there any declaration by the Court of Appeal to the effect that the order of the Court of Appeal dated 25.6.2008 was a per-incuriam order. The answer is in the negative. Party to an action cannot decide that an order of court is a per-incuriam order. Such a decision must be made by court and if such an order was made by court. It is the duty of court to vacate it. When I consider the above matters, I am of the view that there is material to consider that the 2nd Defendant-Respondent and/or his Power of Attorney holder had violated the order of the Court of Appeal dated 25.6.2008. In this connection I would like to consider a judicial decision. In *De Alwis Vs Rajakaruna* 68 NLR 180 this court observed the following facts.

“According to the terms of an interim settlement recorded by court in an action the plaintiff agreed to hand over certain motor vehicles (tractors) and undertook not to make use of them. The plaintiff however failed to honour his undertaking.” This Court held as follows.

“The plaintiff was guilty of contempt of court. The failure of a party to honour an undertaking given by him to court is a contempt of court.”

When a party to an action gives an undertaking to court, it becomes his duty to implement it. When a party fails to honour an undertaking given to court, such party is guilty of contempt of court. The 2nd Defendant-Respondent has failed to honour the undertaking given by him to court when his Power of Attorney holder made the application to court on 18.12.2009 to release money from the sale proceeds of vessel M.V. JAAMI.

When I consider all the above matters, I hold that the Court of Appeal was wrong when it, by judgment dated 7.3.2011, decided not to initiate an inquiry or issue charges for contempt of Court of Appeal. In my view there is material against the 2nd Defendant-Respondent and/or his Power of Attorney holder to consider contempt charges. For the above reasons, I set aside the judgment of the Court of Appeal dated 7.3.2011 and direct the Court of Appeal to rehear the case.

The Plaintiff-Petitioners in their application filed in this court has also sought the following relief.

“Order the 2nd Defendant-Respondent and/or his Power of Attorney holder PPJ Hewawasam to forthwith return the sum of Rs.33,983,850/95 received by him on 22.12.2009.”

It has to be noted here that in the Revision Application 45/2006 filed in the Court of Appeal, the Plaintiff-Petitioners had not sought such a relief. His appeal to this court was against the judgment dated 7.3.2011 wherein the Court of Appeal refused to consider charges of contempt of Court of Appeal. The Court of Appeal by the said judgment has not considered the granting or refusing of the said relief. Therefore it is not proper for me to consider granting of the said relief. I therefore refused to consider the said prayer.

For the aforementioned reasons, I set aside the judgment of the Court of Appeal dated 7.3.2011 and direct the Court of Appeal to rehear the application for contempt of court filed by the Plaintiff-Petitioners.

Rehearing ordered.

Judge of the Supreme Court.

Eva Wanasundera PC J

I agree.

Judge of the Supreme Court.

NalinPerera J

I agree.

Judge of the Supreme Court.