IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 13.12.2018

Date of Decision : 21.12.2018

CORAM

THE HON'BLE MR.JUSTICE M.SUNDAR

Application No.7066 of 2018
and
C.S.No.385 of 2012

1.M/s.MSC Mediterranean Shipping Co SA Geneva,
A company incorporated under the laws of
Switzerland and carrying on business at
Chemin Bieu, 12-14, 1208 Geneve,
Switzerland.
Rep by is Power of Attorney,
Mr.A.Umai Balan

2.M/s.Mediterranean Shipping Company (UAE) LLC
A company incorporated under the laws of UAE
and carrying on business at
Sharaf Building, 4th Floor, Al Mina,
Opp. Port and Customs Building/adj
Sea View Hotel, P.O. Box No.50439
Dubai, United Arab Emirates,
rep by its Power of Attorney
Mr.A.Umai Balan

3.M/s.MSC Agency India Pvt. Ltd.,
A company incorporated under the
Provisions of the Companies Act, 1956
and having office at 1st Floor, KGN Towers,
No.62, Ethiraj Salai, Egmore,
Chennai-600 105
rep by is Authorized Signatory,
Mr.A.Umai Balan .. Applicants

Vs.

1.Chloride Alloys (India) Limited,
A company incorporated under the
Companies Act, 1956, and carrying on business

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Inter-alia, at 60, Seethanayakanahalli,
Malur Taluk, Kolar District,
Karnataka-563 130
and represented by its Director
Mr.Supriya Coomer,
son of late Dr.M.M.Coomer

2.ITUS International FZE
A company incorporated under the
Laws of UAE and carrying on business
at P.O.Box 50710, Hamriyah Free Zone,
Sharjah, United Arab Emirates.

3.M/s.MSC Ship Management Hong Kong Limited,
A company incorporated under
the laws of Hong Kong
and carrying on business
at 43rd Floor, The Centre,
99 Queens Road Central, Hong Kong. .. Respondents

This application is filed under Order XIII-A of the Code of Civil Procedure as amended by virtue of Commercial Courts Act, 2015 read with Order XIV Rule 8 of the Madras High Court OS Rules seeking to pass a summary judgment under Order XIII-A of CPC (as amended) to dismiss the suit as against the defendant Nos.2,4 and 5 and to pass such further or other orders as this Hon'ble Court may deem fit and necessary in the facts and circumstances of the case and thus render justice.

सत्यमेव जयते

For Applicants : Mr.P.Giridharan

For Respondents : Mr.S.Raghunathan for R-1

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ORDER

In the main suit, there is a sole plaintiff and there are five defendants.

http://www.judis.nic.in A.No.7066 of 2018 has been taken out by defendants 2,4 and 5 with a prayer

for summary judgment inter-alia under Order XIII-A of amended 'The Code of Civil Procedure, 1908' ('CPC' for brevity) as amended by 'The Commercial Courts Act, 2015' ('said Act' for brevity). In this order / judgment, from hereon, parties shall be referred to by their respective ranks in the main suit for the sake of convenience and clarity.

2 It is necessary to set out the factual matrix of the case in a nutshell for the purpose of better appreciation of this order / judgment. Therefore, the factual matrix of the instant case in a nutshell is set out infra under the caption 'Concise factual matrix'.

3 Concise Factual Matrix :

(a) Plaintiff is a manufacturer inter-alia of Lead Acid Batteries. Such lead acid batteries of plaintiff are manufactured by smelting and refining of lead and allied alloys and for this purpose, it is plaintiff's say that it requires remelted lead ingots which according to plaintiff is an essential ingredient for plaintiff's manufacturing activity.

(b) In the aforesaid nature of business of plaintiff, plaintiff entered into a sales contract dated 01.11.2011 with first defendant for supply of approximately 150 MTs plus or minus 10% remelted lead ingots in six containers which are 20 feet tall, at the rate of 1800 US Dollars per metric tonne.

(c) 150 MTs plus or minus 10% remelted lead ingots (hereinafter referred to as 'suit consignment' for the sake of clarity) was shipped by first defendant in 5 containers under a Bill of Lading dated 27.12.2011 and one container under a Bill of Lading dated 17.01.2012 (six containers in all). Suit

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consignment was shipped by first defendant Shipper from Jebel Ali Port in Dubai, United Arab Emirates to Chennai, India. This Commercial Division is informed that Defendants 2, 3, 4 and 5 belong to a Group of Companies, which goes by the name MSC Group of Companies. To be noted, MSC stands for 'Mediterranean Shipping Company'.

(d) It is not in dispute that MSC group is a private owned business and it is engaged in the business of transportation of goods. Defendant No.2 is the owner of Vessels, namely, MSC Mozambique and M.V.Northern Valour in which suit consignment was shipped from Jebel Ali Port to Chennai Port. Second defendant is in Geneva, Switzerland. Third defendant is second defendant's subsidiary in Hong Kong. This Commercial Division is informed that third defendant has now become a dormant company in Hong Kong. Fourth defendant is a processing officer of second defendant (owner of Vessels) in United Arab Emirates and fifth defendant is second defendant's agent in India. This description of array of parties will reveal that while plaintiff is the consignee, first defendant is the shipper and defendants 2 to 5 put together are all part of MSC Group, i.e., the carrier. Therefore, though there is one plaintiff and five defendants, for all practical purposes, there are three entities to this lis, namely plaintiff consignee, first defendant shipper and the carrier (defendants 2 to 5).

(e) First defendant shipper in United Arab Emirates has been served by way of substituted service on 09.01.2017 as service through usual / normal modes were evaded. Post service of first defendant by substituted

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service on 09.01.2017 also, first defendant has not chosen to come before this Court, though first defendant's name is shown in the cause list. First defendant's name called out aloud thrice and there is no representation. First defendant is set ex parte.

(f) With regard to the suit consignment, it is not in dispute that the same was shipped from Jebel Ali Port in United Arab Emirates to Chennai Port in India in six containers, all of which are sealed containers. It is the case of plaintiff that when ultimately they opened the containers, they found that the suit consignment was not there, but there was only about 9.50 MTs of metal chemical drums. Therefore, the instant suit has been filed by plaintiff consignee claiming the value of the suit consignment which has been made by plaintiff to first defendant. To be noted, the suit claim is little over Rs.1.69 Crores. It is Rs.1,69,23,209.00 to be precise.

(g) As already mentioned, there are effectively three entities to this lis, but one of the three, i.e., the shipper has not chosen to come before this Court inspite of being duly served and has been set ex parte now. Plaintiff consignee is now seeking a decree against the carrier also, but carrier has taken out the instant application being A.No.7066 of 2018 seeking a summary judgment, i.e., dismissal of suit, inter-alia on the ground that plaintiff has no real prospect of succeeding in its claim against the carrier as the liability of the carrier is limited and it ceases on the suit consignment being handed over with seals intact condition to plaintiff.

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(h) Having set out the Concise factual matrix, we shall now move on to rival submissions made before this Commercial Division at the hearing under the caption 'Rival submissions'.

4 Rival submissions :

(A) Mr.S.Raghunathan, learned counsel representing the counsel on record for plaintiff made submissions, which can be broadly summarised as follows :

(i) Carrier having issued bills of lading regarding suit consignment is liable as it necessarily means that the carrier is holding out that it is carrying the suit consignment.

(ii) Carrier, MSC Group, had accepted sealed containers from first defendant shipper knowing fully well that empty metal chemical drums had been struck inside the containers.

(iii) Carrier MSC Group has fraudulently and deliberately prepared bills of lading knowing fully well that declaration of goods made by first defendant was absolutely low and wholly incorrect.

(B) Mr.P.Giridharan, learned counsel on record for defendants 2,4 and 5 which is being referred to as carrier / MSC Group for the sake of

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convenience and clarity, made submissions which can be broadly summarised as follows :

(i) Contract of carriage of MSC group is fulfilled the moment goods are discharged in seals intact condition in Chennai port.

(ii) Once there is a clause in bills of lading that details of suit consignment were given by shipper, carrier is exempt from liability qua contents as there is no obligation on the part of the carrier to check and it cannot check the contents as the same were shipped in sealed containers.

(iii) Bills of lading are only for number of containers and not for its contents.

(iv) With regard to cessation of the liability of the carrier, the moment the equipment interchange receipt is issued by Chennai Container Terminal, the liability of the carrier ends at this very point, to be precise.

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(v) Plaintiff has not filed any document along with plaint to show that suit consignment was weighed in the load port, i.e., Jebel Ali Port in Dubai and therefore, plaintiff has no real prospect of succeeding in the instant claim.

(vi) Carrier, MSC Group's argument regarding

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limited liability of the carrier in contracts of this nature is supported by the principle laid down in ***Thakur Shipping Co. Ltd., Bombay Vs. Food Corporation of India*** case by a Division Bench of this Court in a judgment reported in ***AIR 1983 Mad 105***. ***Thakur Shipping Co. Ltd***.'s principle was restated and applied in two subsequent Division Bench judgments of Madras High Court, i.e., ***Union of India Vs. Tatvani Shipping Company*** reported in ***1998-1-L.W. 16*** and in ***Container Corporation of India Ltd. Vs. Priya Dyes & Chemicals*** reported in ***2012-4-L.W. 163***.

5 Having set out the rival submissions, this Commercial Division shall now proceed to discuss the same, go into the bone of contention and find an answer to the issues that emerge by applying the process of dispositive reasoning. This shall be done under the caption 'Discussion and Dispositive reasoning' infra.

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6 Discussion and Dispositive Reasoning :

(a) As we are dealing with a summary judgment plea under Order XIII-A of amended CPC as amended by said Act, it may be necessary to have a look at the parameters / determinants with regard to summary judgments. The grounds on which summary judgments can be given are set out in Rule 3 of Order XIII-A of amended CPC. A perusal of Rule 3 reveals that there are

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two clauses therein. A further perusal of the two clauses reveals that summary judgment can be passed before recording oral evidence, if the plaintiff has no real prospect of succeeding on the claim or if the defendant has no real prospect of successfully defending the claim. Both these scenarios are circumscribed with a rider that there should be no other compelling reason as to why the claim should not be disposed of before recording oral evidence. Therefore, this discussion and dispositive reasoning will proceed on this basis.

(b) As would be evident from the narrative of factual matrix supra, it will be clear that suit consignment was shipped in two Vessels, namely, MSC Mozambique and M.V.Northern Valour. In M.V.Northern Valour, five containers were shipped under bill of lading dated 27.12.2011. One container was shipped in MSC Mozambique under a bill of lading dated 17.01.2012. These two bills of lading have been filed as plaint document Nos.9 and 10 by the plaintiff and these two documents are not disputed by defendants. Therefore, the same can be looked into. Both Bills of lading are identical as far as terms of shipment and as far as contract of carriage are concerned. The contract of carriage being crux and gravamen of this litigation, it may be necessary to very closely examine both these bills of lading. In the bills of lading, it has been clearly mentioned that 'PARTICULARS FURNISHED BY THE SHIPPER. NOT CHECKED BY CARRIER. CARRIER NOT RESPONSIBLE (See Clause 14)'.

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(c) A perusal of clause 14 of the bills of lading captioned 'DESCRIPTION OF GOODS AND MERCHANT'S RESPONSIBILITY' takes us to clause 14.2 which reads as follows :

> "14.2 No representation is made by the Carrier as to the weight, contents, measure, quantity, quality, description, condition, temperature, marks, numbers or value of the Goods and the Carrier shall be under no responsibility whatsoever in respect of such description or particulars."

(d) Further more, as pointed out by learned counsel for MSC Group, the bills of lading have two different columns depending on the nature of the contract of carriage. One column talks about 'Port of Loading' and 'Port of Discharge', whereas another column talks about 'Place of Receipt (Combined Transport ONLY – See Clauses 1 and 5.2)' and 'Place of Delivery (Combined Transport ONLY - See Clauses 1 and 5.2)'. In the instant cases, while the port of lading and port of discharge have been shown as Jebel Ali and Chennai respectively, place of receipt and place of delivery have been marked 'xxxxxx'.

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(e) Considering the importance of bills of lading for deciding this lis, it is deemed appropriate to scan, extract and reproduce the same infra. Two bills of lading read as follows :

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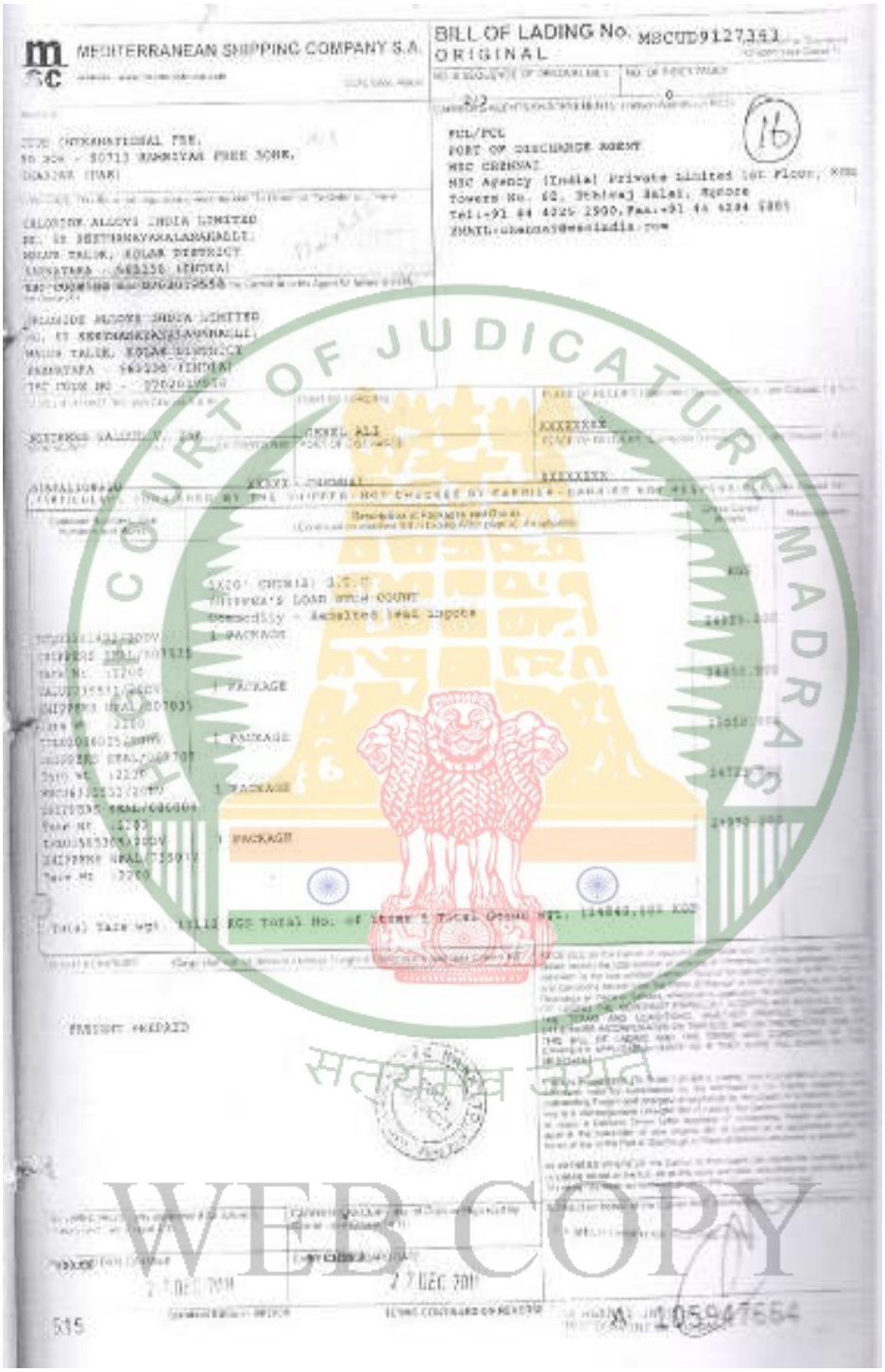

MEDITERRANEAN SHIPPING COMPANY S.A.

BILL OF LADING No. MSCUD9127393
ORIGINAL

(16)

POL/POL
PORT OF DISCHARGE AGENT
MSC CHENNAI
MSC Agency (India) Private Limited 1st Floor,
Towers No. 60, Sthiraj Salai, Agaore
Tel:-91 44 4225 2500,Fax:-91 44 4294 1001
EMAIL:chmmsa@mscindia.com

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(f) Relying on aforesaid two bills of lading, which are admitted documents by the parties to the lis, learned counsel for MSC Group Carrier submitted that bills of lading are effectively contract of carriage between the parties. Learned counsel submitted that place of receipt and place of delivery not being shown and being marked 'xxxxxx' with only port of loading and port of discharge being shown necessarily mean that it is not a combined transport and the moment sealed containers, in sealed condition are handed over to consignee plaintiff with seals intact condition, the responsibility of the carrier ends. To be noted, the clauses / covenants have been set out on the reverse of the bills of lading and the same in enlarged font has been placed before this Commercial Division with consent of both sides.

(g) Furthering his submissions on these lines, learned counsel for MSC Group referred to 'Equipment Interchange Receipt' (hereinafter 'EIR' for brevity), which has been filed not by MSC Group, but by the plaintiff as plaint document No.13. As these EIRs have been filed by plaintiff as plaint document No.13 along with plaint, as defendant does not dispute the same (to be noted, defendant not only does not dispute the same, but is relying on the same to further his case), the same can be looked into. Referring to EIRs, learned counsel submitted that there is a seal in the EIR which clearly reads 'Verified load port seal found intact and passed out'. The moment these EIRs are issued by Chennai Container Terminal, the responsibility of MSC group / carrier ends, is learned counsel's say. Learned counsel submitted that this document filed by plaintiff clinchingly shows that carrier has handed over the

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suit consignment with seals intact condition or in other words, seals were found checked and found to be intact by authorities concerned and thereafter, EIRs were issued. As plaintiff itself has filed the EIRs as plaint document No.13, the plaintiff has no real prospect of succeeding in its claim at least against the carrier, is learned counsel's say. A perusal of EIRs reveal that the submission of learned counsel for Carrier is correct.

(h) To buttress and bolster the submission as legal arguments, as mentioned supra under the caption 'Rival submissions', learned counsel pointed out that the principle that it is for the shipper / consignor to prove by adequate evidence that particulars regarding weight contents etc. entered in the bill of lading represent the correct weight and the exact quantity of the goods which are loaded on board the Vessel, was laid down by a Division Bench of this Court in ***Thakur Shipping Co. Ltd., Bombay Vs. Food Corporation of India*** reported in ***AIR 1983 Mad 105***. Learned counsel taking this Commercial Division through the ***Thakur Shipping Co. Ltd.*** Case, submitted that paragraph 39 of the aforesaid case very pithily lays down this principle. Paragraph 39 of ***Thakur Shipping Co. Ltd.*** case reads as follows:

> "**39.**Thus, a review of the reported cases and the ratio laid down therein clearly goes to show that the statements in the bills of lading regarding the number of bags, tins or containers that are shipped would constitute sufficient evidence against the shipowner about the exact number of bags, tins or containers being shipped. But in so far as the weight, contents and value are concerned, if there is an endorsement that they are not known or if there is a qualifying remark indicating that the master of the vessel has entered those particulars in the bills of lading in accordance with the figures given to him by

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the shipper or consignor, then the statements in the bills of lading regarding those particulars would not be binding on the shipowner and it will be for the shipper or consignor to prove that the consignments loaded on board the ship were of the same weight and the contents were of the same nature and the value was of the same figure as those noted in the bills of lading. The hypothesis on which such a dictum has been laid is not far off to see. In so far as the number of bags, tins or containers is concerned, they can be easily verified by a visual check and the checking process will not involve any complicated procedure. On the other hand, checking the weight or nature or the value of the contents in the consignment that is shipped will involve specialised tests and will also prove to be a time consuming exercise, which the ships cannot afford to do for various reasons, such as, the cost factor, the adherence to departure, and arrival, schedules, the lack of facilities for conducting such checks etc. Therefore, it is that if a bill of lading contained a disclaimer clause, it will not have effect in so far as the number of bags, tins etc. are consigned, as no mistake can be made by the master of a vessel about those particulars. <u>But in so far as the weight, contents and quality are concerned, the disclaimer clause will certainly operate and in such a situation, it will be for the shipper or consignor to prove by adequate evidence that the particulars regarding weight contents etc. entered in the bill of lading represent the correct weight and the exact quantity of the goods which are loaded on board the ship</u>."

(Underlining made by Court for supplying emphasis and highlighting)

(i) As mentioned supra, learned counsel also submitted that ***Thakur Shipping Co. Ltd.*** case was subsequently referred to by another Division Bench of this Court in ***Union of India Vs. Tatvani Shipping***

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Company reported in ***1998-1-L.W. 16***. Taking this Commercial Division through ***Tatvani Shipping Company*** case, learned counsel submitted that paragraphs 15, 16 and 17 are of relevance and the same read as follows :

> "15.Learned Counsel for the respondent cited the following judgment reported in M/s.Thakur Shipping Company Limited, Bombay and another v. Food Corporation of India, (AIR 1983 Madras-105). It was held by Division Bench of this Court Comprising of Natarajan, J. and Sethuraman, J. wherein the learned judges have made a reference to the earlier judgment of this Court in the case of Food Corporation of India v. Property Steamship Company (1977) (I) M.L.J.278, where a similar question was considered and answered. In that case also the Food Corporation of India entered into a charter party with the steamship company for transport of 91,600 bags of rice from Bangkok to Tuticorin. On arrival of the ship at Tuticorin, the rice bags were unloaded. A portion of the consignment was found damaged and there was shortage of rice. The plaintiff therein filed suit for damages for the shortage that had occurred. A Division Bench of this Court, agreeing with the trial court, rejected the claim of the Food Corporation of India and held that since the defendants, the ship owners had neither loaded not unloaded the goods, the plaintiff's agents having assumed the responsibility of transporting the goods by undertaking the operation of stevedoring, and each boat note carried the words 'ship not responsible' and no protest had been made by the plaintiff, the defendants could not be held responsible for the shortage. The ration in the abovesaid case will apply on all fours to the instant case also since the respondent-Corporation had undertaken to load and discharge the ship at its risk.
>
> 16.A learned single Judge of this Court in the case of the *Shipping Corporation of India v. Union of India* (AIR 1976 Goa, Daman & Diu. 49) while interpreting bill of lading has held as follows:

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> “The clause in a bill of lading that "measurement, weight and quantity, not known" meant that the particulars contained in the document were those furnished by the shipper and that the carrier did not accept the particulars as correct. The burden of proving such particulars was on the shipper and by independent evidence de hors the particulars appearing on the document.”
>
> 17.In *K.Assainar v. Malabar Steamship Company Limited* (AIR 1975 Kerala-114), learned single Judge of this Court has held that bill of lading was subject to notation of 'weight declared by the shippers but “not checked”. It is indicative of disclaimer of responsibility and liability. It is open to carrier to contract out of his liability, that no presumption arises merely on the ground that certain quantity has been mentioned in the bill of lading when what has been noted has been qualified by the further statement that the weight was declared by the shippers, but not checked by the carrier. In such a case, the carrier could not be held responsible for shortage when there is no acceptable proof that the actual weight was as noted in the bill of lading at the time of shipment. Learned single Judge while coming to the said conclusion has referred to the various decisions of various courts. There other unreported judgment of our High Court rendered by K. Venkataswami, J., as he then was in C.S. No. 38 of 1979, dated 10.10.1984, Maharajan, J., in C.S. No. 76 of 1967 dated 18.11.1970 and Fakir Mohamed, J., in C.S. No. 380 of 1997 also be usefully referred to in the present context, wherein learned Judges have held that bill of lading is not prima facie evidence when there is disclaimer clause.”

(j) To be noted, ***Thakur Shipping Company*** principle has been specifically referred to in paragraph 15 of ***Tatvani Shipping Company*** case.

(k) As mentioned supra, thereafter, another Division Bench of this Court in ***Container Corporation of India Ltd. Vs. Priya Dyes & Chemicals***

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reported in ***2012-4-L.W. 163*** followed ***Thakur Shipping Company*** principle. The fact that ***Thakur Shipping Company*** principle was pressed into service in ***Priya Dyes & Chemicals*** is articulated in paragraph 24 of the said judgment which reads as follows :

> "24.In support of the above contention, learned Counsel relied on the following decisions of this Court:
> (i)*M/s.Thakur Shipping Co. Ltd., Bombay and another vs. Food Corporation of India (AIR 1983 Madras 105) and*
> *(ii)Nippon Yeesen Kaisha Ltd. V. Union of India and another (AIR 1987 MADRAS 12*)."

(I) Most relevant paragraph in ***Priya Dyes & Chemicals*** case is paragraph 32 and the same reads as follows :

> "32.We are in entire agreement with the views expressed in the decisions referred above. In the present case also, the endorsement "SHIPPERS LOAD, STOW AND COUNT FREIGHT PREPAID CY/CY X20' CNTR SAID TO CONTAIN" found on Ex.A4 bill of lading, only means that there was no admission or acceptance of total number of cartons by the carriers, namely defendants 1 and 2, as declared by the consignor, the third defendant. We are of the considered view that the Clauses in the endorsement, referred above, have been put on the bill of lading to protect the carrier if there is a complaint of short delivery or non-delivery. <u>The plaintiffs have also not discharged their burden in establishing that 250 cartons were actually shipped in the container and in such circumstances, the carriers, namely defendants 1 and 2, and the bailees, namely defendants 4 and 5, cannot be held liable for the short delivery</u>."
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> (Underlining made by Court for supplying emphasis and highlighting)

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(m) In response to the aforesaid submissions of learned counsel for Carrier, learned counsel for plaintiff pointed out that the Carrier issuing bills of lading, necessarily, is issuing a document to the effect that suit consignment, i.e., Remelted Lead Ingots weighing 150 MTs plus or minus 10% is being carried and therefore, the Carrier cannot wash its hands off. This Commercial Division has already referred to the bills of lading as well as the principle in this regard qua liability of the carrier in terms of the contract of carriage and has found that relevant details with regard to suit consignment have been given by first defendant shipper and not by the carrier.

(n) Therefore, there is no difficulty in coming to the conclusion that even according to plaint averments and plaint documents, it emerges clearly that the carrier cannot be held liable with regard to contents as well as weight of suit consignment. Likewise, the liability of the carrier clearly ends on the issue of EIRs and therefore, the claim against the carrier, even according to plaint and plaint documents, clearly emerges as one that the plaintiff has no real prospect of succeeding. To be noted, plaintiff has no real prospect of succeeding against the carrier. This is more so, as details pertaining to suit consignment have been given by first defendant shipper.

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(o) This takes us to the next aspect of the matter which has been set out as various points in the summary of rival submissions. Though it has been set out as more than one point in rival submissions, in sum and substance, the next point which arises for consideration is whether there was collusion between the carrier and the shipper. This issue turns on a very

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simple point. To show that the carrier colluded with the shipper and loaded the suit consignment in the Port of lading at Jebel Ali knowing fully well that it contains only aluminium metal drums and not Remelted lead ingots, it is imperative that plaintiff should have made averments in plaint and filed some supporting plaint documents to show that suit consignment was weighed and handed over to the carrier in the Load Port. It was pointed out by learned counsel for MSC Group Carrier that there is absolutely no plaint document in this direction. In other words, learned counsel submitted that even if plaint proceeds for trial and even if oral evidence is let in and even if all documents filed by plaintiff are proved in a manner known to law, there will be nothing to show that the carrier is liable, as there is no document filed along with the plaint to establish that suit consignment was weighed and handed over to the Carrier. Therefore, even if all the contents of plaint and plaint documents are proved in oral evidence, there will be no liability fastened on the carrier.

(p) A perusal of the plaint documents reveals that learned counsel for Carrier is correct and there is no plaint document to the effect that the suit consignment was weighed and handed over to carrier in the Load Port, namely Jebel Ali, Dubai.

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(q) Therefore, there is no difficulty in coming to the conclusion that the plaintiff has no real prospect of succeeding on the claim qua the carrier. This means that if at all, plaintiff can succeed against the shipper / consignor, namely first defendant. However, first defendant had evaded service and after ultimately being served by substituted service, has not chosen to come before this Court and has been set ex parte.

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(r) A careful examination of aforesaid submissions, discussion and dispositive reasoning reveals that plaint averments and plaint documents even without oral evidence show that first defendant has no real prospect of successfully defending the claim. Therefore, the plaintiff will be entitled to a decree against first defendant and not against the carrier, namely defendants 2 to 5.

(s) This takes us to the trajectory of pleadings in the summary judgment application. In the summary judgment application, plaintiff has filed a memo which reads as follows :

> "1.The above suit has been filed for the recovery of a sum of Rs.1,69,23,209/- together with interest at 18% from the date of plaint till the date of realization.
> 2.The Plaintiff, as the importer of a cargo of about 149,965 MT of remelted lead ingots has sought the value of the said cargo since what was shipped by the 1st Defendant and carried by the Second Defendant, was not delivered to the Plaintiff. According to the Plaintiff, all the Defendants are liable to compensate the Plaintiff for the loss of such cargo.
> 3.Defendants 2,4 and 5 have filed application No.7066 of 2016 under Order XIII-A of the Code of Civil Procedure for a Summary Judgment and for the dismissal of the suit filed by the Plaintiff as against them. Since the First Defendant did not respond to the summons issued by this Hon'ble Court, by an order dated 15.12.2016, this Hon'ble Court ordered notice to the First Defendant by substituted service by Publication in Khaleej Times and the Publication was effected in the issue dated 09.01.2017 in the said Daily. An Affidavit for having effected the Publication dated 27.1.2017 has been filed along with the original of the said Publication in this

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Hon'ble Court on the same date.

4.Without prejudice to the rights and contentions raised by the Plaintiff herein in Application No.7066 of 2018 and since the First Defendant has not entered appearance and put forth a defence in so far as the claim of the Plaintiff is concerned, the First Defendant has no real prospects of successfully defending the claim.

5.The Counter Affidavit filed by the Plaintiff in application No.7066 of 2016 under Order XIII-A of the Code of Civil Procedure for a Summary Judgment may be treated as an Application filed by the Plaintiff under Order XIII-A of the Code of Civil Procedure for a Summary Judgment against the First Defendant.

It is therefore prayed that this Hon'ble Court may be pleased to pass a Summary Judgment in respect of the claim of the Plaintiff, as prayed for, against the First Defendant with costs. This would be entirely without prejudice to the contentions raised by the Plaintiff in Application No.7066 of 2018 filed by Defendants 2, 4 and 5 for a Summary Judgment dismissing the claim of the Plaintiff as against them."

(t) In the memo, plaintiff has sought for summary judgment against first defendant albeit without prejudice to the contentions raised by plaintiff in the summary judgment application, namely A.No.7066 of 2018 taken out by defendants 2,4 and 5.

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7 Conclusion :

(a) As the contentions raised by plaintiff in opposition to summary judgment application have been carefully considered, examined and rejected in the dispositive reasoning supra, this Commercial Division has no difficulty

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in coming to the conclusion that while the Carrier is entitled to succeed in the summary judgment application (having the suit dismissed as against the carrier), i.e., defendants 2 to 5, it is axiomatic and a matter of corollary that plaintiff will be entitled to a decree against shipper / first defendant. To be noted, the suit being decreed against first defendant is not merely because it is axiomatic qua dismissal against defendants 2 to 5, but also because of independent considered conclusions arrived at by this Commercial Division that the documents in the suit file show that the suit consignment was not weighed and loaded in the Load Port. Further to be noted, though the instant summary judgment application has been taken out by defendants 2,4 and 5, as alluded to supra, for all practical purposes, there are three entities to this litigation viz., plaintiff consignee, first defendant shipper and defendants 2 to 5 Carrier (MSC Group). Therefore, if plaintiff is not entitled to succeed against the carrier, it follows as a sequittur that plaintiff has no real chance of succeeding against defendants 2 to 5. Therefore, it is appropriate to dismiss the suit against defendants 2 to 5 carrier while decreeing it against first defendant shipper.

(b) It is for the first defendant to come before this Court and establish that it had actually loaded Remelted lead ingots and not aluminium metal drums. Very importantly, the payment for the said consignment has been made by plaintiff to first defendant. First defendant having received the entire sale consideration for suit consignment has bounden duty to come before this court and establish that it has discharged all its legal obligations by loading in the Load port the entire suit consignment, i.e., Remelted lead

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ingots, for which it has received full consideration. First defendant has not chosen to do that. Merely because first defendant has not chosen to do that, it may not be appropriate to mulct the carrier with liability, particularly when the legal position emerges clearly that the contract of carriage in the instant case is such that the carrier cannot be held liable after having handed over the containers with seals intact condition, vide EIRs which have been referred to supra. To be noted, the decision that there shall be a decree against first defendant is not merely on the ground that first defendant has been set ex parte, but it is on the grounds which have been alluded to supra in the summary judgment, as in the considered opinion of this Commercial Division, a careful analysis of suit file placed before this Commercial Division, reveals that first defendant has no real prospect of successfully defending the claim and therefore, this summary judgment in the light of the memo of plaintiff which is treated as an application for summary judgment by plaintiff qua first defendant. In other words, the summary judgment against first defendant is not only on the ground that first defendant has been set ex parte.

(c) The conduct of the first defendant shipper in having received the entire consideration for suit consignment and evading service in the usual conventional mode compelling the plaintiff to resort to substituted service and ultimately, not even coming before this Court to explain and to say that suit consignment was in fact loaded in the Load Port (if that be so) or to set out its stated position in any other manner is clearly vexatious. Though one can say that this is not false or vexatious defence in every sense of the term, in the considered opinion of this Commercial Division, it qualifies as a vexatious way

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of defending a suit warranting compensatory costs. Considering the claim, nature of the lis and the trajectory of litigation thus far, it is deemed appropriate to impose exemplary / compensatory costs of Rs.5,00,000/- (Rupees five lakhs only).

8 Decision :

A.No.7066 of 2018 is allowed. Suit in C.S.No.385 of 2012 is dismissed against defendants 2 to 5. C.S.No.385 of 2012 is decreed against first defendant with costs and exemplary / compensatory costs.

21.12.2018

Speaking order

Index : Yes

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M.SUNDAR, J.

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order in
Application No.7066 of 2018
and
C.S.No.385 of 2012

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