IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
NOTICE OF MOTION (L) NO.148 OF 2017
IN
SUIT NO.541 OF 2017

Lilly Maritime Pvt. Ltd. ... Applicant/Plaintiff
versus
Shipping Corporation of India Ltd. ... Defendant

Mr. Karl Tamboly i/by Mr. M.V.Raut, for Plaintiff.
Mr. Prathamesh Kamat i/by M/s. A. Mehta Laljee and Co., for Defendant.

CORAM: S.J. KATHAWALLA, J.

DATE: 13th JUNE, 2018

P.C.:

1. By the above Chamber Summons, the Applicant/Plaintiff seeks permission of this Court to amend the Plaint and all other allied and inter-locutory proceedings as per the Schedule annexed to the Chamber Summons.

2. The Plaintiff Company is incorporated under the Companies Act, 1956 and is in the business of buying and/or trading in ships for the purpose of demolition/scrapping. The Defendant is a public sector undertaking and is in the shipping business and is the owner of M.V.Indira Gandhi (the Vessel).

3. According to the Plaintiff in due course of its business, the Plaintiff entered into a Memorandum of Agreement (MOA) dated 12th April, 2017 with the Defendant for purchase of the Vessel for the purpose of demolition/scrapping. The Plaintiff also

paid full consideration payable under the MOA. As per the terms and conditions of the MOA, it was stipulated that it was incumbent upon the Defendant to pay interalia Customs Duty which became due and payable prior to the delivery of the Vessel. According to the Plaintiff, despite the clear stipulation, the Defendant failed/refused to provide to the Plaintiff proof of any such customs duty paid by the Defendant prior to the delivery of the Vessel, because of which the Plaintiff was unable to take delivery of the Vessel. Consequently, the Plaintiff filed the present Suit interalia for Specific Performance by the Defendant of its obligation under the MOA. The Plaintiff in its Suit also sought declaration that the Defendant is liable to pay port trust charges, customs duty and any other statutory charges and crew charges of the Vessel prior to the delivery of the Vessel and for a mandatory injunction directing the Defendant to pay any outstanding port trust charges, customs duty and any other statutory charges and crew charges of the Vessel incurred prior to the delivery of the Vessel.

4 For the sake of convenience, Prayer clauses (a) to (i) of the Plaint are reproduced hereunder :

> "(a) This Hon'ble Court be pleased to issue a declaration that there is a valid, subsisting and binding contract between the Plaintiff and Defendant contained in and/or embodied by the MOA dated 12th April, 2017 and the Plaintiff is entitled to specific performance thereof;

(b) This Hon'ble Court be pleased to issue a declaration that the Defendant is liable to pay all port trust charges, Customs Duty and any other statutory charges and crew charges of the Vessel prior to the delivery of the Vessel;

(c) This Hon'ble Court be pleased to issue a declaration that the port of delivery has been amended pursuant to an agreement between the parties from Bhavnagar to "BHAVNAGAR/ALANG (for beaching)" as per the Port Clearance dated 15th April, 2017;

(d) This Hon'ble Court be pleased to pass a decree of specific performance against Defendant, directing Defendant to discharge its obligations to pay customs duty in full;

(e) This Hon'ble Court be pleased to issue a mandatory injunction directing the Defendant to pay any outstanding port trust charges, Customs Duty and any other statutory charges and crew charges of the Vessel incurred prior to the delivery of the Vessel; and

(f) This Hon'ble Court be pleased to issue a declaration that the delays, if any, in taking delivery of the Vessel are solely due to acts of and on account of the Defendant;

(g) This Hon'ble Court be pleased to declare that the Plaintiff is entitled to a sum of Rs.3,27,481/- per day (as per Exhibit Y) from 19th April, 2017 till delivery of the Vessel, being the damages suffered by the Plaintiff per day due to the delay in the delivery of the Vessel;

(h) This Hon'ble Court be pleased to pass a decree against Defendant for such amount;

(i) In the alternative to the above and only if this Hon'ble Court is not inclined to pass the reliefs mentioned hereinabove, this Hon'ble Court be pleased to pass a decree in favour of the Plaintiff against the

> Defendant for a sum aggregating to Rs.23,02,86,991/- including the principal amount of a sum of Rs.21,27,68,964/- and Rs.1,75,18,027/- (being expenses paid by the Plaintiff) along with interest at the rate of 18% from the date of the suit till payment as set out more particularly in the Particulars of Claim annexed at Exhibit Z hereto;"

5. After the above Suit was filed, the Plaintiff moved an Application for ad-interim reliefs and obtained directions from time to time. By an order dated 16th May, 2017 this Court passed a workable order, without prejudice to the rights and contentions of the parties to the Suit, interalia directing the Plaintiff to take delivery of the Vessel and file a Bill of Entry within one week therefrom. This Court also directed the Defendant to deposit with the Prothonotary and Senior Master of this Court an amount of Rs.94,80,253/- collected by the Defendant from the Plaintiff by way of sales tax and also directed that until the issue as to whether any amount is payable by way of customs duty/sales tax by either of the parties qua the suit transaction, is decided by this Court, the amount so deposited in Court shall be invested by the Prothonotary and Senior Master of this Court in a fixed deposit of a nationalized bank initially for a period of one year from today and renew the same from time to time as per directions of the Court and the Sales Tax authorities shall not take any coercive action against the parties. In compliance with the order dated 16th May, 2017 the Plaintiff without prejudice to their rights and contentions in the present Suit, took delivery of the Vessel

i.e. “M.V.Indira Gandhi” at Bhavnagar anchorage on 22nd May, 2017. The Plaintiff also caused to file Bill of Entry with the concerned authority through its Nominee “Shree Ram Industries Pvt. Ltd., for payments of import of customs duty on behalf of the Owner/Importer i.e. the Defendant herein.

6. According to the Plaintiff, before taking delivery of the Vessel, the Plaintiff and Defendant have jointly carried out Bunker (fuel) survey and accordingly, Survey Report was prepared. The Plaintiff also accepted sales documents from the Defendant which is part of delivery documents including Certificate of Vessel Delivery, Technical and Offshore Service Certificate, No Objection Certificate for Sale, No Encumbrance Certificate, Survey Report etc. These documents form part of “Protocol of Delivery and Acceptance” signed and executed by the Plaintiff and Defendant.

7. According to the Plaintiff, since the Plaintiff faced technical difficulties because of incorrect IGM filed by the Defendant, the Plaintiff despite having taken delivery of the Vessel, was unable to file Bill of Entry before the concerned authorities. The Plaintiff therefore, took out Notice of Motion (L) No.330 of 2017 in the present Suit seeking orders permitting the Plaintiff to file a fresh IGM at Bhavnagar/Alang, and permitting the Plaintiff's Nominee to complete all requisite customs formalities including but not limited to filing of Bill of Entry, requisite payments etc. without prejudice to the Plaintiff's rights and claims in the present suit. By an order dated 24th May, 2017 read with the order dated 25th May, 2017, this Court allowed Notice of

Motion (L) No.303 of 2017 in terms of prayer clauses (a) and (b) which are reproduced hereunder :

> "(a) That pending the final hearing and disposal of the present Suit, this Hon'ble Court be pleased to permit the Plaintiff to file fresh "Import General Manifest" (IGM) at Bhavnagar / Alang mentioning that "the Vessel, M.V. Indira Gandhi is going to go for scrapping / demolition at Bhavnagar/Alang" without prejudice to the Plaintiff's right and claim in Commercial Suit (L) No. 266 of 2017.
>
> (b) That pending the final hearing and disposal of the present Suit, this Hon'ble Court be pleased to permit the Plaintiff's nominee namely "Shree Ram Industries Private Limited", to complete all requisite customs formalities including but not limited to filing of Bill of Entry, requisite payments, etc., without prejudice to the Plaintiff's right and claim in Commercial Suit (L) No. 266 of 2017".

8. According to the Plaintiff, as per Clause- "2" read with Clause-6(c) of MOA dated 12th April, 2017, the Plaintiff in addition to sale price, was required to pay additional estimated cost of fuel/lube oil remaining on board the Vessel. The Defendant by their Letter dated 12th April, 2017 called upon the Plaintiff to make payment of a sum of Rs.1,36,83,646/- towards total estimated cost of HFO, DO, and Lube Oil, on board. Accordingly, the Plaintiff made the payment of the said amount to the Defendant along with the other payments as mentioned therein. As per Clause 6(c) of MOA dated 12th April, 2017, the actual cost of oils remaining on board was

agreed to be calculated at the price prevailing at the port of delivery of the vessel. It was further agreed that excess amount, if any, as compared to the deposited amount would be refunded to the Plaintiff and in case of any shortfall of amount as compared to the deposited amount, shortfall would be recovered from EMD. Accordingly, the Plaintiff by their letter dated 22nd May 2017 called upon the Defendant to refund the Pre-Bid EMD and requested for the work sheet/calculation sheet for determination of the amount payable as mentioned therein in accordance with the MOA at the earliest. In the said letter dated 22nd May, 2017 the Plaintiff specifically pointed out that the Plaintiff has paid an amount of Rs.1,36,83,646/- towards total estimated cost of HFO, DO and Lube Oil on board and therefore, as the Joint Survey of ROB has been completed, the Plaintiff called upon the Defendant to refund the final amount of settlement supported by calculation sheet/work sheet.

9. According to the Plaintiff, the Plaintiff once again by and under their letter dated 25th May, 2017 while requesting the Defendant to forward updated "No Encumbrance Certificate" from the Mercantile Marine Department, Mumbai, in view of the time lag of over a month from the date of such certificate issued on 12th April, 2017 and the date of delivery of the Vessel, further called upon the Defendant to comply with the obligations under the MOA and refund to the Plaintiff the Pre-Bid EMD as agreed, as early as possible. The Plaintiff did not receive any reply to their aforesaid two letters dated 22nd May, 2017 and 25th May, 2017 from the Defendant.

The Plaintiff therefore, reiterated their request by their Advocates Letter/Email dated 25th May, 2017. Only after the receipt of the legal notice, the Advocates for the Defendant by and under their letter/email dated 26th May, 2017 simply replied that they have sought requisite instructions from their client, the Defendant herein, on the contents of the Plaintiff's above mentioned two notices and assured the Plaintiff to respond no sooner they receive the instructions. However, neither the Defendant nor their Advocates responded to the Plaintiff's notices nor complied with the requests made therein.

10. According to the Plaintiff, as per Clause 28 read with Clause 44(iv) of Tender Document as well as Clause 17 of MOA dated 12th April, 2017 the Defendant agreed to retain 10% of the earnest money deposit or rupees 10 Lakhs whichever is lower till such time the Plaintiff submits any one of the document of proof as mentioned in Clause 17 of MOA dated 12th April, 2017. On 31st May, 2017 the Port Officer, Ship Recycling Yard, Alang, of "Gujrat Maritime Board" issued a Certificate in the name of Plaintiff's Nominee, confirming that the Vessel has been beached at Alang Port for Recycling. Therefore, the Plaintiff having complied with all its obligations under Clause 17(c) and all other provisions of the MOA dated 12th April, became entitled to refund of entire Pre-Bid EMD amount including Rupees Ten Lakhs. Thereafter, on 27th January, 2018, the Defendant has filed Bill of Entry before Mundra Custom Authority, which is duly signed by Mundra Customs Department,

wherein the Defendant has admittedly declared itself as an importer of the Vessel namely “M.V.Indira Gandhi” having converted the said Vessel from foreign run to coastal run. The said Bill of Entry dated 27th January, 2017 shows that the duty paid by the Defendant on Fuel Oil, MGO, Lube, Paint, Thinner, Grease on board. The Plaintiff has submitted that bare reading of the said Bill of Entry dated 27th January, 2017 read with the ROB and other documents signed by Master of the Vessel clearly show that at the time of filing of Bill of Entry on 27th January, 2017, the Defendant has paid less duty on Oil, MGO, Lube, Paint, Thinner, Grease, than what is actually required to be paid by the Defendant as per their quantity available on board as per ROB. Therefore, whilst filing Bill of Entry of the Vessel, the Plaintiff's Nominee has paid the deficit duty aggregating to a sum of Rs.10,33,205/- which is not paid by the Defendant at Mundra.

11. The Plaintiff has submitted that apart from the deficit duty as mentioned hereinabove, the Defendant has also not paid total “Import Custom Duty” on the Vessel. The “Import Custom Duty” payable by the Defendant was a sum of Rs.53,97,561.20 as is reflected in the Bill of Entry filed by the Nominee and the receipt issued by the concerned authority which the Plaintiff's Nominee has paid as per the Order dated 16th May, 2017 passed by this Court. Thus, the Plaintiff's Nominee has paid a sum of Rs.55,59,488/- being the “Import Custom Duty” including 2% Educational Cess and 1% Higher Education Cess. The “Import Custom Duty” paid

by the Plaintiff's Nominee as per the Bill of Entry filed by the Nominee is reflected in the receipt annexed at Exhibit II to the Plaint. According to the Plaintiff, in spite of taking delivery of the Vessel on 22nd May, 2017 as per direction of this Court dated 16th May, 2017, the Plaintiff could not file Bill of Entry due to incorrect IGM filed by the Defendant. Thus, the Plaintiff has incurred huge expenses aggregating to a sum of Rs.44,43,464/- towards Officer's Crew Wages, Officer's Crew Food and hotel charges, Officer's crew Travel Charges, Agency Fees, legal fees and Administration and Management charges. The Plaintiff has therefore, submitted that the Plaintiff will suffer grave harm and/or irreparable injury which cannot be compensated in terms of money, if the Defendant is not directed to (i) refund to the Plaintiff entire Pre-Bid EMD of Rs.1,63,00,000/- (Rupees One Crore Sixty Three Lakhs only) as per the terms and conditions of the MOA dated 12th April, 2017; (ii) refund to the Plaintiff the balance amount payable by the Defendant to the Plaintiff out of a sum of Rs.1,36,83,646/- (Rupees One Crore Thirty Six Lakhs Eighty Three Thousand Six Hundred Forty Six only) received by the Defendant towards "Estimated Cost" in terms of quantity and value of HFO, Do and Lube Oil, supported by calculation sheet and work sheet and (iii) refund to the Plaintiff import custom duty amount of Rs.55,59,488/- (Rupees Fifty Five Lakhs Fifty Nine Thousand Four Hundred Eighty Eight only) along with deficit duty amount of Rs.10,33,205/- (Rupees Ten Lakhs Thirty Three Thousand Two Hundred and Five only). The Plaintiff, therefore, seeks to amend the Plaint and claim reliefs as set out in the Schedule to the Chamber Summons.

12. In support of the Chamber Summons seeking amendment to the Plaint, the Plaintiff therefore has submitted that the Plaintiff has already claimed reliefs in the present Suit directing the Defendant to specifically perform their obligation under MOA dated 12th April, 2017. The obligation of the Defendant to refund Pre-Bid EMD and balance amount of estimated cost arise out of the said MOA only, when the Vessel was delivered to the Plaintiff pursuant to the workable order passed by this Court, which admittedly happened post filing of the present Suit. Further deficit custom duty paid by the Defendant and non payment of import duty by the Defendant is revealed/disclosed to the Plaintiff recently after filing of the present Suit and as per the workable order passed by this Court, as more particularly set out hereinabove supported by the documents annexed to the Schedule of amendment. It is submitted that due to action/inaction on the part of the Defendant, the Plaintiff could not take delivery of the Vessel and as such the Plaintiff incurred additional expenses towards crew charges etc., as mentioned hereinabove. Therefore, in addition to the damages claimed by the Plaintiff in prayer clause (g) of the Plaint as per Exhibit 5 to the Plaint, the Plaintiff is also entitled to further damages/recovery of expenses from the Defendant. It is therefore, submitted on behalf of the Plaintiff that the amendments as prayed be allowed.

13. The Plaintiff has relied on the decision of the Hon'ble Supreme Court of India in the case of Raga Tilak D. John V/s. S. Rayappan and Ors.[1] and the decision of this Court in the case of Lok Housing and Construction Ltd. And Anr. V/s. Everest Industries Ltd.[2] and Dhanaji Kashinath Shendkar V/s. Khemchand C. Chawala[3].

14. The Defendant have opposed the above Chamber Summons on the following grounds :

(i) The present Chamber Summons seeks to introduce a new and fresh cause of action based on events which are posterior to the filing of the present Suit, and the same can only be agitated in a fresh suit.

(ii) That the proposed amendment has no nexus with the cause of action invoked/pleaded in the Plaint.

(iii) That the Plaintiff cannot introduce facts which pertain to events post filing of the suit as the same has no nexus with the present Suit.

(iv) That the amendments sought by the Plaintiff are not necessary for determining the real controversy in the suit.

(v) That the Plaintiff endeavours to avoid payment of court fees by avoiding to file a fresh Suit.

15. The Defendant has in support of their contention that the present Chamber Summons deserves to be dismissed, relied on the decision of the Hon'ble Supreme

1 2001 (2) SCC 472
2 2005 (2) MLJ 700
3 2011(6) MLJ 629

Court of India in the case of M/s. Ganesh Trading Co. V/s. Moji Ram[1] and the decision of the Supreme Court in the case of A.K.Gupta and Sons Ltd. V/s. Damodar Valley Corporation[2].

16. I have considered the facts on record and the submissions advanced on behalf of the learned Advocates for the parties. I have also considered the case law relied upon by the Advocates for the parties. Admittedly, the Plaintiff is seeking specific performance of the MOA dated 12th April, 2017. As set out hereinabove, by an order dated 16th May, 2017 this Court passed a workable order calling upon the Defendant to deposit certain amount with the Prothonotary and Senior Master of this Court and directing the Plaintiff to take delivery of the Vessel "M.V.Indira Gandhi". Reliefs claimed by the Plaintiff by way of proposed amendments arise out of same transaction i.e. sale of vessel under MOA dated 12th April, 2017 and the claim of the Plaintiff is in addition to and in continuation of the entitlement of the Plaintiff to recover certain amount from the Defendant already stated in the Plaint. Thus, the cause of action in the present Suit continues and still survives. In my view, the proposed amendments shall not alter and/or change the nature of the suit and/or cause of action in the present Suit. The present Suit shall continue to remain a Suit for specific performance and recovery of damages/money receivable from the Defendant. Infact, in the light of the above and in the wake of subsequent events as

1 1978 (2) SCC 91
2 (1966) 1 SCR 796

mentioned hereinabove, the proposed amendment to the Plaint as per the Schedule of amendments annexed to the Chamber Summons are necessary for proper adjudication of all the issues involved in the present Suit. The right accrued to the Plaintiff for recovery of the aforesaid amount is on account of the subsequent events that took place after filing of the present Suit i.e. the delivery of the Vessel taken by the Plaintiff and bill of entry filed pursuant to the order passed by this Court. The amendments proposed to be made in the Plaint are necessary for facilitating the Plaintiff to claim substantial reliefs, arising out of the transaction involved in the present Suit i.e. sale of Vessel under MOA dated 12th April, 2017 and as such necessary to avoid multiplicity of proceedings. Again if the proposed amendments as prayed for are allowed, the cause of action will not change and no harm, loss or prejudice as such will cause to the Defendant. On the contrary, if the proposed amendments as prayed for are not allowed, the dispute cannot be adjudicated upon in its entirety and the Plaintiff will not be able to seek appropriate reliefs and grave loss, harm and prejudice will occasion to the Plaintiff.

17. The facts and documents mentioned in the Schedule of Amendments arise in the wake of delivery of the Vessel taken pursuant to the workable order passed by this Court and the reliefs claimed are in continuation of the reliefs already sought in the Plaint. By way of proposed amendments, the Plaintiff is seeking refund of several amounts retained/received by the Defendant from the Plaintiff in furtherance of the

MOA. Further, the Plaintiff is also seeking damages towards expenses incurred by thePlaintiff due to delay caused by the Defendant to deliver the Vessel. Thus, the proposed amendment has direct nexus with the present Suit. The Plaintiff sought relief for specific performance of the MOA interalia directing to deliver the vessel. In the proposed amendment, the Plaintiff is seeking order directing the Defendant to comply with their obligation to refund the money retained/received by them under the agreement. The cause of action which entitles Plaintiff to seek relief of refund of Pre-EMD amount, Custom Duty, estimated cost, etc., arise only after filing of the suit in the wake of delivery of Vessel pursuant to the order of this Court. Thus, the cause of action is continuous one and not new. The Plaintiff has already paid maximum court fees of a sum of Rs.3,00,000/- on the entire claim that the Plaintiff seeks from this Court, therefore, no further court fees is liable to be paid when the cause of action is a continuous one.

18. In the case of Lok Housing and Construction Ltd. (Supra) what is sought to be added and incorporated by the Plaintiff were the averments incorporating subsequent events which had transpired during pendency of the Suit and arising out of the very same transaction. Since the subject matter of the property was identical both in the suit and the amendment proposed, the question of the amendment introducing a totally distinct and different cause of action did not arise. It was therefore, held that the amendments should be allowed.

19. In the case of Raga Tilak D. John (Supra), it was held that the amendment does not change the nature of the suit. The Suit was originally filed for permanent injunction restraining demolition of compound wall, but during pendency of the suit, Defendant entered into the property and demolished northern, eastern and western side of the compound wall. An amendment was, therefore, sought for recovery of damages. The amendment was allowed since the said amendment would not change the nature of the suit as originally filed and a subsequent suit would result in multiplicity of proceedings.

20. In the case of Dhanaji Kashinath Shendkar (Supra), originally the suit was filed for declaration of tenancy. The Plaintiff sought to amend the Plaint claiming relief in respect of open land in the wake of demolition of tenanted premises. It was held that the proposed amendment is not inconsistent or mutually exclusive to the original claim made in the Plaint. It was held that the amendment which is necessitated and essential on account of subsequent events, must be allowed.

21. In view of the facts set out in the present case, and what is discussed and held herein above, the submissions of the Defendants cannot be accepted and the judgments sought to be relied upon by the Defendant do not assist them in any manner. In view thereof, the above Chamber Summons is allowed as prayed and all contentions of the Defendant qua the averments/claims made by way of amendments

are kept open. There shall be no order as to costs. Amendments to be carried out within a period of one week from today. A copy of the amended Plaint shall be served on the Defendant.

22. The Chamber Summons is accordingly disposed of.

(S.J.KATHAWALLA, J.)