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IN THE HIGH COURT OF BOMBAY AT GOA

CIVIL REVISION APPLICATION No. 14 OF 2018

Ms. Lena Khan, daughter of late Ivan)
 Khan, Major of age, resident of 6-A)
 Pemino, Altamount Road, Bombay)
 through Power of Attorney -)
 Mr. Kenneth Khan ... **Petitioner**

Vs.

1. M/s. Gammon India Limited)
 A company registered under the)
 Companies Act, 1913, with its)
 registered office at Gammon House,)
 Veer Savarkar Marg, Prabhadevi,)
 Bombay – 400 025.)
2. M/s. I. K. Mrine Charterers)
 Mackinon Mackenzie Bldg.,)
 1st floor, 4, Shoorji Vallabhdas Marg,)
 Ballard Estate, Bombay – 400 038)
3. Mona Kapadia, daughter of late)
 Ivan Khan, Saroj Apartments,)
 Sahney Sujan Park, Pune 411 040.)
4. Capt. Kenneth Khan, son of late)
 Ivan Khan (Partner M/s. IK Marine)
 Charterers), resident of 6-A Pemino,)
 Altamount Road, Bombay 400 026)
5. M/s. Maini Shipping Pvt. Ltd.)
 Apeejay House, 130, Appolo Street,)
 Bombay 400 001)
6. M/s. New India Assurance Co. Ltd.)
 A subsidiary of General Insurance)
 Corporation of India, having its)
 registered head office at New India)
 Assurance Building, 87, Mahatma)

Gandhi Road, Fort, Bombay 400023)
with Divisional Office at Velho Bldg.,)
3rd floor, Panji, Goa)

7. Anant Datta Bhosle,)
Chorao, Ilhas (since deceased through)
Legal heirs – a) Smt. Ratnaprabha)
Anant Bhosle, and, b) Shri Deepak)
Anant Bhosle, both R/o. 723, Chorao,))
Tiswadi Taluka, Tiswadi, Goa **Respondents**

Mr. Raunaq Rao, for the Applicant.

Mr. A. D. Bhobe, for Respondent No. 1.

Mr. K. Noorani, for the Respondent No. 3.

Mr. Amey Kakodkar, for Respondent No. 6.

CORAM : C. V. BHADANG, J.

RESERVED FOR JUDGMENT ON : SEPTEMBER 19, 2019

JUDGMENT PRONOUNCED ON : JUNE 5, 2020
(Pronounced via video conferencing)

JUDGMENT :

1. By this civil revision application under section 115 of the Code of civil procedure (CPC for short) the petitioner, original defendant No. 2(a) is seeking rejection of the plaint in Civil Suit No. 16 of 1992.

2. The brief facts necessary for the disposal of the application may be stated thus:

. That the first respondent M/s Gammon India Ltd (plaintiff) has filed the aforesaid suit against M/s I.K.Marine Charterers (defendant No. 1) and others, for recovery of money and mandatory injunction.

3. The case made out in the plaint is that the plaintiff is a company engaged in the business of civil constructions including construction of dams and bridges etc. The original defendant nos 1 and 3 are respectively the charterers and owners of a vessel viz I. K. Malika which is operated in the inland waters Goa. The defendant No. 4, M/s New India Assurance Co. Ltd., is the insurer of the vessel under a comprehensive policy effective from 1.9.1988 to 31.8.1989. The defendant No. 5 was the Captain of the said barge on 11.2.1989.

4. The plaintiff was engaged by the PWD for the work of Recommissioning and rehabilitation of the Collapsed Mandovi Bridge (Nehru Bridge). The plaintiff commenced the said work in July 1987. For the said purpose the plaintiff had erected a staging truss with the permission of the Captain of Ports between Pier Nos 7 and 8. On account of this and the construction of a new bridge nearby, the Captain of Ports, had issued a notice on 3.1.1989 diverting the movement of all vessels under the Mandovi Bridge strictly between

Pier nos 8 and 9 only, with immediate effect, copy of which, was sent to the Barge Owners Association. As a result of this hundreds of vessels started navigating between Pier nos 8 and 9.

5. It is the material case that on 11.2.1989 at about 4.30 am while the work of the said truss was in progress, under full electric illumination, the defendant No. 5 (captain of the vessel) and the driver of the vessel I. K. Malika navigated the said fully loaded vessel in a rash and negligent manner and flouting the notice dated 3.1.1989 from the captain of ports and dashed against the said truss causing damage to the truss and the machinery mounted on the same, which was thrown in the sea. In the accident one of the labourers working on the site succumbed to the injuries sustained. The matter was reported to the police. According to the plaintiff it suffered damage on account of the loss of the truss part of which is still lying in the riverbed and the damage to the machinery. It is contended that the captain of ports is asking the plaintiff to remove the truss from the river bed or to bear the expenses thereof as the same is obstructing the free navigation in the river. It may be in these circumstances that the plaintiff filed the suit seeking damages and other reliefs.

6. The defendant No. 2A filed an application (Ex D-188) under Order 7 Rule 11 (a) and (d) of the Code for rejection of the

plaint, *inter alia* on the following grounds:

- (a) The plaint does not comply with Order 29, Rule 1 Civil Procedure Code.
 - (b) The plaint has been filed without any Resolution of the Plaintiff Company.
 - (c) The claim does not disclose cause of action as the Defendant No. 4 has already paid against the claim of total loss of the truss raised by the Plaintiff and the Plaintiff has collected Rs.14,24,123/- and therefore, the cause of action ceased on 18.01.1990.
 - (d) The claim is barred by proviso to Section 110 and 110A (3) Motor Vehicles Act, 1939 (“M. V. Act” for short) as modified by Section 54C of the Inland Vessels Act, 1917 (“1917 Act” for short).
 - (e) The claim does not disclose a cause of action against the Defendant No. 2 as admittedly in terms of the paragraphs 2 and thereafter paragraph 21 is a Charterer. The Defendant No. 2 is neither the Master, Driver, Owner nor the Insurer.
 - (f) The suit is barred by law of limitation inasmuch as in terms of Section 110A sub-section (3) of the Inland Vessels Act, 1917 which stipulates that no application for compensation could be entertained unless it is made within six months of the occurrence of the accident.
7. The first respondent filed its reply and opposed the

application.

8. The learned trial court framed following points for determination:

- (i) Whether the plaint is liable to be rejected on the ground of the jurisdiction of the civil court being barred under the Inland Vessels Act?
- (ii) Whether the plaint is liable to be rejected for it being barred by limitation?
- (iii) Whether the plaint is liable to be rejected for want of proper verification, resolution?

9. The learned trial court answered all the points in the negative and by the impugned order dated 28.3.2018 has dismissed the application. Hence this petition.

10. I have heard the learned counsel for the parties. Perused record.

11. Mr. Rao, the learned counsel for the petitioner has submitted that admittedly the petitioner is neither the owner/master nor the driver or the insurer of the vessel. It is submitted that para 2 and 21 of the plaint would make it explicit that the original defendant Nos. 1 and 2 are only the charterers and it is the defendant No. 3 who is the owner. The learned counsel in this regard has referred to the definition of a charterer from Black's Law Dictionary. He has also referred to

clause 9 of Form Comp A prescribed under Rule 3 framed under the 1917 Act in order to submit that the application for compensation can only be filed against the master, Driver, Owner and the insurer of the vessel. It is submitted that the Act does not envisage the claim against the charterer. It is thus submitted that the suit does not disclose any cause of action against the petitioner. It is submitted that in terms of section 110A (3) of the M. V. Act, as made applicable by Section 54 C of the 1917 Act, the limitation for filing the suit was six months and thus the suit was clearly barred by limitation. It is submitted that the trial court was in error in holding that similar application previously filed was rejected on 9.12.2014. It is submitted that the said application was agreed to be withdrawn. Thus there was no adjudication on merits of the claim of rejection of the plaint. It is submitted that the learned trial court having noticed in para 11 of the impugned order that the defendant No. 1 is the charterer and No. 2 is the proprietor, erred in refusing to reject the plaint, on the ground that the suit is also for mandatory and permanent injunction. It is submitted that the learned trial court could not have refused to reject the plaint, once the court had found that the suit is covered by section 110 of the M. V. Act, as made applicable by Section 54 C of the 1917 Act. It is submitted that the impugned order shows non application of mind and suffers from a jurisdictional error which needs to be

corrected.

12. On behalf of the petitioner reliance is placed on the decision of the Supreme Court in ***Economic Transport Organisation Delhi Vs M/s Charan Spinning Mills (P) Ltd and another*** AIR 2010 SC (Supp) 720, in order to submit that it is only the insurer in a given case, which can claim subrogation in recovering the amount paid to the insured.

13. Mr Bhobe, the learned counsel for the contesting respondent No. 1, has supported the impugned order. It is submitted that the trial court has rightly referred to the decision of this court in First Appeal No. 78 of 1997 decided on 29.9.1997 wherein this court has held that the suit was maintainable before the civil court. It is submitted that the previous application having been dismissed no case for rejection of the plaint on a similar ground was made out. It is submitted that the plaint cannot be rejected in part that is against some of the defendants and/or qua some of the properties or claims, as held by the Supreme Court in ***Madhav Prasad Aggarwal and another Vs Axis Bank Ltd. & Anr.*** (2019) 7 SCC 158. It is submitted that the decision in the case of *Economic Transport Organisation (supra)* cannot apply in this case, wherein the claim was filed jointly by the insured (consignor) and the insured against the carrier claiming

deficiency in service under the Consumer Protection Act. It is pointed out that the insured in that case was a subrogee and a special power of attorney holder of the insured.

14. As noticed earlier the first respondent being the original plaintiff is the only contesting respondent in this case.

15. I have carefully considered the submissions made. I find that this petition has to fail on the short count that the plaint cannot be rejected only qua some of the defendant/s, as held by the Supreme Court in *Madhav Prasad Aggarwal (supra)*. The Supreme Court has *inter alia* considered several decisions including the one in ***Sejal Glass Ltd Vs Navilan Merchants (P) Ltd*** (2018) 5 SCC 780. This is what is held in para 10 of the judgment as under:

“10. We do not deem it necessary to elaborate on all other arguments as we are inclined to accept the objection of the appellant(s) that the relief of rejection of plaint in exercise of powers under Order 7 Rule 11(d) CPC cannot be pursued only in respect of one of the defendant(s). In other words, the plaint has to be rejected as a whole or not at all, in exercise of power under Order 7 Rule 11(d) CPC. Indeed, the learned Single Judge rejected this objection raised by the appellant(s) by relying on the decision of the Division Bench of the same High Court. However, we find that the decision of this Court in *Sejal Glass Ltd. [Sejal Glass Ltd. Vs. Navilan Merchants (P) Ltd., (2018) 11 SCC 780 : (2018) 5 SCC (Civ) 256]* is directly on the point. In that case, an application was filed by the defendant(s) under Order 7 Rule 11(d) CPC stating that the plaint disclosed no cause of action. The civil court held that the plaint is to be bifurcated as it did not disclose any cause of action against the Director's Defendant(s) 2 to 4 therein. On that basis, the High Court had opined that the suit

can continue against Defendant 1 company alone. The question considered by this Court was whether such a course is open to the civil court in exercise of powers under Order 7 Rule 11(d) CPC. The Court answered the said question in the negative by adverting to several decisions on the point which had consistently held that the plaint can either be rejected as a whole or not at all. The Court held that it is not permissible to reject plaint qua any particular portion of a plaint including against some of the defendant(s) and continue the same against the others. In no uncertain terms the Court has held that if the plaint survives against certain defendant(s) and/or properties, Order 7 Rule 11(d) CPC will have no application at all, and the suit as a whole must then proceed to trial.”

16. It is necessary to note that although the case of *Madhavprasad Aggarwal* (supra) involved a claim for rejection of plaint under Order 7 Rule 11(d) in *Sejal Glass Ltd* (supra) the Supreme Court has held in categorical terms that the provisions of Order 7 Rule 11 of the Code are not applicable where the rejection of the plaint is sought in part that is against one or more of the defendants or one or more of the properties or claims. In view of this it is not necessary to dilate on the other issues in the matter.

17. In the result the application is dismissed with no order as to costs.

18. At this stage, the learned counsel for the Applicant requests for extension of the stay for a period of eight weeks in order to enable the applicant to consider further steps, if any, to be taken in the matter. Mr. Bhobe, the learned counsel for the first respondent

opposes the same. However, considering the fact that interim stay was operating during the pendency of the revision application and in order to afford a fair opportunity to the applicant, the stay shall continue to operate for a period of eight weeks.

Sd/-
C. V. BHADANG, J.