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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ADMIRALTY AND VICE ADMIRALTY JURISDICTION
NOTICE OF MOTION (L) NO. 1070 OF 2015
IN
ADMIRALTY SUIT (L) NO.257 OF 2015

Mercator Line (Singapore) Limited ...Applicant

IN THE MATTER BETWEEN

Jaldhi Overseas Pte. Ltd. ...Plaintiff

vs

M.V. DAEBO LUMUT, and ANR. ...Defendants

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Mr. Ashwin Shanker, for the Plaintiff.

Mr. Nimay Dave, i/b. Auris Legal, for the Applicant.

Mr. V.K. Ramabhadran, Senior Advocate, i/b. Subra Karmakar, for
Defendant No.3.

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CORAM : S.C. GUPTE, J.

DATED : 20 APRIL, 2015

P.C. :

. The Plaintiff has filed the present suit to recover a maritime claim against the 1st Defendant vessel, which is a foreign flag flying vessel, claimed to be of the beneficial ownership of the 2nd Defendant. The claim arises under a time – charter party, by which the Plaintiff had given its vessel, M. V. Cygnus Ocean, to the 2nd Defendant on a time charter. The claim is in respect of breach of the charter party including non-payment of hire charges and aggregates to over USD 2 Million. It is the case of the Plaintiff that the 2nd Defendant has filed for bankruptcy in Korea. On these

facts, the 1st Defendant vessel, which was within the port and harbour of Visakhapatnam, was arrested by the Plaintiff in the present suit, under an order of arrest dated 17 March 2015. There is no application as yet from the owners of the vessel to vacate the arrest by payment of any security or otherwise. The 1st Defendant vessel is, accordingly, awaiting an order of sale.

2. The Applicant herein claims to be a voyage charterer of the 1st Defendant vessel with M/S Hyundai Glovis Co. Ltd., the purported disponent owner of the vessel. This charter was on a back to back basis of a voyage charter-party between the Applicant and Steel Authority of India Ltd. ("SAIL") for transportation of coal from the Port of Hay Point in Australia for discharge at "East Coast of India Port (s)". In pursuance of these charter-parties, 78,745 MT of Coaking Coal ("cargo") was loaded on board the vessel at the Port of Hay Point. SAIL had nominated two ports on the east coast of India as ports of discharge, namely, Visakhapatnam and Haldia. The instructions were finally issued by SAIL to the Master of the vessel to discharge the cargo of not less than 45,000 MT at Visakhapatnam and the remaining cargo at Haldia. The vessel arrived at the Port of Visakhapatnam on 17 March 2015 and discharged 52,774 MT out of the total cargo of 78,745 MT there. Before the vessel could thereafter proceed to Haldia for discharge of the balance cargo, it was arrested under the orders of this Court as noted above.

3. In the premises, the Applicant has moved the present Notice of Motion for permission to intervene in the suit herein and for leave of this Court for the vessel to sail under arrest from the Port of Visakhapatnam to Haldia, Port of Kolkata and discharge the balance cargo. It is submitted that

SAIL, a Government of India undertaking, requires the cargo on urgent basis to service its steel plants along the east coast of India; and the Applicant faces huge claims of damages as a result of late delivery or non-delivery. It is submitted that appropriate arrangements can be made to allow the vessel to sail under arrest including deputation of a bailiff on board the vessel, handing over of the documents of the vessel to the port authorities at Haldia, etc. The Applicant offers to bear the expenses for such arrangements. It is submitted that there have been precedents by way of similar orders passed by this Court permitting the vessel to sail under arrest.

4. The application is strenuously contested by the Plaintiff. It is submitted on its behalf that this Court ought not to permit the vessel to sail to Haldia, since such journey involves sailing outside the territorial waters of India, i.e. outside the jurisdiction of this Court. It is submitted that the head owners of the vessel are in the midst of bankruptcy proceedings; one is not sure whether even the wages of the crew have been paid; there is no guarantee that the crew co-operate with the Applicant by transporting the cargo at Haldia and submitting to the authorities at Haldia so as to continue the arrest. It is submitted that the 1st Defendant vessel is the only security of the Plaintiff for a claim of over USD 2 Million and that this security cannot be put to risk, including the various maritime risks which create further lien upon the vessel. It is submitted that the Applicant's balance freight to be earned is approximately USD 250,000, for which the Plaintiff's claim of USD 2 Million cannot be jeopardized.

5. Since this Court wanted to see if any ad-hoc mutually acceptable solution could be found in the matter, this Court permitted the Applicant to join SAIL as a party Respondent to its Motion. SAIL thereupon

appeared through Counsel. It was inquired by this Court of its Counsel as to whether SAIL was prepared to accept the balance delivery at Visakhapatnam and mutually work out the issue of transshipment of the cargo to its proposed destination as between the parties. It is submitted by SAIL that SAIL actually required the cargo at Haldia, but because of the draft issues at Haldia, instructed unloading of part cargo at Visakhapatnam, so as to achieve the requisite arrival draft for Haldia, Port of Kolkata. It is submitted that if SAIL were required to transship the cargo from Visakhapatnam to its proposed destination, it would insist on the charges for such transshipment to be treated as sheriff's charges and accordingly charged on the vessel. This course is opposed by the Plaintiff, who claims that it is the cargo owner's responsibility to arrange for discharge of the cargo and such arrangement cannot be at the cost of the vessel or the Plaintiff.

6. It is not usual for this Court to receive such applications in its admiralty jurisdiction and on such few occasions as it had, the orders permitting the vessel to sail under arrest were passed more or less on consent of parties and after ensuring the protection of the security, namely, the vessel under arrest. The issues involved in such application do not appear to have been decided in any contested matter. Allowing the vessel to sail under arrest, and particularly to enable a voyage charterer to discharge the cargo and earn its freight or avoid its damages or to enable a cargo owner to receive its cargo, raises various intricate issues. Firstly, it raises questions as to jurisdiction and authority of the admiralty Court and secondly, as to the law of sea concerning the movement of the vessel whilst under arrest. Thirdly, it involves the question as to who pays for such movement and discharge of the cargo. The parties herein have relied upon

some judgments of the Courts in England and other foreign jurisdictions, in this behalf.

7. The Court of Appeal in England had the occasion to consider the discretion of the admiralty Court to release ships or allow them to sail under arrest in the case of **The Bazias 3 & 4**¹. In that case, the plaintiff charterers commenced proceedings in rem against the vessels **Bazias 3 and Bazias 4** to obtain security for their counterclaim in arbitration proceedings against the defendant owners of the vessels. Whilst the vessels were arrested, after intervention of the freighters, the vacation judge in admiralty (Saville J) ordered that the vessels should remain under arrest but that the freighters should be at liberty to operate the vessels out of the jurisdiction on the freighters' cross-channel ferry service, against undertaking given by the shipowners and the freighters. Subsequently, when the proceedings came up before the regular court, this order was varied (Sheen J) so as to remove the permission for the vessels to operate out of the jurisdiction. The matter was carried before the Court of Appeal by way of appeals from the orders of both Saville J and Sheen J. The Court of Appeal, in the first place, noted that Saville J., describing the order as a sensible, short term commercial solution, had not identified the source of his discretion or explain why he was exercising it in the way he did. The Court of Appeal (per Lloyd L.J.) noted: "There is no way in which the vessels could remain within the custody of the Admiralty Marshal, as required by the judge, and yet be allowed to trade outside the jurisdiction". The Court of Appeal then proceeded to consider the defendant owners' application for stay of admiralty proceedings, which involved the question as to whether or not any vessel can be arrested as security for the satisfaction of any arbitration

¹ 1993-27 Q.B. pg. 673

award to be obtained by the plaintiffs. We are not concerned here with that question, but what is important for us is to note that eventually what the Court of Appeal did was to vary the order made by Saville J. and dismiss the appeal from Sheen J., effect of that being that the two vessels remained under arrest and not able to travel outside the Court's jurisdiction. Ralph Gibson L. J., concurring with the reasons of Lloyd L. J., observed as follows:

“Saville J. on 29 September, in circumstances of great urgency, devised an order as a temporary solution which appeared to be a short-term commercial arrangement and which gave substantial protection to the plaintiffs' position. It seemed to me that there was, and is, much to be said for that solution upon the facts of this case in fairness to all parties. It has however become clear to me that, without departing from established practice, that solution was not open to the judge.”

8. As a matter of principle, and certainly not without there being any special reasons for making a departure from the ordinary rule, this Court would not permit sailing of a ship under arrest out of its jurisdiction, i.e. beyond the territorial waters of India. It may not be possible to spell out these special reasons, and I suppose it would have to be necessarily left to the discretion of the Court on a case by case basis, but one thing is clear. Even when such special reasons exist, the Court will have to adequately ensure that the order of arrest is not overreached and there remains an adequate security for the plaintiff's claim. In a given case, it may be possible to accept the owners' undertaking or other security in the interregnum and permit the vessel to sail under arrest. It may be possible to temporarily secure the plaintiff's claim by other means. The freighters or cargo owners may be permitted to provide such interim security, till the vessel is once again secured within the territorial jurisdiction of the admiralty Court.

9. In our case, in the first place, there is absolutely no special reason why such permission to sail under arrest may be considered. It is a case of an ordinary voyage charter for shipment of cargo. There is nothing placed on record why the discharge cannot be accepted at Visakhapatnam. After all the terms of the charter required discharge at designated ports on the East Coast of India including the Port of Visakhapatnam. The vessel might as well discharge the cargo at Visakhapatnam. The only question then is of transshipment of the cargo to the designated place. Even that is possible, though at a price. The price is a contractual matter between the freighters and the consignee and can be claimed by the party entitled to it. On the other hand, if it turns out that the arrest is wrongful, a claim may be laid even against the Plaintiff. To save that price or, in other words, the damages covering such price, there is absolutely no reason to depart from a usual rule and jeopardise the security of the Plaintiff by subjecting it to unwanted risks. Secondly, there is no effective way of securing the compliance of the arrest order if the vessel is allowed to sail out of the jurisdiction of this Court. It is common ground that to sail to Haldia, the vessel needs to go out of Indian territorial waters. The Applicant is a mere voyage charterer, (not even a time charterer). The crew is not the Applicant's agents or subject to its orders and command. There is no guarantee that the crew will co-operate and dutifully transport the cargo to Haldia and voluntarily submit to continuation of the arrest at the hands of the authorities at Haldia. Even if this Court were to direct the Sheriff to depute a bailiff on board the ship, there is no guarantee that the ship will be steered to Haldia and submitted to continuation of arrest there. There is no way the Plaintiff's security can be jeopardised under the attendant circumstances, no less important of which is the fact of bankruptcy

proceedings taken against the owners of the vessel. It is suggested that the coast guards can be kept informed of the arrest and the permission to the vessel to sail under arrest, and they would ensure that the ship stays on course. Short of setting the coastguard on a hot pursuit of the vessel all the way till it reaches Haldia, this is unattainable. In other words, there is no way to adequately ensure compliance with the order of arrest or secure the Plaintiff's claim in lieu thereof. Neither the Applicant nor SAIL is agreeable to deposit a bail sufficient to secure the Plaintiff's claim at least till the vessel reaches Haldia.

10. Another suggestion is to permit transshipment of the cargo to Haldia and allow the expenses of such transshipment as Sheriff's expenses to be recovered from the vessel. This involves tampering with the order of priority of claims against the vessel under arrest. Our Court in **Sparebanken Sogn Og Fjordane Vs. M. V. Bos Angler²**, held as follows (para 12):

“When an action is brought against a vessel in rem, the Court exercises its jurisdiction treating the vessel which is sued as an entity in itself. When the Court orders the sale of the vessel, it has the inherent power in the exercise of its admiralty jurisdiction to convey upon the purchaser a valid title to the res that is sold free of all charges and encumbrances. This principle was established in the common law as one fundamental to public policy, since it would be manifestly contrary to the evolution of maritime law if a Court of competent jurisdiction which effected the sale of a ship were unable to convey a valid title to an innocent purchaser. Consequently, once a vessel has been sold in the exercise of the jurisdiction in rem, all claims against the vessel have to be enforced against the proceeds of the sale and before the Court which exercises jurisdiction to arrest and thereafter sell the vessel. Equally, it is a matter of settled principle that the Court which holds the proceeds of the sale holds

2 [2013(3) Mh. L.J. 898

them not merely for the benefit of the Plaintiff who moves the Court in the jurisdiction in rem but for and on behalf of all persons who may have claims in respect of the property of the vessel and, after the sale, in respect of the sale proceeds. Consequently, even if in a given case the claim of the Plaintiff were to fail, that would not obviate the fundamental duty and obligation of the Court in the exercise of the admiralty jurisdiction to ensure that the monies which it holds are properly distributed to persons whose claims have been adjudicated upon for realization. Upon the process of adjudication, the issue of determining priorities would arise. The issue of determining priorities comes up before the Court in a situation where the amount representing the aggregate of the claims against the vessel exceeds the amount which has been realized upon the sale of the vessel. Obviously in a situation where the aggregate of the claims is equal to or less than the amount which lies deposited with the Court every one of the claims can be paid in full and it is in a situation where the aggregate of the claims represents a value in excess of what is realized upon the sale of the vessel that the determination of priorities assumes importance. These principles of law have been consistently followed and reiterated in the exercise of the admiralty jurisdiction in common law countries.”

This Court is, thus, under an obligation to distribute the sale proceeds amongst the rightful claimants and according to the priorities of their respective claims. Sheriff's expenses incurred towards appraisal and sale of the vessel are accorded the highest priority, then come statutory rights of detention and claims stemming from such rights, then maritime liens, mortgages and other maritime claims. The law does not permit the costs and liabilities incurred for discharge of cargo on board an arrested vessel to form part of the expenses of the Sheriff so as to allow them a first charge on the proceeds of sale of the vessel.

11. In **The Jogoo**³, the Queen's Bench considered an application by

³ 1 W.L.R. 1377

owners of cargo laden on board the arrested ship **Jogoo** for a declaration that the cost of discharging the cargo at the port of arrest, which was borne by the intervenor cargo owners, should rank *pari pasu* with the charges and expenses incurred by the Admiralty Marshal (who is in the same position as the Sheriff in our case) in executing the commission of appraisal and sale of the vessel, and that the cost should thus become a first charge on the proceeds of sale of **Jogoo**. This is what the learned Admiralty Judge held:

“Such few cases as have been reported show that in England the Admiralty Court has consistently taken the view that the cargo-owners must pay for removal of their own cargo in the event of the contract of carriage not being completed by the ship-owners, and then make a claim against the ship-owners for the damage which they have suffered. It seems to me that this is correct in principle. For these reasons this motion by the interveners must fail.”

In **The Myrto**⁴, the vessel was arrested in England and subsequently ordered to be sold. At that time, there was cargo on board for which freight had been prepaid for a journey to the Middle East. Some cargo owners were ready to pay discharge costs of their own cargo in England. But this was impracticable as the Admiralty Marshal could not unload the vessel in parcels, but had to unload it as a whole. A dispute arose as to who should then pay for such whole discharge. When the matter came before the Admiralty Judge (Bandon J.) orders were made for the Admiralty Marshal to discharge the cargo and make it available to those entitled to its possession, so that all expenses would form part of the Marshal's expenses in executing the commission of appraisal and sale. When the matter went in appeal, the Court of Appeal did not agree with the last part of the order by which the expenses were ordered to be part of the

4 (1978) 1 Lloyd's Rep 11

Marshal's expenses. Lord Denning instead directed that “the Admiralty Marshal should deliver the parcels of goods to those claimants who call for them, the cargo-owners, on a reasonable proof of title. But on taking delivery, those cargo-owners ought to give an undertaking to pay such sum, if any, as may ultimately be found to be payable by them in point of law in respect of the costs of discharging the cargo, that is, such sum as they ought justly to be liable for, according to the proportion properly attributable to them.” He further directed: “As for those claimants of all cargo-owners who do not come in and claim their goods then after a reasonable length of time, 56 days is suggested, the only sensible thing is for that unclaimed cargo to be sold and the proceeds of it come into the general fund available for meeting the various liabilities.”

In **Kleinwort Benson Ltd. Vs. Sherkate Sahami Sakht (The “Myrto” No. 2)**⁵, the Court (Sheen J) handled the issue of expenses of discharging the cargo thus:

“ The issue on this motion is whether the expense of discharging the cargo should be borne by the owners of that cargo rateably in proportion to their respective interests or should be treated as a part of the expenses incurred by the Admiralty Marshal. If the latter contention is correct, the discharging costs, as part of the Marshal's expenses, will rank first in the order of priority of claims against the proceeds of sale of the ship.

This is a problem which does not arise very often. It is a rare occurrence for cargo to be on board a ship at the time when the Court orders a ship to be appraised and sold. Looking back at the work of the Admiralty Marshal over several recent years it appears that on average about 175 ships have been arrested each year. Of those 175 ships have been arrested each year. Of those 175 ships an average of only 25 ships have been appraised and sold

5 [1984] Lloyd's Law Reports Vol. 2, 341

by order of this Court. The remaining 150 ships have been released after security for the claim has been given. The number of ships which have been sold by order of the Court is a very high proportion of the ships which have been arrested in actions in rem instituted by mortgagees. The reasons for this are self-evident.

Some ships are arrested at a time when they are loading cargo; others are arrested while they are discharging cargo, and some are arrested when in ballast. The Admiralty Marshal will not stop the discharge of cargo except when the writ is in respect of a claim for salvage. In a claim for salvage the cargo will be arrested unless security is given for the claim against cargo. If the Marshal arrests a ship which is in the process of loading cargo he will, as a matter of practice, warn the ship's agent not to continue loading if the writ in the action has been issued by mortgagees. He gives this warning because of the high probability that there will be an order for the sale of the ship. But in other cases the Marshal will not suggest that loading is discontinued because the probability is that security for the claim will be given. The Marshal will not interfere unnecessarily with the commercial enterprise on which a ship is engaged."

The High Court of Hongkong, in **Dharamdas & Co. (Nigeria) Ltd. Vs. Mingren Development**⁶, after considering the English and American cases, observed as follows:

"It seems to me that the English position derives from the old common law doctrine of frustration. American courts have approached from a different directness. They appear to look at it this way, that from the moment of its arrest a ship is a common fund administered by the court for the common benefit of all those interested in the fund and that any expenses incurred in the administration of that fund would be borne by the fund itself as an "expense of justice". These may include wharf dues: *The Poznan* [1927] AMC 723 or the cost of discharging cargo to make a vessel more easily disposed of by sale: *The Emilia* [1963] AMC 1447. However this approach has not been without its critics: Gilmore and Black Admiralty

6 [1979] HKCU 19

Law, 2nd Edition, p. 603. Obviously there is no perfect solution. Financial disaster, like any other disaster at sea, is likely to cause suffering to the innocent. The argument that the suffering should fall primarily upon the mortgagee I find largely emotional. It is true that he may sometimes have a free choice of when and where he arrest the ship and may thus be able to lessen the impact on others. But so sometimes do other claimants. And no one can, as a general rule, be blamed for exercising his rights at such time as he thinks most propitious to himself. If he takes undue advantage in any particular circumstance the court may take that into account against him when exercising its discretion. The present position is of long stand. As I see it the position was confirmed in 1943 when contracts for the carriage of goods by sea were deliberately excluded from the preparation of the Law Reform (Frustrated Contracts) Act. I am not persuaded that the American approach is so much more just or that conditions now are so different from those in 1943 that I should take it on myself to make a general change.”

12. The net result is that if the vessel, due to its arrest, is unable to discharge the cargo laden on it, the uniform practice followed is that owners of the cargo are entitled to take the cargo out of the vessel (unless of course there is a lien on the cargo) at their own expense. If it is necessary for the Sheriff to supervise the discharge of the cargo, he is entitled to recover his costs from the owners of the cargo in proportion to their interests and if the cargo owners abandon the cargo, the Sheriff can sell it and recover his expenses from the proceeds of sale. There is no warrant to treat the cargo owners' expenses or the Sheriff's cost in that behalf as a first charge upon the vessel or its proceeds.

13. There is, thus, no warrant for discharging the cargo even at Visakhapatnam at the expense of the Sheriff or the Plaintiff herein, much less to make them pay for the transshipment of the cargo to its contractual

destination. Learned Counsel for the Applicant submits that his client shall suffer damages. That is no reason to alter the rule of priorities of maritime claims to be recovered from the res. Any contract of carriage under which the cargo was loaded, which cannot be performed due to arrest, must de facto be at end, subject of course to the cargo owners' right to damages against the other contracting party.

14. Accordingly, the Motion is disposed of by allowing the Applicant to intervene in the suit. The Applicant is permitted to discharge the cargo at the Port of Visakhapatnam, but at its own costs. There will be no other order on the Motion. It is clarified that remedies, if any, of SAIL, who is joined as a party to the Motion, are open and not in any way prejudiced by this order.

(S.C. GUPTE, J.)