

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

**NOTICE OF MOTION NO.123 OF 2017
IN
COMMERCIAL SUTT NO.314 OF 2016**

Harmony Innovation Shipping Ltd.	)....Applicant/Plaintiff
V/s.	
Cargo of 57080 Mt of Indonesian	)
Steam Coal & 2 Ors.	)....Defendants

WITH

**NOTICE OF MOTION NO.649 OF 2019
IN
COMMERCIAL SUTT NO.314 OF 2016**

Rattan India Power Ltd.	)....Applicant
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IN THE MATTER BETWEEN :

Harmony Innovation Shipping Ltd.	)....Plaintiff
V/s	
Cargo of 57080 MT of Indonesian Steam	)
Coal and 2 ors.	)....Defendants

Mr.Ashwin Shanker with Ms.R.Nyati for plaintiff.
Ms.Shivangi Roy i/by Dewani Associates for defendant no.5.

**CORAM: K.R.SHRIRAM,J
DATE : 11.2.2020**

P.C.:-

1. On 5.11.2019/6.11.2019 the following order came to be passed :-

NOTICE OF MOTION NO.123 OF 2017

1. *Pursuant to order passed by this Court on 27.7.2018 balance cargo of Indonesian Steam Coal lying at port and harbour of Dharamatar was directed to be sold, plaintiff was directed to incur the cost of sale and plaintiff was also permitted to claim to be paid the sale expenses. The Court Receiver was also directed to pay back plaintiffs' expenses from the sale proceeds. After the sale plaintiff has filed an affidavit of proof of expenses incurred through its advocate's personal affidavit affirmed on 17.9.2018 and a further affidavit of one Santosh Koli affirmed on 17.6.2019. Ms.Nyati for plaintiff states that the total amount of Rs.4,18,573/- has been incurred for and on behalf of plaintiff towards the sale of cargo.*
2. *Mr.Mittal for defendant no.5 who is the only defendant who has been appearing, has no objection to the amount being paid by the Court Receiver to plaintiff.*
3. *The Court Receiver says the sale proceeds is with Prothonotary & Senior Master. Therefore, Prothonotary & Senior Master is directed to pay sum of Rs.4,18,573/- to plaintiff by way of cheque drawn in favour of plaintiff's Advocate Mr.Ashwin Shankar under advise to plaintiff. Ms.Nyati believes plaintiff was still in existence and carries on business at the address given in the cause title.*
4. *The Court Receiver shall stand discharged without passing of accounts. Any charges payable to the Court Receiver in addition to the amount of Rs.15,000/- deposited by plaintiff shall be paid over by the Prothonotary & Senior Master, High Court, Bombay to the Court Receiver under advise to the Advocate for plaintiff and defendant no.5.*
5. *Notice of Motion accordingly disposed.*

NOTICE OF MOTION NO.649 OF 2019

6. *In view of the order passed above in Notice of Motion No.123 of 2017, the reliefs sought in this Notice of Motion are redundant except to the extent where the applicant has sought leave to withdraw the sale proceeds deposited with the Prothonotary & Senior Master, High Court, Bombay as the owner of defendant no.1 cargo. For that, certainly evidence is required to be led and that relief cannot be granted in this Notice of Motion.*

7. *Keeping open all rights and contentions of the applicant to prove its ownership of defendant no.1 cargo, merits of which will be considered at the time of hearing of such an application when made, Notice of Motion stands disposed.*

8. *Ms.Nyati states that in view of the amended Order-8 Rule-1, the time to file written statement by defendant no.5 expired long ago and there is no written statement on record. Ms.Nyati states that Court can place the matter for issues. Mr.Goenka agrees. At the same time as there is no written statement of the only contesting defendant i.e., defendant no.5, question of framing any issues does not arise.*

9. *At the same time, in my view, this is not a matter which can be disposed of without oral evidence being led by plaintiff. Therefore, this order will not, however, preclude defendant no.5 from cross-examining the witness of plaintiff or confronting plaintiff's witness with documents. It is also clarified that defendant no.5, however, would not be entitled to lead any evidence of his own, nor can his cross-examination be permitted to travel beyond the very limited objective of pointing out the falsity or weaknesses of plaintiff's case. In no circumstances, should the cross examination be permitted to travel beyond this legitimate scope and to convert itself virtually into a presentation of defendant no.5's case either directly or in the form of suggestion put to plaintiff's witness.*

10. *Plaintiffs to file affidavit of documents and give inspection of documents to defendant no.5 within three weeks failing which plaintiffs will not be permitted to rely on any document, copy whereof is not annexed to the plaint and mentioned in the list of documents annexed to the plaint. Within one week of taking inspection, defendant no.5 shall file and serve copy of its statement of admission and denial of documents with reasons for denial. If the statement of admission and denial is not given, defendant no.5 shall be deemed to have admitted the existence of all the documents of plaintiffs.*

AT 5.00 P.M.

11. *Ms. Nyati mentioned that Liquidator has been appointed for plaintiff and therefore, the statement made by her in the morning session saying that plaintiff was still in existence is not correct. She will have to take instructions from the Liquidator. Ms. Nyati states as she did not have instructions from the Liquidator in the morning session to appear, requests that both the notices of motion to be listed for hearing afresh next week so that she can take instructions from the Liquidator and address the Court.*

12. *There is nobody present for defendant no.5 though Ms. Nyati informed the Court that notice has been given to the advocate for defendant no.5. I do not wish to pass an order recalling the orders passed in the morning in the absence of counsel for defendant no.5.*

13. *Ms. Nyati states she will mention again tomorrow morning at 11.00 a.m. after fresh notice to advocate for defendant no.5.*

06.11.2019

1. *Not on board. Upon mentioning taken on board.*

2. *Ms. Nyati prays that since she did not have instructions to appear on behalf of plaintiff from the*

Liquidator, the orders passed dismissing Notice of Motion No.123 of 2017 and Notice of Motion No.649 of 2019 be recalled. Mr. Mittal has no objection.

3. Therefore, the orders passed on 5th November 2019 in Notice of Motion no.123 of 2017 and Notice of Motion no.649 of 2019 are by consent recalled. Both the Notices of Motion be listed for hearing on 14th November 2019.

2. Mr.Ashwin Shankar for plaintiff places on record his own affidavit affirmed on 11.2.2020 and a print out of an email dated 11.2.2020 from the Liquidators of plaintiff. The affidavit is taken on record and the email dated 11.2.2020 is taken on record and marked 'X' for identification.

3. Ms.Shivangi Roy for defendant no.5 confirms having received a true copy of the affidavit and photo copy of the email. Ms.Roy reiterates her no objection for granting reliefs as prayed for in the Notice of Motion.

4. Mr.Ashwin Shankar confirms that the Liquidators are in agreement with the grant of reliefs as prayed for in the Notice of Motion and that has been orally confirmed to him and also the email states that the Liquidators authorized and continued the Board Resolution authority letters previously issued by Harmony Innovation Shipping Ltd., and those authority letter permits Mr.Shankar to be

reimbursed the expenses.

5. Accordingly, Notice of Motion allowed in terms of prayer clause-(b) which reads as under :-

“(b) That the costs attendant to the judicial sale of the Defendant Cargo (17,080 Mts) be borne jointly by the Plaintiff and other creditors (if any) and that such expenses be characterized as “Sheriff’s Expenses”, to be recoverable by the Plaintiff and the said other creditors of the Defendant Cargo as a first charge from out of the sale proceeds of the Defendant Cargo as a first charge from out of the sale proceeds of the Defendant Cargo, as soon as the said sale proceeds are deposited with this Hon’ble Court”.

6. Prothonotary & Senior Master, High Court, Bombay is directed to pay sum of Rs.4,18,573/- to plaintiff by way of cheque drawn in favour of plaintiff’s Advocate Mr.Ashwin Shankar under advise to Liquidators upon Mr.Ashwin Shankar filing an authority from the Liquidators that the cheque can be drawn in his name.

7. Prayer clause-(c) cannot be granted. Prayer clauses-(d) and (e) raise triable issues. Those can be decided at the appropriate stage.

8. Notice of Motion disposed.

9. All to act on authenticated copy of this order.

KJ

NOTICE OF MOTION NO.649 OF 2019

1. In view of the order passed above in Notice of Motion No.123 of 2017, the reliefs sought in this Notice of Motion are redundant except to the extent where the applicant has sought leave to withdraw the sale proceeds deposited with the Prothonotary & Senior Master, High Court, Bombay as the owner of defendant no.1 cargo. For that, certainly evidence is required to be led and that relief cannot be granted in this Notice of Motion.

2. Keeping open all rights and contentions of the applicant to prove its ownership of defendant no.1 cargo, merits of which will be considered at the time of hearing of such an application when made, Notice of Motion stands disposed.

General

1. Mr.Shankar states that in view of the amended Order-8 Rule-1, the time to file written statement by defendant no.5 expired long ago and there is no written statement on record. Mr.Shankar states that Court can place the matter for issues. Ms.Shubhangi Roy agrees. At the same time as there is no written statement of the only contesting defendant i.e., defendant no.5, question of framing any

issues does not arise.

2. In my view, this is not a matter which can be disposed of without oral evidence being led by plaintiff. Therefore, this order will not, however, preclude defendant no.5 from cross-examining the witness of plaintiff or confronting plaintiff's witness with documents. It is also clarified that defendant no.5, however, would not be entitled to lead any evidence of its own, nor can its cross-examination be permitted to travel beyond the very limited objective of pointing out the falsity or weaknesses of plaintiff's case. In no circumstances, should the cross examination be permitted to travel beyond this legitimate scope and to convert itself virtually into a presentation of defendant no.5's case either directly or in the form of suggestion put to plaintiff's witness.

3. Plaintiff to file affidavit of documents and give inspection of documents to defendant no.5 within three weeks failing which plaintiff will not be permitted to rely on any document, copy whereof is not annexed to the plaint and mentioned in the list of documents annexed to the plaint. Within one week of taking inspection, defendant no.5 shall file and serve copy of its statement of admission and denial of documents with reasons for denial. If the statement of

admission and denial is not given, defendant no.5 shall be deemed to have admitted the existence of all the documents of plaintiff.

4. Leave to amend the cause title of plaint as per the draft tendered, granted. Draft is taken on record and marked 'X1' for identification. Amendment to be carried out and amended plaint to be served within two weeks.

(K.R.SHRIRAM,J)