pdp

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
COMMERCIAL APPEAL LODGING NO. 28 OF 2018
IN
COMMERCIAL ADMIRALTY SUIT (L) NO. 3 OF 2018
WITH
NOTICE OF MOTION (L) NO. 42 OF OF 2018

Shadiram & Sons Pvt. Ltd.
19-A, South Raja Street, 1st Floor,
Tuticorin – 620 001 .. Appellant
(Org. Plaintiff)

Versus

m.v. RIVA WIND (IMO No. 9301196)
flying the flag of Marshall Islands,
presently in Port and Harbour Tuticorin
along with hull, appurtenances and
machinery. .. Respondent
(Defendant)

Mr. Prashant S. Pratap, Senior Advocate i/by Mr. Ashwin Shanker for appellant – plaintiff.

Mr. Rahul Narichania, Senior Advocate a/w Mr. Pranoy Kottaram and Ms. Varsha Ramann i/by Bose & Mitra & Co. for respondent-defendant.

CORAM: NARESH H. PATIL &
NITIN W. SAMBRE, JJ.

RESERVED ON : JANUARY 23, 2018

PRONOUNCED ON : FEBRUARY 06, 2018

ORDER [Per Naresh H. Patil, J.] :

1. The appeal is directed against the Order dated 12/01/2018 passed by the learned Single Judge in Judge's Order No. 3 of 2018 in Commercial Admiralty Suit (L) No. 3 of 2018.

2. The appellant – original plaintiff filed Commercial Admiralty Suit Lodging No. 3 of 2018 on 11/1/2018 praying for various reliefs, including relief of arrest of the defendant's vessel “MV Riva Wind”. In Clause (c) of the prayers, the plaintiff prayed as under :-

> (c) For an order and decree in favour of the Plaintiff and against the Defendant vessel, MV Riva Wind for the sum of INR 41,05,04,838.00 (Indian Rupee Forty One Crores Five Lakhs Four Thousand Eight Hundred Thirty Eight Only) together with interest thereon at the rate of 12% per annum from the date of the institution of the suit till payment / realization and costs of Rs.12,73,700.00 and poundage as per the Particulars of Claim annexed as Exhibit “S” hereto;

3. The suit was taken up for order on 12/1/2018, on motion. The appellant prayed for arrest of defendant's vessel which is at the port and harbour of Tuticorin. It is pleaded that plaintiff is the holder and/or consignee and/or endorsee of eight bills of lading. The goods, yellow peas were to be transported by sea in bulk through the defendant's vessel from the port of Odessa, Ukraine for discharge at the port of Tuticorin and/or Hazira and /or Mumbai. The plaintiff's claim in the suit is for loss and damage caused as a result of breach of contract of carriage by the owners of the defendant vessel and delay in prosecuting the voyage from Odessa to Tuticorin. It is contended that a sales contract was entered into between J. K. International (as Sellers) and the plaintiffs (as Buyer) for the purchase of 30,000 mts. of yellow peas at a price of USD 303 per mt. CIFFO Tuticorin. The vessel arrived at the port of Odessa for loading on 31/7/2017 and was berthed. It is submitted that the full quantity of 30,000 mts. was available for loading and the vessel would have completed loading on 2/8/2017. According to the plaintiff it appears that there was an engine breakdown and for this purpose the vessel was shifted on 11/8/2017 for repair works. So no loading took place between 1/8/2017 and 11/8/2017. Loading operations and cargo documentation was completed on 2/10/2017 and the vessel sailed from Odessa for Tuticorin. According to

the plaintiff the period of delay on account of the main engine breakdown was about 42 days plus an additional 9 days for re-berthing as the vessel had to await her turn. In the ordinary course, the vessel would have covered the distance within 45 days. On this basis it was submitted that the vessel ought to have arrived at the discharge port on or about 16/9/2017. There was a delay of 52 days in arrival of the vessel. The plaintiff is liable to pay the purchase price of the goods to the Seller under the Sale Contract. On 8/11/2017 the Government of India issued a notification imposing customs duty at the rate of 50% on import of yellow peas which was hitherto nil. Due to the late arrival of the vessel, the landed cost of the cargo got increased by 50% and imposition of customs duty caused substantial loss to the plaintiff. In para 16 of the plaint the plaintiff states as under :-

> "16. The plaintiffs further submit that it would have been in the reasonable contemplation of the owners of the Defendant that some loss to the consignee/cargo interests was likely or was liable to result on account of the delay in arrival of the vessel and delay in delivery of marketable goods under a Contract of Carriage of Goods by Sea. Even though the exact nature of the loss would not have been known, the Defendants would have known that the Plaintiffs would very likely suffer a

loss with reference to the marketability of the goods carried on board the vessel. Imposition of customs duty was a possibility that would affect the marketability of the goods. In the present case as a result of the imposition of customs duty on 8 November 2017, which was not in force in Spetember 2017 when the vessel was expected to otherwise arrive, the plaintiffs have suffered a loss in the amount of duty payable of Rs.28,83,22,701.78 on the value of the cargo. The marketability of cargo has been severely impacted on account of the imposition of customs duty which has increased the landed cost of the cargo. The Plaintiff submits that this is the measure of damages that they are seeking to claim and recovery from the Defendant."

In para 23 of the plaint, it is stated as under :-

"23. Entirely with prejudice to the above, the Plaintiff submits that in addition to the loss on account of the customs duty, the Plaintiff has also suffered a loss due to the fall in the market price of the goods at the port of destination. The demand for yellow peas is at its highest during the pre-diwali period of September and October 2017 since it is mainly used in the making of sweets and savoury items. There is a fall in the market price after Diwali. As per the quotation obtained by the Plaintiff from two independent brokers, the market price of the yellow peas at Tuticorin on 15 September 2017 was Rs.22,500.00 per mt. The market price when the goods actually arrived on 7 November 2017 was Rs.20,200.00 per mt. The fall in the market price was Rs.2,300.00 per mt. This aggregates to a loss of Rs.6,86,61,589.00 basis the total quantity of 28,852 mts. The Plaintiff is entitled to claim this amount as damages from the owners of the Respondent vessel for delay in arrival of the cargo at the port of discharge........"

4. The claim of the plaintiff is mentioned in para 25 of the plaint, which reads as under :-

"25. Under the circumstances, the Plaintiffs have the following claims against the Defendants:

a) INR 5,35,20,547.50 towards demurrage at Tuticorin;

b) INR 28,83,22,701.78 towards 50% customs duty levied on the yellow peas – as per the demand from Customs department; This security will be voluntarily reduced if the Customs duty liability of the Plaintiffs can be avoided. Add to this interest at 12% per annum as potential Interest liability to the Customs department under section 47(2) Indian Customs Act 1962 in case of delayed payment of duty.

c) Loss in market value of cargo based on fall in market price: Rs. 6,86,61,589/-.

5. The learned Single Judge rejected the prayer of the appellant

– plaintiff to arrest the vessel for two items of claim i.e. 50% customs duty amounting to Rs.28,83,22,701.78 and loss of market value amounting to Rs.6,86,61,589/-. However, the learned Single Judge, prima facie, found substance in the claim made in respect of demurrage to the tune of Rs.5,35,20,547.50 which according to the learned Judge falls under the category of Article 1 Clause 1 (g) and /or (h) of the International Convention of Arrest of Ships, 1999. The learned Single Judge was prima facie convinced to grant relief on that count.

6. The learned Senior Counsel appearing for the appellant – plaintiff submitted that on the remaining two counts the the learned Single Judge ought to have allowed the motion by directing arrest of vessel and/or by directing furnishing of security.

7. In support of his submissions, the learned Senior Counsel appearing for the appellant placed reliance on the judgment in the case of **KOUFOS vs. C. Czarnikow Limited [1969 (1) AC 350].** In the submission of the counsel, Section 73 of the Indian Contract Act, 1872 is based on the judgment of the English Court in the case of Hadley vs. Baxendale (1854) 9 Exch 341 which was decided in the year 1853. This

test was incorporated in the Indian Contract Act which was enacted in 1872. The same test is followed in English law even today. The entire fulcrum of the case of the appellant is based on the judgment of House of Lord in KOUFOS's case (Supra). According tot the learned counsel said judgment brings English law at par with American law. The learned counsel submitted that loss on account of imposition of customs duty is also a loss flowing from the delay on the part of the respondent in completing the voyage with reasonable dispatch. It is submitted that application for arrest of the vessel is an action *in rem.* The test is that the plaintiff has to make out a reasonably arguable case. The requirement is to prove at the outset that the plaintiff has a cause of action sustainable in law. The counsel submits that in case a foreign ship is freed from arrest, it may leave and never return to the country in which case the plaintiff would have lost their right forever to entertain proceedings *in rem*. The claim of the appellant for security is not oppressive but based on custom duty, loss on account of a fall in market price and demurrage charges claimed on actuals.

8. The learned Senior Counsel further submitted that the learned Single Judge is in agreement with the judgment in KOUFOS's case

(supra). One of the claims relating to demurrage was favourbly considered by the learned Single Judge and on the same line the learned Single Judge ought to have granted relief to the appellant. The learned counsel places reliance on the following judgments :

(a) KOUFOS vs. C. Czarnikow Ltd. [1969 SCC 350, House of Lords].

(b) Liverpool & London S.P. & I Association Ltd. vs. M. V. Sea success I and Another [(2004) 9 SCC 512].

(c) Videsh Sanchar Nigam Ltd. vs. M. V. Kapitan Kud and ors. [(1996) 7 SCC 127].

9. The learned Senior Counsel appearing for the respondent-defendant submitted that in the facts of the case, the view adopted by the learned Single Judge is a probable view, it is reasonable and proper one. A prima facie view has to be taken in the circumstances and the learned Single Judge has rightly rejected the request of the appellant on two items of claim i.e. (a) custom duty and (b) loss in market value of the goods. The learned counsel submitted that changes in custom duty payable are brought by publishing a notification in the official gazette and advance knowledge of such changes is never made available to the public to avoid evasion of

custom duty by importers or manipulation of records. As regards the claim on fall in market value, it is submitted that the owners of the vessel being foreigners having their offices in Marshall Islands, could never have known, much less contemplated the specific market or use of the said cargo in India. They were not expected to know that market price of the cargo will fall in case of delay in delivery. The appellant had not provided any evidence to substantiate its claim of alleged fall in the market price of the cargo. The issue is required to be considered on the basis of material evidence which can be only done during the hearing of the suit. The plaintiff must establish a prima facie case for claiming such reliefs and in the view of the learned counsel, the plaintiff has failed to establish its claim at an interim stage. The view of the learned Single Judge was based on appreciation of material provided to him by the appellant. Placing reliance on the judgment of the Supreme Court in the case of Wander Ltd. & Anr. vs. Antox India Pvt. Ltd. **[1990 Supp SCC 727]**, the learned counsel submitted that the Appellate Court will not re-assess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material placed on record. The counsel submitted that the respondent could not have foreseen the claims made by the plaintiff based on alleged delayed delivery of the goods. The issues raised by the appellant are required to be contested in the suit. The order of arrest of vessel is a harsh order which attracts serious consequences. The learned counsel, therefore, prayed for dismissal of the appeal. The learned counsel places reliance on the following judgments:

(a) Firm Kishanlal Shrilal Patwa vs. Union of India, Rly. Administration now Northern Rly. and anr. [AIR 1960 MP 289].

(b) Titantium Tantalum Products Ltd. vs. Shriram Alkali & Chemicals [2006 SCC OnLine Del 584]

(c) Wander Ltd. and anr. vs. Antox India P. Ptd. [1990 (Supp) SCC 727]

(d) The Queen's Bench Division decision in The Polo II [1977 Vol. 2 Lloyd's Law Reports 115].

(e) M/s. Kimberly – Clark Lever Private Ltd. vs. M.V. Eagle Excellence [Appeal No.240 of 2007 decided by the Division Bench of this court on 13/8/2008.]

10. We have gone through the impugned order and the record placed before us. The learned Single Judge while dealing with the submissions made on behalf of the plaintiff recorded a statement made by the learned counsel for the plaintiff that there is no document which

guaranteed that the vessel would arrive at Tuticorin in 45 days. Therefore, the issue arises as to what is the reasonable period for a vessel to reach its destination. The principles laid down in the case of KOUFOS (Supra) was cited before the learned Single Judge, who had agreed with the judgment that the vessel has to make voyage within a reasonable time. But at the same time, the learned Single Judge observed that what is reasonable time is a question of fact. The causes of delay in making the voyage are required to be looked into. The learned Single Judge was obviously to take a prima facie view of the matter at that stage because the request of the plaintiff was to order arrest of the vessel and/or to direct security to be furnished by the defendant.

11. The learned Single Judge was convinced to accept the plea of the plaintiff in respect of claim of demurrage of Rs.5,35,20,547.50 and accordingly that relief was granted.

12. We had gone through the judgments cited by the learned counsel appearing for both the parties. The principles laid down in the cited judgments, the parameters for appreciating a prima facie case and the principles behind directing arrest of vessel are set out in the judgments

cited above. In the facts, we find that it would be reasonable and proper to observe that as regards the two claims which were denied by the learned Single Judge, the plaintiff needs to lead necessary evidence for establishing the same as to whether the respondent-defendant could foresee the loss caused to the appellant-plaintiff as claimed and in fact such loss was caused. It is a matter which requires consideration of facts, material placed on record and appreciation thereof. At this stage, it would not be appropriate to direct arrest of vessel or to direct respondent to furnish security against the two items of claims. As stated by the plaintiff there was no document which guaranteed that the vessel would arrive at Tuticorin in 45 days.

13. In the facts of the case, we find that the learned Single Judge adopted a view which is probable one. The view of the learned Single Judge seems to be reasonable and proper. We do not notice any perversity in the order passed by the learned Single Judge.

14. The plaintiff would be entitled to lead appropriate evidence during the hearing of the suit in respect of the relief against the said two claims rejected by the learned Single Judge. We clarify that the

observations made by us are of prima facie nature and same shall not affect the rights of the contesting parties in the suit.

16. For the reasons stated above, the appeal stands dismissed.

17. Notice of Motion (L) No. 42 of 2018 does not survive and stands disposed of accordingly.

(NITIN W. SAMBRE,J.) (NARESH H. PATIL,J.)

18. After pronouncement of the order, the learned counsel appearing for the appellant prays for continuation of status quo order granted earlier for a period of one week. The learned counsel appearing for the respondent objected to the prayer made by the appellant. In the facts, we direct the parties to maintain status quo, as on today, for a period of one week from today.

(NITIN W. SAMBRE,J.) (NARESH H. PATIL,J.)