IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 05.08.2020

CORAM :

THE HONOURABLE MR. JUSTICE R. SUBBIAH
and
THE HONOURABLE MR. JUSTICE C. SARAVANAN

Original Side Appeal Nos. 154 and 155 of 2020
and
C.M.P. Nos. 7804, 7805 and 7806 of 2020

M/s. Wan Hai Lines (Singapore) Pte Ltd.
IC, Hee Ching Road
25-1, Teepal Towers, Singapore - 089315
rep. by its Agent M/s. Wan Hai Lines (India) Pvt Ltd.,
Ground Floor, Seethakathi Business Centre
684-690, Anna Salai, Thousand Lights
Chennai - 600 006

Also at
Rep. by its Agent M/s. Omega Shipping Agencies Pvt Ltd
No.2, V.V.D. Building, First Floor
World Trade Avenue, Harbour Estate
Tuticorin - 628 004

Also at
Rep. by its Agent M/s. Omega Shipping Agencies Pvt Ltd.,
Paul Abrao Building
Subramaniam Road
Willingdon Island, Cochin - 628 003 ..Appellants in both the appeals

Versus

1. Tionale Pte Ltd.,
   77, High Street
   # 11-01/05, High Street Plaza
   Singapore - 179433
   Rep. by its Power of Attorney Agent
   Mr. P. Barathiraj

2. M/s. S.J. Logistics (India) Limited
   610/611, Avior Nirmal Galaxy Building
   L.B.S. Road, Mulund
   Mumbai - 400 080

3. M/s. Ningbo Leadocean International Logistics Co., Ltd.,
Room No.1905, 19th Floor, Cocentric Building
No.5020, Binge Road, Futian District, Shenzen
People's Republic China

4. Commissioner of Customs, Chennai
Customs House 1
No.60, Rajaji Salai, Chennai - 600 001

5. Commissioner of Customs, Tuticorin
ICD, 1663/2B, Harbour Exp. Road
Tuticorin - 628 004

6. Commissioner of Customs, Cochin
Cochin Customs House
Willingdon Island
Cochin - 682 009

7. M/s. Sibi Polymers
Unit 2, 13/7, Masayankadu
Palathinpatti, Rasipuram
Namakkal

8. M/s. Zemafore Poly Impex
17/144, Tharakkalam, Chittur Post
Palakkad - 678 101, Kerala

9. M/s. Vital Industries India Pvt Ltd.,
C/o. M/s. Spy Agro Industries Ltd.,
New Industrial Estate, Udumalpuram
Nandyal - 518 501, Kurnool District ..Respondents in
Andhra Pradesh both the appeals

OSA No. 154 of 2020:- Appeal filed under XXXVI Rule 9 of Original Side Rules read with Clause 15 of the amended Letters Patent, 1865 and read with Section 13 of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Act, 2018 against the order dated 01.07.2020 passed in Application No. 1346 of 2020 in CS (Comm.Div) No.148 of 2020 on the file of this Court.

OSA No. 155 of 2020:- Appeal filed under XXXVI Rule 9 of Original Side Rules read with Clause 15 of the amended Letters Patent, 1865 and read with Section 13 of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Act, 2018 against the order dated 01.07.2020 passed in O.A. No. 211 of 2020 in CS (Comm.Div) No.148 of 2020 on the file of this Court.

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For Appellant : Mr. P. Giridharan
in both the appeals
For Respondents : Mr. E. Om Prakash, Senior Advocate
for Mr. P. Neelakandan
for Mr. Menon
in both the appeals

COMMON JUDGMENT

(Judgment of the Court was delivered by R. SUBBIAH, J)

Both these Original Side Appeals have been filed by the third defendant in the suit in C.S. (Comm.Div) No. 148 of 2020 on the file of this Court challenging the Order dated 01.07.2020 passed in Application No. 1346 of 2020 in CS (Comm.Div) No.148 of 2020 and O.A. No. 211 of 2020 in CS (Comm.Div) No.148 of 2020 passed by the learned single Judge. The said suit was filed by the first respondent/plaintiff herein seeking the following reliefs:-

> "The Plaintiff therefore prays for a Judgment and Decree, jointly and severally against the defendants 1 to 3 herein:
>
> (a) Declaring that the Plaintiff being the lawful owner of the said goods morefully describd in the Schedule hereto is entitled to have delivery of the same in terms of the contract of carriage upon payment of USD 4380 equivalent to Rs.3,36,165 (Rupees Three Lakhs Thirty Six Thousand One Hundred and Sixty Five Only)
>
> (b) Grant a Mandatory injunction directing Defendant No.1 and/or Defendant No.2 to handover to the plaintiff the original Ocean Bills of Lading Nos. 030A501777, 030A501774, 030A502070, 025A513190 pertaining to the said Goods described in the Schedule, upon receipt of the agreed freight of USD 4380 equivalent to Rs.3,36,165 (Rupees Three Lakhs Thirty Six Thousand One Hundred and Sixty Five Only)
>
> And/or in the Alternative,
>
> Direct Defendant No.3 and its agents at Chennai, Tuticorin and Cochin ports to transfer the said Goods covered under the Ocean Bills of Lading Nos. 030A501777, 030A501774, 030A502070, 025A513190 and morefully described in the Schedule hereunder to a Customs Bonded Warehouse specified by this Honourable Court and permit the plaintiff to take delivery of the said goods upon payment of the

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agreed freight of USD 4380 equivalent to Rs.3,36,165 (Rupees Three Lakhs Thirty Six Thousand One Hundred and Sixty Five Only)

(c) Permanent injunction restraining Defendant Nos. 1 to 3, jointly and severally, including their men, employees and agents, from selling, transferring, alienating, encumbering, disposing of or in any other manner dealing with the said Goods covered under the Ocean Bills of Lading Nos. 030A501777, 030A501774, 030A502070, 025A513190 and morefully described in the Schedule hereunder,

(d) Permanent injunction restraining Defendant Nos. 1 to 3, jointly and severally, from levying any demurrage/detention charges in respect of the said Goods described in the schedule hereto

(e) To direct the Defendant Nos. 1 to 3, jointly and severally, to pay costs of the Suit to the plaintiff; and

(f) pass such further or other reliefs as this Honourable Court may deem fit and proper in the circumstances of the case and thus render justice."

2. For the sake of convenience, the parties to these appeals shall be referred to as 'plaintiff' and 'defendants' as arrayed in the suit.

3. As per the averments in the plaint, the plaintiff is a trading company in Singapore and engaged in the business of buying and selling 100% Polyethylene Terepthalate, commonly abbreviated as PET, which is used as a raw material for manufacturing plastic containers. During the course of such business, the plaintiff purchased 550 metric tonne of PET Resin from M/s. Hainan Yisheng Petrochemical Company Limited, China by paying the full sale price of USD 437250. Such transaction between the plaintiff and M/s. Hainan Yisheng Petrochemical Company Limited, China was on F.O.B. basis that is free on Board basis under which the Seller will be relieved of the responsibility once the goods are shipped/boarded on the vessel. It is stated in the plaint that as the plaintiff had paid the entire sale price, they have became the absolute owner of the entire goods. On 05.02.2020, the plaintiff has entered into a sale contract with the defendants 7 to 9 on "Cost, Insurance, Freight" (CIF) basis viz., the risk of goods will be with the plaintiff till delivery is effected to the purchasers/defendants 7 to 9. For the purpose of transporting the cargo, the plaintiff approached the first defendant, a freight forwarder to transport the goods by Sea from China to India. By an e-mail dated 06.02.2020, the first defendant also confirmed that the freight charges payable was USD 365 per container and requested

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the plaintiff to contact the second defendant, a Non Vessel Owning Common Carrier (NVOCC). Accordingly, the plaintiff contacted the second defendant and thereafter informed the Seller M/s. Hainan to arrange for shipment of the goods through the second defendant. Accordingly, the seller delivered the goods for transit and the same was stuffed in containers and carried by the appellant/third defendant in their vessel. The appellant/third defendant also issued four Ocean Bills of Lading dated 21.02.2020, 22.02.2020, 22.02.2020 and 28.02.2020 indicating the name of the plaintiff as shipper. As per the trade practice, the Original Bills of Lading have been handed over by the defendant No.3 to the defendant No.2 who in turn had issued House Bills of Lading dated 22.02.2020 and 28.02.2020 on "Freight Collect" basis. The Plaintiff was required to apply to the defendant No.1 for obtaining delivery of the goods and the defendant No.1 has to collect the original Bills of Lading from the defendant No.2 and handover the same to the plaintiff, upon payment of the agreed freight charges of USD 365 per container. It is stated that the vessel carrying the goods arrived at the Port of Chennai on 11.03.2020, the port of Tuticorin on 11.03.2020 and the port of Cochin on 04.03.2020 and 14.03.2020 respectively. It is also stated that the freight agreed to be paid by the plaintiff is USD 365 per container and the total freight charges works out to USD 4380, which the plaintiff is always ready and willing to pay. However, for the reasons best known, the first defendant did not furnish the original Bills of Lading on the ground that the first defendant is having certain dispute with the second defendant over which the plaintiff is no way connected. Due to non-receipt of the original Bills of Lading, the plaintiff could not take delivery of the goods. On the other hand, the purchasers, defendants 7 to 9 are pressurizing the plaintiff to honour the contractual obligation. Further, for the delay in clearing the cargo beyond 14 days, the defendant No.3 carrier and port authorities also charge demurrage and/or detention charges at USD 150 plus 18% service tax, per day. Due to the delay and breach of contract on the part of the defendants 1 to 3 in failing to furnish the original Bills of Lading, the plaintiff was made to suffer immensely. The Plaintiff is always ready and willing to pay the admitted freight charge of USD 4380 but due to the dispute between the defendant No.1 and defendant No.2, the goods were unnecessarily withheld in the port whereby the plaintiff was made to suffer. In such circumstances, the plaintiff has filed the suit for the relief stated supra.

4. Pending suit, the plaintiff filed applications in O.A. No. 211 of 2020 for an interim direction and O.A. No. 1346 of 2020 in C.S. No. 148 of 2020 for interim injunction. When the aforesaid applications came up for hearing on 05.06.2020, the learned single Judge observed that the plaintiff has made out a

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prima facie case and therefore entitled for grant of an interim order. Accordingly, by the order dated 05.06.2020, the learned single Judge granted an interim direction directing the appellant/defendant No.3 and its agents at Chennai, Tuticorin and Cochin Ports to transfer the goods covered in the Ocean Bills of Lading Nos. 030A501777, 030A501774, 030A502070, 025A513190 to a customs bonded warehouse in the port location, on condition the plaintiff deposits the freight charge for a sum equivalent to USD 4380 before any nationalised bank and also restrained the defendants 1 to 3 from alienating or disposing the goods covered under the aforesaid Ocean Bills of Lading. By a separate order, the learned single Judge also granted an interim injunction restraining the defendants 1 to 3 from alienating or selling the goods in question to any third party.

5. Subsequently, when the applications came up for hearing before this Court on 01.07.2020, the plaintiff contended that despite the order dated 05.06.2020, the appellant/defendant No.3 did not transfer the goods to a customs bonded warehouse. The learned single Judge, by the order dated 01.07.2020, directed the plaintiff to deposit a sum of Rs.10 lakhs to the credit of the suit within a period of one week. On such deposit and in the event of the defendants 7 to 9/purchasers paying the customs duty to the exporter for clearance of the goods, the appellant shall ensure that the goods are transferred. Aggrieved by the aforesaid order dated 01.07.2020, the appellant/ third defendant has come up with these appeals.

6. The learned counsel for the appellant would vehemently contend that the appellant cannot warehouse the goods beyond 14 days within which period the plaintiff ought to have taken delivery of the goods. Further, the appellant is only a Sea Carrier and it is not the duty of the appellant to transfer the goods to a customs bonded warehouse. It is also contended that the delivery of the goods cannot be effected without the plaintiff/first respondent paying the sum of Rs.43,28,430.40 as on 25.06.2020 towards detention charges. However, the learned single Judge erred in observing that the payment of Rs.43,28,430.40 is a matter to be decided at the time of trial. According to the counsel for the appellants, the appellant has a lien over the goods for the amount payable by the first respondent/plaintiff and therefore he prayed for setting aside the order passed by the learned single Judge.

7. Per contra, the learned Senior counsel for the first respondent/ plaintiff would contend that the plaintiff was always ready and willing to take delivery of the goods soon after the goods reached the respective ports. However, the defendants 1 to 3 did not handover the Bills of Lading without which the plaintiff was unable to take the delivery of the

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goods. Further the delay, if at all, is due to the present lockdown to arrest the spread of the Pandemic and therefore, the delay cannot be attributed towards the plaintiff. In any event, the learned Senior counsel for the first respondent/plaintiff would contend that the plaintiff is not liable to pay a sum of Rs.43,28,430.40 as on 25.06.2020 towards detention charges, as claimed by the appellants when there is no delay on their part in clearing the goods.

8. We have heard the counsel for both sides and perused the materials placed on record. At the outset, we have to observe that the second defendant in the suit, who is presently holding the bills of lading, did not appear before this Court to contest this appeal. The appeal is contested only by the first respondent/plaintiff. We also wish to observe that the goods in question have reached the Port of Chennai on 11.03.2020, the port of Tuticorin on 11.03.2020 and the port of Cochin on 04.03.2020 and 14.03.2020 respectively. From that date, the goods are lying idle without being cleared inter alia requiring retention charges payable for clearance of the goods. As far as the dispute in the present appeals is concerned, the plaintiff would contend that it is always ready to pay the agreed freight charges but it was the defendants 1 to 2 who have failed to handover the respective Bills of Lading to the consignee notified in the respective Bills of Lading by the plaintiff due to which the goods were not handed over to defendants 7 to 9. On the other hand, the contention of the appellant/third defendant is that neither the plaintiff nor the purchasers/defendants 7 to 9 were not in possession of the original Bills of lading and therefore they cannot claim title over the goods and consequently, the appellant cannot transfer the goods in their favour.

9. Admittedly, the plaintiff is the owner of the goods in question as is evident from various documents filed along with the plaint, including the bills of lading in which the name of the plaintiff is prominently indicated as the Shipper. The title of the plaintiff is also not specifically disputed by the appellant. But what is disputed by the appellant is that the plaintiff is liable to pay Rs.43,28,430.40 as on 25.06.2020 towards detention charges without which the appellant cannot clear the goods. It is submitted that the appellant is entitled to auction the goods under Section 148 of the Customs Act. The appellant-plaintiff has submitted that to deliver the imported goods without the originals of the respective Bills of Lading would expose to the appellant to a risk of third party claim by the 2nd defendant on a future date. However, the 2nd defendant is not before us. In our view, the 2nd defendant is entitled to receive freight which the appellant has deposited to the credit of the suit pursuant to an order dated 05.06.2020. Having

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regard to the above, we are of the view that the learned single Judge has rightly observed that the liability of the plaintiff to the pay Rs.43,28,430.40 as on 25.06.2020 towards detention charges is a disputed question and has to be decided only in the course of trial in the suit. The learned single Judge has directed the appellant to pay Rs.10 lakhs to the credit of the suit. The imported consignment is still within the bounds of Customs Department in a customs warehouse. The defendants 7 to 9 may clear of the imported goods on payment of the appropriate customs duty. In our opinion, the order passed by the learned single Judge needs no interference except for the amount directed to be deposited by the plaintiff. We are therefore of the view that having regard to the quantum of dispute raised by the appellant/third defendant towards detention charges payable by the plaintiff to the tune of Rs.43,28,430.40 as on 25.06.2020, the plaintiff shall deposit a further sum of Rs.10 lakhs, over and above the sum of Rs.10 lakhs directed to be deposited by the learned single Judge, which will meet the ends of justice. Such amount shall be paid by the plaintiff without prejudice to their rights. Accordingly, we direct the first respondent/plaintiff herein to deposit a further sum of Rs.10 lakhs over and above the sum of Rs.10 lakhs as directed to be deposited by the learned single Judge, to the credit of the suit, forthwith.

10. At this juncture, the learned counsel for the appellant/third defendant submitted that for the loss sustained by the appellant/third defendant due to the acts of the first respondent/plaintiff, the appellant/third defendant is entitled to raise a counter claim. Therefore, liberty is given to the appellant/ third defendant to raise a counter claim against the plaintiff/first respondent, if they are so advised.

11. Accordingly, we dismiss both the Original Side Appeals filed by the appellant. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

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To
The Sub Assistant Registrar,
Original Side, High Court, Chennai.

OSA Nos. 154 & 155/2020

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