IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

SUMMARY SUIT NO.355 OF 2014

Safiran Payam Darya Shipping Lines Co. ….Plaintiffs

V/s.

Blobex International Pvt. Ltd. ....Defendants

Mr.Vishal Sheth a/w Ms.Ritcha Sahay i/by Bimal Rajasekhar for the plaintiffs.

None for the defendants.

CORAM : K.R.SHRIRAM,J
DATE : 15.4.2016

P.C.:-

1 At the outset, the counsel for the plaintiffs seeks leave to amend the prayer clause in the plaint. Leave granted. Amendment to be carried out forthwith. Re-verification dispensed with.

2 When the summons for judgment was heard the court was pleased to conclude that it was a fit case to hold that the plaintiffs were entitled to a summary decree. Nevertheless the court granted the defendants to raise defence and defend the suit in trial but subject to precondition of depositing principal amount of Rs.1,94,36,000/- with the Prothonotary & Senior Master, High Court, Bombay within six weeks. The plaintiffs have tendered a certificate issued by the Prothonotary & Senior Master certifying that defendants have not deposited the amount as directed. It is also stated that the matter

was not carried in appeal.

3 This is what the court said while deciding the summons for judgment and concluding that it was a fit case to hold that the plaintiffs are entitled to a summary decree.

> *In September 2011 a cargo of approximately 15,000 Mts of rock phosphate was loaded on plaintiff's motor vessel ABBA (Said Vessel) for carriage from Egypt to Bombay. Defendant was the notified party mentioned in 3 bills of lading that were issued covering the entire cargo. Bills of lading that had been issued by plaintiff were endorsed in favour of defendant and defendant as endorsee was entitled to receive goods. Though it is the case of defendant that it had paid freight to one Zenith Corporation, which was acting as desponent owner, it is the plaintiff's case that they were not paid any freight and they were not paid charges which agreegated to about US$ 12,12,000/. As this amount was outstanding, plaintiff exercised lien on the cargo.*
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> *2 As defendant wanted delivery of the cargo against the bills of lading issued by plaintiff, plaintiff and defendant, on or about 26.11.2011 entered into a written agreement under which defendant undertook to pay the outstanding amount of US$ 13,12,000/. The counsel for plaintiff stated that though the agreement provided the outstanding amount to be US $ 13,12,000/, the actual outstanding was only US $ 12,12,000/under the said agreement. As provided in the agreement, defendant acknowledged the fact that the said vessel had arrived at Bombay port and that they had approached plaintiff for delivery of cargo on which plaintiff has exercised lien; to secure delivery of the cargo and to discharge plaintiff's lien on cargo, defendant has agreed to pay to plaintiff the freight and part of demurrage and detention losses as defendant's debt to plaintiff for enabling plaintiff to release the cargo. Under the said agreement, defendant confirmed and acknowledged the debt to plaintiff agreegating to US $ 12,12,000/(Not US $ 13,12,000/). Out of the said total debt, defendant was to pay US $ 562,000/ to plaintiff's agent, M/s. J.M.Baxi & Co. before release of the delivery order for 10,000 MTs and breaking bulk; a further sum of US $ 100,000/ by demand draft within two days of commencement of discharge and in any event before completion of discharge of 10,000 MTs of the cargo from the vessel at Bombay; a further amount of US $ 170,000/ before issuance of delivery order for balance 4,783 MTs and lastly US $ 30,000/ within 15th day after completion of discharge; US $ 100,000/within 17th day after completion of discharge, US $ 100,000/within 95th day after completion of discharge and US $ 150,000/within 120th day after completion of discharge all towards*

plaintiff's demurrage and detention costs. The subject matter of the suit is restricted to the last limb, i.e, US $ 380,000/. Plaintiff confirms having received all the other amounts. In respect of this US $ 380,000/, defendant issued 4 post dated cheques for a sum equivalent in Indian rupees. For the amount of US $ 30,000/, US $ 100,000/, US $ 100,000/and US $ 150,000/,defendant issued four cheques for Rs.15,36,000/; Rs.51,20,000/, Rs.51,20,000/and Rs.76,80,000/. All these four cheques were dishonoured with the endorsement "Payment stopped by the Drawer".

3 By the letter dated 27.8.2013, plaintiff through their advocate called upon defendant to make payment of an amount of Rs.2,47,00,000/(at the conversion rate applicable on that date) the sum equivalent of US $ 380,000/. Plaintiff also claimed interest @ 18% p.a.

4 In reply, defendant, through their advocate's letter dated 12.9.2013, for the first time raised the ground that they were compelled to enter into the agreement and threatened with the sale of cargo to third party because of which settlement agreement was entered into by defendant with plaintiff. Defendant also took a stand that plaintiff should not have insisted upon the original bills of lading for delivery and further called upon plaintiff to return the sum of US$ 842,000/ that they had paid to plaintiff under the settlement agreement. It is necessary to note that defendant had not raised any protest prior to plaintiff calling upon defendant to pay the amount of US $ 380,000/.

5 Plaintiff's case is based upon the Settlement Agreement and dishonoured cheques. The defence of defendant is that the agreement relied upon by plaintiff has been executed under coercion and largescale fraud having been played by plaintiff, one M/s. Ocean Pacific, one M/s. Zenith Corporation (Romania) and M/s. J.M.Baxi and Company, i.e., agent of the plaintiff and, therefore, the settlement agreement had no sanctity in the eyes of law. It is also the case of defendant that they had paid Zenith Corporation a sum of US$ 304,150/in seven installments by 26.9.2011, which amount, apart from the freight of US $ 2,70,000/also included an amount of US $ 34,150/(approximately) towards other miscellaneous charges. The counsel for plaintiff, however, was not able to explain, if according to the defendant they had paid US $ 304,150/ by26.9.2011 then why did the Zenith Corporation (As per Exhibits 19 and 20 to the reply) call upon defendant to pay the balance amount of freight. The counsel stated that by this, parties had ganged up against defendant and they had no arrangement whatsoever with plaintiff and according to him, Zenith Corporation had represented itself to be owner as per the fixture note at Ex.1 to the reply. At the same time, it is quite clear from Ex.23 to the reply which is an Email from defendant to plaintiff and others, that defendant always knew that Zenith Corporation was only a desponent owner. It is true that the stand taken by *defendant is that they have fulfilled their obligations under the fixture note with Zenith Corporation. At the same time, it has to be noted that plaintiff gave up its lien on the cargo purely on the basis of the Settlement Agreement entered into by defendant with plaintiff. Plaintiff otherwise would not have discharged its lien on cargo. The salient portion of the agreement is as under:*

> *"This is an Agreement for resolving the unpaid amount of Owners losses (Freight + Demurrage + Detention) of M.V.ABBA which was fixed for loading 15000 Mtons Rock Phosphate from Hamrawein Port to Mumbai by Charterer namely M/s. Ocean Pacific C/P and Fixture Note dated 28.07.2011; but till date (26.12.2011), the Owners have not yet received the Freight + Demurrage and Detention. M/s. Globex International Pvt. Ltd., New Delhi110 025, India (Globex), being the cargo receiver of the cargo presently on board the vessel, m.v.ABBA, presently at Mumbai Port, allege that they have previously paid the agreed freight and load port demurrage to M/s. Zenith Corporation, Romania, with which the Owners are not concerned. Globex however have approached the Owner for delivery of their cargo which has been liened by the Owner for recovery of Owners' losses as above. To secure delivery of the cargo, and to discharge Owners' lien on the cargo, Globex have agreed to pay to the Owner, the freight and part of the demurrage and detention losses as Globex's debt to the Owner, for enabling the Owners to release the cargo under and subject to following procedures and indemnities:*
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> *AAA - (1) Receivers M/s. Globex confirm and acknowledge their debt to the Owners aggregating to US $ 1,312,000. Out of the said total debt, the Receivers, Globex, shall pay US $ 562,000/(US$ 462,000/ as full freight + US$ 100,000/ as first part of detention) to Owners' Agent, M/s. J.M.Baxi & Co., Mumbai, India, before entitling them to release of the Delivery Order for 10,000 MT and breaking bulk. Owners on their part must ensure that the Delivery Order is released as soon as possible after depositing the Demand Draft in their Agent's bank.*
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> *(2) Receivers M/s. Globex will pay a further US $ 100,000 by Demand Draft to Owners Agent, M/s. J.M.Baxi & Co. Mumbai, within two days of commencement of discharge and in any event before completion of discharge of 10,000 MT of the cargo from the vessel at Mumbai. In case of Receivers failure to pay, Owner has right to stop discharging and all consequences/vessel's delay and costs shall be on the Receivers.*
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> *(3) Receiver M/s. Globex shall give a Demand Draft to Owners Agent, M/s. J.M.Baxi & Co.,Mumbai for US $ 170,000/before issuance of Delivery Order for balance 4,783 MT.*
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> *(4) US $ 30,000/ is payable within 15th day after completion of discharge; and a further US$ 350,000/ in 3 parts – (1) US $ 100,000/payable within 70th day after completion of*

discharge, (2) US $ 100,000/payable within 95th day after completion of discharge, and (3) US$ 150,000/payable within 120th day after completion of discharge; all towards Owners' demurrage and detention costs.

BBB – Receivers hereby confirm that they have no claims whatsoever against the vessel and her Owners; and further undertake not to arrest and/or detain the vessel. The Receivers shall indemnify the Owner and Despondent Owner and their Agent, and hold them fully indemnified harmless, in respect of any loss, damage or expenses caused by any arrest or detention whether or not the same is justified.

CCC – Receivers accept that the cargo has been on board for a long time and Owners are not aware of the quality of the cargo, the receivers hereby indemnify Owners against all claims in respect of the quality of the cargo.

DDD - In consideration of the Owners agreeing to issue Delivery Orders to the receiver and discharging the cargo, the receivers hereby confirm and undertake not to detain or arrest the vessel and indemnify Owners and keep them harmless in respect of any loss, damage, claim or any other expense of whatsoever nature which the Owners may sustain by so delivering the cargo to the receivers.

EEE – The Receivers guarantee to discharge the vessel at the rate of 2000 MT PWWD and seven days free time once discharge takes place at Cargo Working Anchorage. Time will start to count upon vessel's arrival at Working Anchorage.

FFF - (1) Stevedore damage / laytime commencement for discharge port as per Gencon 94 (2) Demurrage Rate at discharge Port: US$ 7000/PDPRFD Receivers shall be responsible and liable for payment of further demurrage, if any, and all applicable costs & charges, as per Clauses EEE & FFF above.

GGG – This agreement shall be construed in accordance with Indian Laws and each and every person liable under this indemnity shall be subjected to the jurisdiction of the courts in India.

HHH – This Agreement shall in no way hinder the Owners and Receivers from taking separate and suitable action against the Charterers of the vessel, M/s. Ocean Pacific, M/s. Zenith Corporation, Romania and Yi Hai Shipping, London and for receiving their dues, damages, losses, claims, etc."

(emphasis supplied)

6 Therefore, defendant having persuaded plaintiff to give up its lien and made part payment and further balance by issuing post dated cheques, defendant today cannot today go back on the agreement. In fact, even when time to deposit postdated cheques came, the stand of defendant was "Kindly do not present the cheque until any further instruction as we need to discuss this with the owners".Nowhere defendant has taken a stand that they *were coerced to enter into Settlement Agreement and issue the cheques. The first time such a stand was taken only when plaintiff issued their notice of demand dated 27.8.2013, which is almost two years after the cargo was discharged and delivered to defendant. It is to be noted that the receiver of the cargo was defendant. Moreover, this Court has also held in Balaji Pressure Vessels Ltd. V/s. Bharat Petroleum Corporation Limited1 that simple commercial pressure is not good enough. The pressure so as to constitute duress must be such that the victim must have entered the contract against his will, must have had no alternative course open to him, and must have been confronted with coercive acts by the party exerting the pressure and the pressure exercised by the other party must be such as the law would not regard legitimate. Paragraph 12 of the said judgment reads as under:*

> *"12 In Atlas Express Ltd. (Supra), we find a good deal of discussion on economic duress as a factor which vitiates a consent. A litany of judgments has been noted, where English judges have acknowledged the existence of this concept, and applied it to a variety of situations. The passages from the Judgment of Lord Scarman in Pao On Vs Lau Yiu 1979 (3) ALL ER 65 (PC) quoted therein succinctly bring out the meaning of economic duress. 'Duress, whatever form it takes, is a coercion of the will so as to vitiate consent', notes the learned judge, but explains that in a contractual situation commercial pressure on a party alone is not enough. There must be some factor "which could in law be regarded as a coercion of his will so as to vitiate his consent". In such cases, it may be material to enquire whether the person alleged to have been coerced did or did not protest; whether, at the time he was allegedly coerced into making the contract, he did or did not have an alternative course open to him such as an adequate legal remedy; whether he was independently advised; and whether after entering the contract he took steps to avoid it. Simple commercial pressure is not good enough. The pressure so as to constitute duress must be such that the victim must have entered the contract against his will, must have had no alternative course open to him, and must have been confronted with coercive acts by the party exerting the pressure. In other words, the pressure exercised by the other party must be such as the law would not regard legitimate. After a review of various authorities on the point, the necessary ingredients of a plea of economic duress as a ground for avoiding a contract are stated by the Delhi High Court as follows:*
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> *"(a) Pressure which is legitimate;*
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> *(b) Its effect on the victim i.e. that the pressure must be a significant cause inducing the Claimant to enter into the contract;*
>
> *(c) Lack of reasonable alternative i.e., that the practical effect of the pressure was that there is compulsion on, or a lack of practical choice for, the victim."*

7 In my view, plaintiff's stand was that they were not paid freight and detention charges. If one looks at the copies of the two bills of lading annexed to the plaint, it does not say that freight was prepaid. The two bills of lading have been issued by plaintiff in which defendant is shown in the box 'Notify Address'. If defendant had made the payments of freight, then certainly the bills of lading would have reflected the freight paid. The exercise of lien by plaintiff was certainly legitimate.

8 Even the Delhi High Court in the matter of M/s. Double Dot Finance Limited v. M/s. Goyal MG Gases Limited 2 has held that the plea of coercion, undue influence or duress raised by a party to challenge the 'accord and satisfaction' cannot be accepted lightly merely upon word of mouth. The burden to establish this plea remains on the party which raises it.

9 Having considered facts and circumstances of the case in its entirety, even if the defendant may have a case against Zenith Corporation, the defendant has confirmed and acknowledged its debt to plaintiff to secure delivery of cargo and discharge plaintiff's lien on the cargo, agreed to pay to plaintiff the freight and part of the demurrage and detention losses as defendant's debts to plaintiff to persuade the plaintiff to release the cargo to defendant. Having persuaded plaintiff to discharge and release the cargo against issuing postdated cheques after entering into the settlement agreement, and the defendant, having taken delivery of the cargo, cannot now raise an objection by alleging sham, fraud, undue influence or coercion, etc. The defence of defendant smacks of lack of bonafide. Defence of defendant is just a sham to avoid payment. It is also to be noted that the counsel for the defendant stated that the defendant has not commenced any action against Zenith Corporation which according to defendant, it had paid freight to.

4 The counsel for the plaintiffs tenders the original of the notice dated 27.8.2013 and the reply dated 12.9.2013 from the Advocates for the defendants. As regards the other documents, in the affidavit in reply filed by the defendants, they have also relied on all the documents relied upon by the plaintiffs. The defendants have also admitted that the settlement agreement was entered into and the

fact that cheques were issued by them pursuant thereto. Certified copy of the affidavit in reply is received and marked Exh.P-1. Documents are taken on record and marked Exh.P-2 & Exh.P-3.

5 Under Section 58 of the Evidence Act 1872, no fact need to be proved in any proceedings which the parties thereto or their agents have agreed to or admitted or deemed to have been admitted. From the affidavit in reply filed to the summons for judgment, the defendants are deemed to have admitted the documents relied upon by the plaintiffs. Paragraphs- 13, 15 & 19 of the judgment of the Apex court in [1]Gautam Sarup Vs. Leela Jetly & ors. read as under :-

> "13. An admission made in a pleading is not to be treated in the same manner as an admission in a document. An admission made by a party to the lis is admissible against him proprio vigore.
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> *14.........*
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> *15. A thing admitted in view of Section 58 of the Indian Evidence Act need not be proved. Order VIII Rule 5 of the Code of Civil Procedure provides that even a vague or evasive denial may be treated to be an admission in which event the court may pass a decree in favour of the plaintiff. Relying on or on the basis thereof a suit, having regard to the provisions of Order XII Rule 6 of the Code of Civil Procedure may also be decreed on admission. It is one thing to say that without resiling from an admission, it would be permissible to explain under what circumstances the same had been made or it was made under a mistaken belief or to clarify one's stand inter alia in regard to the extent or effect of such admission, but it is another thing to say that a person can be permitted to totally resile therefrom.*
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> *The decisions of this Court unfortunately in this regard had not been uniform. We would notice a few of them.*
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> *16........*
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> *17........*

1 AIR 2008 SCW 4113

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19. Hiralal (supra) has been recently noticed by this Court in Sangramsinh P. Gaekwar & Ors. v. Shantadevi P. Gaekwad (Dead) through LRs. & Ors. [(2005) 11 SCC 314], wherein it is stated :

"215.Admissions made by Respondent 1 were admissible against her proprio vigore.

216. In Nagindas Ramdas v. Dalpatram Ichharam this Court held :

"... Admissions if true and clear, are by far the best proof of the facts admitted. Admissions in pleadings or judicial admissions, admissible under Section 58 of the Evidence Act, made by the parties or their agents at or before the hearing of the case, stand on a higher footing than evidentiary admissions. The former class of admissions are fully binding on the party that makes them and constitute a waiver of proof. They by themselves can be made the foundation of the rights of the parties. On the ot her hand, evidentiary admissions which are receivable at the trial as evidence, are by themselves, not conclusive. They can be shown to be wrong."

(See also Bishwanath Prasad v. Dwarka Prasad.)

217. In Viswalakshmi Sasidharan v. Branch Manager, Syndicate Bank this Court held :

"On the other hand, it is admitted that due to slump in the market they could not sell the goods, realise the price of the finished product and pay back the loan to the Bank. That admission stands in their way to plead at the later stage that they suffered loss on account of the deficiency in service."

218. Judicial admissions by themselves can be made the foundations of the rights of the parties."

Modi spinning (supra) and Hiralal (supra) were followed therein.

Yet again in Union of India v. Pramod Gupta (Dead) by LRs. & Ors.

[(2005) 12 SCC 1] this Court held :

"Before an amendment can be carried out in terms of Order 6 Rule 17 of the Code of Civil Procedure the court is required to apply its mind on several factors including

viz. whether by reason of such amendment the claimant intends to resile from an express admission made by him. In such an event the application for amendment may not be allowed. (See Modi Spg. & Wvg. Mills Co. Ltd. v. Ladha Ram & Co., Heeralal v. Kalyan Mal and Sangramsinh P. Gaekwad v. Shantadevi P. Gaekwad)"

6 In the circumstances, plaintiffs are entitled to a decree against the defendants.

7 The defendants are ordered and decreed to pay to the plaintiffs a sum of US$ 3,80,000 and the interest thereon @ 2% p.a. from the date of filing the suit until payment/realization. The plaintiffs are also entitled to cost in the sum of Rs.1,00,000/-. Decree be drawn up accordingly. Suit stands disposed.

(K.R.SHRIRAM,J)