

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ADMIRALTY AND VICE ADMIRALTY JURISDICTION
IN
ITS COMMERCIAL DIVISION
JUDGES ORDER NO. 78 OF 2021
IN
COMMERCIAL ADMIRALTY SUIT (L) NO. 9208 OF 2021

MONJASA DMCC

....Plaintiff

V/s

M/V Bon Atlantico (IMO NO.9248203)
and Anr.

....Defendants

Mr. Prashant Pratap, Senior Advocate a/w Mr. Naishadh Bhatia i/b Crawford Bayley and Co. for plaintiff.

CORAM : K.R.SHRIRAM, J.
DATED : 7th APRIL, 2021.

P.C. :

1. Not on Board. Upon mentioning taken on production board at 11.00 a.m.
2. This is a claim for arrest of Defendant No.1 – Vessel owned by Defendant No.2 for non payment of invoice for supply of bunker to Defendant No.1. The bunker has been supplied at the instance and request of Defendant No.2. Plaintiff has relied upon a communication from Defendant No.2 at page no.44 of the plaint whereby, prima facie it appears, defendants have acknowledge the liability.

3. Mr. Pratap states that there is a caveat against arrest filed on 22/02/2021 on behalf of Defendant No.2 by one Adv. Sandhya Pillai. The caveat therefore is valid. The caveat, however, mentions that the caveator will furnish security in the sum of Rs.5,000/- whereas the claim in the suit is for USD 99,574.51 (Principal) plus interest of USD 5,155 @ 2% per month from 13/01/2021 till the date of the suit and increasing interest @ 2% per month plus legal cost of USD 10,000/-, total of USD 114,730/- as on date of suit.

4. This court in an unreported judgment¹ was faced with a similar situation. In that suit the caveator had offered security in the sum of Rs.1,00,000/- whereas plaintiff was claiming a decree in the sum of Rs.1,09,00,000/-. The court held that in such a situation, plaintiff can still move the court for arrest of vessel but before getting an order of arrest plaintiff will have to satisfy the court that the amount of security mentioned in the caveat is so low that it does not secure his interest. The court proceeded to opine that in such a case plaintiff will also be entitled to move the court for dispensing with the requirement of serving notice on defendant under Rule 935 of the Bombay High Court Rules (which is now 1079 under the New Rules). The court held that in such case if the court finds that the security offered by the caveator does not secure the interest of plaintiff, the court will be able to dispense with the requirement of serving notice on caveator.

¹ Dated 09/08/2006 in Notice of Motion No.1858 of 2006 in Admiralty Suit No.11 of 2006 Mr. Bernardo de Souza Vs. M.V. Seven Island & Anr.

5. For ease of reference paragraph no.5 of the said judgment is reproduced herein.

5. *Now, to understand the rival submissions it is first necessary to refer to Rule 929 of the Bombay High Court Rules. Rule 929 reads as under :-*

929. Caveat against arrest of property

Any person desiring to prevent the arrest of any property shall file in the registry a preceipe, signed by himself or his Advocate, who may be acting for him, requesting that a caveat be entered against the arrest of the said property and undertaking to enter an appearance in person or a vakalatnama in any suit that may be instituted against the said property and to give security in such suit in a sum not exceeding the amount to be stated in the preceipe or to pay such sum into the registry. A caveat against the issue of a warrant for the arrest of the said property shall thereupon be entered in a book to be kept in the registry, called the "Caveat warrant Book".

Perusal of the above quoted Rule shows that a person who apprehends that a suit may be instituted against him in this court in its admiralty jurisdiction, wherein an order of arrest of any property may be sought can file a caveat undertaking to appear either in person or by vakalatnama and give an undertaking to give security in such suit of such amount as may be mentioned in his undertaking. In view the provisions of Rule 932 Caveat remains in force for a period of six months from the date on which it is filed. An application can be made under Rule 934 for setting aside a caveat. Rule 934 is important which reads as under :-

"934. An application to set aside a caveat shall be made by Chamber Summons support by affidavit."

Rule 935 casts an obligation on the Plaintiff in a suit in relation to which a caveat has been filed to serve a copy of the plaint on the person who has filed the caveat. Rule 935 reads as under :-

935. Copy of plaint in suit against property to be served before filing plaint, on party who has entered caveat.

Any person instituting a suit against any person in respect of which a caveat has been entered in the "Caveat Warrant Book" shall, before filing the plaint, serve a copy thereof upon the party on whose behalf the caveat has been entered or upon his Advocate and annex to the plaint a statement of such service.

It is significant to note that under Rule 934, copy of the plaint is to be served on the caveator even before the suit is filed. Then comes rule 936, which is also of importance. Rule 936 reads as under :-

"936. Within three days from the filing of the plaint, the party on whose behalf the caveat has been entered shall, if the sum in which the suit has been instituted does not exceed the amount for which he has given the undertaking, give security in such sum or pay the same into the registry, or if it exceeds the amount, give security in the sum in which the suit has been instituted or pay the same into the registry."

It is clear from the provisions of Rule 936 that it casts an obligation in the caveator to furnish security within a period of three days from the filing of the plaint. The entire controversy with which I am presently concerned is, whether under Rule 936, the caveator is obliged to give security of the amount which is mentioned in his undertaking or he is to give security of the suit claim. It is clear from the provisions Rule 936 that the caveator is under an obligation to mention in his caveat the amount of which he is willing to give security. Now, this amount of security which the caveator has to mention would obviously be the amount which in the estimate of the caveator, is sufficient to secure the interest of the Plaintiff during the pendency of the suit. Now, in view of the provisions of these Rules, in a suit where the caveat has been filed following situation may arise.

(i) The amount mentioned in the caveat may be more than the amount of the suit claim.

(ii) The amount mentioned in the caveat and the amount of the suit claim may be the same.

(iii) *The amount mentioned in the caveat may be less than the amount of the suit claim.*

Situation (i) and (ii) does not create any problem, because in both the situations the caveator can give security of the suit claim and the interest of the Plaintiff would stand secured. But the dispute arises when the amount of the suit claim is substantial more than the amount mentioned in the caveat. In my opinion, the requirement of Rule 929 that the caveator should mention a sum of which he is willing to give security is a strong indicator, which suggests that the obligation of the caveator is to give security of that amount, in the event, the suit is filed against him. If that is not so, and irrespective of the amount mentioned by him in the caveat, he is said to be obliged to give security of the amount of suit claim, then the requirement contained in Rule 929 of the caveator mentioning the amount of which he is willing to give security would be redundant and would serve no purpose. Rule 936 cannot be read in isolation. It will have to be read and construed harmoniously with the Rules that proceed it and the Rules that follows it. Had it been the intention of the framers of the Rules that in any case the caveator is obliged to give security of the amount of the suit claim, then there was no necessity to include the requirement of the caveator mentioning in the sum of which he is willing to give security in the undertaking that he has given under Rule 929. In my opinion, therefore, the obligation cast by Rule 936 on the caveator, in case whether the amount of the suit claim is more than the amount mentioned in the caveat is to give security of the amount mentioned in the caveat. Placing of such a construction also does not leave the Plaintiff without remedies to have his interest secured.

If according to the Plaintiff, the amount mentioned in the caveat is ridiculously low and it is not enough to safeguard the interest of the Plaintiff, Rule 939 permits the Plaintiff to move the Court for arrest of the vessel despite caveat being filed. Rule 939 reads as under :-

“939. The fact that there is a caveat against arrest in force shall not prevent a party from getting a warrant of arrest issued and the property to which the caveat relates, arrested.”

The above provisions of Rule 939 shows that though there is caveat filed, the Plaintiff can still move the Court for arrest of the vessel. Before getting an order of arrest, the Plaintiff will have to satisfy the Court that the amount of security mentioned in the caveat is so low that it does not secure his interest. Therefore, in my opinion, in such a case, the Plaintiff will also be entitled to move the Court for dispensing with the requirement of serving notice on the Defendant under Rule 935. Rule 935 is procedural one and, therefore, has to be complied with only substantially. In other words, the requirement cannot be termed to be mandatory. Therefor, in case the Court finds that the security offered by the caveator does not secure the interest of the Plaintiff the Court would be able to dispense with the requirement of Rule 935. Thus, in case the defendant chooses to mention in his caveat ridiculously low amount, then the plaintiff on satisfying the Court about it would be entitled to move the Court for arrest of the vessel without issuing notice to the caveator. If the vessel is a vessel of Indian registration, there is nothing in law which prevents the Plaintiff from moving the Court for enhancement of the amount of security if according to the Plaintiff, the amount mentioned in the caveat is not enough to safeguard the interest of the Plaintiff. It is further to be seen that if the provisions of Rule 936 are read to mean that the defendant is obliged to give security of the amount of suit claim, then in my opinion, that would work prejudice to the interest of the defendant because he will be obliged to give security of the amount of suit claim within a period of three days, otherwise under Rule 938, a decree will be liable to be passed against him. There is no Rule to be found which permits the defendant to move the Court for permission to give security of any lesser amount than the amount of suit claim is excessive and exorbitant. In my opinion, reading the provisions of the relevant Rules harmoniously, leads one to the conclusion that a caveator is obliged to give security of such amount which is mentioned in his caveat and not of the suit claim where the amount f the suit claim is in excess of the amount mentioned in the caveat.

6. In this case, as noted earlier, plaintiff is seeking decree for a total sum of USD 114,730/- which is increasing at 2% per month from the

date of the suit until payment/realisation on the principal amount of USD 99,574.51 whereas the security offered by the caveator is a ridiculous figure of Rs.5,000/-. I am using the expression ridiculous because Defendant No.2 who is the caveator knows the invoice amount having received the invoice and prima facie acknowledged its debts but still files caveat offering security of Rs.5,000/-. Therefore, requirement of serving notice or copy of plaint before arrest, on Defendant No.2 by plaintiff is dispensed with.

7. Mr. Pratap states that Mr. Prashant Asher partner of Crawford Bayley and Co. has personally assured him and instructed him that signatory of letter of authority Mr. Mohammed El-Hassan has the authority to give undertaking on behalf of plaintiff, (a scanned copy of the undertaking is filed in the court) to sign the plaint and further authorise the persons mentioned in the letter of authority annexed to the plaint. Mr. Pratap further undertakes on instructions that the original undertaking will be filed in the Registry on or before 19th April, 2021. Plaintiff shall also file a separate Power of Attorney authorising the Claims and Collections Manager Mr. Mohammed El-Hassan and this shall be filed alongwith undertaking on 19th April, 2021 failing which (a) the order of arrest will stand vacated without further reference to the court ; (b) the suit will also stand dismissed and (c) Defendants will be awarded damages for wrongful arrest equal to the claim in the suit.

8. Prima facie, case for arrest of defendant vessel is made out.
9. The Judge's Order for arrest of defendant vessel is signed separately.
10. Plaintiff is at liberty to forward a copy of the communication from the Sheriff of Mumbai forwarding this order by fax/email/hand delivery/RPAD to Port and Customs Authorities.
11. The undertaking of plaintiff's advocate that the warrant of arrest will be served upon the vessel, the Port and Customs Authorities within two weeks from today is accepted.
12. After execution of warrant of arrest, if the arrested vessel is not released by furnishing security or bail amount within 15 days, or an application for vacating order of arrest is not filed, or vessel is found abandoned by the person in-charge of the vessel or owner or is found unmanned, in such an event, on application made by plaintiff, the office of Sheriff of Mumbai shall present Sheriff's report for auctioning vessel within seven days from the date of receiving communication from plaintiff's advocate or from the date of knowledge of abandonment of vessel.
13. All to act on a copy of this order duly authenticated as true copy by the Associate of this Court.

(K.R. SHRIRAM, J.)