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

COMMERCIAL ADMIRALTY SUIT (LODG.) NO. 11 OF 2018

Darya Shipping Pvt. Ltd. .. Plaintiff
Vs.
LPG MAHARSHI BHARDWAJ & Ors. .. Defendants

WITH
NOTICE OF MOTION (LODG.) NO. 703 OF 2018
IN
COMMERCIAL ADMIRALTY SUIT (LODG.) NO. 11 OF 2018

State Bank of India .. Applicant/Intervener

In the matter between :

Darya Shipping Pvt. Ltd. .. Plaintiff
Vs.
LPG MAHARSHI BHARDWAJ & Ors. .. Defendants

WITH
NOTICE OF MOTION NO. 1897 OF 2017
IN
ADMIRALTY SUIT NO. 39 OF 2017
WITH
NOTICE OF MOTION NO. 78 OF 2018
IN
ADMIRALTY SUIT NO. 3 OF 2018
WITH
NOTICE OF MOTION NO. 80 OF 2018
IN
ADMIRALTY SUIT NO. 1 OF 2018
WITH
NOTICE OF MOTION NO. 77 OF 2018
IN
ADMIRALTY SUIT NO. 4 OF 2018
WITH
NOTICE OF MOTION NO. 82 OF 2018
IN

ADMIRALTY SUIT NO. 2 OF 2018
WITH
COMMERCIAL NOTICE OF MOTION NO. 389 OF 2018
IN
COMMERCIAL SUIT NO. 18 OF 2018
WITH
COMMERCIAL NOTICE OF MOTION NO. 504 OF 2018
IN
COMMERCIAL SUIT NO. 29 OF 2018
WITH
COMMERCIAL NOTICE OF MOTION NO. 263 OF 2018
IN
COMMERCIAL SUIT NO. 12 OF 2018
WITH
COMMERCIAL NOTICE OF MOTION NO. 405 OF 2018
IN
COMMERCIAL SUIT NO. 21 OF 2018
WITH
COMMERCIAL NOTICE OF MOTION NO. 256 OF 2018
IN
COMMERCIAL SUIT NO. 9 OF 2018
WITH
COMMERCIAL NOTICE OF MOTION NO. 261 OF 2018
IN
COMMERCIAL SUIT NO. 106 OF 2018
WITH
COMMERCIAL NOTICE OF MOTION NO. 247 OF 2018
IN
COMMERCIAL SUIT NO. 124 OF 2018

Shri Abhishek Khare a/w. Ms.Prapti Kedia i/b Khare Legal Chambers for Darya Shipping Private Limited.

Shri V.K. Ramabhadran, senior advocate a/w. Shri Brendon Pereira and Shri Aman Rungta i/b M/s. Crawford Bayley and Co. for defendant no.3.

Shri Sanjeev Maheshwari-defendant no.3 present in Court (IRP.)

Shri J.P. Sen, senior advocate i/b Ashwin Shanker for applicant in NMCDL/703/2018 and mortgagee banks.

Mr.Rahul Narichania, senior advocate a/w. Ms.Damayanti Sen, Shri

Rishabh Saxena and Shri Sanjeev Sambasivam i/b Bose and Mitra and Co. for Fleet Ship Management INC.

Captain Rajesh Deshwal, Managing Director of Darya Shipping Private Limited present in Court.

Mr. Sunil Joshi (AGM) and Mr. Amit Varghese for State Bank of India.

Ms.Nidhi Agarwal (Chief Manager) and Ms.Swati Swaroj (Manager) for ICICI Bank.

Mr. Chandra Sekhar Akumarthy (Chief Manager) for Andhra Bank.

Mr. Nitin Parmar (Asst. Vice President) for DBS Bank.

Mr. Bharat Singh Phonia (AGM) for Bank of India.

CORAM : K.R.SHRIRAM, J.
DATE : 27TH MARCH 2018

P.C.

1. Shri Sen, learned senior counsel appearing for the Mortgagee Banks, which form or are part of committee of creditors, states that the Advocates tried their best with the Mortgagee Banks/committee of creditors (COC) to come up with a workable solution but they have not been able to achieve a workable solution and they need some more time. Shri Sen further states that as directed by His Lordship Hon'ble Shri Justice S.C. Gupte, in the order dated 23rd March 2018, though his clients are in breach of the order technically speaking because they did not have the demand draft of Rs.12 crores ready yesterday, his clients have brought Rs.12 crores today by way of demand drafts drawn in favour of the Prothonotary and Senior Master, High Court, Bombay. Shri Sen states that these demand drafts will be

deposited with the Prothonotary and Senior Master, High Court, Bombay by 1:30 P.M. today. Prothonotary and Senior Master to encash those demand drafts.

2. Shri Khare appearing for Darya Shipping Pvt. Ltd. states as under :

Because of non-payment by defendant no.3/the committee of creditors/Mortgagee Banks, plaintiff is unable to keep funding maintenance of all the vessels. Shri Khare states that plaintiff had agreed for 60 days credit and those 60 days got over on 15th February 2018 and by now plaintiff has been out of pocket in excess of Rs. 23 crores.

Defendant no.3 or the Mortgagee Banks/COC have to honour their commitments and pay as even crew have not been paid wages.

All the six vessels are LPG tankers and five of them are at the anchorage within the Deendayal Port limit and because of non-payment, plaintiff is also unable to supply diesel to keep the generators running and that has resulted in black out on the vessels.

If the vessels drag anchor, without assistance of generators, the vessels cannot be controlled and that can cause huge maritime disaster.

On 22nd March a collision took place between two vessels near where LPG Maharashi Bharadwaj (defendant no.1) has been anchored within Kandla Port limits and both vessels suffered extensive damage. One of the vessel, which was in the anchorage, in the collision, lost her anchor and since the vessels managed by plaintiff are also facing blackout situation due to non-availability of diesel in view of non-payment by defendant no.3/COC/Mortgagee Banks as promised, even the vessels managed by plaintiff are prone to risk of collision.

The master of LPG Masharshi Bhavatreya, another vessel of defendant no.2 managed by plaintiff on behalf of defendant no.3/COC/Mortgagee Banks, has reported in his email dated 22nd March 2018, copy where of is annexed to the affidavit in the notice of motion No. 30 of 2018 taken out by plaintiff and is yet to be taken up for hearing, that vessel LPG Maharshi Bhavatreya is running short of fuel, emergency generator damaged during trial on 20th March 2018, lifeboat engines are not starting and definitely safety of crew is at risk.

Since the other four vessels are also in the same vicinity in the same port, those vessels are also prone to risk of collision and the safety of crew on board all vessels is at grave risk.

There is also an email dated 25th March 2018, from master of LPG Maharshi Krishnatreya-another vessel owned by defendant no.2 and managed by plaintiff for and on behalf of defendant no.3/COC/Mortgagee Banks to plaintiff stating *"Vessel on blackout can communicate only on mob power frm 0600 to 1000 hrs."*

We are facing an emergency situation waiting for a possible ecological disaster endangering human life, properties and marine life.

On 24th March 2018, the Deputy Conservator of Kandla Port has sent an email to plaintiff which reads as under :-

> " *This is in reference to 5 vessels of Ex Varun shipping LPG tankers which are lying in Deendayal Port Trust port limits. It has been reported time and again that these vessels are not displaying lights and shapes in accordance with regulations of SOLAS Convention and are a danger to navigation. Also all the vessels are unseaworthy and a threat to safety of life and environment.*
>
> *These vessels are now in your management and therefore you directed to take urgent steps to prevent any untoward incident or mishap that might cause loss of life and/or damage to environment and impede safety of navigation in the port failing which you will be held responsible for any risk, cost and consequences of damage to property and environment."*
>
> (emphasis supplied)

Therefore, it is rather a dangerous situation in which the vessels are placed.

3. Shri Sen submitted that the Mortgagee Banks have an exposure of about Rs.800 crores to defendant no.2 and hence there is hesitation in making payments. In my view, this cannot be a reason to not pay a party who has been engaged by defendant no.3-IRP to protect the interest of the same Mortgagee Banks.

4. Plaintiff had undertaken to give 60 days credit and the 60 days credit expired almost 40 days ago. It will be absolutely unfair to make plaintiff

keep funding to protect assets which are mortgaged to the secured lenders/Mortgagee Banks represented by Shri Sen. When a company is in liquidation, in all situations, the banks to whom the assets of the company are mortgaged, funds the maintenance and security of the assets of the company in possession of the liquidator and of course, the banks get reimbursed that amount from the sale proceeds. The situation that we are today in, is not different.

5. As recorded in the order dated 19th March 2018, even defendant no.3, viz., Insolvency Resolution Professional ('IRP'), has recommended that a sum of Rs.9,02,21,000/- has to be paid to plaintiff and this recommendation was made as early as on 5th February 2018, as it appears from the minutes of the meeting held on 5th February 2018 and again on 20th February 2018, 26th February 2018 and 6th March 2018. This amount of Rs.9,02,21,000/- has not been denied by any member of the committee of creditors and Mortgagee Banks who either form or are part of the committee of creditors but has not been paid because it was not approved by the 75% voting shares of the financial creditors. Therefore, in my view, no prejudice will be caused in any event to the banks if this amount of Rs.9,02,21,000/- is paid over to plaintiff by the Prothonotary and Senior Master, High Court, Bombay.

6. Shri Sen states that a bank guarantee has to be taken from plaintiff if he has to withdraw this amount. In normal circumstances, I would have directed plaintiff to give a bank guarantee. In this case, however, as a pre-condition for withdrawal of Rs.9,02,21,000/-, plaintiff and each of the directors of plaintiff (excluding independent or non-executive directors) shall give personal undertaking to the Prothonotary and Senior Master, High Court, Bombay in the format approved by the Prothonotary and Senior Master, High Court, Bombay to bring back this amount of Rs.9,02,21,000/- within such period as the Court will direct. The reason I am not insisting for the bank guarantee is because as early as on 5th February 2018, defendant no.3-IRP has recommended to COC and Shri Sen's clients are part of COC, that this amount has to be paid to plaintiff. IRP (defendant no.3) is a chartered accountant by qualification and certainly would not have recommended payment of this amount unless he thought that this amount was payable. Further, he is the Chairman of the committee of creditors. Moreover, none of the minutes of the meetings, indicate the creditors have disputed this amount of Rs.9,02,21,000/-. The minutes of meeting only record, it was not approved by more than 75% of the voting shares. In my view, the word '*approved*' has to be given a narrow meaning only to the extent that 75% did not agree for release of this amount not because they questioned the quantum. Nowhere in the minutes

it has been noted that even one of the creditor had raised an objection on the quantum. In any event, between 5th February 2018 till today, the Mortgagee Banks/committee of creditors, by whatever expression you may call them, had enough time to go through the accounts and raise an objection on the quantum. No such objection has been raised. Moreover, plaintiff is continuing to manage the vessel and is incurring the costs and cannot run away in view of the undertaking given to the Director General of Shipping. Plaintiff will also be submitting bills and therefore, if for any reason, plaintiff has been paid more than what it was entitled to, that can certainly be adjusted from the future bills. Shri Khare states all details have been provided long ago and if any clarification is required, plaintiff will provide. Therefore, in my view, it will be unfair if plaintiff is directed to give a bank guarantee in the sum of Rs.9,02,21,000/-.

7. At the same time, if plaintiff wishes to withdraw the remaining amount of Rs.2,97,79,000/-, i.e, the difference between Rs.12 crores and Rs.9,02,21,000/-, plaintiff will have to give a bank guarantee for that amount from a nationalised bank to the satisfaction of the Prothonotary and Senior Master, High Court, Bombay.

8. Shri Sen also suggested that all the six vessels of defendant no.2 being managed by plaintiff could be sold immediately. Shri Ramabhadran,

learned senior counsel appearing for defendant no.3 (IRP) states that even though technically 180 + 90 days of moratorium is over, until the National Company Law Tribunal (NCLT) takes a decision on the report filed by defendant no.3, moratorium should be deemed to be continuing. For the moment, I am not going into that aspect because the committee of creditors, which is driving the cause before the NCLT themselves have no objection for sale of all the six vessels. Shri Sen, on instructions, states the same can be considered while deciding the priorities and further adds that if all the vessels are sold, the problem and cost of maintaining all the six vessels will also be arrested and the Mortgagee Banks will also be able to recover its money earlier. In my view, Shri Sen is correct and the point raised by Shri Ramabhadran can be considered while deciding the priorities. Of course at that time, the earlier orders passed by this Court will naturally prevail.

9. At the same time, I fail to understand the objection of defendant no.3-IRP. The frame work of IBC as it stands is that the management of the company is literally in the control of and to the benefit of the secured creditors and managed by the secured creditors and the promoters/ex-directors of the company have no role to play. The mortgagee banks who are or form part of the committee of creditors have no objection for sale of

the six mortgaged vessels but curiously it is the defendant no.3-IRP who wants to question the authority of this Court. It makes me wonder at whose behest defendant no.3-IRP is raising this issue particularly when the mortgagee banks have no objection for sale of the vessels. In fact, Shri Sen, counsel for the Mortgagee Banks suggested this Court order sale of all the six vessels. Certainly, the opposition of defendant no.3-IRP appears to be at the behest of somebody else who wants to thwart the sale of the vessels.

10. Shri Sen, on instructions, stated that it would be in the interest of every party if this Court directs sale of the vessels in the notices of motion taken out by another plaintiff being Notice of motion No.1897 of 2017 in Admiralty Suit No. 39 of 2017, Notice of motion No.78 of 2018 in Admiralty Suit No. 3 of 2018, Notice of motion No. 80 of 2018 in Admiralty Suit No.1 of 2018, Notice of motion No. 77 of 2018 in Admiralty Suit No. 4 of 2018, Notice of motion No. 82 of 2018 in Admiralty Suit No.2 of 2018, with Notice of motion in commercial division No. 389 of 2018 in Commercial Suit No. 18 of 2018, Notice of motion in commercial division No. 504 of 2018 in Commercial Suit No. 29 of 2018, Notice of motion in commercial division No. 263 of 2018 in Commercial Suit No. 12 of 2018, Notice of motion in commercial division No. 405 of 2018 in Commercial Suit No. 21 of 2018, Notice of motion in commercial

division No. 256 of 2018 in Commercial Suit No. 9 of 2018, Notice of motion in commercial division No. 261 of 2018 in Commercial Suit No. 106 of 2018 and Notice of motion in commercial division No. 247 of 2018 in Commercial Suit No. 124 of 2018.

11. Therefore, by consent, the following notices of motion are taken up for hearing though not listed on board :

NOTICE OF MOTION NO. 1897 OF 2017
IN
ADMIRALTY SUIT NO. 39 OF 2017
WITH
NOTICE OF MOTION NO. 78 OF 2018
IN
ADMIRALTY SUIT NO. 3 OF 2018
WITH
NOTICE OF MOTION NO. 80 OF 2018
IN
ADMIRALTY SUIT NO. 1 OF 2018
WITH
NOTICE OF MOTION NO. 77 OF 2018
IN
ADMIRALTY SUIT NO. 4 OF 2018
WITH
NOTICE OF MOTION NO. 82 OF 2018
IN
ADMIRALTY SUIT NO. 2 OF 2018
WITH
COMMERCIAL NOTICE OF MOTION NO. 389 OF 2018
IN
COMMERCIAL SUIT NO. 18 OF 2018
WITH
COMMERCIAL NOTICE OF MOTION NO. 504 OF 2018
IN
COMMERCIAL SUIT NO. 29 OF 2018
WITH
COMMERCIAL NOTICE OF MOTION NO. 263 OF 2018

IN
COMMERCIAL SUIT NO. 12 OF 2018
WITH
COMMERCIAL NOTICE OF MOTION NO. 405 OF 2018
IN
COMMERCIAL SUIT NO. 21 OF 2018
WITH
COMMERCIAL NOTICE OF MOTION NO. 256 OF 2018
IN
COMMERCIAL SUIT NO. 9 OF 2018
WITH
COMMERCIAL NOTICE OF MOTION NO. 261 OF 2018
IN
COMMERCIAL SUIT NO. 106 OF 2018
WITH
COMMERCIAL NOTICE OF MOTION NO. 247 OF 2018
IN
COMMERCIAL SUIT NO. 124 OF 2018

12. In view of the above, the Sheriff of Mumbai shall have the defendant Vessels, viz., (i) LPG MAHARSHI DEVATREYA, (ii) LPG MAHARSHI KRISHNA TREYA, (iii) LPG MAHARSHI BHAVATREYA, (iv) LPG MAHARSHI BHARDWAJ, (v) LPG MAHARSHI SHUBHATREYA and (vi) LPG MAHARSHI MAHATREYA, apprised by independent surveyors (and the counsels suggest M/s.Ericson and Richards Surveyors Private Limited be appointed), fix the terms and conditions of sale, issue advertisement and take all steps to complete the sale and make a report to this Court for confirmation of the sale as per the time line below :-

(a) M/s.Ericson and Richards Surveyors Private Limited (E & R) is appointed to inspect each of the six vessels, viz., LPG

MAHARSHI DEVATREYA, LPG MAHARSHI KRISHNA TREYA, LPG MAHARSHI BHAVATREYA, LPG MAHARSHI BHARDWAJ, LPG MAHARSHI SHUBHATREYA and LPG MAHARSHI MAHATREYA and submit a valuation report indicating the price if the vessels were sold for scrapping/breaking and for trading.

(b) Meeting of concerned advocates and parties for settling the terms and conditions of auction sale and issue of public advertisement of auction in the newspapers, The Free Press Journal, Navshakti and the online edition of TradeWinds – by 5th April 2018.

(c) Inspection by intending bidders from 5th April 2018 to 12th April 2018.

(d) Each of the vessels to be inspected by E & R and valuation report to be submitted by E & R on or before 16th April 2018.

(e) Last date for submission of bids to the Sheriff of Mumbai- 16th April 2018.

(f) Opening of bids and confirmation of the offer by the highest bidder by the Court- 20th April 2018 at 3.00 p.m.

Parties interested in bidding will give Earnest Money Deposit of Rs. 2 crores for every vessel they bid for.

13. The costs and expenses of the valuation, publication and sale as mentioned above shall be initially borne by the mortgagee bank/s in each of the suit. In each of the suit, mortgagee bank/s shall deposit a sum of Rs.10 lakh per vessel with the Sheriff of Mumbai or such further amount as the Sheriff of Mumbai may seek in case of deficit towards the cost of inspection and valuation and the advertisement expenses, publication of sale notice etc. Such expenses will be treated as Sheriff's Expenses to rank first in order of priorities and shall be reimbursed immediately from the sale proceeds being deposited with the Sheriff.

15. Shri Sen states that the amount of Rs. 12 crores that he has been paid today, should be treated as Sheriff's expenses. Shri Narichania disagrees and states that the earlier orders shall prevail. Whether they have to be treated at par or whether Fleet Ship Management Inc. has the priority, will be considered at the appropriate stage and certainly the earlier orders shall prevail.

16. Shri Khare and Shri Narichania state that plaintiff in all the suits

either filed by Darya Shipping Private Limited or Fleet Shipping Management Inc. shall add all the mortgagee banks as defendants. Shri Shanker gives an undertaking to file Vakalatnama on behalf of the mortgagee banks within one week from today. Shri Shanker states that details of the mortgagee banks will be provided to the advocates of plaintiff by 2nd April 2018. Within one week of receiving the said details, plaintiffs to amend the respective plaints and serve a copy of the amended plaint upon all defendants including newly added defendants.

17. Shri Ashwin Shanker waives service of writ of summons and further states that within four weeks of receiving the amended plaint, will file the written statement. Shri Ramabhadran, on instructions, states defendant no.3 also waives service of writ of summons.

18. Notice of Motion (Lodg.) No. 703 of 2018 accordingly disposed.

Notwithstanding disposal of the notice of motion, all office objections to be removed and notice of motion to be numbered within two weeks.

19. Rest of the matters be listed on 11th April 2018 for directions.

(K.R. SHRIRAM, J.)