IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

THURSDAY, THE 18TH DAY OF JANUARY 2018

THE HON'BLE MR. JUSTICE C.V.KARTHIKEYAN

A.Nos.7200 and 2986 of 2017
in
C.S.No.141 of 2017

(*) 1. Mr.Vijay G.Prabhu
S/o. Mr.Ganesh Prabhu

(*) 2. Mr.Ganesh Prabhu
S/o. Mr.Devaraya Prabhu

(*) Mrs.Geetha Prabhu
W/o. Mr.Ganesh Prabhu
Shree Prabhu Ganesh
8th Cross, Gandhi Nagar,
Mangalore 575003.

(*) Amended as per order dated 18.1.2018 in
A.No.7200 of 2017) : Plaintiff

Vs.

1. A vessel namely, TB Parasea One,
bearing IMO No.9456381 flying a Palu flag together with her hull, tackle engines, machinery, paraphernalia and all her appurtenant on board presently lying and being at V.O. Chidambaranar Port Trust, Tuticorin Port, Tamil Nadu, India through its owner and all persons claiming to be interested in the vessel.

2. PARADIGM SEASTAR LTD.,
A company incorporated under the laws of Dubai
having its address at 408, Dubai Real Estate Centre
Al Mina Road, Satwa, P.O. Box 50126
Dubai, UAE. : Defendants

A.No.7200 of 2017

1. Mr.Vijay G.Prabhu
S/o. Mr.Ganesh Prabhu

2. Mr.Ganesh Prabhu
S/o. Mr.Devaraya Prabhu

Mrs.Geetha Prabhu
W/o. Mr.Ganesh Prabhu
"Shree Prabhu Ganesh"
8th Cross, Gandhi Nagar,
Mangalore 575003.

4. Roy Lexim (Formerly known as
Royal Exim Exporters And Importers),
A Registered Partnership firm
having its office at 6-2-40, 8th Cross Road,
Gandhinagar, mangalore-575 003,
India Represented through its Power of attorney
Mr.S.Senthil, and Indian Inhabitant
having his residence at
No.10/33, Second floor,
Kamala Nehru Nagar Second Street,
100 ft Road, Vadapalani,
Choolaimedu,
Chennai 600094 : Applicants

Vs.

1. A vessel namely, TB Parasea One,
bearing IMO No.9456381 flying a Palu flag together
with her hull, tackle engines, machinery, paraphernalia
and all her appurtenant on board presently lying and
being at V.O. Chidambaranar Port Trust, Tuticorin Port,
Tamil Nadu, India through its owner and all persons
claiming to be interested in the vessel.

2. PARADIGM SEASTAR LTD.,
A company incorporated under the laws of Dubai
having its address at 408, Dubai Real Estate Centre
Al Mina Road, Satwa, P.O. Box 50126
Dubai, UAE. : Respondents/Defendants

Application praying that this Hon'ble Court be pleased to substitue that Applicants 1 to 3 herein as plaintiffs in the present suit in place of the 4th Applicant/Plaintiff.

A.No.2986 of 2017:

1. A vessel namely, TB Parasea One,
bearing IMO No.9456381 flying a Palu flag together
with her hull, tackle engines, machinery, paraphernalia
and all her appurtenant on board presently lying and

being at V.O. Chidambaranar Port Trust, Tuticorin Port, Tamil Nadu, India through its owner and all persons claiming to be interested in the vessel.

2. PARADIGM SEASTAR LTD.,
A company incorporated under the laws of Dubai
having its address at 408, Dubai Real Estate Centre
Al Mina Road, Satwa, P.O. Box 50126
Dubai, UAE. : Applicants/Original Defendants

-Vs.-

Roy Lexim (Formerly known as
Royal Exim Exporters And Improters),
A Registered Partnership firm
having its office at 6-2-40, 8th Cross Road,
Gandhinagar, mangalore-575 003,
India Represented through its Power of attorney
Mr.S.Senthil, and Indian Inhabitant
having his residence at
No.10/33, Second floor,
Kamala Nehru Nagar Second Street,
100 ft Road, Vadapalani,
Choolaimedu,
Chennai 600094 :Respondent/Original Plaintiff

Application praying that this Hon'ble Court be pleased to (a) pass an order for rejection of the plaint as per the provisions laid down in Order VII Rule XI of the Code of Civil Procedure, 1908, and (b) pass an order for return of an amount of Rs.78,36,643.00/- (Rupees Seventy Eight Lakhs Thirty Six Thousand Six Hundred and Forty Three only) paid towards security on behalf of the defendants for release of the Defendant No.1 Vessel.

These Applications coming on this day before this court for hearing the court made the following order:-

CS.No.141 of 2017 has been filed, invoking the admiralty jurisdiction of this Court by the Plaintiff, Roy Lexim (formerly known as Royal Exim Exporters and Importers), a registered Partnership Firm, having its office at 6-2-40, 8th Cross Road, Gandhinagar, Mangalore 575003, represented through its Power of Attorney S.Senthil, an Indian Inhabitant, having his residence at No.10/33, Second Floor, Kamala Nehru Nagar, Second Street, 100 ft. Road, Vadapalani, Choolaimedu, Chennai-94, against (1) Vessel, namely, TB Parasea One, bearing IMO No.9456381, flying a Palu flag together with her hull, tackle engines, machinery, paraphernalia and all her appurtenant on board presently lying and being at V.O.Chidambaranar Port Trust, Tuticorin Port, Tamil Nadu, India, through its owner and all persons claiming to be interested in the Vessel and (2) Paradigm Seastar Limited, a Company incorporated under the laws of Dubai, having its address at 408, Dubai Real Estate Centre, A1 Mina Road, Satwa, P.O.Box 50126, Dubai UAE.

2. The suit had been filed, seeking a judgement and decree against the Defendants for a sum of Rs.78,36,643.40/- together with interest on the principal sum of Rs.68,98670/- and for arrest and sale of the 1st Defendant Vessel, TB Parasea, which, at that particular point of time, was lying in the territorial waters of India at the V.O.Chidambaranar Port Trust, Tamil Nadu and for a direction to adjust the sale proceeds against the suit claim and for costs of the suit.

3. At the time when the suit was filed, the Plaintiff had also filed an application in A.No.1278 of 2017,

seeking an order of arrest and sale of the 1st Defendant Vessel. Arrest was also ordered. Subsequently, on directions of this Court, the Defendants had deposited a demand draft, for a sum of Rs.78,36,643.40/-, drawn on Karnataka Bank, Salem, dated 14.3.2017 and the Vessel was released pursuant to the orders in A.No.1687 of 2017. Subsequently, the Defendants had filed the present application in A.No.2986 of 2017 under Order 7 Rule 11 of CPC to reject the plaint. Thereafter, A.No.7200 of 2017 has been filed, seeking to substitute the Applicants 1, 2 and 3 as the Plaintiffs in the present suit in the place of the 4th Applicant/ Plaintiff. All these applications were heard together.

4. The Plaintiff was in the business of exporting and importing construction materials. The Plaintiff and the 2nd Defendant had entered into an agreement executed at Mumbai on 3.9.2016, referred as the charter party. The Plaintiff had chartered a tow and tug to tug the Vessel TB Parasea One. A refundable charter deposit of Rs.23,50,000/- had also been paid. This had been paid by the Plaintiff to the 2nd Defendant. The Vessel came to Mangalore port only on 16.10.2016 and weather condition was also bad. It was stated that the condition of the Vessel was very bad and repairs had to be undertaken. This took a period of four days. Since the Vessel was under charter to the Plaintiff, they decided

to commence the loading. However, the Defendants did not inform about the damage that already existed in the ballast tanks of the Vessel.

5. It has been stated that instead of halting the loading operations, the Defendants instructed the Plaintiff to commence loading. Thereafter, the Vessel was taken to Bharathi Shipyard Limited, Mangalore for undertaking major repairs. Consequently, the Plaintiff had lost their order from Jet Mid-East India Trades. Repairs were completed only on 20.11.2016. The Plaintiff received a new purchase order on 7.12.2016 from Sri Kirthika International. It was only for 3000 metric tonnes because the Agency was not sure about the sea worthiness of the Vessel. The loading was completed on the Vessel on 10.12.2016. The Vessel which left on 12.12.2016 from New Mangalore Port with the partial load of 3000 metric tonnes, reached Male, Maldives on 20.12.2016, taking a total of 8 days. Whereas overall sailing is only 5 days. The Plaintiff had suffered huge losses. It was under these circumstances that when the Vessel was again birthed at Tuticorin Port, the suit had been filed and sought for arrest of the Vessel. After the order of arrest was passed, the amount as stated above was deposited into the Court and the Vessel had been released.

6. The Defendants, had thereafter, filed A.No.2986 of 2017 under Order 7 Rule 11 of CPC to reject the plaint. In

the affidavit filed in support of the said application, it has been stated that there is no privity of contract between the Plaintiff and the 2nd Defendant. It has been stated that the Plaintiff relied upon a partnership deed dated 1.6.2016 and a reading of the said agreement would show that the Plaintiff was functioning under the name and style of 'Roy Lexim'. However, in the plaint, they have categorised it as 'Royal Exim'. Consequently, the Plaint had been instituted in the name of a wrong person. It has been stated that the Plaintiff had an intention to defraud the 2nd Defendant. It has been further stated that there was a provision for arbitration. It has been stated that the order of arrest was obtained on the basis of the averments which the Plaintiff knew to be false. It has been stated that the plaint should be rejected.

7. A counter affidavit has been filed to the said application, stating that the very cause title of the present suit shows that the Plaintiff firm was formerly known as 'Royal Exim' and subsequently, changed its name to 'Roy Lexim and both the firms are one and the same. It has been stated that even after the name change, 'Roy Lexim' continues to make the payments and operate the same bank accounts. It has been stated that the Defendant Company has its office in India and carries out all its operations from India. It has been stated that the Plaintiff had sought arrest of the

Vessel on valid and legal grounds and it was finally stated that the application to reject the plaint should be dismissed.

8. During the course of the arguments, the learned counsel for the Applicant/ 2nd Defendant widened the scope of the application, stating that the Plaintiff was an unregistered partnership firm and consequently, claimed that the Plaintiff cannot either sue or to be sued in view of Section 69 of the Partnership Act.

9. The Plaintiff had filed A.No.7200 of 2017 to substitute (1) Vijay G.Prabhu, (2) Ganesh Prabhu and (3) Geetha Prabhu, as Plaintiffs in favour of the original Plaintiff. In the affidavit filed in support of the said application, it has been stated that the present Applicants 1 to 3 are the partners of the Plaintiff firm. It has been further stated that a suit by or against a partnership firm is nothing but a suit by or against all partners. It has been stated that the same business is being continued in the name of 'Roy Lexim' with the same PAN Number. It has, therefore, been that the this application to substitute must be allowed.

10. A counter has also been filed, stating that there is no privity of contract between the present Applicants and the Defendants. It has been stated that the Applicants had not produced any documentary evidence in

support of the averments that the partners of both the firms, 'Roy Lexim' and 'Royal Exim' are one and the same. It was claimed that the application to substitute should be dismissed.

11. I have carefully considered the arguments of Mr.Manoj Khatri, the learned senior counsel for the Applicant in A.No.2986 of 2017 and the Respondent in A.No.7200 of 2017 and Mr.Ravi Kumar Paul, the learned senior counsel for the Respondent in A.No.2986 of 2017 and the Applicant in A.No.7200 of 2017.

12. A.No.2986 of 2017 was filed under Order 7 Rule 11 of CPC. Order 7 Rule 11 (a) and (d) alone applies to the Original Side of the Madras High Court. Order 7 Rule 11 (a) and (d) are follows:-

> "**11. Rejection of plaint:-** The plaint shall be rejected in the following cases:—
>
> (a) where it does not disclose a cause of action;
>
> (d) where the suit appears from the statement in the plaint to be barred by any law; "

13. The present application to reject the plaint has been filed on the ground that there is no privity of contract between the Plaintiff and the Defendants. In support of this contention, more particularly, in support of the fact that the Plaintiff is not a registered partnership firm, the learned counsel for the Applicant/ 2nd Defendant has relied on **1977 1 SCC 379 (Seth Loonkaran Sethiya and**

others Vs. Ivan E.John and others), wherein paragraph 21, it was held as under:-

> "21. A bare glance at the section is enough to show that it is mandatory in character and its effect is to render a suit by a Plaintiff in respect of a right vested in him or acquired by him under a contract which he entered into as a partner of an unregistered firm, whether existing or dissolved, void. In other words, a partner of an erstwhile unregistered partnership firm cannot bring a suit to enforce a right arising out of a contract falling within the ambit of Section 69 of the Partnership Act. .."

14. The learned senior counsel has also relied on **2006 3 SCC 100 (Mayar)** on the issue of suppression of facts. It was held in paragraph 12 as under:-

> "12. 'The court has to read the entire plaint as a whole to find out whether it discloses a cause of action and if it does, then the plaint cannot be rejected by the court exercising the powers under Order 7 Rule 11 of the Code. Essentially, whether the plaint discloses a cause of action, is a question of fact which has to be gathered on the basis of the averments made in the plaint in its entirety taking those averments to be correct. A cause of action is a bundle of facts which are required to be proved for obtaining relief and for the said purpose, the material facts are required to be stated but not the evidence except in certain cases where the pleadings relied on are in regard to misrepresentation, fraud, wilful default, undue influence or of the same nature. So long as the plaint discloses some cause of action which requires determination by the court, the mere fact that in the opinion of the Judge the plaintiff may not succeed cannot be a ground for rejection of the plaint."

15. On the other hand, Mr.Ravi Kumar Paul, the learned senior counsel, answering the issue of unregistered

partnership firm, has relied on **CDJ 2009 MHC 4768 (S.B.Steel Industries Vs. India Re-Rolling Mills)** wherein paragraph 52, it was held as under:-

> "52. The bar contemplated under Section 69(2) of the Act will come into picture only when the suit is filed to enforce a right arising from a contract against a third party. In the present case, the suit has been filed for recovery of possession of A and B Schedule properties and to pay damages for use and occupation. If that being so, as rightly pointed out by the learned senior counsel for the Respondent, the suit is to enforce a statutory right available to the Plaintiff under the provisions of the Transfer of Property Act and the suit is not the one to enforce a right arising from a contract entered into between the parties."

16. The learned senior counsel has also relied on **CDJ 2011 SC 1122 (Navjivan Kagdi & Co. and another Vs. Dhiren S.Doshi and others)** wherein it was held as follows:-

> "13. ... Having regard to the purpose Section 69 (2) seeks to achieve and the interest sought to be protected, the bar must apply to a suit for enforcement of right arising from a contract entered into by the unregistered firm with a third party in the course of business dealings with such third party. If the right sought to be enforced does not arise from a contract to which the unregistered firm is a party, or is not entered into in connection with the business of the unregistered firm with a third party, the bar of Section 69(2) will not apply."

17. In the present case, the Defendants had specifically not averred that the Plaintiff is not an unregistered firm. This has come up only during the arguments. However, as rightly pointed out by Mr.Ravi Kumar

Paul, the learned senior counsel, even an unregistered partnership firm can exercise its rights when there is a right to be exercised under law or the statue. In the present case, the Plaintiff's claim has to be adjudicated during the trial. Rejection of the plaint is not the answer.

18. As is seen, the cause of action is bundle of facts and law and these have to be tested during the trial. Witnesses will have to be examined and documents have to be exhibited and proved to be relevant and admissible in nature and thereafter, a considered finding will have to be given. On the basis of the averments in the plaint, there is a definite cause of action and in that, the Plaintiff has specifically stated about the existence of a charter party and the liability arisen by the Defendants out of the charter party. Dates and events have been specifically pleaded by the Plaintiff and the Plaintiff has also specifically stated about the sea worthiness and the repairs done to the Vessel and they have also specifically stated about such suffering owing to the delay in sailing time from Mangalore to Maldives. All these contributed to the delay, which had resulted in loss to the Plaintiff. This is cause of action for the Plaintiff. The fact that the Plaintiff firm is registered or unregistered is an issue to be decided during the trial. Consequently, I find no reason to reject the plaint at the threshold and consequently, A.No.2986 is to be

dismissed.

19. With respect to A.No.7200 of 2017, by substituting the Plaintiffs, the cause of action does not change and there will be no shift in the cause of action and the Defendants will not be seriously prejudiced and accordingly, A.No.7200 of 2017 is to be allowed.

20. In the result, A.No.2986 of 2017 is dismissed and A.No.7200 of 2017 is allowed. No costs. The Plaintiff is directed to carry out necessary amendment and file a amended copy of the plaint on or before 01.02.2018.

Sd./-C.V.K.J
18/01/2018

//Certified to be true copy//
Dated at Madras this the day of 2018.

COURT OFFICER(O.S.)

jj 21.03.18