IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 28.10.2021
CORAM :

THE HON'BLE MR.SANJIB BANERJEE, CHIEF JUSTICE

AND

THE HON'BLE MR.JUSTICE P.D.AUDIKESAVALU

OSA (CAD) No.88 of 2021
and CMP No.16921 of 2021

Banque Cantonale De Geneve
having its office at
Case Postale 2251, 1211 Geneve 2,
Rep. by its Power of Attorney Agent,
V.Padmanabhan. ...Appellant/Appellant/Plaintiff

-vs-

Owners and Parties Interested in
the Vessel M.V.Polaris Galaxy,
having IMO 9339648, now lying at the outer
anchorage of the Port of Tuticorin
(V.O.Chidambaranar Port),
Tuticorin 628 004, rep. by its Master.
...Respondent/Respondent/Defendant

Appeal filed under Section 13(1) of the Commercial Courts Act, 2015 read with Order XXXVI Rule 1 of OS Rules against Judgment and Order dated 24.09.2021 passed in Application No.1494 of 2021 in C.S.No.96 of 2021 on the file of original side of this court.

A.No.1494/2021:

filed, to order for a decree and Judgment in favour of the Plaintiff and against the Defendant Vessel and the parties interested in her by summary proceedings for the sum of USD 6,705,357.38(Approx INR.48,94,91,089/-(Rupees fourty Eight Crores Ninety Four Lakhs Ninety one Thousand and Eighty Nine only) (Calculated at 1 USD=73 INR) and further interest at 12% (or wherever other rate this Hon'ble Court may deem fit) from the date of filing of the suit until Payment/realization with costs.

Prayer in C.S.No.96/2021:

a.To order the arrest and sale of the vessel Vessel M V POLARIS GALAXY, having IMO: 9339648, flying the flag of Liberia now lying at the outer anchorage of the Port of Tuticorin(V O

Chidambaranar Port), within the jurisdiction of this Hon'ble Court along with her hull, gear, tackle, engines, machinery, bunkers, equipment, furniture, fixture and all other paraphernalia and appurtenances, presently lying at the port and harbour of Tuticorin (V O Chidambaranar Port) and direct the deposit of the sale proceeds in this Hon'ble Court towards satisfaction and by way of security towards the Plaintiff's claim:

b.For an order and decree in favour of th Plaintiff and against the Defendant for a sum of USD 6,705,357.38 equivalent to Rs.48,94,91,089/-(Forty Eight Crore, Ninety Fourt Lakh, Ninety One thousand and eighty Nine only)(CALCULATED AT the current exchange rate of 1 USD=73 INR), together with further interest at the rate of 12% per annum on the principal amount from the date of the institution of the suit till payment/realization, together with costs and poundage;

For the Appellant : Mr.Zarir Bharucha
for Mr.S.Raghunathan

For the Respondent : Mr.Prasanth S.Pratap,
Senior Counsel
for Ms.Deepika Murali.

J U D G M E N T
(Delivered by the Hon'ble Chief Justice)

The appeal arises out of an order in course of an application for summary judgment under Order XIII-A of the Code of Civil Procedure, 1908 in an admiralty action to which the Commercial Courts Act, 2015 also applies.

2. A preliminary objection is taken by the defendant respondent to the effect that the appeal is not maintainable in view of the restricted scope of appeal in Section 13 of the Act of 2015 and in the light of a recent judgment of this court reported at 2021 SCC OnLine Mad 5428 (Hindustan Unilever Limited v. S.Shanthi). The defendant asserts that since the order impugned has been passed under Order I Rule 10 of the Code, which gives complete discretion to the trial court to add or strike out any party, and such nature of order is not recognised as appellable under Order XLIII of the Code, the appeal cannot be pursued. It is the further submission of the defendant that, at any rate, no decision on the merits of the plaintiff’s claim has been made in the order impugned; the trial court only desires to adjudicate the disputes in the presence of the added defendant.

3. The plaintiff appellant relies on Section 14 of the Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017 which provides as follows:-

> "14. Appeal – Notwithstanding anything contained in any other law for the time being in force, an appeal shall lie from any judgment, decree or final order or interim order of a single Judge of the High Court under this Act to a Division Bench of the High Court."

The plaintiff says that since the suit has been filed in the admiralty jurisdiction pertaining to a maritime claim, it is the appeal provision in the Act of 2017 which will hold sway over the appeal provision in the more general statute that is the Act of 2015.

4. In support of the plaintiff's contention that the present appeal is maintainable as Section 14 of the Act of 2017 permits every interim order to be amenable to appeal, the plaintiff has referred to an order dated January 24, 2020 passed by the Calcutta High Court in APO No.180 of 2019 (Rigveda Maritime Pte. Ltd vs. Sohom Shipping Pvt. Ltd). In the short order, Section 13 of the Act of 2015 and Section 14 of the Act of 2017 were noticed before it was held, inter alia, as follows:

> "In view of the wide amplitude of Section 14 of the Act of 2017 and the 2017 Act being later in point of time, having the effect of overriding Section 13(2) of the Act of 2015, where both Acts are Acts of Parliament, there is no impediment to receiving the present appeal arising out of an order by which the court refused to immediately conclude the sale of the vessel..."

5. The defendant contends that Section 13 of the Act of 2015 was substantially amended in 2018 and when such amendment was introduced, the Act of 2017 was already in force. It is suggested that since the amendment came to be operational in 2018, the overriding nature of the provision in Section 13 of the Act of 2015 would hold the field notwithstanding Section 14 of the Act of 2017. Apart from the fact that an amendment to an existing statute may not be read in the manner that the defendant suggests, there is a more fundamental aspect to the matter. There can be no doubt that the present suit was filed in the admiralty jurisdiction of this court and pertains to a maritime claim. The cause of action of the plaintiff is the mis-delivery of the goods by the carrier. The plaintiff is the consignee indicated in the bill of lading and the defendant is the carrier.

6. When a suit has been instituted under the Act of 2017 by invoking the admiralty jurisdiction in pursuance of a maritime

claim, the provisions of the Act of 2017 would continue to govern the action. Here again, the defendant has suggested otherwise. According to the defendant, the provision of the Act of 2017 would apply till the action is in rem, but once the defendant appears and furnishes security, as has been done in this case by the defendant, it becomes an action in personam and the matter would no longer be governed by the Act of 2017. Such argument is exceptionable. In any event, between the Act of 2017 and the Act of 2015, the Act of 2017 is the special statute and the Act of 2015 is the more general statute and, as such, the right of appeal in the present case will be governed by Section 14 of the special statute rather than Section 13 of the more general enactment.

7. The plaintiff has also relied on a judgment rendered by the High Court of Gujarat on October 21, 2020 in R/O.J Appeal No.4 of 2020 (Bulk Marine Pvt. Ltd vs. M.V.Silvia Glory) where same view has been expressed as to the scope of appellability in the admiralty jurisdiction.

8. On merits, the plaintiff submits that its claim in the present case is on account of the defendant not delivering the goods covered by the relevant bill of lading to the plaintiff or to the order of the plaintiff. The plaintiff says that it holds the bill of lading and it is nobody's case that the bill of lading was surrendered to the carrier at the time of the recipient of the goods receiving the supply. According to the plaintiff, the carrier is obliged to deliver the goods according to the instructions of the consignee. The carrier in this case acted clearly in breach of the terms and conditions of the bill of lading and the general practice followed in such regard. The plaintiff says that it is in such circumstances that the plaintiff has applied for summary judgment since the defendant can have no manner of defence to the claim.

9. The plaintiff refers to a letter of indemnity issued by one Profitable Wealth Inc. to the defendant on May 24, 2020 that the defendant has relied upon. The plaintiff demonstrates that as per the relevant letter, Profitable Wealth Inc. required the plaintiff to deliver the goods to Chevron Singapore Pte Ltd and has indemnified the defendant harmless in respect of any liability, loss, damage or expense of whatsoever nature that may be sustained by the defendant as a consequence of making the delivery of the goods as per the instructions of Profitable Wealth Inc.

10. The plaintiff asserts that since the plaintiff is the consignee indicated in the bill of lading and the plaintiff had not authorised Profitable Wealth Inc. to receive the goods or issue instructions as to the delivery thereof, the plaintiff is

not concerned with what instructions may have been received by the defendant from Profitable Wealth Inc. or any other party nor is the plaintiff concerned with the manner in which the defendant acted on the basis of such instructions. The plaintiff claims that the plaintiff was entitled to the goods and since it appears to be the fairly admitted position that the goods have not been delivered to the plaintiff or to its order, the plaintiff is entitled to the value thereof or due compensation therefor.

11. The plaintiff refers to the judgment and order impugned dated September 24, 2021 and submits that nothing in the eight terse paragraphs contained therein indicates any legal or legitimate basis for impleading Gulf Petrochem as a defendant to the proceedings. The plaintiff says that the order impugned does not conclusively indicate that the added party is either a necessary or a proper party and, according to the plaintiff, no reasons for the presence of the added party is indicated in the impugned order.

12. Indeed, the order impugned is spread over eight paragraphs. The first five are the preliminary paragraphs. At the sixth paragraph, it is recorded that the sole defendant delivered the goods at Singapore based on a delivery order apparently issued by the customer of the plaintiff and the defendant apparently acted on the basis of an e-mail of May 21, 2020 issued by Gulf Petrochem. The trial court recorded the defendant's contention that the plaintiff had financed the transaction and that the plaintiff was not the owner of the cargo and since the owner of the cargo was Gulf Petrochem which had not been impleaded, the suit was liable to be dismissed.

13. Upon noting such contention, the trial court concluded as follows in the only paragraph in support of the order:

> "8. In the suit transaction, the Gulf Petrochem (GP), who is the customer of the plaintiff, is the key player on whose instructions, the goods have been delivered at Singapore by the defendant. IOCL has sold marine fuel to GP based on the LC issued by the plaintiff for USD 6,050,000. GP has engaged the defendant to transport the cargo. As per the Bill of Lading, the cargo is supposed to be delivered at Singapore. The defendant has discharged the cargo at Singapore Port based on the letter of indemnity dated 24.05.2020 given by Profitable Wealth INC, Singapore. In the documentary credit opening (LC) dated 12.05.2020 originated from the plaintiff there is a clause which indicates cargo can be delivered on obtaining indemnity in case of temporary non availability of original Bill of Lading."

14. It must also be recorded that the court observed at paragraph 9 that from the documents and facts pleaded "Gulf Petrochem (GP) who is the customer of the plaintiff, is the proper and necessary party in the suit." However, it was not indicated as to what documents and what facts impelled the court to arrive at such conclusion or the legal basis for discovering Gulf Petrochem to be either a necessary or a proper party thereto. The plaintiff also seeks to refer to the charter-party under which the defendant obtained time charter of the vessel. According to the plaintiff, even such charter party does not entitle the defendant to deliver the goods to any person except upon the instructions being received from the consignee. However, such aspect of the matter may be totally irrelevant in the present context since a document to which the plaintiff is not a signatory cannot be seen to deal with the plaintiff's property.

15. The defendant, quite fairly, accepts that ordinarily the consignee named in a bill of lading would be the party entitled to receive delivery of the goods covered by the relevant bill of lading. However, the defendant submits that the facts of the present case would indicate that the plaintiff was never intended to be the consignee or the party to whom the goods had to be delivered, notwithstanding the bill of lading indicating the plaintiff to be the consignee thereunder. According to the defendant, Gulf Petrochem obtained credit facilities from the plaintiff bank in respect of the subject transaction and the plaintiff bank was to be paid after a period of 60 days. The defendant asserts that since the goods had to be delivered within such period of 60 days, it is inconceivable that the plaintiff would be entitled to receive the goods since the plaintiff's time to receive repayment would not mature before the expiry of 60 days from the date of its agreement with Gulf Petrochem in such regard. The relevant agreement was entered into on or about May 8, 2020.

16. The defendant also refers to the case made out in the plaint, particularly at paragraphs 10, 11 and 12 thereof:

> "10. On 8 May 2020, one Gulf Petrochem FZC ("GP") approached the Plaintiff seeking financing for a transaction of purchase of fuel from Indian Oil Corporatioin Ltd. ("IOCL") and onward sale of marine fuel to Aramco Trading Fujairah FZE ("Aramco"). The proposed transaction was as follows:
>
> a) GP would buy marine fuel from IOCL at USD 220.5880 per MT.
> b) GP would sell on the marine fuel to Aramco at USD 246.726 per MT.

c) The load port for the cargo would be Kandla and the discharge port would be Fujairah.

d) The Plaintiff would finance the purchase of the fuel by GP from IOCL by way of letter of credit so as to enable GP to procure the cargo and sell it onward to Aramco. The purchase price for the onward sale would be remitted by Aramco into GP's bank account maintained with the Plaintiff.

11. The payment terms under the sale by GP to Aramco were to be on open credit given that Aramco was an Oil Major. In other words the Plaintiff would rely on the name of Aramco as having never defaulted as security for payment due from them. The relevant payment terms expressed in the contract stated:.

"THE PAYMENT SHOULD BE MADE WITHIN 60(SIXTY) CALENDAR DAYS FROM THE DATE OF INVOICE (INVOICE DATE - DAY 0) AGAINST PRESENTATION OF THE SELLER'S INVOICE ANDN COQ (Certificate of Quality)."

12. The understanding between the parties in relation to this aspect of security, was as follows:

a) It was agreed that the original Bill of Lading representing the cargo would be issued by the shipowner to the order of the Plaintiff. The title/property in the cargo of fuel financed and paid for by the Plaintiff would vest with the Plaintiff.

b) Independent of the obligation to pay from Aramco, the Plaintiff would remain the lawful holder of the original Bill of Lading and would be entitled to delivery of the cargo thereunder, the security for the Plaintiff's claim was the cargo, i.e., the fuel itself. However, until the Plaintiff received confirmation of the onward sale to Aramco, the title/property in the cargo of fuel would vest with the Plaintiff by virtue of being the lawful holder of the original Bill of Lading."

(Emphasis in original)

17. The defendant says that if it is the plaintiff’s case that it merely held the bill of lading as a security, it would not lie in the mouth of the plaintiff to assert that the plaintiff was entitled to receive delivery of the goods. The further point that the defendant makes is that the plaintiff has not asserted that it remains unpaid in respect of the plaintiff financing the acquisition of the goods by Gulf Petrochem from Indian Oil Corporation Limited. The defendant points out that the plaintiff agreed that the consignment would be sold by Gulf Petrochem to Aramco and the plaintiff merely needed a

confirmation of the onward sale to Aramco, which confirmation has been received by the plaintiff. As a consequence, the defendant suggests that the plaintiff has no cause of action against the defendant as the carrier, and the plaintiff has to look to its customer, Gulf Petrochem, in the event the plaintiff remains unpaid.

18. The matter falls within a very short compass. The primary document is not disputed. The plaintiff is the named consignee in the bill of lading and it is also accepted by the defendant, in particular, that ordinarily it would be the consignee who would be entitled to obtain delivery of the goods covered by a bill of lading. In this case, it may also be noticed that Gulf Petrochem is the notify party mentioned in the bill of lading. In international trade, documents are of immense value and courts must proceed on the basis of the letter of the documents without seeking to ascertain the nature of the underlying or any incidental transaction. If it is imperative that a carrier notifies the party indicated as the notify party, what it implies is that notice of the arrival of the vessel or the notice of readiness to discharge cargo must be given to such party whereupon such party would produce the bill of lading and obtain the discharge of the cargo. It is also possible that the consignee may authorise the carrier to release the cargo in favour of the notify party or to any other as the consignee is entitled to assign its right to obtain delivery under the bill of lading to any party of the consignee's choice.

19. What is of paramount importance is that it is the consignee and the consignee alone which can issue instructions or authorise the delivery of the goods covered by the bill of lading to any third party. The carrier is not obliged to act as per the directions or instructions of any third party as the bill of lading, in a sense, is the document of title pertaining to the cargo and it is elementary that it is only the owner of the goods who has the right to alienate the goods or transfer the same.

20. Implicit in the letter of May 24, 2020 issued by Profitable Wealth Inc. was that such entity required the carrier to do something unusual or out of the ordinary, and, as such, exposing the carrier to a risk in course of such deviation. As a consequence, to induce the carrier to deviate from the usual practice, Profitable Wealth Inc. indemnified the carrier harmless against any claim that may be made against the carrier for the carrier acting according to the instructions of Profitable Wealth Inc. The plaintiff had nothing to do with Profitable Wealth Inc. or any instructions that Profitable Wealth Inc. or Gulf Petrochem or even the Maharaja of Gaipajama may have issued to the carrier. These instructions, whether

issued by Gulf Petrochem or Profitable Wealth Inc., were not backed by any authority of the plaintiff. In such circumstances, what the arrangement between the defendant and the third parties may have been may not be of any relevance in the suit and in the context of the plaintiff's claim herein.

21. As to the averments in paragraphs 10 to 12 of the plaint, it is sometimes better not to say too much. However, the averments may be seen as part of a narrative leading up to the claim of the plaintiff and the plaintiff's cause of action against the defendant. In the scheme of the action and the particular claim of the plaintiff as the consignee in the bill of lading against the defendant carrier, the transactions between the plaintiff and Gulf Petrochem or those between Gulf Petrochem and Indian Oil Corporation or even that between Gulf Petrochem and Aramco are of no relevance. Till such time that the plaintiff's name appeared as the consignee in the bill of lading, the defendant was obliged only to the plaintiff to deliver the goods to the plaintiff or to the order of the plaintiff and the defendant, in acting on the basis of instructions issued by others may not have affected the right of the plaintiff or the plaintiff's claim under the bill of lading.

22. In such circumstances, Gulf Petrochem Inc., which may have been financed by the plaintiff qua the subject transaction is neither a necessary nor a proper party to the plaintiff's simple claim against the carrier of the goods for the breach of the contract of carriage and in the carrier's failure to deliver the goods to the plaintiff or to the order of the plaintiff. It is not unusual in the industry for goods to be released at the request of a stranger, but that is precisely why the stranger indemnifies the carrier. It is more likely than not that the entity that induced the defendant to discharge the goods in Singapore may be beyond the defendant's reach; but that may not be an excuse to resist the plaintiff's claim. It is equally possible that the plaintiff may have acquiesced in the delivery instructions issued by Profitable Wealth Inc., but when the plaintiff has not, it is only the indemnity furnished by the entity that the defendant can chase.

23. The observations made herein must be understood to be in the context of what was required to be considered and should not unduly weigh with the trial court in course of the expeditious disposal of the application for summary judgment that the plaintiff has filed.

24. The order impugned dated September 24, 2021 is set aside. The trial court is requested to take up the application for summary judgment and dispose of the same in accordance with law as expeditiously as the business of the trial court permits.

OSA (CAD) No.88 of 2021 is allowed as above. The defendant will pay costs assessed at Rs.1,50,000/-. CMP No.16921 of 2021 is closed.

s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

sra

To

The Sub Assistant Registrar
Original Side
High Court, Madras.

+1 CC to Mr.S. Raghunathan, Advocate sr 55972.
+1 CC to Ms.Deepika Murali, Advocate sr 56014

OSA (CAD) No.88 of 2021

AJS(CO)
SP(09/11/2021)