

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 09.08.2019

CORAM :

THE HONOURABLE MR.JUSTICE N.KIRUBAKARAN
and

THE HONOURABLE MR.JUSTICE ABDUL QUDDHOSE

O.S.A.No.159 of 2018

and

C.M.P.No.8758 of 2018

1.A Vessel namely TB PARASEA ONE,
bearing IMO No.9456381, flying a Palau
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,
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

... Appellants/Applicants/Defendants 1 and 2

-Vs-

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

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

3.Mrs.Geetha Prabhu
D/o.Mr.Ganesh Prabhu

All residing at Shree Prabhu Ganesh
8th Cross, Gandhi Nagar, Mangalore - 575 003
Representing M/s.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.

... Respondents/Respondents/Plaintiffs

PRAYER:Appeal against the order dated 18.01.2018 passed by the
learned Single Judge in dismissing the applications in
A.S.No.7200 and 2986 of 2017 in C.S.No.141 of 2017.

For Appellants :Mr.Manoj Kathire

For Respondents:Mr.Ravikumar Paul, Senior Counsel
for M/s.A.A.V. Partners

J U D G M E N T

(Judgment of the Court was delivered by N.KIRUBAKARAN, J)

The appeal has been filed by the defendants against the dismissal of an application taken out by the appellants to reject the plaint filed by the respondent invoking admiralty jurisdiction.

2.The facts of the case are as follows:

(a).The respondents filed C.S.No.141 of 2017 invoking admiralty jurisdiction of this Court by ROY LEXIM (Formerly known as ROYAL EXIM Exporters and Importers) against the appellants seeking decree and judgement for a sum of Rs.78,36,643.40 together with interest on the principle sum of Rs.68,98,670 and for arrest and sale of the appellant's vessel TB PARASEA ONE lying in the territorial waters of India at V.O.Chidambaranar Port Trust, Tamil Nadu and for a direction to adjust the sale proceeds against the suit claim and for interests.

(b). The respondents are doing business of exporting and importing construction materials. The respondents and the second appellant entered into an agreement at Mumbai on 03.09.2016 which is otherwise called "charter party". The respondents had chartered tow and tug vessel to tug TB PARASEA ONE and a refundable deposit of Rs.23,15,000/- was also paid by the respondents to the second appellant. The vessel came to Bangalore port on 16.10.2016 and the weather condition was also bad. It is contended that the condition of the vessel was very bad and repairs had to be undertaken on the vessel which took four days. As the vessel was in charter to the respondents, they decided to commence the loading. However, the appellants' did not inform about the damage that already existed in the ballast tanks of the vessel.

(c).It is stated that inspite of halting the loading operations, the appellants' instructed the respondents to commence the loading. Thereafter, the vessel was taken to Bharathi Ship Yard for undertaking major repairs. Resultantly, the respondents has lost orders from Jet Mid East India Traders, as the repairs were completed only on 20.11.2016. Thereafter, the respondents received new purchase orders on 07.12.2016 from Sri Kirthika International and it was only for 3000 MT because the agency was not sure about the sea worthiness of the vessel.

The loading operations were completed on the vessel on 10.12.2016. The vessel which left from the New Mangalore Port on 12.12.2016 with approved load of 3000 MT reached the Male taking a total of 8 days, whereas the overall sailing time is only 5 days. Due to that the respondents suffered huge losses. Thereafter, when the vessel was berthed at Tuticorin Port, the suit was filed by the respondents to arrest the vessel.

(d).The order of arrest was passed and thereafter on direction from this Court, the appellants deposited a Demand Draft dated 14.03.2017 for a sum of Rs.78,36,643.41 and pursuant to the orders in O.A.No.1786 of 2017, the vessel was released.

(e).Subsequently, the appellants filed an application in O.A.No.2986 of 2017 under Order VII Rule 11 CPC to reject the plaint. The said application, on contest was dismissed by the learned Single Judge against which the present appeal has been preferred.

3.Heard Mr.Joy Thattil Ittoop, learned counsel for the appellants and Mr.Ravi Kumar Paul, learned Senior Counsel for the respondents.

4.Though the learned counsel for the appellants would submit that the respondents firm was formerly known as ROY LEXIM, in the plaint it has been stated as ROYAL EXIM and therefore, the suit has been filed in the name of a wrong person, it is rightly contended by Mr.Ravi Kumar Paul, learned Senior Counsel appearing for the respondents that in the cause title of the suit itself it has been shown that the plaintiffs' firm was formerly known as ROY LEXIM and subsequently, the name has been changed as ROYAL EXIM and both the firms are one and the same.

5.The learned Senior counsel appearing on behalf of the respondents particularly stated that even after the name change ROYAL EXIM continues to make payments and operate the same accounts. As the title itself shows that the previous name and new name, there is no question of filing the suit in the name of the wrong person. Therefore, the plea that there is no privity of contract between the appellant and the respondents has to be rejected and it was rightly rejected by the learned Single Judge.

6.The second point which has been putforth by the appellants is that the respondents firm is an unregistered firm and therefore, the suit cannot be filed by the unregistered firm in view of the bar under Section 69 of the Partnership Act. In this regard, the following two judgments has been relied upon by the learned counsel for the appellant.

(i).SETH LOONKARAN SETHIYA AND OTHERS v. Mr.IVAN E. JOHN AND OTHERS reported in (1977) 1 Supreme Court Cases 379.

(ii).MAYAR (H.K.) LTD. AND OTHERS v. OWNERS AND PARTIES, VESSEL M.V. FORTUNE EXPRESS AND OTHERS reported in (2006) 3 Supreme Court Cases 100.

7.However, it is seen from paragraph 17 of the order passed by the learned Single Judge that the plea that the respondents firm is an unregistered firm has not been taken and it is only during the course of the argument it was advanced. Moreover, the learned Single Judge had rightly held that even an unregistered partnership firm can file the suit when there is no bar under the law or statute. Therefore, the learned Single Judge rightly rejected the said contention stating that the respondents claim has to be adjudicated during the trial.

8.What is to be seen is whether cause of action is available for the respondents to file the suit. The cause of action is nothing but a bundle of facts on law and it has to be decided only during the trial by examining the witnesses and marking the documents. On the basis of averments only, the application for rejection of plaint has to be decided.

9.A perusal of the plaint would definitely reveal the definite cause of action for filing the suit. The respondents plead that the existence of charter party liability had arisen due to the conduct of the appellants and the events which led to filing of the suit have been elaborately stated including the seaworthiness of the vessel and the repairs done to the vessel and the loss caused to the respondent due to the delay in sailing from Mangalore to Maldives.

10.When the allegations made in the plaint make out a case to maintain the suit, the issue has to be decided only at the time of trial. Similarly, the issue as to whether the respondents' firm is registered or an unregistered has to be decided during the trial, as rightly pointed out by the learned Single Judge. All the contentions can be pleaded by the appellants by filing a proper written statement. Further, the appellants are at liberty to prove their case by adducing proper evidence in defence and get the suit dismissed. Therefore, the learned Single Judge was right in dismissing the application to reject the plaint.

11.However, the learned counsel for the appellants would submit that there is a clause for arbitration and the appellants are ready for arbitral proceedings. Similarly, learned Senior counsel appearing on behalf of the respondents would also submit that they are also ready to participate in the arbitration

proceedings. Based on the representation, a memo has been filed by both the parties contending that there is an arbitration clause in the Charter Party agreement i.e. BIMCO TOWHIRE 2008 for arbitration in Singapore. The learned Counsel appearing on behalf of the appellants and the learned Senior Counsel appearing on behalf of the respondents upon instructions from their respective clients have now agreed to refer their disputes to arbitration in Mumbai, India by consent.

12.By consent of both parties, Mr.Akshar Kolse Patil is nominated as the sole arbitrator and all disputes under the said BIMCO charter party to where agreement is referred to the sole arbitrator.

13.While dismissing the appeal, the matter is referred to arbitration to be done by Mr.Akshar Kolse Patil, who has been nominated as sole arbitrator by consent of both the parties as per memo dated 04.07.2019.

14.In fine, the appeal is dismissed. Consequently, connected miscellaneous petition is closed. No costs.

s/d-

Assistant Registrar(CS VI)

True Copy

Sub-Assistant Registrar

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To

1.The Sub Assistant Registrar
Original Side
High Court, Madras 104.

2.Mr. Akshay Khose Patel
Arbitrator
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2nd Floor, Room No. 19
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Opp. Dwarka Resturant
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+1 CC to M/s. Joy Thattil Ittoop, Advocate sr 68746

O.S.A.No.159 of 2018

MP(CO)

SP(06/11/2019)