IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
APPEAL (L) NO.753 OF 2014
IN
NOTICE OF MOTION NO.34 OF 2002
IN
ADMIRALTY SUIT NO.102 OF 1999
ALONGWITH
NOTICE OF MOTION (L) NO.2801 OF 2014
IN
APPEAL (L) NO.753 OF 2014
ALONGWITH
APPEAL (L) NO. 754 OF 2014
IN
NOTICE OF MOTION NO.1080 OF 2011
IN
ADMIRALTY SUIT NO.102 OF 1999
ALONGWITH
NOTICE OF MOTION (L) NO.2803 OF 2014
IN
APPEAL (L) NO. 754 OF 2014

Stressed Assets Stabilization Fund .... Appellant.
(Org. Plaintiff)

V/s

DAMANIA-I & Anr. .... Respondents.
(Org. Defendants)

Mr. Venkatesh Dhond, Senior Counsel with Mr. Rashmin Khandekar, Mr. Darshan Mehta, Ms. S. Shahi i/b Dhruve Liladhar & Co. for the Appellant.

Mr. Haresh Jagtiani, Senior Counsel with Mr. Suprabh Jain and Mr. Nausheen Rajani for Respondent No.1.

Mr. Ajay Fernandes i/b Motiwalla & Co. for Respondent No.2.

CORAM: V. M. KANADE &
REVATI MOHITE DERE, JJ.

DATE: 5th January, 2015

P.C.:- ***(Per V.M. Kanade, J.)***

1. Both these Appeals can be disposed of by a common order. Both the Appeals are filed by the Appellant; one challenging the order passed in Notice of Motion taken out by the original Defendant – Respondent No.1 herein, seeking permission for release of the Vessel which was arrested by the Appellant and the another Appeal is filed by the Appellant dismissing the Notice of Motion taken out by the Appellant, seeking leave of the Court to sell the Vessel.

2. Brief facts which are relevant for the purpose of deciding both these Appeals are as under:-

3. Appellant advanced a sum of US $ 50,79,365 for the import of Respondent-Vessel, which was repayable as per the schedule stated in the letters dated 07/03/1996 and 24/04/1996. The usual agreements were executed alongwith personal guarantee which was given by the promoters of the said Company. Deed of Mortgage was also executed by the said Company on the Respondent-Vessel.

4. Thereafter, due to non-payment of the amount which was advanced, correspondence was exchange and, finally, the Appellant called upon Respondent No.1 to pay the entire outstanding dues aggregating to Rs 30,68,00,576/- as on 01/07/1999 alongwith further interest. On account of the non-payment of the said amount, Appellant filed a suit being Admiralty Suit No.102 of 1999, seeking an order of declaration that Respondent No.1 were liable to pay an amount of Rs 32,87,62,605/- and for enforcement of its mortgage on the said Respondent-Vessel.

5. During the pendency of the suit, a proposal was given for One Time Settlement (“OTS”) and the Appellant conveyed its approval to the OTS, subject to the terms and conditions mentioned in the letter dated 10/03/2008. The said settlement was subject to the terms and conditions which were in the Appendix of the said letter. Thereafter, there was a modification to the terms of the approved OTS of the dues and a letter to that effect was issued by the Appellant dated 12/11/2010 by which certain terms and conditions of the approved OTS were modified and the payment of the balance amount of Rs 450 lakhs was rescheduled. Respondent No.1, thereafter, took out a Notice of Motion in 2011 being Notice of Motion No.1080 of 2011, seeking an order of this Court directing the Appellant to release the said Vessel.

6. It is contended that Respondent No.1 paid an amount of Rs 550 lakhs and, therefore, as per the terms and conditions of the OTS Scheme, they were entitled to seek release of the said Vessel. Prayer clause (a) of the said Notice of Motion No. 1080 of 2011 reads as under:-

> “(a) that this Hon'ble Court be pleased to release the Defendant Vessel DAMANIA – I from the arrest of this Hon'ble Court;”

This Notice of Motion was heard alongwith Notice of Motion taken out by the Appellant being Notice of Motion No.34 of 2002. The said Notice of Motion was taken out by the Appellant in 2002, seeking various reliefs, including the prayer for selling the said Vessel by public auction.

7. Both these Notices of Motion were heard by the learned Single Judge, who, by his common order, was pleased to allow the Notice of Motion No.1080 of 2011 taken out by Respondent No.1 for release of the Vessel, subject to Respondent No.1 furnishing the Bank Guarantee of Rs 90 lakhs. Notice of Motion taken out by the Appellant, however, was dismissed. Though, no reference is made to the dismissal of the Notice of Motion in the said order, on reading the entire order, it is apparent that the Notice of Motion

No.34 of 2002 taken out by the Appellant has been disposed of by the said order.

8. Mr. Dhond, the learned Senior Counsel appearing on behalf of the Appellant has assailed the order passed by the learned Single Judge. It is submitted that on conjoint reading of the OTS Scheme dated 10/03/2008 and the modification of the said Scheme, it is apparent that the Respondent No.1 were under an obligation to pay not only the principal amount but also the enhanced interest which would be payable on non-payment of the principal amount within one year. He submitted that in the modified OTS Scheme, the time to pay the said amount was extended and the Respondent No.1 were permitted to repay the said amount in 8 installments. However, the clause in the modified OTS Scheme clearly reflected that the said amount which was payable in 8 quarterly installments was to be paid paid with interest and the rate of interest also was @ 10% per annum on the quarterly installments and in the event of there being any default in the payment of quarterly installments as per the repayment rescheduled, the defaulted installment would carry interest @ 14% per annum. It is submitted that, therefore, on account of non-payment of the interest, there was failure on the part of the Respondent No.1 to make payment as per the OTS Scheme.

9. The learned Senior Counsel appearing on behalf of the Appellant then submitted that the Appellant by its letter dated 24/09/2012 had revoked the OTS with immediate effect. It is, therefore, contended that the Respondent No.1 not having performed their obligation, they were not entitled to seek specific performance of the obligation on the part of the Appellant to release the Vessel from the arrest. It is submitted that even assuming without admitting that the said letter dated 24/09/2012 was not proved to be served on the Respondent No.1 and even if, at this stage, concrete material has not been placed on record to establish the said fact even then since the letter was annexed to the Affidavit-in-reply dated 09/04/2014 which was duly served, Respondent No.1 were aware of the said fact of revocation and, therefore, on account of revocation of OTS of dues, it was not open for Respondent No.1 to claim release of the Vessel by relying on some of the clauses of the said OTS.

10. He then submitted that burden of establishing the facts was on Respondent No.1 in a suit filed under Admiralty Jurisdiction. He submitted that the said burden has not been discharged by Respondent No.1. The learned Senior Counsel appearing on behalf of the Appellant then relied on the judgment of the Apex Court in *Videsh Sanchar Nigam Ltd. vs. M.V. Kapitan Kud and Others*[1]. He submitted that the

1 (1996) 7 SCC 127

Apex Court has laid down the factors which are to be taken into consideration by the Court before passing an order of releasing the Vessel after it was arrested. He also submitted that the Outward Register of the Appellant clearly indicated that the letter dated 24/09/2012 was dispatched and there was entry to that effect in the said Register.

11. He further submitted that the finding given by the learned Single Judge that the entire principal amount of Rs 550 lakhs has been paid by the Respondent No.1 and, therefore, Respondent No.1 were entitled to release of the Vessel was incorrect since the learned Single Judge had not taken into consideration the modified Scheme which clearly contemplated payment of interest as per clause (ii) of the modified terms dated 12/11/2010. He, therefore, submitted that the order passed by the learned Single Judge was liable to be set aside.

12. On the other hand, Mr. Jagtiani, the learned Senior Counsel appearing on behalf of the Respondent No.1 submitted that the Defendant/Respondent No.1 had established that the letter dated 24/09/2012 was a fabricated document. He submitted that this fact could be ascertained from the letter written by the Appellant dated 07/03/2011 and the subsequent letter confirming that Respondent No.1 had enclosed 7 cheques of Rs 350 lakhs. He submitted that

it is inconceivable that before the said period was over on 31/12/2012, the Appellant would issue letter dated 24/09/2012. It is submitted that the learned Single Judge was justified in recording the finding and allowing the Notice of Motion taken out by Respondent No.1 – Original Defendant.

13. The learned Counsel appearing on behalf of the Bombay Port Trust submitted that the learned Single Judge had merely adjourned the Chamber Summons which was taken out by the Port Trust. He submitted that if the dues which are payable to the Port Trust are not paid by Respondent No.1, Respondent No.1 may not be permitted to take back their Vessel and that statutory lien of Respondent No.2 would continue over the said Vessel. He submitted that an amount of Rs 827 lakhs (approximately) is due and payable by Respondent No.1 to Respondent No.2 till today. This submission is vehemently opposed by the learned Senior Counsel appearing on behalf of Respondent No.1. He submitted that this claim has not been established by Respondent No.2. It is submitted that as long as Respondent No.2 does not prove their claim, they are not entitled to seek any relief in the Appeals filed by the Appellant herein.

14. After having heard the learned all the learned Counsels appearing on behalf of the respective parties at length, we

are of the view that no case is made out by the Appellant for setting aside the order passed by the learned Single Judge. It is not in dispute that there was OTS Scheme and the approval was granted to the proposal given by the Respondent No.1 for OTS. The first proposal was accepted by letter dated 10/03/2008. Clause 4 of the said letter makes it clear that the settlement would be subject to the terms and conditions given in the Appendix. Since we are concerned only with the relief which is claimed by Respondent No.1 viz that of release of the Vessel which was arrested pursuant to the orders passed by this Court the only relevant clauses in our view would be regarding time when Respondent No.1 would be entitled to claim release of the Vessel. However, for the sake of convenience, we would like to reproduce the relevant clauses from the proposal for payment of Rs 550 lakhs which is approved by the Appellant. The relevant clauses are clauses 1 to 4 which read as under:-

> "i) Rs 50 lakh on issue of LoA (received)
>
> ii) Balance Rs 500 lakh, carrying interest @ 11.25 % p.a., to be paid together with interest within 12 months from the date of LoA i.e. on or before March 9, 2009.
>
> However, in the event, the repayment period extends beyond March 10, 2009

> interest @ 14% p.a. would be charged.
>
> 2. On receipt of Rs 50 lakhs, SASF and company would file consent term before High Court and DRT Mumbai.
>
> 3. We also convey our "No Objection" to the High Court for release of the vessel from the custody of the High Court to enable the company to carry out repairs and operate the vessel subject to the company clearing the bonded dues.
>
> 4. The settlement will also be subject to terms and conditions given in the **Appendix.**"

The clause (e) in the Appendix is most important, which reads as under:-

> "(e) In the event of delay in payment of settlement amount beyond 12 months, the settlement amount would carry interest at 14% p.a., from the date of LOA till clearance of settlement amount. If the default in payment persists beyond one year, SASF shall have the right to reverse the waiver of dues and restore the original liability as per the terms of the loan agreement entered into by the company and adjust the payment received, if any, towards the dues."

Since Respondent No.1 have paid an amount of Rs 50 lakhs as per clause i) and thereafter, there was modification of the terms by letter dated 12/11/2010, the said modified rescheduled payment of balance amount of Rs 450 lakhs was as mentioned in the relevant clauses of the said letter dated 12/11/2010, which read as under:-

> “i) Rs 50 lakh on issue of LoA.
>
> ii) Balance Rs 400 lakh payable in 8 quarterly instalments of Rs 50 lakh each commencing on December 31, 2010 and ending on September 30, 2012, carrying interest @ 10% p.a. with effect from December 31, 2010 payable along with the quarterly instalment. In the event of any default in payment of quarterly instalment as per the repayment schedule, the defaulted instalment would carry @ 14% p.a.
>
> 2. On receipt of Rs 50 lakh, SASF and company would file consent term before High Court (draft enclosed)
>
> 3. SASF would also convey its “No Objection” to the High Court for release of the vessel from the custody of the High Court to enable the company to carry out repairs and operate the vessel subject to the company clearing the bonded dues.
>
> 4. Except above, all other terms and conditions of our earlier letter of approval No.4005/SASF/HO/WSEL dated March 10, 2008 remain unchanged.”

On conjoint reading of both these One Time Settlements, it is apparent that time to make balance payment of Rs 450 lakhs was extended and the payment of Rs 400 lakhs was to be made in 8 quarterly installments.

15. It is an admitted position that the Consent Terms were not filed in this Court as envisaged under Clause 2 of both the One Time Settlement Schemes. However, upon payment of Rs 50 lakhs, Respondent No.1 had taken out the Notice of Motion for release of the Vessel.

16. In our view, upon reading both the original OTS proposal and modified proposal, it is apparent that, prima facie, the tenor of the said OTS Scheme appears to be to permit Respondent No.1 to get back the Vessel after payment of Rs 50 lakhs initially under the OTS dated 10/03/2008 and under the modified OTS dated 12/11/2010 upon payment of Rs 50 lakhs, the Appellant was to convey its no objection to the High Court for release of the Vessel. It is not in dispute that the said amount has been paid by Respondent No.1 and, therefore, in our view, Respondent No.1 became entitled to get the said Vessel released.

17. So far as the question of revocation of the OTS Scheme is concerned, without expressing any opinion on merits of the case and more particularly on the authenticity of the

letter dated 24/09/2012, prima facie we are of the view that the Appellant has not been in a position to establish that the said letter had been communicated to Respondent No.1 and as such, at this stage, it will not be possible for us to arrive at a conclusion that the OTS was revoked by the said letter dated 24/09/2012. The Outward Register does not conclusively establish the fact that this letter was either sent by the Appellant or received by Respondent No.1. The other letter dated 07/03/2011 written by Respondent No.1 to the General Manager of the Appellant and the reply dated 06/06/2011 given by the Appellant's Deputy General Manager does create a doubt as to whether the said letter was, in fact, sent by the Appellant and received by Respondent No.1. The submission made by the learned Senior Counsel appearing on behalf of the Appellant that irrespective of the service or communication of the said letter, Respondent No.1 were not entitled to claim specific performance of the conditions mentioned in the clauses of the OTS on account of non-payment of the interest component, cannot be accepted. Both the OTS proposal dated 10/03/2008 and 12/11/2010, if read together, clearly indicate the intention of the parties that the Vessel was to be released upon initial payment of Rs 50 lakhs, which amount admittedly has been paid.

18. We are therefore of the view that there is no infirmity in

the order which is passed by the learned Single Judge. We, however, clarify that the observations made by the learned Single Judge are of prima facie nature and both the parties will have to establish their contentions in the suit by leading evidence.

19. So far as the contention of the learned Counsel appearing on behalf of Respondent No.2 is concerned, we are of the view that since no appeal has been filed by Respondent No.2 against the impugned order, Respondent No.2 will not be in a position to claim any relief in the Appeals filed by the Appellant herein.

20. We, however, direct the learned Single Judge to hear and decide the Chamber Summons taken out by Respondent No.2 expeditiously. We also direct Respondent No.1 herein to insure the Vessel after its release. It is clarified that Respondent No.1 shall not sell the Vessel without seeking leave of this Court.

21. With the above directions, both these Appeals are disposed of. Since the Appeals are disposed of Notices of Motion taken out in the said Appeals do not survive and they are also disposed of.

22. At this stage, the learned Senior Counsel appearing on

behalf of the Appellant seeks leave for continuation of stay which was granted during pendency of these Appeals. Request for stay, however, is rejected since the Vessel was arrested in 1999 and the full Bank Guarantee of Rs 90 lakhs has been furnished by Respondent No.1.

(REVATI MOHITE DERE, J.) **(V.M. KANADE, J.)**

BDPPS