

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ADMIRALTY & VICE ADMIRALTY JURISDICTION

IN ITS COMMERCIAL DIVISION

COMMERCIAL NOTICE OF MOTION NO.2200 OF 2019

IN

COMMERCIAL ADMIRALTY SUIT NO.5 OF 2019

National Insurance Company Limited )...Applicant

**IN THE MATTER BETWEEN :**

Jagson International Ltd. )...Plaintiff no.1

National Insurance Company Limited )...Plaintiff no.2

V/s.

Shipping Corporation of India )....Defendant

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Mr.Shyam Kapadia a/w Ms.Shriya Luke and Mr.Birjish Kumar i/by  
Tuli and Co. for applicant/plaintiff no.2.

Mr.Rishabh Shah a/w Ms.N.Sumnani i/by M/s.Bhatt and Saldanha for  
defendant.

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

**DATE : 6.1.2020**

**P.C.:-**

1. This application is to recall an order dated 12.2.2019, by which the Court disposed off the suit as withdrawn. Mr.Kapadia for applicant states that applicant (Plaintiff no.2) was the insurance company which was in carriage of proceedings having been

subrogated the claim by plaintiff no.1. Mr.Kapadia states applicant did not give instructions to Advocate Mr.Rajesh Mirchandani to withdraw the suit. Mr.Mirchandani, advocate, who sought withdrawal of the suit is not present in Court.

2. Mr.Shah for defendant on instructions leaves it to the Court to pass such order as required. Of course, Mr.Shah states that applicant has filed this application only on 22.7.2019. More than 5 months after the order dated 12.2.2019 was passed. Affidavit-in-reply has also been filed. Mr.Shah states that the matter has not been settled with plaintiffs.

3. Plaintiff no.1 was owner of a rig and it is plaintiffs' case that a vessel owned by defendant collided with the rig and thereby caused loss/damage to the rig. According to plaintiffs it is a case of negligent navigation/unseaworthiness of the vessel owned by defendant. The rig was insured with plaintiff no.2.

4. This suit has a peculiar history. Plaintiff no.1 had initially, on 3.8.2002 filed a suit being Special Civil Suit No.40 of 2002 before the learned Civil Judge, Senior Division at Jamkhambhali, Jamnagar, Gujarat praying for a money decree in the sum of Rs.4,70,09,733/-.

Applicant/plaintiff no.2 was joined as a proforma defendant in the said Special Civil Suit. Defendant was defendant no.1 in that suit. During the pendency of the Special Civil Suit, applicant paid to plaintiff no.1 a sum of Rs.2,57,09,293/- under the policy as interim on account payment. In view of the part payment made by applicant to plaintiff no.1, plaintiff no.1 executed a letter of subrogation dated 4.9.2002 in favour of applicant. Under the letter of subrogation, plaintiff no.1 assigned, transferred and abandoned all its actionable rights and remedies against defendant on account of loss, to the extent of part payment. Along with the letter of subrogation, plaintiff no.1 also executed Special Power of Attorney dated 4.9.2009 which *inter alia* authorized applicant to participate in the proceedings against defendant. On 18.11.2002, applicant/plaintiff no.2 filed an application to transpose itself as plaintiff no.2 from being the proforma defendant no.2 in the special civil suit. The said application was allowed by an order dated 10.9.2003. Since then, applicant has been plaintiff no.2 in the proceedings filed against defendant.

5. In view of the enactment of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act 2015 (Commercial Courts Act) the Special Civil Suit was, sometime in May-2016 transferred from Jamnagar to the Commercial

Division of the District Court at Rajkot and was re-numbered as Commercial Suit No.99 of 2016. Defendant challenged the jurisdiction of Rajkot Court and on an application filed by defendant under Order VII Rule 11 of the Code of Civil Procedure 1908 (CPC), the Rajkot Commercial Court held that it did not have jurisdiction to entertain the suit and opined that Admiralty Court in Bombay would be the appropriate forum which could exercise jurisdiction. Accordingly, by an order dated 3.8.2018 the plaint was returned to plaintiff under order VII Rule 10 of CPC with leave to present it before the Commercial Division of this Court exercising admiralty jurisdiction. That is how this Suit came before this Court.

6. It is a mystery as to how the plaint was re-presented in this High Court. Mr.Kapadia states that plaintiff no.2 did not instruct Mr.Rajesh Mirchandani to represent plaintiff no.2-applicant in this Court. There is, however, a letter at Exh.G to the affidavit-in-support written by Advocate Mr.Rajesh Mirchandani to Prothonotary & Senior Master, High Court, Bombay in which it is stated as under :-

“.....

*Today, we are filing the complete papers and proceedings of the aforesaid suit, which may be allowed to be taken on record. Concerned department may be instructed to take on file the papers and proceedings and be lodged and renumbered if any. You are further requested to kindly pass an order and may place the matter before the appropriate*

*court for further directions as required in the matter.*

*Mumbai dated this 4<sup>th</sup> day of Sept. 2018*

*(Rajesh Mirchandani)*  
*Advocate for the plaintiffs*

*O/s Regn No.5615/Adv Code : I 6428”*

The presentation form in the record & proceedings also has been signed by Mr.Rajesh Mirchandani. The plaint presented also is the amended plaint that shows applicant as plaintiff no.2. But curiously, Mr.Rajesh Mirchandani by an email dated 5.11.2019, copy whereof is at Exh.B to the rejoinder dated 29.11.2019 states that he had filed Vakalatnama/appearance on behalf of plaintiff no.1 and he never appeared for the applicant/plaintiff no.2. He also states that he never made a statement seeking leave to withdraw the suit on behalf of the applicant.

7. In the affidavit-in-support also it is stated that applicant had no knowledge or intention to have the suit withdrawn and it has provided no instructions or consent whatsoever whether oral or written for such withdrawal to Mr.Rajesh Mirchandani or any one.

Therefore, certainly there is some confusion and it is difficult to place the fault on any one individual. And in this

confusion, unfortunately, the applicant having paid crores of rupees to plaintiff no.1 and to whom the actionable rights and remedies against defendant to the extent paid by plaintiff no.2 to plaintiff no.1 have been subrogated will suffer, if the application is not allowed. Moreover, plaintiff no.2 is in carriage of proceedings. In my view that should not happen.

8. In view of these facts and circumstances, I am inclined to allow the Notice of Motion. The order dated 12.2.2019 disposing of the suit as withdrawn is recalled. Suit is restored to file.

9. Mr.Kapadia on instructions states that further court fees, if any, will be paid within one week from today.

10. Mr.Shah for defendant waives service of any fresh writ of summons. Mr.Shah also states that further written statement if any, will be filed and copy served by 31.1.2020.

11. At this stage, Mr.Kapadia states that plaintiff no.1 Jagson International Limited has been served a copy of this application and relies on an affidavit of one Rajkumar Yadav affirmed on 5.11.2019. Registry to take on record the said affidavit. Despite service,

Mr.Kapadia states plaintiff no.1 has not appeared and therefore, requests the matter be placed on 8.1.2020 for directions so that he can take instructions as to whether plaintiff no.1 can be transposed as defendant no.2.

Stand over to 8.1.2020 for directions.

**(K.R.SHRIRAM,J)**