

Sharayu Khot.

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

COMMERCIAL APPEALS NO. 153 OF 2017

IN

NOTICE OF MOTION NO. 1189 OF 2015

IN

ARBITRATION PETITION NO. 1201 OF 2015

WITH

CHAMBER SUMMONS NO. 1 OF 2018

IN

COMMERCIAL APPEAL NO. 153 OF 2017

**Johann M.K. Blumenthal GmbH & Co., ...Appellant
K.G.**

Versus

**The Shipping Corporation of India Ltd & ...Respondents
Ors.**

Mr. Pradeep Sancheti, Senior Counsel a/w Mr. Aniruddh Hariyani, Ms. Pallavi Bali, Mr. Hormuz Mehta, i/b M/s. J. Sagar Associates, Advocates for the Appellants in Appeal and for Applicants in Chamber Summons No. 1 of 2018.

Mr. Zal Andhyarujina, Counsel, a/w Mr. Nimay Dave and Mr. Anuj Dhawan, i/b M/s Bose and Mitra & Co., Advocates for Respondent No. 1.

**CORAM : B.R. GAVAI &
RIYAZ I. CHAGLA, JJ.**

DATE : 5 December 2018

ORDER : (Per Riyaz I. Chagla, J.)

1. This Appeal challenges an order passed by the learned Judge of this Court dated 25th October 2016 (“*the impugned order*”), whereby the Notice of Motion taken out by the Appellant/Petitioner in Arbitration Petition filed under Section 48 of the Arbitration and Conciliation Act, 1996 (“*the Act*”) was dismissed. The Notice of Motion had sought garnishee orders against Respondent No. 1 claiming that there was a debt owed by Respondent No. 1 to the 2nd Respondent against whom the Foreign Arbitration Award has been passed. The learned Judge by the impugned order had rejected the application on the ground that there was nothing on record to show that there was a debt alleged to be owed by Respondent No. 1 to Respondent No. 2 and/or the alleged debt being

attached by this Court for issuing notice to the garnishee under Rule 46A of Order XXI of the Code of Civil Procedure, 1908 (“CPC”).

2. It is necessary to advert to the brief facts leading to the filing of this Appeal :-

There was a shipbuilding contract of one 176,000 DWT Bulk Carrier (HULL No. H1066) entered into between the Appellant, as the Buyer and one Jiangsu Rongsheng Heavy Industries Group Co.Ltd. as builder. By a Novation agreement dated 14th November 2007, the said Jiangsu Rongsheng Heavy Industries Group Co.Ltd. was replaced by Respondent No. 2. Further by Addendum No. 1 dated 15th February 2008, the 3rd Respondent was added as party to shipbuilding contract. As a dispute arose between the Appellant and Respondents No. 2 and 3, a foreign arbitration was instituted between them and which resulted into a Foreign Arbitration Award dated 2nd December 2014 in favour of the Appellant and against these Respondents.

By a letter dated 24th February 2015 addressed on behalf of the Appellant to the 2nd and 3rd Respondents, a demand for payment was made pursuant to the Foreign Arbitration Award. On 19th March 2015, the Appellant received information that the 1st Respondent owes money to the 2nd Respondent and accordingly, the Appellant filed an Arbitration Petition for enforcement of the Award in this Court and took out a Notice of Motion therein seeking garnishee orders against the 1st Respondent.

3. It is necessary in this context to refer to the orders passed by this Court from time to time. An order came to be passed on 19th March 2015 whereby the Respondent No. 1 was restrained from making any payment to the 2nd Respondent. A further order was passed by this Court in the Notice of Motion on 20th March 2015 which recorded the statement of the 1st Respondent that no money is due and payable by 1st Respondent to 2nd Respondent and that in case the Respondent No. 1 is required in future to pay any amount to the 2nd

Respondent, appropriate notice shall be given by the 1st Respondent to the Petitioner before making such payment. On 8th May 2015, the learned Judge of this Court recorded the statement of the 1st Respondent that the 1st Respondent does not propose to part with any further amount to either 2nd or 3rd Respondents in pursuance of the contract for delivery of the vessel m.v. Desh Vibhor. The statement was accordingly accepted. On 3rd July 2015, the Arbitration Petition seeking enforcement of the Foreign Award was made absolute in terms of prayer clause (a) thereof and the statement which had been made by the 1st Respondent before this Court on 20th March 2015 was continued until further orders. On 16th July 2015, the learned Judge of this Court recorded the statement of the 1st Respondent that it does not have to pay any amount to the 2nd Respondent under any contract and that the statement made before this Court on 20th March 2015 was continued and it was recorded that in case any amount as required to be paid by the 1st Respondent to 2nd Respondent in future, the Petitioner would be given 72 hours prior notice. On 18th October 2016,

the learned Counsel again reiterated that they do not owe any money to Respondent No. 2.

4. The learned Counsel for the Petitioner had before the learned Judge tendered a copy of letter from the Advocate of the 1st Respondent dated 27th April 2015, wherein it is stated that after finalization of statement of accounts, the sum of US\$ 2,55,171.40 was payable to the 2nd Respondent. The 1st Respondent thereafter, reiterated that no monies were owed by it to the 2nd Respondent. Accordingly, Respondent No. 1 was directed to file an Affidavit explaining its letter and also confirming that they do not owe any money to the 2nd Respondent. The 1st Respondent has filed an Affidavit of one Captain Kelath Devadas, Director (Technical and Offshore Division), an authorised signatory of the 1st Respondent affirmed on 21st October 2016. The said Affidavit explained that when the vessel m.v. Desh Vibhor was delivered by the 2nd Respondent to the 1st Respondent on 28th March 2015, bunkers of the value of USD 2,55,171.40 were remaining on board the

vessel. Accordingly, the 2nd Respondent demanded/called upon the 1st Respondent to make payment of the price of the bunkers remaining on board at the time of delivery. It is also stated in the Affidavit that under the shipbuilding contract, the 1st Respondent had guaranteed for performance, material and workmanship for a period of one year from the date of delivery and acceptance of the vessel and in view thereof, the Respondent No. 1 withheld a sum of USD 2,55,171.40 by way of security for any damages/defects in relation to the performance, material and workmanship of the vessel under guarantee period. It has been stated that the vessel encountered various defects/deficiencies in relation to performance, material and workmanship of the vessel which had been notified to Respondent No. 2 and the 1st Respondent had carried out the repairs. Respondent No. 1 had accordingly a claim against Respondent No. 2 towards the costs incurred for rectifying and repairing the defects in performance and material of the vessel. It was stated that the 1st Respondent is not holding any sums payable to the 2nd Respondent, because the amount withheld

i.e. USD 2,55,171.40 has been adjusted against the costs incurred by the 1st Respondent in rectifying and repairing the defects in performance, material and workmanship under shipbuilding contract. Taking this into consideration, the learned Judge has accordingly, held that the question of granting any prayer sought for against the Respondent No. 1 in this Notice of Motion does not arise. It is directed that if at any point of time, the Respondent No. 1 has to pay any amount to Respondent No. 2, they shall give notice of at-least seven working days to the Petitioner before releasing any such payment.

5. Shri. Pradeep Sancheti, the learned Senior Counsel appearing for the Appellant has submitted that the issue as to whether the 1st Respondent owed any debt to the 2nd Respondent was required to be decided by the learned Single Judge after framing an issue. He has submitted that the learned Single Judge should have taken into consideration, the fact that the 1st Respondent had at various times taken a contrary stand

as far as its liability to the 2nd Respondent was concerned. He has submitted that Respondent No. 1 had initially stated that it owes a debt of USD 2,55,171.40 to the 2nd Respondent and hence, it was necessary for this Court to issue notice to the garnishee under Order XXI Rule 46A of the CPC. Further, considering the later denial of any debt due by the 1st Respondent to the 2nd Respondent, it became a triable issue which required trial under Order XXI Rule 46C of the CPC. Hence, this Court could not have summarily dismissed the Notice of Motion preferred by the Appellant herein by holding that there was no debt of the garnishee which has been attached under Order XXI Rule 46A of the CPC. He has submitted that the Foreign Arbitration Award was passed in favour of the Appellant and against the Respondents No. 2 and 3 and that the Arbitration Petition seeks enforcement of the Foreign Award as a decree. He has submitted that accordingly, Order XXI Rules 46A to 46H of the CPC would apply and that the learned Judge of this Court has not properly considered these provisions, particularly, when the 1st Respondent had stated that it owed a

debt to the 2nd Respondent and that it was necessary in the light of which for this Court to pass garnishee orders against the 1st Respondent as sought for in this Notice of Motion.

6. We have considered the submissions. We find that the 1st Respondent had made a statement on 16th July 2015 when the Notice of Motion had been taken up for *ad-interim* relief that it does not have to pay any amount to the 2nd Respondent under the contract and that in case any amount is required to be paid by 1st Respondent to the 2nd Respondent in future, the Petitioner/Appellant would be given 72 hours prior notice as recorded by this Court. This statement was accepted and continued till the dismissal of this Notice of Motion.

7. It is necessary to refer Order XXI Rule 46A of the CPC, which reads as under:-

“46A: Notice to garnishee

(1) The Court may in the case of a debt (other than a

debt secured by a mortgage or in charge) which has been attached under rule 46, upon the application of the attaching creditor, issue notice to the garnishee liable to pay such debt, calling upon him either to pay into Court the debt due from him to the judgment-debtor or so much thereof as may be sufficient to satisfy the decree and costs of execution, or to appear and show cause why he should riot do so.

- (2) An application under sub-rule (1) shall be made on affidavit verifying the facts alleged and stating that in the belief of the deponent, the garnishee is indebted to the judgment-debtor.*
- (3) Where the garnishee pays in the Court the amount due from him to the judgment-debtor or so much thereof as is sufficient to satisfy the decree and the costs of the execution, the Court may direct that the amount may be paid to the decree-holder towards satisfaction of the decree and costs of the execution.”*

It is clear from the said provision, that there has to be a debt which has been attached under Rule 46 for a notice to

be issued to the garnishee. In the present case, there is according to the statement of the 1st Respondent, no debt due by the 1st Respondent to the 2nd Respondent and hence, nothing to be attached pursuant to which a notice could be issued to the garnishee as sought for in the Notice of Motion filed by the Petitioner. The learned Judge has considered the material on record including the statements made in the Affidavit filed on behalf of the 1st Respondent by Captain Kelath Devadas, Director (Technical and Offshore Division) as an authorised signatory of 1st Respondent affirmed on 21st October 2016. In the Affidavit it is categorically stated that the 1st Respondent as on date is not holding any sums payable to the 2nd Respondent as they have withheld sum of Rs. 2,55,171.40 and adjusted the sum against costs incurred by the 1st Respondent in rectifying and repairing the defects in performance, material and workmanship under the shipbuilding contract. In paragraph 7 of the said Affidavit, the Respondent has stated as under:-

“7. *The Respondent No.1 states that no sums are payable by Respondent No.1 to the Respondent No.2 under the Ship-Building Contract, dated 17th November 2010 or under any other Contract.*”

8. The learned Judge despite holding that the question of granting any prayer in the Notice of Motion does not arise, has at the same time, protected the Appellant by holding that if at any point of time, Respondent No. 1 has to pay any amount to Respondent No. 2, they shall give notice of at least 7 working days to the Appellant before releasing any such payment. Hence, the Appellant cannot have any grievance against the impugned order.

9. We do not accept the submissions of the learned Senior Counsel for the Appellant that it was necessary for this Court to frame an issue under Order XXI Rule 46C of the CPC as to whether the 1st Respondent owed a debt to the 2nd Respondent and/or for this Court to conduct a trial on this issue.

We find that since the 1st Respondent itself has made a statement that it does not owe any amount as and by way of debt to the 2nd Respondent, nothing further requires to be determined. We are of the considered view that there is no question of any issue being framed and/or trial as there is nothing on record to show a debt due by the Respondent No. 1 which has been attached by this Court under Order XXI Rule 46 and Rule 46A of the CPC and hence, Order XXI Rule 46C does not apply.

10. We find no infirmity in the impugned order, which requires the Appellate Court to interfere. Accordingly, the present Appeal is dismissed. Hence, Chamber Summons does not survive.

[RIYAZ I. CHAGLA J.]

[B.R. GAVAI, J.]