

A.Nos. 2571 & 3162 of 2020

IN

C.S.No. 265 of 2020

C.V.KARTHIKEYAN J.

A.No. 2571 of 2020 has been filed by the defendant in the suit under Section 45 of the Arbitration and Conciliation Act, 1996 to refer the parties to arbitration in terms of Clause 68(a) of Charterparty Agreement dated 29.07.2020.

2. A.No. 3162 of 2020 as the nomenclature suggests had been filed subsequent to the earlier application, again by the defendant under Order 1 Rule 10(2) of the Code of Civil Procedure seeking to implead the Office of the Commissioner of Customs, Tuticorin as party/defendant to the suit.

3. The plaintiff and the defendant have been at lis for quite some considerable time.

4. The Court had the benefit of hearing elucidate arguments advanced by Mr. Prashanth S.Pratap, learned Senior Counsel assisted by Mr.S.Raghunathan, on behalf of the plaintiff and Mr. Satish Parasaran, learned Senior Counsel assisted by Ms. Deepika Murali on behalf of the

defendant. The Court at the outset deeply appreciates the sanguine manner in which the arguments had been advanced.

5. Even before examining the issues raised in the two applications, it would only be appropriate that to a little extent, the facts in the suit are stated.

6. The defendant are the Owners and Parties interested in the Vessel M V EAGLE. She is a Vessel flying the flag of Panama and she is registered in Panama. Unfortunately she took anchorage at Tuticorin (V.O.Chidambaranar Port) within the jurisdiction of this Court. Taking advantage of that particular fact, the plaintiff Wajilam Exports (Singapore) Pte Ltd., had instituted the present suit taking advantage of Order XLII of the Original Side Rules relating to Admiralty jurisdiction, seeking a Judgment and Decree against the defendant, namely the Owners and Parties interested in the Vessel M V EAGLE, seeking an order of arrest and also seeking for a judgment and decree against the defendant for a declaration that the exercise of lien by the defendant over the cargo on the ship as stated by their communication to the plaintiff is unlawful and illegal and consequentially, for a direction against the defendant to permit berthing of the said Vessel and

discharge the cargo of 1656 timber logs which was on board the said Vessel. The initial arguments were with respect to the order of arrest and the question whether the defendant had a lien over the cargo or whether there was an unconditional holding of the cargo by the plaintiff.

7. Around that point of time on 06.11.2020, the matter came up before this Court and the learned Senior Counsels focused their submissions with respect to the Import General Manifest and that it had been handed over to the Customs Authorities and that a direction should be issued to the Custom Authorities to furnish a copy of the same to the defendant/agent of the defendant if they so demand and also with respect to the Bills of Lading, since it had been pointed out that the original Bills of Lading were with the agent of the plaintiff at Tuticorin and that they should be handed to the agent of the defendant. Further arguments were advanced and the Court was called upon to ensure necessary security was provided to the defendant towards their claim, which claim related to the invoices for the second hire charges and the dates for which it was payable and whether it was from 14th September 2020 till 28th September 2020 or whether from 14th September 2020 till 16th September 2020. An issue of further hire charges for subsequent periods was also raised by the defendant. It must also be pointed out that very

unfortunately, the Vessel had suffered damages and a claim on that ground was also raised by the defendant.

8. It must also be pointed out that the Court had noted that the parties had agreed to settle disputes through arbitration and the seat of arbitration was in London and it was also noted that the present application now under consideration, namely, A.No. 2571 of 2020 had been filed by the defendant seeking to refer the issues raised to arbitration.

9. To a little extent, hoping to balance the respective rights of the parties, this Court had directed the plaintiff to deposit USD 2, 62,297 by way of fixed deposit in the name of the Registrar General, Madras High Court. It had been made very clear that this amount represented a very rough calculation of the amounts claimed against the plaintiff and was only for the sole purpose of directing release of the cargo. There was a further direction that the two Bills of Lading which were on that point of time in the possession of the agent of the plaintiff should be handed over to the agent of the defendant. The plaintiff was also permitted to get a copy of the Import General Manifest which they had submitted to the Custom Authorities and hand over a copy to the agent of the defendant.

10. There were a few issues over the Import General Manifest. A.No. 3162 of 2020 had been filed owing to necessity felt by the defendant that the documents furnished particularly the Bills of Lading and Import General Manifest would have to be further examined and for that particular purpose, the Office of the Commissioner of Customs, Tuticorin, was claimed to be a necessary party to adjudicate the issues raised. At the initial point of time, owing to the deposit as directed of USD 2,62,297 out of 1656 logs of timber, 1000 logs were initially directed to be released to the plaintiff.

11. The matter came up again before this Court and it was found from the Bills of Lading that the cargo could be segregated into 86 separate lots and this related to number of Bills of Lading provided by the plaintiff, namely, 86 in number. The cargo was said to have been purchased by 34 different Micro, Small and Medium Entities and who had in fact purchased them in 86 separate lots.

12. Mr. Satish Parasaran, learned Senior Counsel on behalf of the defendant, thereafter pointed out an affidavit filed by the plaintiff dated 04.02.2021 much after all those orders were passed and the discharge of the cargo had commenced.

13. In the said affidavit, the plaintiff had stated that no Bills of Lading were issued at the time when the Import to the Manifest was filed. It was also stated that they were to be issued but were not actually issued since the defendants had refused to discharge the cargo from the Vessel. Thereafter, the Bills of Lading were issued subsequently after orders of the Court permitting the cargo to be discharged from the Vessel.

14. In effect, the plaintiff wanted to convey that the Bills of Lading were supposed to be issued but were not actually issued since there was objection by the defendants. They were later issued after orders were passed permitting discharge of the cargo. The learned Senior Counsel therefore stated that the Bills of Lading if had been issued after the orders of the Court should also be dated subsequent to the orders of the Court.

15. However, my attention had been drawn to the dates of the various Bills of Lading and it is seen that most of them are prior to 06.11.2020 which was the date of the first order directing the plaintiff to provide security for effecting discharge of the initial 1000 logs of timbers. This aspect had been pointed out by Mr.Satish Parasuran, who stated that this raises, a thought

process which hopefully may not be correct, that, the plaintiff could have issued the Bill of Lading even prior to the date of the order. There should be an explanation offerably by the plaintiff and I am confident that there would be an explanation. But what concerns me is that a notice had been issued to the agent of the defendant under Section 124 of the Customs Act 1962. Mr. Satish Parasaran was much agitated by this particular notice. Ofcourse, Mr. Prashanth S.Pratap pointed out that this notice had been issued on 03.02.2020 and three months have passed from the date of such notice and that the defendant has nothing to fear or worry about the same. But whether there is anything to be feared or worried about the same is for the defendant to express and it is clear they are quite apprehensive of the consequences.

16. Section 108 of the Customs Act, 1962 relates to the power of a gazetted Officer of the Customs to summon persons, to give evidence and produce documents. This issuance of summons seeking production of documents, recording of evidence can be termed as an inquiry as equivalent to a judicial proceedings within the meaning of Sections 193 & 228 of the Indian Penal Code. Both the said provisions are not happy provisions and it would only be to the interest of the defendant that they avoid facing such proceedings, but they have been issued with a notice. Under the said notice

dated 03.02.2020, the defendant has been called upon by the Superintendent of Customs, to produce a copy of the Charter Party Agreement, details of the Hire Charges and other charges fixed for the Vessel MV EAGLE, the amounts paid by the plaintiff to M/s. Zora Shipping S.A., along with supporting documents and details of the value of cargo, the Insurance Amount of the cargo with supporting documents and ofcourse the details relating to the present suit.

17. This indicates that the Office of the Commissionerate at Tuticorin had commenced a serious investigation and not just a roving inquiry in to the entire issue relating to the import of the cargo.

18. It is the concern of Mr.Satish Parasaran that the ship having sailed away and the plaintiff having sold all the cargo to various dealers, the defendant would be the only available person to answer the queries of the Customs Authorities. Sale of cargo is claimed to be conducted day to day basis. There are as many as 1656 logs of timbers which had been segregated into 86 lots and there are 34 purchasers. There could be even further subdivision and further sales effected. But finally, it would be the defendant who will be called upon to answer to any charge which is inflicted owing to

the import of the cargo. It is under these circumstances that the application to implead the Office of the Commissioner of Customs had been filed by the defendant.

19. However, Mr. Prasanth S. Pratap, learned Senior Counsel for the plaintiff stated that the present suit is quite narrow in compass and there is also a clause in the agreement to refer disputes to Arbitration and which is accepted by both the parties. Naturally the Court is bound under Section 45 and its surrounding provisions and the Court must refer the parties to settle all their issues before an Arbitral Tribunal. The learned Senior Counsel therefore objected to any suggestion that the defendant be permitted to implead another defendant in this suit instituted by the plaintiff when particularly the Commissioner of Customs is neither a necessary party nor a proper party as viewed from the eyes of the plaintiff. The learned Senior Counsel also stated that all the issues should be referred to arbitration as contemplated under Section 45 of the Arbitration and Conciliation Act 1996 and all further proceedings of the suit should be stayed and if the defendant had any further grievance or would a like to restore to any further applications or reliefs, the proper approach would be to either approach the Arbitral Tribunal or file an application under Section 9 of the Act which contemplates that even pending

arbitration, the parties can file application and seek necessary reliefs from the Court.

20. I have carefully considered the arguments put forth by both the learned counsels.

21. Let me first take up the application filed under Section 45 of the Arbitration and Conciliation Act, 1996 namely, A.No. 2571 of 2020. The provision of the Act is quite clear. Section 45 is as follows:-

“45 Power of judicial authority to refer parties to arbitration. —Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (5 of 1908), a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed. ”

22. As a matter of fact, the provision starts with a non-obstantive

clause stating that not withstanding anything contained in the Code of Civil

Procedure or in the earlier part of the Act, the judicial authority, in this case, this Court, when presented with a dispute which the parties had agreed to refer to Arbitration, should refer the parties to Arbitration. The provision is quite straight forward and direct. Refer the parties to Arbitration and stay further proceedings of the suit. Resorting to arbitration can be avoided only when one of the parties plead that the arbitration agreement is null and void or vitiated by fraud which aspects are not raised by either one of the parties to this suit.

23. Mr. Prashanth S.Pratap, learned Senior Counsel also relied on the Judgment of the Hon'ble Supreme Court reported in ***CDJ 2008 SC 1641 [M/s. Shakti Bhog Foods Limited Vs. Kola Shipping Limited]*** wherein the Hon'ble Supreme Court was emphatic in their observation that when a Court is presented with a fact situation where the parties had agreed to refer disputes to Arbitration, then the Court should respect such agreement and refer the parties to Arbitration and not take on itself the onus of deciding the issues raised.

24. In ***2019 SCC OnLine SC 358 [Vidya Drolia and Others v.***

Durga Trading Corporation], a larger Bench of the Hon'ble Supreme Court

decided a reference with respect to arbitrability of any issue, and stated that the Court must again refer the parties to arbitration and even if issues relating to arbitrability are raised, it would only be the prerogative of the Arbitral Tribunal to decide such an issue and it is not again for the Court to take up the onus of deciding the arbitrability of those issues.

25. I am bound by the decisions.

26. Naturally the issues in the present suit will have to be referred to Arbitration under Section 45 of the Arbitration and Conciliation Act, 1996, I am informed that the Arbitral Tribunal had already been constituted and that the parties have also participated before the said Tribunal, by the plaintiff herein presenting a claim statement, albeit, as stated by Mr. Sathish Parasaran, with delay, I am not aware of that fact directly but stating a point advanced before Court. The defendant herein had also been provided with an opportunity to rebut the claim statement by way of filing a counter. In the result, Application No. 2571 of 2020 is allowed and the parties are relegated before the Arbitral Tribunal and I am confident that issues raised would be addressed with due concern.

27. Now, I shall take up the other application, namely, A.No. 3162 of 202. I am of the firm opinion that this application requires deep consideration. It is an application filed under Order 1 Rule 10(2) of the Code of Civil Procedure and in simple terms is an application to implead a third party as a defendant to the suit. Order 1 Rule 10(2) CPC actually grants the Court power to implead a party even on its own motion. But then, the issue that now arises for consideration is as to what purpose it would serve if the Custom Authority is impleaded as a defendant when the issues in the suit are to be referred to Arbitration and further proceedings are stayed, in view of Section 45 of the Arbitration and Conciliation Act, 1996.

28. In this connection, I would draw attention to Section 30 of the Code of Civil Procedure and in particular to Section 30(b) CPC.

“30. Power to order discovery and the like.-

Subject to such conditions and limitations as may be prescribed, the Court may, at any time, either of its own motion or on the application of any party,-

(a);

(b) issue summonses to persons whose attendance is required either to give evidence or

to produce documents or such other objects as aforesaid;

(c) order any fact to be proved by affidavit.'

29. Section 30 also gives the power to the Court, on its own motion, to issue summons to any person whose attendance is required to produce documents, subject ofcourse to the limitation as may be prescribed. This particular section is the basis under which Order XI of the Code as amended with specific reference to a Commercial Dispute has been framed which gives the procedure for disclosure, discovery and inspection of documents and also how interrogatories are to be raised. The issue now is whether interrogatories can be raised limited to parties to the suit or even to third parties to the suit.

30. Section 30 CPC and Order XI CPC are both pre-trial procedures. Section 30 CPC does not, on a plain reading, limit itself to parties to the suit. The word used is 'persons'. Mr. Prashanth S. Pratap raised an objection stating that no purpose would be served since even if fraud is alleged over the Bills of Ladings produced, since the issue of fraud can also be agitated before the Arbitral Tribunal and that this Court should simply tie its hand and await the award of the arbitral tribunal and till then stay further

proceedings in the suit and permit the suit to lie in doldrums. But the issue is a little more serious.

31. The issue is with respect to averments made in an affidavit filed in Court that the Bills of Lading have been issued subsequent to the order of the Court. The order of the Court was on 06.11.2020. The Bills of Lading however are dated even prior to that I am confident that the plaintiff will have explanations for the same, but it would only be appropriate that the Commissioner of Custom gives his version with respect to the circumstances surrounding the entire transactions relating to the import and discharge of the cargo from the ship. This aspect relates to an enquiry which is necessary owing to the orders passed by this Court and weighing the plaintiff and the defendant with the same scales, I hold that this is an issue the Court has a duty to examine. It goes beyond a simple order of winding up the proceedings because the matter had been referred under Section 45 of the Arbitration and Conciliation Act, 1996 and staying further proceedings of the suit and closing the eyes of the Court and stating that this is an issue the parties will have to agitate before the Arbitral Tribunal. I hold that this is an issue which has befallen for consideration owing to the orders of this Court. The Arbitral Tribunal may not be interested in examining the orders of this Court. They

would rather concentrate on the order / award to be passed based on the claim and the objections raised to the claim.

32. I hold it would only be in the interest of both the parties that they clear their respective names and the Court can put to rest any lingering doubt regarding the veracity of the Bills of Lading produced.

33. I therefore hold that it would be appropriate that a direction is issued to the Commissioner of Customs Tuticorin to produce all the relevant documents relating to the cargo which had been imported and discharged from M V EAGLE subsequent to her berthing at the Port of Tuticorin till her leaving the shores at Tuticorin and also the subsequent sale of the Cargo and also produce every other relevant document relating to the transaction. The entire file may be produced by the Officials of the Customs at Tuticorin and it would only be in the interest of both the parties and ofcourse the Court also that the said file is perused by both the learned counsels on record and submissions are made whether any further enquiry is to be directed by the Court. This power to examine the file is a power cast upon the Court more as a duty towards the administration of Justice to ensure that there is no manipulation of the documents stated in affidavits filed before the Court. The proceedings,

particularly the issues relating to the reliefs sought in the plaint will not be examined, but I am convinced that the Court has every right and duty to examine whether there had been any manipulation of documents presented before Court and whether the facts as stated in the affidavits filed before this Court are true as stated, particularly when the deponent of the affidavit has solemnly sworn that they are true to the best of knowledge. This is an exercise which can be conducted even if the issues between the plaintiff and the defendant are stayed because now it is now a matter between the Court and the documents presented before the Court. I therefore hold with respect to A.No. 3162 of 2020 that instead of impleading the said Official, I would rather direct the Registry to issue notice to the Commissioner of Customs, Tuticorin Port to produce all relevant documents relating to the cargo / discharge of cargo/ transportation of cargo / sale of cargo and relevant documents including the Bills of Lading / Import General Manifest and every other documents relating to the Vessel M V EAGLE which berthed in the port at Tuticorin at the time when the suit was instituted in October 2020. Such summons is to be issued by the Registry for appearance either in person or by deputing a responsible Officer from the Commissionerate of Customs Tuticorin to appear before this Court on 24.03.2021 at 2.15 p.m. If batta for such summons is to be filed, defendant to take up that responsibility.

34. List A.No. 3162 of 2020 alone on 24.03.2021 at 2.15 p.m.

C.V.KARTHIKEYAN J,

vsg

35. A.No. 2517 of 2020 is allowed. No costs.

36. Registry may commence indexing the papers and the parties are referred to arbitration for further proceedings. The issues in the suit are stayed until further orders.

37. Registry may issue necessary certified xerox copy of any relevant documents as required by the plaintiff and the defendant if such documents are required to be presented before the Arbitral Tribunal.

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12.03.2021

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