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IN THE SEYCHELLES COURT OF APPEAL

CIVIL APPEAL NO. 24 OF 1994

ILIAS DURDUNIS

APPELLANT

v

THE OWNERS OF THE SHIP "M.V.MARIA"
also known as "M.V.MARLO"

RESPONDENT

Before : Silungwe, Ayoola & Adam JJA

Mr. P. Boulle for the Appellant

Mr. A. Fernando for the Respondent

JUDGMENT OF ADAM, J.A.



The Appellant brought an Admiralty Action in Rem Against The Ship "M.V.Maria" also known as "M.V.Marlo" by Writ of Summons in Action in Rem with the Statement of Claim for US\$360 000. In that Writ of Summons the Appellant was cited as the Plaintiff and The Owners of the Ship as the Defendant. In the Acknowledgment of Service of Writ of Summons in Action in Rem the Government of Seychelles acknowledged the Writ on behalf of the Republic of Seychelles sued as The Owners of Ship with the Statement of Defence which averred that on the facts set out in the Statement of Claim the action was misconceived, that Proceedings in Rem does not lie in respect of any claim against the Government of Seychelles or property belonging to the Government of Seychelles and that the Admiralty Jurisdiction of the Supreme Court of the Seychelles could not be invoked in respect of the Appellant's claim.

A "Writ of Summons in Action in Rem" stated to be issued from the Registry without a date (but 1993) a seal or Registrar's signature was served on the 16th September 1993 by affixing a copy on the outside of the superstructure of the Ship by the Process Server. That

Amerasinghe J observed that Mr. Boule was of the view that the Appellant's right therefore remained protected. On the other hand Mr. Fernando's argument was that the ship was the property of the government by forfeiture and that the Rules under S I 60 of 1976 prevented the Appellant from instituting proceedings against Government property. He further submitted that the learned Chief Justice's reservation that all the rights and claims arising out of any actions in rem must take precedence over the forfeiture order in favour of the government was made per incuriam as his attention had not been drawn to the provisions of section 7(3) as modified and so it should not be followed or considered binding - *Huddersfield Police Authority v Watson* [1947]2 All ER 193 (KB) at 196.

Amerasinghe J. also referred to *Ydra III Naftiki Eteria v The Republic*, Criminal Appeal No 11 of 1993, where this Court stated in terms of section 151 of the Criminal Procedure Code (Cap.45) a forfeiture order is mandatory. He therefore held that a careful examination of section 151 showed that the learned Chief Justice's forfeiture order merely amounted to a declaration of what had become forfeited in the face of the absence of any reasons to the contrary. The failure to consider the provisions of section 7(3) as well as the mandatory nature of section 151 which regarded forfeiture as stemming automatically from the conviction without any discretion in the court to impose conditions, lead Amerasinghe J. to conclude that the reservation in the forfeiture order had been made per incuriam. Therefore Amerasinghe J. held that he was not bound to follow or give expression to it by enforcement. He also held that even if it was conceded that enforceable rights were given by that forfeiture order, but in view of section 7(3) the Seychelles Supreme Court lacked

judgment may be set aside on the ground that it was obtained by fraud or collusion; but in Mauritius the effect in their law of a judgment was governed by Article 1350 and 1351 of the Civil Code.

On the other hand Mr. Fernando for the Respondent stressed that there was no proceeding pending when the forfeiture order was made on December 16th 1993 since the so-called Writ of Summons in Action in Rem served on September 16th 1993 did not have a number, a seal of the Seychelles Supreme Court and no fees were paid. He compared this with the Writ of Summons in Action in Rem of May 9th 1994 issued out of the Registry of Seychelles Supreme Court that was before Amerasinghe J. which displayed the number "Civil Side No 63 of 1994", the seal and the fees had been paid and this was the court process. He pointed out that although the Appellant's Application to fix a date for trial of July 20th 1994 mentioned the Writ of Summons in Action in Rem being issued against the Ship and that an amended Writ of Summons in Action in Rem was issued on May 16th 1994, an examination of the Writ of Summons in Action in Rem of May 9th 1994 revealed that there was nothing to show it was an amendment. That Writ has endorsed on it O.75, r.3 which is a reference to the English Rules of the Supreme Court that governs the Writ of Summons in Action in Rem. Mr. Fernando pointed out the learned Chief Justice's order related to all rights and claims arising out of any action in rem. This meant that for the learned Chief Justice's Order to be operative an action in rem must have been pending on or before December 10, 1993. As there was no such proceeding pending on that date the Appellant could not succeed. He also submitted that as section 151 of Criminal Procedure Code was imperative, a Court has no power to make a conditional forfeiture. If one were to construe the learned Chief Justice' forfeiture

proceedings in rem in respect of any claim against the Seychelles Government but it is a claim against Hydra III Maritime Co of Piraeus, Greece, the previous owners, which is against the Ship and which means that what applies of section 7(3) is "the arrest, detention or sale of any ship ... belonging to the Seychelles Government". He argued that the issue was what belonged to the Seychelles Government. His contention was that certain rights in rem in the Ship had been carved out from the ownership of the Ship by the forfeiture order of 10th December 1993.

In The Banco (1971)P 137 (CA) it was stated that the right to arrest was coterminous with the maritime lien, that Admiralty jurisdiction is not invoked by an action in rem against a vessel merely by issue of a writ, but when it is served on the vessel and the warrant of arrest executed or deemed to ~~be~~ executed.

On the 7th March 1994 the Appellant's Attorney requested a Warrant to Arrest the Ship along with his supporting affidavit. On 16th May, 1994 an Acknowledgment of Service was entered by the Seychelles Government.

It is clear that the Writ of Summons in Action in Rem was served by the Process Server on the 16th September, 1993 but no Warrant of Arrest was issued in September 1993 or in March 1994.

It follows that even if this Court were to hold that the forfeiture order of the 10th December, 1993 reserved certain rights arising from an action in rem, the present proceedings could not be held to be pending proceedings prior to the 10th December 1993 as

Naftiki Eteria v The Republic, supra, a forfeiture order under section 151 also covers all things used or intended to be used in the commission of the offence and such a forfeiture order is mandatory. As for innocent claimants "the resilience of the judicial process, in the absence of statutory provision, may not be wanting in fashioning a relief" for such claimants. In his commendable effort to protect the innocent the learned Chief Justice clearly erred when he gave precedence to those rights and claims since all things used in the commission of the offence must be forfeited to the Republic of Seychelles.

Now Amerasinghe J. also held that even if it is conceded that the learned Chief Justice's forfeiture order gave rise to enforceable rights the Seychelles Supreme Court lacked jurisdiction because of section 7(3) which prohibited action in rem against the property of the Seychelles Government. It appears that what the learned Judge was trying to emphasize was that section 7(3) denied him jurisdiction, as far as actions in rem against the property of the Seychelles Government was concerned since the Ship was held by him to be the property of the Seychelles Government even if the Appellant had any enforceable rights in that property. Further, he also correctly held that section 7(3) also prevented him from issuing orders of arrest, detention or sale of the Ship.

In the result the appeal is dismissed with costs.

Dated at this day of 1995

M. A. Adam

Mahomed Ali Adam
JUSTICE OF APPEAL

*Judgment delivered in the presence
of counsel*

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