

# IN THE SEYCHELLES COURT OF APPEAL

[Coram: F. MacGregor (PCA), F. Fernando (J.A), F. Robinson (J.A)]

## Civil Appeal SCA25/2018

(Appeal from Supreme Court Decision MC N0: 03/2018)

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Faiz Mubarak Ali

Appellant

Versus

Hairu Investment Management Services  
(Private Ltd.)

Respondent

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Heard: 02 May 2019

Counsel: Mr A. Derjacques for Appellant

Mr B. Georges for Respondent

Delivered: 10 May 2019

### JUDGMENT

F. Robinson (J.A)

#### Background facts

1. This is an appeal from the judgment of a learned Judge of the Supreme Court ordering the appellant to quit, leave and vacate the vessel Sea King,<sup>1</sup> formerly known as CFC-01, failing which a writ *habere facias possessionem* will issue.
2. The application before the Supreme Court was supported by the following evidence:
  - (a) "Doc 2", a copy of a certificate of registration, showed that on the 27 January

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<sup>1</sup> The vessel in question is referred to as "Sea King", "Seaking" or "SEAKING" due to how it has been reported in the pleadings and the judgment dated the 3 April 2018.

2014, Hairu Fisheries Management Comoros S.A., a *société*, (the "*Société*"), was registered on the register of "*COMMERCE ET DU CREDIT MOBILIER*" of the Union of Comoros. Mr. ZainulAbdeen Mohamed Hairu, a Sri Lankan national, is the named "*PDG*" of the *Société* on that certificate.

- (b) "*Doc 1*", a letter, dated the 10 February 2015, emanating from North West Marine Lanka (Pvt) Ltd. (27, Industrial Estate, Dankotuwa, 61130, Sri Lanka) and addressed to the Ministry of Transport of the Union of Comoros, with a detailed pre-purchase marine survey report attached, informed the latter that —

*"We hereby **transfer the ownership** of the 18.5 Mtr fishing Vessel – CFC 01, built by our organisation to the Hairu Fisheries Management (Comoros) SA who are operators of the National Fishing Company in Union of Comoros."*

(Emphasis supplied)

- (c) "*Doc 4*" showed that the Maritime Administration of the Union of Comoros issued a provisional registration certificate bearing No.15/REG/1300053/031, on the 17 February 2015, to the *Société*, the named owner of the CFC-01 on that provisional registration certificate.

- (d) According to "*Doc 5*", a letter dated the 19 February 2015, the Maritime Administration of the Union of Comoros permitted the CFC-01 to travel from the Union of Comoros to Seychelles for repairs and, afterward, to proceed on one single voyage, from Seychelles to the Union of Comoros. That permission was valid until the 16 May 2015.

- (e) "*Doc 6*" is a partnership agreement entered into, on the 4 March 2015, between a "*BUSINESS REGISTERED AS "BABA ALI" under the Registration of Business Names Act 1972 in the Republic of Seychelles (business registration No. B 8413977) represented by its sole proprietor named FAIZ MUBARAK ALI AND*

*HAIRU INVESTMENT MANAGEMENT SERVICES (PRIVATE) LIMITED* [the

respondent]... a duly established Company in the Democratic Socialist Republic of Sri Lanka (bearing Certificate of Incorporation Number PV 80308..." (the "Partnership Agreement"). "BABA ALI" and the respondent entered into the Partnership Agreement to venture into an Indian Ocean fishing expedition and marketing programme based in Seychelles. The respondent is the named owner of the vessel Seaking on the Partnership Agreement. I interject to state that it is not clear to me as to when the change of vessel name occurred. Be that as it may, the following clauses of the Partnership Agreement are of particular relevance:

*"...REGISTRATION AND TRANSFERRING OF THE OWNERSHIP OF FISHING VESSEL/S*

*The parties hereby initially agreed to provisionally register the fishing vessel owned by HIMS ("Hairu Investment Management Services (Private) Limited") under the name of the "First part" ("BABA ALI") established in Seychelles only for the legal purposes for obtaining tax incentives and duty free concessions to conduct the aforementioned activities within the Republic of Seychelles.*

*It is further agreed that the agreed upon new company to be incorporated in the Seychelles namely Hairu Fisheries (Seychelles) Company Limited shall be included as the alternate name in the application for vessel registration. Parties hereby expressly accept and agree that the absolute ownership in the initial vessel register under Seychelles law shall always vest with "HIMS" and the share allocation to the "First Part" or "BA" as the case may be under this partnership or any other agreement entered by both parties connected with the aforementioned activities shall not at any time mean or consist the ownership of the vessel absolutely owned by "HIMS".*

*The "First part" or "BA" as the case may be hereby expressly undertakes and hereby binds itself to transfer the ownership of the vessel registered under his name or his legal entity within Thirty (30) days of incorporation of the new company governed by this partnership agreement and no later than the 10<sup>th</sup> of April 2015..."*

(Emphasis supplied)

According to "Doc 3", "CHANGE OF DIRECTOR/SECRETARY AND PARTICULARS OF DIRECTOR/SECRETARY", presented by SP Corporate Consultants (Private) Limited, No. 241, 1<sup>st</sup> Floor, Havelock Road, Colombo 06,

filed with the Department of the Registrar of Companies, (Colombo), on the 18 May 2015, the respondent's directors are ZainulAbdeen Mohamed Hairu and Hairunisa Hairu.

- (f) "Doc 7" showed that, on the 4 March 2015, Hairu Fisheries (Seychelles) Company Limited (Co. No. 8415221-1) was incorporated under the Companies Act, 1972, of Seychelles. According to paragraph 11 of the affidavit of the respondent, Hairu Fisheries (Seychelles) Company Limited was incorporated with a shareholding of 51:49 in favour of the appellant as the local partner in the enterprise.
- (g) Paragraph 14 of the affidavit averred: "*14. I [ZainulAbdeen Mohamed Hairu] was informed by the Respondent and verily believe that the "Sea King" was subsequently registered under BABA ALI 8413977, bearing Registration number 50238 in furtherance of the understanding referred to in the [Partnership Agreement]*".
- (h) According to "Doc 8", "*DISSOLUTION OF PARTNERSHIP BETWEEN THE BUSINESS REGISTERED AS "BABA ALI" UNDER THE BUSINESS NAMES ACT 1972 OF SEYCHELLES AND HAIRU INVESTMENT MANAGEMENT SERVICES (PRIVATE) LIMITED UNDER THE COMPANIES ACT IN SRI LANKA FOR VENTURING INTO AN INDIAN OCEAN FISHING EXPEDITION & MARKETING PROGRAMME BASED IN THE REPUBLIC OF SEYCHELLES*", executed in Colombo, Sri Lanka, the parties agreed to dissolve the Partnership Agreement on the 24 July 2015. In terms of Clause 2 of "Doc 8":

*"2. CASH SETTLEMENT, RE-REGISTRATION AND TRANSFERING OF THE OWNERSHIP OF FISHING VESSEL CFC-01 (SEAKING)*

*The parties agree that "BA" shall receive a full and final settlement of the sum of United States Dollars ..... or its equivalent in Seychellois Rupees amounting to .....*

*Such settlement shall be:*

- (a) *Withdrawal and transfer of cash to BabaAli Account/s from the Euro Account and the Seychellois Account at the Bank of Ceylon of Hairu Fisheries (Seychelles) Company Limited Account Nos. .... & ..... AND*
  - (b) *Cash Deposit from (HIMS) Sri Lanka or its nominees/authorized agents to Baba Ali Account at Bank of Ceylon Seychelles bearing No..... in the sum of United States Dollars ..... or its equivalent in Seychellois Rupees.*
  - (c) *Additionally, "HIMS" shall pay "BA" all costs included for berthing, Transit Insurance and related expenses on official invoices submitted.*
  - (d) *100% financial settlement shall be made in Seychelles when vessel CFC-01 has been officially approved to leave Seychelles waters permanently upon signing of Bill of Sale by "BA", lowering of Seychellois flag on vessel and provisional approval for sailing from Seychellois waters has been approved."*
- (i) "Doc 9", titled "BILL OF SALE", showed that "BABA ALI" represented by the appellant, transferred the vessel Seaking to the respondent, on the 28 July 2015, at the price of United States Dollars ("\$") 300,000/-. The schedule to that bill of sale, which contained the description of Seaking, was not laid before the court. According to that bill of sale, Seaking is formerly known as CFC-01.
- (j) *Doc 11*, a letter, dated the 29 July 2015, from the appellant to the Seychelles Maritime Safety Administration ("SMSA"), notified the SMSA that the appellant will de-register Seaking, which was registered under BABA ALI BRN8413977, within forty-five days of the said letter: ("*Doc 10*"). The SMSA acknowledged receipt of the said letter on the 31 July 2015, and requested the appellant to provide a copy of the bill of sale for Seaking.
- (k) "*Doc 12*", is a copy of an extract - "*INSCRIPTIONS Of SECURITY ON MOVABLES*" (SeaKing) - dated the 3 November 2015 - a pledge between the pledgee, Bank of Ceylon (a local bank) and the pledgor, the appellant. The amount secured by the pledge is 475,000/- Seychelles rupees, subject to interest at the rate contemplated by the pledge.

3. The appellant's defence before the Supreme Court, as can be gathered from his own affidavit, was that he is the owner of the vessel Seaking. The following evidence in support of his defence, is relevant:

(a) The first purports to be a Seychelles Certificate of Registry issued by the SMSA to a fishing vessel Seaking on the 16 December 2015. That certificate will expire on the 15 December 2020. "BABA ALI" (company No. B.R.N. B8413977) is the named owner of Seaking on that Certificate of Registry.

(b) An import permit, valid from the 10 February 2015 to the 30 April 2015, in relation to an "18.5MTR COMMERCIAL FISHING VESSEL WITH HYUNDAI MARINE DIESEL ENGINE M6D33TI (410HPX2200RPM)", in the name of the appellant. The total permit value was 4,260,000/- rupees.

(c) A bill of sale, dated the 3 March 2015, made between the North West Marine (Pvt) Ltd, the named manufacturer and owner of the fishing vessel Seaking and "BABA ALI", in terms of which North West Marine (Pvt) Ltd purportedly transferred to "BABA ALI" all its rights, title and interests in the vessel Seaking at the price of \$300,000/-.

4. The learned Judge reviewed the evidence and was satisfied that the title to the vessel Seaking, formerly known as CFC-01, was clearly vested in the respondent, and accepted the respondent's submission that the appellant had no real defence to the application. The learned Judge gave the following reasons, *inter alia*, to justify her decision:

"[14] I have studied the two bills of sale, one is dated 10 February 2015 and the other 3 March 2015, both from the same company but in relation to CFC-01 and Sea King respectively. The authenticity of the second of these documents is in question while the first has not been challenged."

[15] I also have had sight of an import permit dated 10 February 2015 of an 18.5 metre vessel into Seychelles with HD Code 89020000. I note the advisory note on the document (Certificate

of Registry) which states that "It is advised that current ownership and mortgage details be confirmed from the Registrar of Shipping".

*Such confirmation has been not produced by the Respondent.*

[18] *Ultimately, the Respondent has been unable to prove title to the possession of the boat. He appears to be holding on to the vessel for compensation under the partnership agreement. While this is a claim he may wish to make it gives him no right of retention of the vessel as such detention is not permitted in the particular circumstances of this case...".*

### **Grounds of appeal and contentions of parties**

5. The soundness of the learned Judge's reasons is being challenged on the following grounds:

- "(1) *The Learned Judge erred in failing to find that the Appellant was not a trespasser on the said vessel, the Sea King.*
- (2) *The Learned Judge erred in law in failing to find that the Appellant had substantial legal arguments which thereby necessitated a hearing, by a Plaint action, before the Supreme Court, considering:*
  - a) *He had a title to the said vessel.*
  - b) *He had a proper registration of the vessel at the Registry of Ships in Seychelles with the Seychelles Maritime Safety Administration.*
  - c) *He had a charge with a local commercial bank for the vessel, i.e Bank of Ceylon (Seychelles) Ltd.*
  - d) *He has possession and control of the said vessel and is paying the manufacturer the costs of the vessel.*
  - e) *He is conducting a fishing business with the vessel and employs 6 Sri Lankan nations as fisherman and three Seychellois on shore. The vessel is appropriately licensed.*
  - f) *He imported the said vessel from Sri Lanka to Seychelles.*
  - g) *Both parties to the Management Agreement, agreed that respondent had good title.*

- (3) *The Learned Judge erred in law in failing to consider that should the Court determine that the Appellant's title was void, the management contract, which pre-supposed and expressly confirms his title, would be void also.*
- (4) *The Learned Judge erred in law in failing to determine that should there be dispute as to two titles interpartes, the application must be dismissed."*

6. The grounds of appeal are, in substance, that the learned Judge was wrong to reject the defence put forward by the appellant as not serious and *bona fide* on the erroneous ground that the appellant was a trespasser on the fishing vessel in question.
7. Mr. Derjacques submitted that for such an application to succeed, it must be established that the appellant is a trespasser. He argued that the appellant is not a trespasser because the evidence presented, by the appellant before the Supreme Court, established that he also has title to the vessel Seaking. On that basis, he stated that the learned Judge erred in law by failing to dismiss the application.
8. Mr. Georges on behalf of the respondent submitted that the respondent's ownership of the vessel in question had been traced from its purchase in the Comoros as vessel CFC – 01, through the Partnership Agreement, through the dissolution of the Partnership Agreement, and through a bill of sale dated the 28 July 2015. He submitted that the evidence showed that the vessel in question does not belong to the appellant. He added that the appellant offered no explanation as to why it executed the bill of sale for the vessel in question to the respondent. On this basis, he submitted that it was clearly open to the learned Judge to find that the respondent had no defence and was purely dissimulating. In his view, title to the vessel was clearly vested to the respondent.
9. The remedy sought is essentially one derived from the French law of "*Les Référés*", which provides a remedy to an owner of a property with a clear title. In applying that law, the Seychellois courts have repeatedly held that an applicant for a writ *habere facias possessionem* has first to establish a clear title to the possession of the property concerned and that, if he succeeds, his application will be granted, unless the respondent shows that he has a serious and *bona fide* defence. See, for example, the case of *Delphinus Turistica*



*Maritima S.A. v. Villebrod* 1978 [SLR]121, in which Sauzier J stated:

*"A writ habere facias possessionem may be issued **on the application of an owner**, the lessor of property, **when the Court is satisfied that the respondent to the application has no serious defence to make thereto...***

(Emphasis supplied)

I interject to state that, in **Delphinus Turistica Maritima S.A.**, the principles, in relation to the writ *habere facias possessionem*, stated to apply to immovable property were made applicable to a yacht under a contract of hire.

10. In the light of the principles set out above, we first have to consider whether or not the respondent, who claimed to be the owner of the vessel in question, has a clear title to it. In that regard, and in relation to the reasons put forth by the learned Judge, we make the following observations:

- (a) according to the affidavit of the respondent, the respondent is the financial arm of the Hairu Group of Companies. Paragraph 2 of the affidavit of the respondent went on to state that the Hairu Group of Companies is registered and domiciled in Sri Lanka. These allegations were not substantiated by the respondent;
- (b) paragraph 4 of the affidavit went on to aver that on or about the 10 February, the *Société* purchased, through the respondent, vessel CF-01 along with other vessels from North West Marine Lanka (Private) Limited. According to the said paragraph 4, the respondent is the financial and management arm of the *Société*. These allegations were not substantiated by the respondent;
- (c) North West Marine (Pvt) Ltd. transferred the ownership of the vessel CFC-01 to the *Société* on the 10 February 2015. North West Marine (Pvt) Ltd. also sold the vessel Seaking, formerly known as CFC-01, to "BABA ALI" on the 3 March 2015. It is a disturbing fact that Mr. ZainulAbdeen Mohamed Hairu, who swore to the affidavit of the respondent in his capacity as a director of the respondent and the "PDG" of the *Société*, did not mention, in the affidavit of the respondent, the facts

and circumstances surrounding both purchases. The bill of sale, witnessing the sale of the vessel Seaking between North West Marine (Pvt) Ltd and "BABA ALI", from which "BABA ALI" purportedly derives its title, was produced by the appellant;

- (d) the Partnership Agreement and the dissolution of the Partnership Agreement did not advance the case for the respondent as they contained mere assertions of ownership without stating the facts on which the claim of ownership is based;
- (e) it is neither here nor there that the appellant offered no explanation as to why it executed the bill of sale for the vessel to the respondent. It appears that the title of "BABA ALI" to the vessel Seaking was questionable on the date of the execution of the bill of sale for the vessel Seaking to the respondent, on the 28 July 2015;
- (f) we are not clear about the legal status of "'BABA ALI' represented by the appellant". The appellant made a vague allegation, in his affidavit, to the effect that "[5] [he] herewith produce a Bill of Sale for the vessel which is registered to [his] name Basa Ali Brn No. 8413977" (sic). It is noteworthy that paragraph 14 of the affidavit of the respondent mentioned that the vessel: "'Sea King' was subsequently registered under BABA ALI BRN 8413977, bearing registration number 50238 in furtherance of the understanding referred to in paragraph 10 [of the affidavit]."

11. I am of the opinion that the learned Judge erred when she granted the writ *Habere Facias Possessionem*. I say so because:

- (1) the respondent who claimed to be the owner of the vessel in question did not establish that it had a clear title to it. The title of the respondent to the vessel Seaking was to say the least not clear. It is noteworthy that the findings of the learned Judge indicated that she held the same view.
- (2) the application for the writ was filed, on the 26 December 2017, almost two years

after the issues complained of by the respondent. There is no reason put forward to explain the delay for the application.

12. Before we leave this appeal, we note that this matter was heard by the Supreme Court - Civil Side MA 47/2017 Hairu Investment Management Services (Private) Limited v BABA ALI Civil Side No. MA 47/2017 and Civil Side MC/03/2018 Hairu Investment Management Services (Private) Ltd v Faiz Ali Mubarak. The decisions in both matters are conflicting. The learned Judge in the first application, after reviewing the evidence, found that the applicant had not satisfied all the principles laid down by the Seychellois jurisprudence and refused to issue the writ. The learned Judge also found that the matter had been instituted against the wrong party. The appellant through Counsel did not raise any objection before the Supreme Court to the matter being re-litigated.
13. We read the following excerpt from Halsbury Laws of England:

**"1651. Re-litigation and abuse of process.**

*The law discourages re-litigation of the same issues except by means of an appeal. It is not in the interests of justice that there should be re-trial of a case which has already been decided by another court, leading to the possibility of conflicting judicial decisions, or that there should be collateral challenges to judicial decisions; there is a danger, not only of unfairness to the parties concerned, but also of bringing the administration of justice into disrepute. The principles of res judicata, issue estoppel and abuse of process have been used to address this problem, although abuse of process is often characterised as being a rule of wider application than the rest."*

**Decision**

14. For the reasons stated above, I allow the appeal, quash the order made by the learned Judge for the appellant to quit, leave and vacate forthwith the vessel Sea King, formerly known as CFC-01, cancel the writ *Habere Facias Possessionem* and substitute therefor, an order dismissing the application. With costs in favour of the appellant.

F. Robinson (J.A)

**I concur:.** .....

F. MacGregor (PCA) (J.A)

**I concur:.** .....

A. Fernando (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 10 May 2019