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

NOTICE OF MOTION NO.1575 OF 2016
IN
ADMIRALTY SUIT NO.77 OF 2013

Axis Bank Limited ….Applicant/Plaintiff

Vs.

M.T. Pratibha Koyna and Ors. ....Defendants

Mr. Nimay Dave a/w. Mr. Mayur Bhojwani and Ms. Prangana Barua i/b. M/s. Manilal Kher Ambalal and Co. for applicant/plaintiff.
Mr. Bimal Rajasekhar i/b. Mr. Ashwin Shanker for Intervener.
Mr. Rajiv Singh i/b. Mr. Rahul P. Jain for defendant nos.9 and 10 and for respondent.
Mr. Sharan Jagtiani for Official Liquidator for defendant no.4.

CORAM : K.R.SHRIRAM, J.
DATE : 20th DECEMBER, 2017

P.C.:

NOTICE OF MOTION NO.1575 OF 2016

1 This notice of motion is taken out by applicant (a) to declare the written statement dated 20th December, 2013 filed on behalf of defendants as false; (b) to inquire into the offences under Sections 191 and 193 of Indian Penal Code, 1860 as per the provisions of the Section 340 read with Section 195 (b) of Criminal Procedure Code, 1973 and deal with respondent in accordance with law for making false statements on oath during judicial proceedings and (c) to direct and commit the matter to the concerned Metropolitan Magistrate Court to prosecute respondent.

2 Plaintiff has filed this suit against seven vessels, i.e., defendant nos.1,2,3,5,6,7 and 8, which were owned by Pratibha Shipping Company

Limited (in liquidation). The company in liquidation is defendant no.4. Plaintiff has filed this suit for recovering all the amounts lent to defendant no.4 (in liquidation) as per various facility agreement entered into between plaintiff and defendant no.4. Defendant nos.2,3,5,6 and 8 have been sold and the sale proceeds are lying either with this Court or with Madras High Court. Defendant no.1 is still in the possession of Arab Shipbuilding and Repair Yard (ASRY) of Bahrain. Defendant no.7 has been sold by Chinese Shipyard after adjusting the amounts payable to it and has paid over the surplus amount to Corporation Bank Limited. This is what the Court learnt from the submissions made by counsel.

3 It is the case of applicant that respondent, who had declared the written statement on behalf of the company (in liquidation) defendant no.4, had made false statements knowing them to be false. The relevant portions on which, applicant is making this allegation, could be found in paragraph 2 and paragraph 4 of the written statement, which read as under :

> 2. With reference to paragraph 2, the Defendants state that the current status of Defendant Nos.1,2 and 3 is as follows :
>
> a) Defendant No.1, to the best of our knowledge, is in control of ASRY yard Bahrain which is exercising possessory lien over the same.
>
> ……….
>
> ……….
>
> 4. With reference to paragraph 4, the Defendants state that the status of Defendant Nos.5,6,7 and 8 as on date is as follows :

a. ....

b. ....

c. Defendant No.7 is Zhoushan Xinya Shipyard Limited, China and Zhoushan Xinya Shipyard Limited, China is exercising possessory lien on the Defendant Vessel."

4 It is the case of applicant that from the affidavit filed by ASRY in chamber summons that applicant had taken out being chamber summons no.652 of 2014, it came to light that possessory lien (incorrectly mentioned in the affidavit in support as "order of arrest") has been given up by ASRY and the vessel was infact trading on the date the written statement was declared. Applicant has relied upon a copy of not only the affidavit filed by ASRY but also copy of the corporate guarantee dated 1st October, 2013 entered into between plaintiff, Pratibha Oil and Natural Gas Private Limited (PONG) and ASRY. Mr. Dave, counsel for applicant states that from the corporate guarantee it is quite evident that defendant no.1, viz., Pratibha Koyna has been released to the Managers/Charterers upon executing the said corporate guarantee. Mr. Dave further states that the name of Pratibha Koyna has been changed to Surya Kuber to defraud the creditors. Mr. Dave states that respondent, who has signed the corporate guarantee on behalf of PONG, is the same person who had declared the written statement dated 20th December, 2013 and respondent having signed the said corporate guarantee, was aware that Pratibha Koyna was no more under possessory lien or arrest of ASRY and ought to have

disclosed the same in the written statement and by stating in the written statement "Defendant No.1, to the best of our knowledge, is in control of ASRY yard Bahrain which is exercising possessory lien over the same" has made an incorrect statement in the written statement and therefore, is guilty of perjury.

5 Another ground for alleging respondent having committed perjury is with regard to defendant no.7 vessel. According to Mr. Dave, it is stated in the written statement that "defendant no.7 is under the possessory lien of Zhoushan Xinya Shipyard Limited, China (the said Shipyard)" which is also incorrect because the said vessel had been sold by the said Shipyard to the knowledge of company (in liquidation) some time in June, 2013. Mr. Dave states that when the company (in liquidation), of which respondent was the Managing Director, was aware in June, 2013 that the vessel had been sold, still respondent chose on 20th December, 2013 to state in the written statement that the said Shipyard was exercising possessory lien over the defendant vessel.

6 Mr. Jagtiani, counsel appearing for Official Liquidator supported the views expressed by Mr. Dave and relied upon a judgment of the Apex Court in the matter of ***Pritish vs. State of Maharashtra and Ors.***[1] to submit that once the court forms an opinion that the matter has to

1. (2002) 1 SCC 253

be referred to the Magistrate, it is not mandatory that there should be an inquiry made into any offence which appears to have been committed.

7 Mr. Singh, counsel for respondent states that respondent has not made any statement intentionally which could be termed incorrect. Mr. Singh further states that the statements made in the written statement were based on the understanding of respondent. So far as Pratibha Koyna is concerned, Mr. Singh states that on the date the written statement was declared, ASRY continued to exercise control over the vessel. So far as defendant no.7, i.e., Pratibha Chandrabhaga is concerned, respondent was still under the impression that the vessel was yet to be sold on the date the written statement was declared.

8 I have considered the affidavit in support, reply and rejoinder. So far as Pratibha Koyna is concerned, it is indisputed that in the written statement respondent has verified a statement that defendant no.1 was in control of ASRY which is exercising possessory lien over the same though he has qualified it with “to the best of our knowledge”. In the corporate guarantee dated 1st October, 2013 it is stated as under :

> *……….. The Beneficiary has possessory lien of marine vessel, “Pratibha Koyna” currently berthed in the port of ASRY Shipyard, Bahrain for the total outstanding sum of US$ 5.42 million (US Dollars Five million and four hundred twenty thousand only)*
>
> ………….
>
> *ii. In the event there is a breach by the Charterers (with the Owners pertaining to the Charterparty Agreement as per Annex A), in respect*

> *of the timely payments to the Beneficiary, the Guarantor/Owners will deliver at their own costs, marine vessel "Pratibha Koyna" to the Beneficiary at the nearest nominated port of call as per the instructions of the Beneficiary..............*

9 It is not disputed that the vessel Pratibha Koyna was redelivered to ASRY on 26th December, 2014 as could be found in paragraph 7.3 of the affidavit filed by ASRY in company application no.609 of 2015. It is also to be noted that subsequently on 17th February, 2015 a seizure order was passed by the Civil Court of the Kingdom of Bahrain for arrest of defendant no.1 vessel - Pratibha Koyna.

10 So far as Pratibha Chandrabhaga is concerned, there is a letter annexed to the affidavit in reply from Corporation Bank dated 24th October, 2013 in which it is noted that "competent authority has accorded permission to issue No Objection Certificate to Chinese Shipyard for sale of vessel MT Pratibha Chandrabhaga."

11 The explanation of respondent in view of this letter is that the Corporation Bank having accorded its permission only in late October, 2013, the vessel was still in possession of the Chinese Shipyard and was yet to be sold. Mr. Singh states that even for a moment, we take that the vessel had been sold by the Chinese Shipyard, the surplus from the sale proceeds was anyway going to Corporation Bank and it cannot be alleged that the money went into the pocket of respondent.

12 I have before me a judgment of the Apex Court in the matter of ***M.S. Ahlawat vs. State of Haryana and Anr.***[2] relied upon by Mr. Singh on behalf of respondent. It will be useful to reproduce paragraphs 5,6 and 7 of the said judgment and the same read as under :

> *5. Chapter XI of IPC deals with false evidence and offences against public justice' and Section 193 occurring therein provides for punishment for giving or fabricating false evidence in a judicial proceeding. Section 195 of the Criminal Procedure Code (Cr.P.C.) provides that where an act amounts to an offence of contempt of the lawful authority of public servants or to an offence against public justice such as giving false evidence under Section 193 IPC, etc. or to an offence relating to documents actually used in a court, private prosecutions are barred absolutely and only the court in relation to which the offence was committed may initiate proceedings. Provisions of Section 195 Cr.P.C. are mandatory and no court has jurisdiction to take cognizance of any of the offences mentioned therein unless there is a complaint in writing as required under that Section. It is settled law that every incorrect or false statement does not make it incumbent upon the court to order prosecution, but to exercise judicial discretion to order prosecution only in the larger interest of the administration of justice.*
>
> *6. Section 340 Cr.P.C. prescribes the procedure as to how a complaint may be preferred under Section 195 Cr.P.C. While under Section 195 Cr.P.C, it is open to the court before which the offence was committed to prefer a complaint for the prosecution of the offender, Section 340 Cr.P.C. prescribes the procedure as to how that complaint may be preferred. Provisions under Section 195 Cr.P.C. are mandatory and no court can take cognizance of offences referred to therein. It is in respect of such offences the court has jurisdiction to proceed under Section 340 Cr.P.C. and a complaint outside the provisions of Section 340 Cr.P.C. cannot be filed by any civil, revenue or criminal court under its inherent jurisdiction.*
>
> *7. This Court in Chajoo Ram v, Radhey Shyam & Anr., AIR (1971) SC 1367, stated that where the offence relates to a court under Section 195 Cr.P.C. sanction of the court should be obtained first and such sanction should be granted only in those cases where me perjury appears to be deliberate and conscious and the conviction is reasonably probable or likely and to start prosecution for perjury too readily and too frequently without due care and caution and on inconclusive and doubtful material defeats its very end. It is made clear that there is no inherent power to make a complaint apart from the provisions of Section 195 Cr.P.C.*

2. (2000) 1 SCC 278

13 Therefore, even if I proceed on the basis that respondent had made a false statement or incorrect statement in the written statement, it would not make it incumbent upon this Court to order prosecution. Having heard the counsel and also having considered the affidavits filed, I am unable to come to a conclusion and respondent's interpretation of the documents cannot be faulted to conclude that respondent had made those submissions in the written statement deliberately and consciously and those statements were against the larger interest of administration of justice.

14 In the circumstances, I am unable to grant the reliefs as sought in the notice of motion. Notice of motion stands dismissed with no order as to costs.

GENERAL

15 On 5th March 2014, issues were framed in the present suit. Thereafter on 14th September 2016, defendant nos.9 & 10 were permitted to intervene in the present suit and file their written statement. Written statements have been filed by Defendant Nos.9 & 10. Accordingly, the following Additional Issues are framed:

> i. Whether the Plaintiff carried out due diligence before sanctioning the Financial Facility in question to Defendant No.4 (now in liquidation)?
>
> ii. Whether Defendant Nos.9 & 10 prove that the Plaintiff and Defendant No.4 (now in liquidation) acted in

collusion?

16 On 18th November 2015, cross-examination of PW-1 was closed as the Ex- Director/s of the company (in liquidation) had not come forward to give instructions to the Official Liquidator. Considering that defendant nos.9 & 10 were impleaded thereafter, by the consent of parties, order dated 18th November 2015 is partially modified and defendant cos.9 & 10 are permitted to cross-examine PW-1.

17 In view of the Additional Issues framed today, plaintiff is permitted to file and serve additional affidavit of evidence alongwith compilation of additional documents, if any, on or before 11th January 2018.

18 Suit is directed to be listed on 24th January 2018 at 3.00 p.m. for marking of additional documents.

(K.R. SHRIRAM, J.)