

24th March, 1994

Judge:-

Onor. Albert Manchè LL.D.

Anatoli Reznikov and his wife Natalia Reznikova

versus

*Nikolai A. Kotikov for and on behalf of the foreign company Pan
European Trading International Company Limited*

***Warrant of Impediment of Departure - Garnishee Order -
Warrant of Seizure - Abusive Procedure - Lis Alibi Pendens***

*From the facts of the case the Court concluded that the Warrants were
issued vexatiously, to hold defendants hostages in Malta.*

The Court:-

*Upon seeing the writ of summons in which plaintiffs
premised that:*

Defendant Nikolai A. Kotikov allegedly on behalf of the

foreign company Pan European Trading International Company Limited on the 31st December 1993 abusively and illegally and without the Courts of Malta having jurisdiction, obtained against plaintiffs the issuing of three precautionary warrants, and namely a Warrant of Impediment of Departure, a Garnishee Order and a Warrant of Seizure (Documents A, B and C) for the amount of Eighty thousand five hundred Malta Liri (Lm80,500) value of merchandise (Induction Furnace) that plaintiffs are allegedly refusing to deliver to defendants nomine although they bound themselves to do so;

There existed no agreement in the sense alleged by defendant nomine and namely that plaintiffs had to deliver the merchandise mentioned in the warrants and it is neither true that they have control or ever had control on the same merchandise;

From documents on which defendant is basing his claim, it results clearly that the present plaintiffs are in no way involved neither directly nor indirectly, the amounts therein mentioned do not tally with the fantastic pretensions of defendant nomine and the alleged payments are prior to the agreement, in which agreement no reference was made to them and it appears that they were made in favour of an entity or Company with which the present plaintiffs have no connection;

Defendant brought forward no proof that he is authorised to act on behalf of the foreign company Pan European Trading International Co. Ltd. if it exists;

Defendant's action in obtaining the issue of the Warrants above mentioned is nothing but abusive manœuvring of the Maltese juridical system from someone who for reasons known to

him does not want to return to his country or to invoke the right forum to solve his complaints;

The behaviour of defendant is illegal and abusive vis-a-vis the plaintiffs and this because the plaintiffs never had any juridical relationship with defendant nomine in connection with the merchandise above mentioned as shall be proved during the cause;

Ant the said warrants are null and without effect;

And by the illegal and abusive action of defendant as explained before, the plaintiffs suffered and are suffering damages for which defendant is responsible personally, for which damages plaintiffs are reserving their rights;

Asked that this Court should for the reasons premised:

1. declare and decide that defendant nomine obtained the issue of the said warrants against plaintiffs illegally, abusively and unjustly and consequently the same warrants are null and without effect;

2. order the revocation of the garnishee order, warrant of seizure and of Impediment of departure;

Saving in favour of plaintiffs for the action of damages against defendant nomine as well as the same defendant personally.

With costs against defendant nomine;

Upon seeing the plaintiffs' declaration confirmed under oath

as well as their list of witnesses;

Upon seeing the statement of defence filed by defendant nomine in which he pleaded:

"1. That plaintiffs, although they bound themselves with defendant in his capacity above mentioned, they failed without valid reason, to see to it that by the end of December, 1993 they deliver to him in Malta Injection Furnace Mod IST 025/320 and ten accessory pieces TGG200 for the same model of oven bought by defendant from the Research Institute and Design Firm "Sistema" of Kalynygrad Moscow on the 22nd October, 1993, this failure of plaintiffs forms the merit of the Writ of Summons in the case with inverted names filed before this Honorable Court on the 13th January, 1994 and not yet appointed. Thus applicant pleads "lis alibi pendens";

2. In the second place without prejudice to the premised and in subsidiary line of defence, plaintiffs' demands are unfounded at law and in fact;

With costs against plaintiffs;"

Upon seeing the defendant's declaration confirmed under oath as well as his list of witnesses;

The hearing of the evidence and of the submissions having been concluded;

Having considered:

That defendant's plea of "lis alibi pendens" is such that the

Court would be precluded from pronouncing itself on the merits if the plea were founded in law, and therefore, before considering the merits of the present action, the Court is to adjudge on the said plea;

The plea is somewhat parallel with the plea of "exceptio rei judicatae". Just as a suit cannot be decided upon more than once, so also there cannot be at the same time more than one judicial relation between the same persons on the same merit, because this would imply a plurality of decisions on the same issue. The effect of the plea of "litis pendentia" in the words of Section 792 of the Code of Organization and Civil Procedure is that the Court before which the second action is brought may order the suit to be remitted to the first Court. In fact, doctrine and caselaw in the matter are to the effect that it is in fact mandatory for the Court to declare its own incompetence "ex officio" if such plea is founded, in spite of the use of the word "may" in the said section quoted herein;

The essential conditions for this plea is the identity of the two actions which resulted from the identity of all the elements thereof, i.e. the parties, the subject-matter and the cause of the demand. It emerges clearly from a comparison between the action filed by defendant nomine against the plaintiffs and present action that the subject-matter of the actions is not identical, because whilst the present action concerns the precautionary acts of garnishee order, warrant of seizure and impediment of departure, the other action concerns the alleged non-delivery of a furnace. If the present action were to be decided the judgement could not conceivably constitute a "res judicata" vis-a-vis the action for the delivery of the furnace. Therefore, the plea of "lis alibi pendens" raised by defendant nomine is unfounded at law and is to be rejected;

Having considered:

That the second plea raised by defendant nomine is that plaintiffs' demands are unfounded at law and in fact;

The Court only considers relevant to the present case the facts and pleadings concerning the validity or otherwise of the precautionary warrants forming the subject-matter of this suit, because the plaintiffs' claim is to be adjudged independently of the merits of defendant's action against plaintiffs, because it could very well happen that plaintiffs' claim be upheld and the precautionary warrants revoke whilst defendant nomine could, this notwithstanding, be successful in his claim concerning the delivery of the furnace;

On perusal of the plaintiffs' grounds premised in the writ of summons, it emerges that the first two premises concern the merits of the other action filed by defendant nomine because they would constitute a plea to defendant's claim concerning the delivery of the furnace. Therefore the grounds in the premises which can be considered in this case are those relating to the issue of the precautionary warrants because the plaintiffs' claim is that the defendant obtained the issue of the said warrants illegally, abusively and unjustly and that consequently the same warrants are null and without effect; and the Court is being asked to order their revocation on the said cause of the claim;

The Court has to point out that unfortunately much of the evidence heard and of the submission made are more relevant to the other action than to the question concerning the validity or otherwise of the warrants. It must also point out that the submissions made omitted any reference to the garnishee order

and warrant of seizure and centred on the warrant of impediment of departure;

In general, precautionary warrants are issued on the responsibility of the applicant but, as was upheld by the Honourable Court of Appeal, in the case "Dr. Carlo Moore LL.D. versus Walter Moore" determined on the 24th January, 1944 (Coll. Vol: XXXII - I - 15) this does not mean that if the Court has reason to consider that the request for the issue of a warrant is manifestly vexatious that the Court has to uphold such a request, in such a case the Court is empowered and has even the duty to reject the request. It follows that the Court may, on the same grounds, revoke a precautionary act which has already been issued on applicant's responsibility. With regard to the warrant of impediment of departure the provisions of law which could have a bearing on the present action are sections 855 (1), and 868A (1) (a) of the Code of Organization and Civil Procedure (Chap. 12);

Section 855 (1) lays down that:

"The object of a warrant of impediment of departure is to secure a claim which might be frustrated by the departure of the debtor . . . omissis . . ."

Section 868A (1) (a) lays down that:

"Without prejudice to any other right under this or any other law, the person against whom a warrant of impediment of departure has been issued, may, make an application to the Court issuing the warrant praying that the warrant be revoked on any of the following grounds: (a) that any of the conditions requested by law for the issue of the warrant does not in fact subsist;"

It is a fundamental requisite of the impediment of departure that the claim would be frustrated by the departure from these Islands of the debtor. If such a condition does not subsist then the issue of the warrant would be merely vexatious and consequently illegal and its revocation justified and the Court would be in duty bound to revoke the warrant;

The plaintiffs have submitted "inter alia" that as defendant claims that plaintiffs are obliged to deliver the furnace in Malta to be sent from Russia, he should have allowed them to go to Russia to do that, but instead, he has restrained them both in Malta and even rejected their offer extended to him to let at least one of the plaintiffs, at his own choice, return to Russia.

Plaintiffs further submitted that defendant failed to prove that in issuing the impediment of departure he is representing the Company he alleges to represent, and that defendant is restraining fellow Russians, the plaintiffs, from leaving Malta because he requires their assistance in Malta because the transfer of funds in Russia is unlawful and the Maltese Courts should not assist the defendant to restrain the plaintiffs' liberty in order to assist him in an illegality. Plaintiffs further submitted that from defendant's evidence it emerges that he cannot go to Russia to conclude the deal. Several other submissions were made during the rather lengthy proceedings taking up thirteen (13) sittings but, as they are not strictly relevant to this case, the Court is not considering them in its deliberations;

Having considered:

That the defendant submitted "inter alia" that the issue of a precautionary warrant is justified if a person genuinely thinks that

he is a creditor and that he cannot do anything else to have this credit safeguarded. Defendant claims that the plaintiffs can do something from Malta to have the furnace delivered in Malta and defendant just does not want to know how this is done. He further submitted that the control of the furnace is in plaintiffs' hands. With regard to defendant's capacity to represent the foreign company "Pan European Trading International Co. Ltd." defendant pleaded that plaintiffs cannot contest defendant's capacity to represent the company in judicial proceedings when they themselves are suing him in that capacity and defendant had exhibited the memorandum and articles of association of the Company;

Having considered:

The the contending parties are Russian nationals and were close friends up to December of 1993 to the extent that defendant resided in plaintiff's flat in Moscow when he used to visit that city and was also given other facilities including the use of a car, and plaintiffs, when in Malta, were afforded similar treatment by defendant. Defendant is fully aware of the places of residence of plaintiffs in Moscow and their place of business and has at his disposal every means of contacting them in that city, and therefore, should he choose to sue them in Moscow he would have no problems, moreover, plaintiffs have no assets in Malta and presumably have assets in Moscow where their business is located. However, assuming that the defendant can legitimately sue the plaintiffs in Malta, what the Court has to examine is whether the defendant can obtain against them the issue of a warrant of impediment of departure in his capacity of lawful representative of the defendant company and whether he requires the said warrant so that this claim be not frustrated;

Plaintiffs rightly submitted with regard to the issue of defendant's power to represent the defendant company that, though defendant exhibited several documents relating to the company he failed to produce one single document purporting to empower him to represent the Company. Furthermore, in the Court's opinion the fact that plaintiffs are suing the defendant in representation of the company does not legally preclude them from contesting his right to do so because, this being an action for the revocation of the warrants obtained by defendant in his aforesaid capacity, the plaintiffs had to sue him for the revocation in the same capacity in which he had obtained the issue of the warrants. It is also correct to affirm, as defendant submitted orally, that it is plaintiffs in this case who have to prove their allegations. On the other hand it is equally true that "negativa non sunt probanda" and if defendant is claiming that he can represent the company it is incumbent upon him to prove this, particularly when the company is registered abroad and plaintiffs have no means of obtaining in Malta information concerning it. In the Court's opinion defendant could have produced documentary proof on the matter, but failed to do so;

The Court fails to understand how the presence of both plaintiffs is required to ensure that the furnace in question is delivered from Russia to Malta. The fact that defendant is insisting on restraining both plaintiffs from leaving Malta to return to their home and to attend to their business in Moscow inevitably leads to the conclusion that defendant is keeping plaintiffs as hostages because the defendant failed to justify the need of keeping both plaintiffs away from their home and business. The Court is of the opinion that, under the circumstances which have emerged during the hearing, the warrant of impediment of departure has been issued vexatiously and that defendant has failed to prove satisfactorily that he is empowered

to represent the defendant company in judicial proceedings, without prejudice to what the defendant might prove in due course in the case in which he stands as plaintiff;

Though the parties hardly mentioned the garnishee order and the warrant of seizure during the hearing, in view of the Court's conclusion concerning the defendant's lack of power to represent the defendant company in obtaining the issue of the warrants, the Court is upholding plaintiffs' claim on all the precautionary warrants mentioned in the summons;

For the foregoing considerations;

Adjudges as follows:

Disallows the defendant's plea of "lis alibi pendens" and finds in favour of plaintiffs' claims. Orders that the costs be borne by the defendant nomine, except for the interpreter's fees which are to be borne as to one moiety by plaintiffs and as to the other moiety by defendant nomine.
