IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ADMIRALTY AND VICE ADMIRALTY JURISDICTION

NOTICE OF MOTION NO.1264 OF 2013
IN
ADMIRALTY SUIT NO.45 OF 2009

Safmarine Container Line ....Applicant/Org. Def.No.3

IN THE MATTER BETWEEN :

Eastman International ....Plaintiff

Vs.

m.v. Maersk Kalmar & Ors. ....Defendants

Mr. Ashwin Shanker a/w. Mr. Bimal Rajasekhar for the plaintiff.
Ms. Shreema Doshi a/w. Mr. Adhiraj Malhotra i/b. Dunmorr Sett for the applicant/defendant no.3.

CORAM : K.R.SHRIRAM, J.
DATE : 15th DECEMBER, 2016

P.C.

1 The defendant no.3 has taken out this notice of motion for rejection of the plaint under Order 7 Rule 11 of the Code of Civil Procedure as far as defendant no.3 is concerned and for framing of issue under Section 9A of the Code of Civil Procedure (CPC).

2 So far as framing of preliminary issue under Section 9A was concerned, the same was rejected vide a order dated 8th September, 2015. Therefore, what was left was only to consider the prayer for rejection of the plaint (incorrectly mentioned as dismiss the suit) under Order 7 Rule 11 of CPC.

3 Order 7 Rule 11 of the Code of Civil Procedure reads as under :

> *"11. Rejection of plaint — The plaint shall be rejected in the following cases:-*
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> *(a) where it does not disclose a cause of action;*
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> *(b) where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so;*
>
> *(c) where the relief claimed is properly valued, but the plaint is returned upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;*
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> *(d) where the suit appears from the statement in the plaint to be barred by any law :*
>
> *(e) where it is not filed in duplicate;*
>
> *(f) where the plaintiff fails to comply with the provisions of rule 9*
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> *[Provided that the time fixed by the Court for the correction of the valuation or supplying of the requisite stamp-papers shall not be extended unless the Court, for reasons to be recorded, is satisfied that the plaintiff was prevented by any cause of an exceptional nature from correcting the valuation or supplying the requisite stamp-papers, as the case may be, within the time fixed by the Court and that refusal to extend such time would cause grave injustice to the plaintiff.]"*

4 The counsel for the applicant submitted that even though in the prayer clause – (b) it is mentioned clause -(a) of Order 7 Rule 11, the court should also reject the plaint under clause (d) because from the statement in the plaint the suit appears to be barred by law because this court has no jurisdiction as against defendant no.3.

5 Let us see whether the applicant is correct or not.

6 The suit, as originally filed, is against four defendants. Defendant no.1 was a vessel which it is stated in the plaint, without any

basis, as jointly owned by defendant no.3 and defendant no.4. Defendant no.2 is a party in Congo with whom the plaintiff had entered into a Contract of Sale to sell spaghetti for total sum of USD 212,940. The origin of the cargo was in Mersin, Turkey. The cargo was loaded on board m.v. HANSA BERGEN at port Mersin, Turkey, for discharge at Pointe Noire, Congo. It is stated that two Bills of Lading were issued by one Maersk Denizcilik AS and it is alleged, again without any prima facie evidence, that they were the Agents of defendant no.3. It is further alleged that defendant no.3 confirmed that the cargo was delivered to defendant no.2 without production or surrender of the original Bill of Lading and as a result thereof, the plaintiff suffered a loss of USD 192,940. The only allegation against defendant no.3 can be found in paragraph 2 of the plaint which reads as under :

> *"2. THE FIRST SHIPMENT. Under a Contract of Sale (countersigned Proforma Invoice) dated 31.3.2008 between the plaintiffs and the defendant no.2, it was agreed to sell Spaghetti 250 Gms (40 packets in a container) for total amount of USD 212,940. Under its terms, the origin was in Turkey. An advance of USD 20,000 was to be paid by the defendant no.2 to the plaintiffs and the balance amount was to be paid on faxing of the Bill of Lading. Accordingly, the goods were loaded on board the Vessel HANSA BERGEN at the landport Mersin in Turkey for discharge at Pointe Noire, Congo. Two Bill of Ladings bearing No.SAFM 751124549 and SAFM 526308584 came to be issued by the defendant no.3 through their Agents Maersk Denizcilik AS. The shippers were shown as the plaintiffs. The consignee was "to order". These goods were loaded on 10.8.2008. The plaintiffs understand that the goods have been mis-delivered without production of the original Bill of Lading. The plaintiffs is the holder of the original of this Bill of Lading. The defendant no.3 have confirmed that they have already delivered this cargo without production or surrender of the original Bill of Lading. As a result of the above, the plaintiffs have suffered a loss of the balance of the invoice value of USD 192,940 for the above goods. In the alternative, they have lost their ownership, control and possession*

> *over the cargo as described within the Bill of Lading. The plaintiffs also hold the defendants liable for breach of contract. The defendants are also guilty of conversion, and the tort of interference with a contract. The defendant no.2 is liable for breach of the Sale of Contract for failing to make the balance payment, collect the Bill of Lading and in turn subsequently collect the cargo upon surrendering the original Bill of Lading to the defendant no.3."*

7 Relying upon the judgment of the Apex Court in the matter of ***M.V. Elisabeth and Ors. vs. Harwan Investment and Trading Pvt. Ltd.***[1] various arguments were raised by the counsel for the applicant to submit that this court did not even have jurisdiction as against defendant no.1 vessel was concerned, when the suit was filed the vessel was not even in the territorial waters and within jurisdiction of this court because in the plaint it is stated that the vessel was expected to arrive at port Nhave Sheva on 23rd August, 2009.

8 The counsel for the plaintiff submitted that a Single Judge of this court has held that this court can exercise jurisdiction even if the vessel is not within the territorial waters which judgment was though set aside by a Division Bench, the Apex Court has stayed the judgment of the Division Bench and therefore, the Single Judge's judgment still holds good and in any event, that issue is pending before the Apex Court.

9 The jurisdiction clause in paragraph 17 of the plaint reads as under :

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1. AIR 1993 SC 1014

> *"17. The 1st defendant vessel is presently expected in the port and harbour of Nhava Sheva. The Admiralty Jurisdiction of this Hon'ble Court extends throughout the territorial waters of India. Consequently, this Hon'ble Court has jurisdiction to receive, try and dispose of the suit and pass interlocutory orders. The defendants reside/carry on business within jurisdiction."*

10 It will also be useful to reproduce paragraph 12 of the plaint as well, which reads as under :

> *"12. The defendant vessel is presently in the port and harbour of Nhava Sheva and after completion of her employment will, unless detained or arrested, sail to an unknown destination, thereby resulting in the plaintiff's claim remaining unsecured. The vessel is expected to arrive in Port Nhava Sheva on 23rd August, 2009. She is likely to sail out of jurisdiction on 25th August, 2009. Consequently, an ad-interim order of arrest of the defendant vessel is necessary, failing which grave and irretrievable loss and injury will be caused to the plaintiff. In the absence of an order of arrest, the plaintiff's suit will be rendered infructuous as there are no assets within India, other than the defendant vessel, which the plaintiff can look to for satisfaction of its claim against the owner of the defendant vessel. Moreover there is no other equally alternative efficacious remedy available to the plaintiff."*

Therefore, in paragraph 12 it is stated the vessel was in the port and harbour of Nhava Sheva and in paragraph 17 it is stated in the first sentence vessel was expected in the port and harbour of Nhava Sheva and in the second sentence of paragraph 12 it is stated the vessel is expected to arrive in port Nhave Sheva on 23rd August, 2009. Mr. Shanker stated by oversight in paragraph 12 the word "expected" was missed out in the first sentence after the word "presently". Admiralty jurisdiction is based on the presence of the vessel within the territorial waters of India. Mr. Shanker submitted that it is only stated the 1st defendant vessel was expected in the port and harbour of Nhava Sheva but that does not mean the vessel was not within the territorial waters of India. I agree with Mr. Shanker that for the court to exercise its jurisdiction vessel need not be in a port but only in territorial waters. However, the obligation is on the plaintiff to atleast make positive averment that the vessel is within the territorial waters of India. No such averment is made.

11 The fact in this case is caveat against the arrest of defendant no.1 was entered into in this court and defendant no.1 furnished security against the arrest of defendant no.1 vessel. By furnishing the security, in my view, defendant no.1 or its owners have submitted to the jurisdiction of this court.

12 In paragraph 1 of the plaint it is alleged that defendant no.3 and defendant no.4 are shipping companies owned and/or controlled and/or beneficially owned by the same interest and it is also alleged that defendant no.1 was a vessel beneficially owned and/or controlled by the defendant no.3 and defendant no.4 against whom the plaintiff have a claim in personam.

13 After the suit was filed, the plaintiff has settled the suit with defendant no.1 and defendant no.4 and by an order dated 22nd March, 2013 the suit against defendant nos.1 and 4 was disposed of. The plaintiff has not amended the plaint after the suit was disposed of. Mr. Shanker,

counsel for the plaintiff submitted that Order 7 Rule 11 provides that the court has to consider whether the plaint has to be rejected or not upon reading of the plaint and since the plaint has not been amended, the court should accept the same as it is, even though the suit as against defendant nos.1 and 4 has been disposed and continue to exercise jurisdiction.

14 The Apex Court in the matter of ***T. Arivandandam vs T. V. Satyapal & Another***[2] has held that if on a meaningful not formal reading of the plaint it is found manifestly vexatious and merit-less in not disclosing a clear right to sue, the court should not entertain the action. Justice V R. Krishna Iyer (as he then was), in his inimitable style held as under :

> *" 5. We have not the slightest hesitation in condemning the petitioner for the gross abuse of the process of the court repeatedly and unrepentantly resorted to. From the statement of the facts found in the judgment of the High Court, it is perfectly plain that the suit now, pending before the First Munsif's Court, Bangalore, is a flagrant misuse of the mercies of the law in receiving plaints. The learned Munsif must remember that if on a meaningful-not formal reading of the plaint it is manifestly vexatious, and meritless, in the sense of not disclosing a clear right to sue, he should exercise his power under Or.VII r.11 C.P.C taking care to see that the ground mentioned therein is fulfilled. And, if clever, drafting has created the illusion of a cause of action, nip it in the bud at the first hearing by examining the party searchingly under Order X C.P.C. An activist Judge is the answer to irresponsible law suits. The trial court should insist imperatively on examining the party at the first bearing so that bogus litigation can be shot down at the earliest stage. The Penal Code (ch.XI) is also resourceful enough to meet such men, and must be triggered against them. In this case, the learned Judge to his cost realised what George Bernard Shaw remarked on the assassination of Mahatma Gandhi "It is dangerous to be too good.*
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> *6. The trial court in this case will remind itself of s.35-A C.P.C and take deterrent action if it is satisfied that the litigation was inspired by vexatious motives and altogether groundless. In any view, that suit has no survival value and should be disposed of forthwith after giving an immediate hearing to the parties concerned.*

2. AIR 1977 SC 2421

> *7. We regret the infliction of the ordeal upon the learned Judge of the High Court by a callous party. We more than regret the circumstance that the party concerned has been able to prevail upon one lawyer or the other to present to the court a case which was disingenuous or worse. It may be a valuable contribution to the cause of justice if counsel screen wholly fraudulent and frivolous litigation refusing to be beguiled by dubious clients. And remembering that an advocate is an officer of justice he owes it to society not to collaborate in shady actions. The Bar Council of India, we hope will activate this obligation. We are constrained to make these observations and hope that the co-operation of the Bar will be readily forthcoming to the Bench for spending judicial time on worthwhile dispute and avoiding the distraction of sham litigation such as the one we are disposing of. Another moral of this unrighteous chain litigation is the gullible grant of ex parte orders tempts gamblers in litigation into easy courts. A judge who succumbs to ex parte pressure in unmerited cases helps devalue the judicial process."*

15 Any attempt of parties to cleverly draft the plaint and create an illusion of the cause of action and obtain orders of arrest of vessel to pressurize owners to settle the matter should be nipped in the bud. In the plaint as drafted there is no averment as to how this court will have jurisdiction as against defendant no.3 was concerned. A bald and baseless statement is made "defendants reside/carry on business within jurisdiction" and address given of defendant no.3 is of Belgium. The transaction based on which the plaintiff claims to have suffered a loss was based on an agreement with a party based in Congo (defendant no.2) for shipment of cargo from Mersin in Turkey to a port in Congo. The plaintiff also is based in Ludhiana. There is nothing that has happened within the jurisdiction of this court. The plaintiff has made bald averments in the plaint that defendant no.1 was beneficially owned by defendant no.3 and defendant no.4 and defendant no.3 and defendant no.4 were beneficially owned by an unnamed entity.

16 There is not even a shred of evidence to even prima facie suggest or conclude that defendant no.3 and defendant no.4 were jointly owned by common interest and defendant no.3 and defendant no.4 jointly owned defendant no.1 vessel. These are mere bald statements in the plaint. The jurisdiction clause (Clause 17) in the plaint is totally silent as to how this court has jurisdiction as against defendant no.3 is concerned. It simply says “the defendants reside/carry on business within jurisdiction”. The address in the cause title of defendant no.3 is in Belgium. How defendant no.3 is supposed to be residing or carrying on business within jurisdiction is not mentioned. If one reads the whole plaint one may gather what the plaintiff is trying to convey, though it is not clear from the plaint because defendant no.3 and defendant no.4 are alleged to beneficial owners of defendant no.1 and defendant no.3 and defendant no.4 are jointly and beneficially owned by a common interest, which common interest is not even mentioned, as the defendant no.1 vessel was expected in the port of Nhava Sheva, this court will have jurisdiction against defendant no.3. The averments in the plaint are absolute hodgepodge.

17 The suit was filed in 2009. This notice of motion has been taken out in 2013. We are in 2016. Even at this stage the plaintiff has not bothered to even produce as to how defendant no.3 was beneficial owner of defendant no.1 or defendant no.3 and defendant no.4 were beneficially

owned by a common entity and atleast name that entity or how defendant no.3 is supposed to reside/carry on business within this court's jurisdiction. Admittedly the Bill of Lading has not been issued by defendant no.3 but by a separate entity. It is alleged that the entity who issued the Bill of Lading was the Agent of defendant no.3 (no evidence of this) but the delivery of cargo was given by defendant no.3. That alleged mis-delivery also happened in Congo. Not within the jurisdiction of this court.

18 On a meaningful and not formal reading of the plaint it is quite obvious that this court has no jurisdiction as against defendant no.3. In my view, it will be waste of time if such a suit is kept pending and make the parties to go on with the trial. Plaint against defendant no.3 is rejected.

The notice of motion is accordingly disposed with no order as to costs.

19 At this stage the counsel for the plaintiff states that they have not served defendant no.2 and the plaintiff do not wish to prosecute the suit as against defendant no.2 is concerned.

20 In view of the above, nothing survives in the suit. The suit accordingly stands disposed.

(K.R. SHRIRAM, J.)

Gauri Gaekwad