IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 01.04.2021

Pronounced on : 20.04.2021

CORAM

THE HONOURABLE MR. JUSTICE **C.V.KARTHIKEYAN**

A.No.3162 of 2020
in
C.S.(Comm.Div.) No.265 of 2020

Owners and parties interested in the Vessel
Eagle, having IMO No.9227869, now lying
at the outer anchorage of the Port of Tuticorin
(V.O.Chidambaranar Port)
Tuticorin – 628 004
represented herein by its Master ... Applicant / Defendant

Vs.

Wajilam Exports (Singapore) PTE Limited,
A company incorporated under the laws of Singapore,
having its registered office at 10 Ansol Road,
#27-14 International Plaza,
Singapore 079903.
Represented by Power of Attorney Agent
Mr.N.K.Prem Kumar ... Respondent / Plaintiff

Prayer:- This application filed under Order XIV Rule 8 of Original Side Rules read with Order I Rules 10(2) of C.P.C., praying to implead the Office of the Commissioner of Customs, Tuticorin with address at Customs House, New Harbour Estate, Tuticorin – 628 004 as a Defendant in C.S.(Comm.Div.) No.265 of 2020.

For Applicant / Defendant	:	Mr.Satish Parasaran, Senior Counsel, Assisted by Ms.Deepika Murali
For Respondent / Plaintiff	:	Mr.Prashanth P Prathap, Senior Counsel, Assisted by Mr.S.Ragunathan

ORDER

Further arguments in this application were advanced consequent to the order dated 12.03.2021 when both the present application and A.No.2571 of 2020 had been considered by this Court.

2. The present application has been filed by the defendant in the suit seeking to implead the Office of the Commissionerate of Customs, Tuticorin Port, as a defendant to the suit.

3.A.No.2571 of 2020 which had been discussed along with the present application on 12.03.2021 was an application filed under Section 45 of the Arbitration and Conciliation Act, 1996, by the defendant seeking to refer the issues in the suit to arbitration.

4.In the course of the order dated 12.03.2021 the said application was allowed and the plaintiff and the defendant herein had been relegated before the Arbitral Tribunal which had been already constituted and the parties had also participated in the proceedings before the Arbitral Tribunal.

5.Insofar as the present application is concerned, on examining the facts, this Court had held 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 of Tuticorin and also subsequent sale of the cargo and also produce every other relevant document relating to the transactions.

6.A few background facts are required.

7.The suit had been instituted by M/s.Wajilam Exports (Singapore) Pvt Ltd., a Company incorporated under the Laws of Singapore, carrying on business as traders, exporters and importers of timber logs against the Owners and Parties interested in the Vessel MV Eagle which was lying at the outer anchorage of the Port of Tuticorin, within is the territorial jurisdiction of this Court while exercising Admiralty Jurisdiction.

8.The plaintiff as Charterers and Zora Shipping SA as owners of the vessel MV Eagle had entered into an agreement on 29.07.2020 relating to the hire of the vessel MV Eagle for a trip via Vanimo, Papua New Guinea to India with a cargo of 1656 logs of timber. The charter hire commenced on 03.08.2020 when the vessel left Zhanjiang Port China and then proceeded to the Port of Vanimo in Papua New Guinea and loaded 1656 pieces of round logs admeasuring about 8000 cbm. Two Bills of Ladding were issued by the Master covering 1311 pieces of round logs and 346 pieces of round logs respectively.

9.In the process of loading the cargo there were several instances, due to lack of power, and Crane No.3 being not available. There was a breakdown of equipments which affected the full working of the vessel. The plaintiff claimed deduction 33% of the hire charges on pro rata basis for the breakdown period. This was claimed taking advantage of the terms of the charter party agreement. It was also claimed by the plaintiff that the vessel did not perform in accordance with the speed warranty. There was time lost and excess fuel consumed. There was also bad weather.

10.In the meantime, Zora Shipping SA, had raised an invoice for charter hire charges which was paid in full by the plaintiff on the due date. A second invoice was also raised but which was not paid since the plaintiff claimed deductions on account of off hire and speed / consumption as well as excess payment of three days made under the previous invoice. Zora Shipping SA raised a further invoice claiming hire charges for a further period. They also claimed stevedore damages. The owners of the vessel also issued a Notice of Lien on the cargo towards outstanding hire charges. They also stated that they have reserved the right to sell the cargo or discharge it at another port in their absolute discretion.

11.The vessel arrived at Tuticorin Port on 14.09.2020 and the Master of the vessel refused to proceed to berth and discharge the cargo. The plaintiff claimed that the defendant was not entitled to exercise a lien on the cargo. Disputes had arisen. The suit was therefore filed seeking the arrest and sale of the vessel, and for a declaration that the exercise of lien by the owners of the cargo on board the vessel was unlawful and illegal and to consequently direct the defendant to berth the vessel for the purpose of discharging the entire cargo of 1656 timber logs.

12.The applications in the suit were heard at length at various stages and finally, the plaintiff also deposited USD 2,62,297 by directions of this Court by way of fixed deposit in the name of the Registrar General, Madras High Court. The logs of timber were directed to be released to the plaintiff. There were as many as 86 Bills of Lading in circulation and it had been stated that the cargo was to be purchased by 34 different Micro, Small and Medium Entities (MSME) who had purchased it in 86 separate logs. Detailed orders were passed on 06.11.2020 and again on 11.11.2020.

13.An affidavit was directed to be filed by the plaintiff enclosing the Bills of Lading since doubts were raised regarding the veracity of the same. Thereafter, when the matter came up on 12.03.2021, this Court had directed the parties resort to Arbitration to settle their disputes.

14.However with respect to the present application, referring to the issues raised by the defendant that Bills of Lading were issued subsequent to the orders of this Court on 06.11.2020 and that the Bills of Lading were dated even prior to that particular date, a direction was issued to the Commissioner of Customs, Tuticorin, to produce all the relevant documents relating to the cargo which had been imported and discharged from MV Eagle subsequent to her berthing at Tuticorin till her leaving the shores at Tuticorin and also subsequent sale of the cargo and to produce every other relevant documents relating to the transactions. Notice was directed to the Commissioner of Customs, Tuticorin.

15.Mr.A.P.Srinivas, learned Senior Standing Counsel, then appeared on behalf of the Commissioner of Customs, and filed a memo indicating the documents which are available in the office of the Commissionerate of Customs, Tuticorin. The list of documents which are available are as follows:-

1.86 Nos. of Bills of Lading raised against 34 parties.

2.86 Nos. of In-Bond Bills of Entries raised against 34 parties.

3.86 Nos. of Ex.Bond Bills of Entries raised against the 34 parties.

4.86 Nos. of Commercial invoices raised against 34 parties.

5.Import General Manifest (IGM) No.2147 dated 08.09.2020.

6.78 Nos. of Letter of credits (LCs) issued by banks.

16.Further arguments were advanced with respect to the jurisdiction of this Court to pass any further directions.

17.Mr.Prashanth P Prathap, learned Senior Counsel, assisted by Mr.S.Raghunathan, who argued on behalf of the plaintiff pointed out that the Court cannot enter into a fishing and roving enquiry, particularly since the Customs Authority was already seized all the matter and had also issued notice to both the Agents of the plaintiff and the defendant. The learned Senior Counsel stated that the Bills of Lading had been dated but had not been handed over and had been handed over physically only after orders of this Court and urged the Court accept the fact that the Bills of Lading are genuine and had not been created or prepared with oblique purposes.

18.The learned Senior Counsel also pointed out that since the Court had passed orders in the application filed under Section 45 of the Arbitration and Conciliation Act, 1996, the parties should be directed to proceed further before the Arbitral Tribunal. Even if the defendant has any grievance, they can always file an application under Section 9 of the

Arbitration and Conciliation Act, 1996 which application is always maintainable and can be filed even during the pendency of the arbitral proceedings.

19.Specific reference was drawn to Section 9(1)(e) wherein, the Court under the said provision can grant such other interim protection as may appear to the Court to be just and convenient.

20.The learned Senior Counsel however stated that this Court was exercising jurisdiction on the Commercial Division and not under the Arbitration Act, and therefore cannot pass any order of any nature once the parties had been relegated to Arbitration under Section 45 of the Act. The learned Senior Counsel also pointed out Section 5 of the Arbitration and Conciliation Act, 1996 which restricted judicial intervention except as provided under the various provisions of the Act and one of the provision is Section 9 of the Arbitration and Conciliation Act, 1996.

21.The learned Senior Counsel also pointed out the proviso brought in to Section 2(2) as an amendment indicating that Section 9 of the Arbitration and Conciliation Act, 1996 will also apply to International

Commercial Arbitration even if the place of arbitration is outside India. The learned Senior Counsel therefore stated that when a specific provision was available, it is only appropriate that the aggrieved party takes advantage of such provision and that this Court should not venture into any further enquiry, having referred the parties to Arbitration.

22.The learned Senior Counsel also pointed out the judgment reported in ***(2011) 8 SCC 3333, Fuerst Day Lawson Limited Vs. Jindal Exports Limited,*** wherein the Hon'ble Supreme Court very clearly stated that the Arbitration and Conciliation Act, 1996, is a self-contained and exhaustive code and that any remedy sought under the provisions of the Act, should be sought only taking advantage of the provisions of the said Act and that judicial intervention should be restricted. This Court should not as a matter of principle venture to examine any further issue particularly as the parties had been referred to Arbitration and also since the Commissioner of Customs, Tuticorin, was also seized of the matter having issued notices to the Agents of the plaintiff and the defendant.

23.The learned Senior Counsel also pointed out that by deposit of USD 2,62,297, the plaintiff had also secured the claim of the defendant. It was also pointed out that any enquiry made by the Court will not lead to a decree or to an award and therefore, it would only be a meaningless exercise and stated that it would be in the interest of all concerned that the matter is left to rest and the parties are permitted to take recourse in manner known to law and approved by law.

24.Mr.Satish Parasaran, learned Senior Counsel, on the other hand stated that the defendant has a claim only against the plaintiff and has no claim as against the purchasers of the logs. The learned Senior Counsel pointed out to the observation made in the order dated 12.03.2021, wherein this Court had stated it would only be in the interest of both the parties and also of the Court that the documents are produced by the counsels on record and submissions are made whether any further enquiry is to be directed by the Court. The learned Senior Counsel stated that there can be no review of the said order. The learned Senior Counsel also stated that fraud has occurred and reiterated that it would be in the interest of the justice that this Court examine that allegation.

25.I have carefully considered the arguments advanced.

26.This is an application seeking to implead the Commissioner of Customs, Tuticorin, as a defendant in the suit. The issues raised in the suit have been referred to be decided through Arbitration under Section 45 of the Arbitration and Conciliation Act, 1996 on an application filed by the defendant. The Arbitral Tribunal has already been constituted and the parties had also filed their claim petition and had joined issue with such claim. Judicial intervention in an arbitral proceedings is discouraged under Section 5 of the Act. By way of an amendment the provisio to Section 2(2) of the Act, had been introduced and it had been very specifically provided that the provision under Section 9 of the Act, would also be applicable to International Commercial Arbitration. Under Section 9 of the Act, the Court may be approached even during the arbitral proceedings seeking reliefs as stated under Section 9 of the Act.

27.The application filed to implead the Commissioner of Customs, has now been widened to examine whether any fraud has occurred in the transactions. Fraud is alleged by the defendant and denied by the plaintiff.

28.That is a matter now under consideration of the Commissioner of Customs, Tuticorin Port, who is competent to issue notices and examine the allegations. Notices have been issued. I am confident that the Commissioner of Customs, Tuticorin, would act in accordance with law. Discretion is solely vested with the said Authority and it is not for this Court to either give any directions or even indicate the aspects to be examined. I refrain from doing so. An explanation has been given that the Bills of Lading though had been dated earlier, had been physically handed over only subsequent to the orders of the Court. Since, the parties had been referred to adjudicate the dispute through arbitration, impleading of the Commissioner of Customs in the present suit would serve no purpose. Expanding the scope of the application to examine the documents presented before the Commissioner of Customs would not be an appropriate procedure to be followed particularly, because the Commissioner is also seized of the entire issue. Parallel enquires should not be encouraged.

29.I would therefore let the matter rest and dismiss the present application. The parties may workout their remedies in manner known to law and as advised. I also hold that passing any judicial order after referring the parties to arbitration would also not be proper and would also tantamount to exceeding jurisdiction of the Commercial Division of this Court while examining the issues in a Civil Suit.

30.With the above observations, the Application is dismissed. No order as to costs.

Sd/-C.V.K.J
20.04.2021

//Certified to be true copy//
Dated at Madras this the day of 2021.

JJ 22/06/2021 COURT OFFICER(O.S.)

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