

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

IN ITS COMMERCIAL DIVISION

COMMERCIAL SUIT NO. 54 OF 2013

(SUMMARY SUIT NO. 113 OF 2013)

SJJ Marine Pte. Ltd.)
a Company under the appropriate laws of)
Singapore having their office at A Upper Cross)
Street, #08-08, Peoples Park Centre, Singapore)... Plaintiff

VERSUS

1. Pisces Exim (India) Private Limited)
a Company incorporated under the Companies)
Act, 1956, having its registered office at)
Row Bungalow No.5, Valmiki Baug,)
Mungul, Margao-403 601 and its branch office)
at Pisces Exim India Pvt. Ltd. , Ground floor,)
Rane Sadan, Road No.5, Natwar Nagar,)
Opposite Janata Store, Jogeshwari (East))
Mumbai-400 060)
2. PS Exim (HK) Ltd., a company incorporated)
under the appropriate laws of Hong Kong,)
having its office at 9/F, Bel Trade Commercial)
Building, 3 Burrows Road, Wanchai, Hong Kong)
and carrying on business in Mumbai through)
Pisces Exim India Pvt. Ltd. , Ground floor,)
Rane Sadan, Road No.5, Natwar Nagar,)
Opposite Janata Store, Jogeshwari (East))

Mumbai-400 060

)...Defendants

Ms. Naira Jejeebhoy with Ms. Jyotika Jain i/by M/s. Bose and Mitra and Co., for Plaintiff.

Mr. Hari Wadhvana, for Defendants.

CORAM: S.J. KATHAWALLA, J.

DATE : 10TH APRIL, 2017

ORAL JUDGMENT:

1. The Plaintiff, a company incorporated under the laws of Singapore, has filed the present Suit under Order XXXVII of the Code of Civil Procedure, 1908 for recovery of a liquidated sum of money from Defendant Nos. 1 and 2, who are sister concerns. Defendant No. 1 is a company incorporated under the Indian Companies Act, 1956 while Defendant No. 2 is a company incorporated under the laws of Hong Kong. After the institution of the present Suit, Defendant No. 2 has been liquidated pursuant to the order dated 22nd October 2012 passed by the High Court of Hong Kong SAR. On 11th December 2015 the Hong Kong Liquidators declared a first and final dividend of 2.494% of all admitted unsecured claims against Defendant No. 2 since the liquidated value of the assets of Defendant No. 2 was insufficient to satisfy all claims in full.

Pursuant to this declaration of dividend, the Plaintiff has received a sum of Hong Kong Dollars 536,005.82 from Defendant No. 2's Liquidators as and towards part satisfaction of its claims against Defendant No. 2, including claims forming the subject matter of the present Suit. In the circumstances, the Plaintiff is proceeding only against Defendant No. 1 in the present Suit and has submitted that proportionate credit of 2.494% of the total claim of USD 1,570,000 may be given.

2. The claims in the present Suit arise on a written agreement dated 18th July 2012 ("**the Settlement Agreement**") entered into between the Plaintiff on the one hand and Defendant No. 1 on the other hand. The Settlement Agreement was entered into pursuant to the Charterparty Agreements dated 26th April 2012 and 7th May 2012 by which Defendant No. 2 took on hire two vessels of the Plaintiff, *MV Dubai Crown* and *MV Peristil*, respectively. Defendant No. 2 admittedly failed and neglected to pay the freight, demurrage and detention charges due to the Plaintiff under these Charterparty Agreements. The Plaintiff accordingly, exercised its lien over the cargo being carried by the said vessels. Defendant No. 1, as the sister concern of Defendant No. 2, entered into the Settlement

Agreement with the Plaintiff in order to secure the Plaintiff's claims and obtain discharge of the cargo.

3. Under the Settlement Agreement Defendant No. 1 (described as Party B) agreed and confirmed that it would pay to the Plaintiff (described as Party A) certain amounts as stipulated therein in consideration for which the Plaintiff gave up its lien on the cargo on board *MV Peristil* and, further, agreed to discharge the cargo on *MV Dubai Crown*. The relevant clauses of the Settlement Agreement dated 18 July 2012 are set out below:

“1. Party B confirm that they would be paying the discharge port Demurrage / Detention of Mv Peristil by 30th July 2012. The amount to be in the range of Usd 500,000 – 570,000. Exact amount is to be agreed later together with supporting evidence.

2. Party B confirm that they would clear the Freight of Mv Dubai Crown i.e. Usd 8,70,500.20 along with Demurrage /Detention at Load port i.e. Usd 170,000 on or before 30th July 2012.

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5. Upon receipt of payment mentioned in clause 1 & 2 and letter in clause 4 Party A have to discharge the cargo of MV Dubai Crown and keep 10,000 mts of the cargo under their or protective agents custody. Failing which party A to be mutually discuss about discharge and payment schedule.

6. Upon confirmation of this agreement Party A to instruct their agents to discharge and release cargo of Mv Peristil.”

4. Subsequently, on 20th July 2012, Defendant No. 2 sent an email to the Plaintiff's representative confirming the lump sum amount towards the final payment for the vessel *MV Peristil* to be USD 530,000.

The relevant portion of the email is produced as under:

“Reference to our agreement dated 18th July 2012, Charterers confirm a lump sum amount of Usd 530,000 towards final payment of Mv. Peristil discharge port demurrage / detention.”

5. The Plaintiff through their reply dated 20th July 2012, confirmed the amount of USD 530,000. The Plaintiff and the Defendants accordingly, confirmed and crystallized the amount payable under Clause 1 of the Settlement Agreement to be USD 530,000. The Defendants were therefore unconditionally liable to pay the Plaintiff the specified sums. However, the Defendants thereafter failed to make payment in accordance with the terms of the Settlement Agreement and the Plaintiff was constrained to file this summary suit for recovery of an amount of USD 1,570,500.20/- together with interest thereon from the date of the suit.

6. Defendant No. 1 entered appearance and sought leave to defend. By an order dated 2nd April 2014 Defendant No. 1 was granted

leave to defend conditional upon it depositing the Plaintiff's claim. The order of 2nd April 2014 was challenged by Defendant No. 1 in Appeal No. 199 of 2014, which was dismissed by an order dated 19th September 2014. Paragraphs 2, 10, 11 and 12 of the order dismissing Defendant No. 1's Appeal are relevant and reproduced hereunder:

"2. The appeal is entirely without merit. The plaintiff's case is so firmly established that the learned Judge, ought, in fact, to have made the sums for judgment absolute and passed a decree. Instead, the learned Judge granted the appellant leave to defend, conditional upon depositing only a part of the plaintiff's claim. It is, therefore, respondent No. 1 i.e. the plaintiff who is the aggrieved party and not the appellant. The plaintiff, however, has not filed a cross appeal as an appeal against such an order is not maintainable by the plaintiff.

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10. Had the matter ended with the agreement dated 18th July, 2012, that may well have been so. However, subsequently, the exact amount due under clause 1 was agreed to between the parties. By an email message dated 20th July, 2012, defendant No. 2 confirmed that a lumpsum amount of US Dollars 5,30,000 was due towards final payment of MV Peristil's discharge port demurrage/detention. Defendant No. 2 requested the plaintiff to confirm the same, which the plaintiff did, by its email in reply also dated 20th July, 2012. Thus, the amounts in respect of clause 1 is also liquidated amount. We are, therefore, unable to agree with Mr. Pratap that the learned Judge, to use his phrase, "actually intended" the order to be restricted to the amounts due under clause 2.

11. There is, therefore, absolutely no defence whatsoever to the plaintiff's claim in suit. This was, in fact, a fit case for making the

summons for judgment absolute for the entire amount claimed in the suit. The learned Judge, however, granted the appellant/defendant No. 1 leave to defendant conditional upon the deposit of an amount of only US Dollars 10.40 lacs, which is obviously the amount only with respect to Clause 2. There was, in fact, no reason for the learned Judge not having passed an order even in respect of amounts due under clause 1. However, no appeal has been filed against the order by respondent No. 1 i.e. the plaintiff, obviously in view of the fact that an appeal by the plaintiff against an order of conditional leave, is not maintainable. 12. The appeal is, therefore, dismissed. The time to deposit the amount as per the impugned order is extended up to and including 31st October, 2014. There shall be no order as to costs.”

7. Defendant No. 1 did not challenge the order dated 19th September 2014 dismissing its Appeal and the findings therein have become final. On Defendant No. 1 failing to deposit the claim amount within the prescribed period, the Plaintiff moved for ex-parte decree. In the interim, the Plaintiff had also initiated winding up proceedings against Defendant No. 1 being, Company Petition No.10 of 2013. The Plaintiff however withdrew the said Company Petition, and accordingly on 21st October 2015, it was ordered that the present Suit be listed for ex-parte decree.

8. On 10th April 2017 the matter was listed before me for passing of an ex-parte decree. At the hearing before me on 10th April 2017, counsel

appeared on behalf of Defendant No. 1 and accepted that Defendant No. 1 had not deposited the claim amount within the time line prescribed by this Court in its order of 2nd April 2014 (and extended by the Ld. Division Bench's order of 19th September 2014). However, counsel appearing for Defendant No. 1 submitted that while granting conditional leave to defend, the learned Judge did not intend the consequence of non-compliance with the deposit order to result in a decree even in respect of the sums under clause 1 of the Settlement Agreement. Counsel appearing for the Plaintiff submitted that this stance of the Defendant is foreclosed by the findings of the Ld. Division Bench in paragraphs 9 and 10 of its order dated 19th September 2014 disposing of Defendant No. 1's Appeal. It was further submitted that the sums due to the Plaintiff were in fact liquidated and in the light of Defendant No. 1's failure to deposit in compliance with the directions of this Court, the Plaintiff is entitled to a decree forthwith and the Defendant No. 1 does not have a right of audience as the present Suit has been listed for ex-parte decree.

9. It is clear from the record that on 21st October 2015 it was ordered that the present Suit be listed for ex-parte decree. Admittedly,

Defendant No. 1 has not deposited the amount as directed within the prescribed period. The non-deposit certificate issued by the Prothonotary and Senior Master dated 18th September 2014 is tendered in court and taken on record.

10. The submission by Defendant No. 1 that while granting conditional leave to defend the learned Judge did not intend that a decree would follow in respect of the entire claim is not borne out from a plain reading of the order dated 2nd April 2014. In any event, the Ld. Division Bench has already rejected a similar contention raised by Defendant No. 1 in Appeal No. 199 of 2014. In fact, the Ld. Division Bench has observed that Defendant No. 1 has no defence and this was a fit case for making the summons for judgment absolute for the entire amount claimed. The order dated 19th September 2014 passed by the Ld. Division Bench has attained finality. Accordingly, Defendant No. 1's submission is rejected and the Plaintiff is entitled to a decree in respect of its entire claim.

11. The original documents relied upon by the Plaintiff are tendered in Court and taken on record. The Plaintiff has also placed on record the Notice of Dividend dated 11th December 2015 and letter dated

5th January 2016 enclosing a cheque for HK\$ 536,005.82/-, received from the Hong Kong Liquidators of Defendant No. 2. The Plaintiff has subsequently also filed an Affidavit dated 11th April 2017 under Section 65B of the Indian Evidence Act in order to prove the email correspondence annexed to the Plaint. Maximum court fees have already been paid by the Plaintiff in respect of the present proceedings.

12. In the circumstances, I am satisfied that the Plaintiff is entitled to a decree for the entire claim amount of USD 1,570,000/- from Defendant No. 1. However, proportionate credit is to be given in respect of the recovery made from the Liquidators of Defendant No. 2. Accordingly, the claimed amount of USD 1,570,000/- is reduced by 2.494% being the final dividend declared and paid by the Liquidators of Defendant No. 2. After deduction of USD 39,155.80/- from the total claim amount, the balance amount payable is USD 1,530,844.20 and the Plaintiff is entitled to a judgment and decree in respect of this amount. The Plaintiff is also entitled to interest thereon under Section 34 of the Code of Civil Procedure, 1908.

13. In view thereof, Defendant No. 1 is ordered and directed to pay to the Plaintiff USD 1,530,844.20/- together with interest thereon at the

rate of 8% per annum from the date of filing the suit till payment and/or realization thereof. The decretal amount shall be paid by Defendant No. 1 to the Plaintiff in US Dollars.

14. Defendant No. 1 shall pay costs of the Suit to the Plaintiff to the tune of Rs. 1,00,000/-.

15. The present Suit is accordingly decreed and a decree of USD 1,530,844.20/- with interest at the rate of 8% per annum thereon is passed in favour of the Plaintiff and against Defendant No. 1. The Office shall return the original documents to the Advocate for the Plaintiff upon the Advocate for the Plaintiff handing over Photostat copies of the said documents duly certified by him as true copies.

(S.J. KATHAWALLA, J.)