

Arun

REPORTABLE

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL APPELLATE DIVISION
COMMERCIAL APPEAL NO. 215 OF 2019
IN
NOTICE OF MOTION NO. 747 OF 2017
IN
COMMERCIAL SUIT NO. 816 OF 2017**

1. **THE STATE OF MAHARASHTRA,**
Through The Sheriff of Mumbai,
Old Secretariate Building,
KB Patil Marg,
Fort, Mumbai – 400 032.

... APPELLANT

~ VERSUS ~

1. **SINICA GRAECA SHIPPING
LIMITED,**
A Company incorporated under the
laws of the Marshall Islands having its
Corporate Office at Trust Company
Complex, Ajeltake Road, Ajeltake
Island, Majuro Marshall Islands
MH96960.

ARUN
RAMCHNDRA
SANKPAL

Digitally signed by
ARUN RAMCHNDRA
SANKPAL
Date: 2022.07.07
17:22:33 +0530

2. MT CHEMROAD MEGA (IMO 9228318),

A Vessel flying the flag of Panama together with Her Hull, Engines, Gears, Tackles, Bunkers, Machinery, Boats, Apparel, Plant, Furniture, Fixtures, Appurtenances, Equipment and Paraphernalia On Board presently lying and being at Jawahar Lal Nehru Port, Navi Mumbai, through her owner and all persons Claiming to be interested in the Vessel

... RESPONDENTS

APPEARANCES

FOR THE APPELLANT

Mr Ashutosh Kumbhakoni,
Advocate-General, with Jyoti Chavan and Sneha Bhanage, for State.

FOR RESPONDENTS

Mr Rahul Narichania, Senior
Advocate, with Ruchir Goenka & Ashutosh Tiwari, i/b Bose & Mitra & Co.

**CORAM : G.S.Patel &
Madhav J Jamdar, JJ**

DATED : 6th July 2022

ORAL JUDGMENT (Per GS Patel J):-

1. The Appeal is by the State Government with leave of the Court against an Order and Judgment dated 17th July 2018 (KR

Shriram, J). Leave was required because the State Government was not a party to either of the Suits before the learned Single Judge.

2. Mr Justice Shriram had before him two Commercial Suits. For the purposes of the Appeal we are concerned with only one of these. Commercial Suit No. 98 of 2015 (North Star Marine) is not the subject matter of the challenge and we need not concern ourselves with that portion of the order that deals with it.

3. Commercial Suit No. 816 of 2017 was brought by Sinica Graeca Shipping Limited (“**Sinica Graeca**”) against MT Chemroad Mega (“**Chemroad Mega**”) a vessel flying a Panamanian flag. Sinica Graeca is a company incorporated in the Marshall Islands.

4. The question that Shriram J addressed related to the Sheriff’s poundage. He identified the issues in paragraph 2 of the order (pages 11 to 12) thus:

“2. The issues can be split as under:

(i) In a case where, before the Sheriff of Mumbai executes the warrant of arrest issued by the Admiralty Registrar or before he serves the order of arrest passed by this Court in cases where warrant of arrest has been dispensed with the parties settle the matter, whether the Sheriff will be entitled to any poundage?

(ii) in a case where, order of arrest has been served or warrant of arrest has been executed levied against the vessel, parties have entered into an Agreement to refer the disputes either to arbitration or submit to the jurisdiction of a Court other than this Court, may be in a different country

and have exchanged letters of undertaking to pay such amount as awarded by the Arbitrator or the Court, whether any poundage is payable?”

This Appeal is concerned with the second question.

5. What happened in the Sinica Graeca–MT Chemroad matter was this. On 17th August 2017 there was a collision between Chemroad Mega and Sinica Graeca’s vessel of the same name in Malaysian/Indonesian waters. Each party had a claim against the other for loss, expense or damage arising from this collision. On 18th August 2017, Sinica Graeca, the corporate owner of the vessel that bore its name, commenced an in rem action against Chemroad Mega in the Court at Kuala Lumpur in Malaysia. Before it could be arrested, Chemroad Mega sailed. On 24th September 2017, the owners of Chemroad Mega brought an in rem action against Sinica Graeca and its vessel in Singapore. MV Sinica Graeca was arrested. On 25th September 2017, the owners of Chemroad Mega began an in personam action against the interests of MV Sinica Graeca again in Singapore.

6. On 3rd October 2017, to procure the release from arrest of MV Sinica Graeca in Singapore, the MV Sinica Graeca interests furnished security to the MT Chemroad Mega interests. These took the form of two letters of undertaking issued by two different insurance firms, both based overseas. On 11th November 2017, the MV Sinica Graeca interests i.e. owners, filed the present Suit No. 816 of 2017. They applied for and obtained a warrant of arrest against MT Chemroad Mega. That vessel was arrested.

7. After this, Sinica Graeca and MT Chemroad Mega entered into two Agreements, both dated 14th November 2017. One is called the Collision Jurisdiction Agreement. This is an Agreement between the parties to refer their respective claims for determination and it identifies the applicable law and the agreed jurisdiction. It says that the English Law and jurisdiction is to apply with unrevised 1996 Protocol Limits of Liability. This will apply to each claim. Then the parties had what is called a Side Agreement. These were necessary to substitute the letters of undertaking issued by the insurance companies with mutual promises and obligations as reflected in the Side Agreement. The letters of undertaking were to be returned and replaced with security and the Side Agreement was subject to English Law and English High Court jurisdiction. The sum and substance of the Side Agreement was that MT Chemroad Mega would be released from arrest and the present Suit No. 816 of 2017 would stand compromised or disposed of. The proceedings in Singapore and Malaysia would also be discontinued. The MT Chemroad Mega interests/owners also agreed to pay a certain amount as legal costs incurred by Sinica Graeca after the collision. There is also a counter security from the Plaintiffs Protection and Indemnity (P&I) club to the Defendants' P&I Club regarding coverage of such damages as might be awarded by the English Court.

8. Since the two Agreements of 14th November 2017 were executed in a Suit in this Court, the spectre of the Sheriff's poundage raised its head. But nobody knew — or indeed knows even now — on what amount this poundage was or is to be computed. The relevant rules at that time said in the table of fees

that the Sheriff was entitled to one percent of ‘the amount of satisfaction, compromise or settlement’. But there was and still is no amount of satisfaction, compromised or settlement. All that the parties agreed to do was to shift the scene of action elsewhere under different rules of play to determine who was liable to whom and in what amount. As the learned Single Judge pithily put it, “one percent of zero is still zero”, and therefore there was no question of poundage.

9. The learned Single Judge assessed the relevant rules 474, 475 and 476 of the Bombay High Court (Original Side) Rules read with Table 5. We may be moving ahead at this stage but we note that the Rules have since been amended and, cutting a very long story short, the provision for payment of poundage as a percentage is now substituted with a very modest flat fee. There is no challenge to that aspect of the matter.

10. The case advanced by Mr Narichania for the Plaintiff, opposing the Sheriff’s claim for poundage, was that there had to be necessarily the satisfaction or fulfilment of critical ingredients before any liability to pay poundage could even arise. To begin with, there had to be a realisation, satisfaction or settlement. If there was no realisation, etc., there was simply no basis to compute a percentage (hence: “1% of zero is zero”). But that realisation also had to be the result of and traceable to an arrest effected by the Sheriff. If the parties settled before an arrest or attachment was effected there would be no question of poundage. Similarly, if a suit was decreed and the decree was satisfied either in execution or in a compromise, and the sum of settlement or the sum of realisation was known, a

question of poundage could, under the rules as they then stood, arise.

11. What had happened in this case, however, was entirely different. The Agreement between the Plaintiff and Defendant was certainly not one that could be or was impeached by anyone. Parties were always at liberty to agree to take their disputes to any form of adjudication permissible in law in any other venue. That would not mean that there was a 'realisation'.

12. The submission before the learned Single Judge on behalf of the Government at that time was that at a minimum the Plaintiff should secure the Sheriff for the amount that it *could* receive, i.e. one percent of the entirety of its claim. This, it was conceded, would be payable only if the Plaintiff succeeded in its claim against the Defendant.

13. The learned Single Judge, considering a large amount of law including the decisions especially in *Seabird Marine Limited v m.v. Kota Berani & Ors*¹ held that no poundage was payable. The principle reasoning is to be found in paragraph 17 where the learned Single Judge accepted the argument that the arrest must be effected (or actual attachment levied) and this must necessarily be followed by a realisation. It is only then that under the then existing rule can there be a valid demand of poundage. The realisation must, the learned Single Judge held, and in our view quite correctly, be the result of the execution of the arrest or the attachment. Of course the

¹ Admiralty Suit No. 20 of 1992 unreported oral order dated 8th October 1992.

learned Single Judge was bound by the decision in *Seabird Marine Limited*, and he so held.

14. The latter part of the order deals in a more general way with whether or not the Court should continue with the concept of the Sheriff's poundage. That is not the subject matter of this Appeal and we need not venture to express any opinion on it.

15. On the facts of the case, i.e. the Agreements arrived at between the Plaintiff and the Defendant and the consequences of the Suit being compromised, we are in agreement with the learned Single Judge and find no reason to interfere with the impugned order.

16. The submissions by Mr Kumbhakoni, learned Advocate General, stem more from a sense of concern of the possible impact that he apprehends the Single Judge's order may have on other pending cases. There are, he points out, many suits pending that have not yet been decreed. Perhaps there are even cases where there are continuing orders of arrest, seizure or attachment but where realisations have not been effected. This decision, he submits, should not be allowed to operate so as to affect those cases. We believe this anxiety is misplaced. Obviously each case will have to be decided first on an assessment of its own facts. We do not think that the learned Single Judge has in the impugned order set out any vastly broader principle applicable to all pending suits. He has interpreted the law regarding when a claim for poundage can be triggered. Whether or not the Sheriff is able to claim poundage will

depend on the facts of each particular case. That is one. Second, whether that poundage is to be computed according to the revised flat-fee schedule or on the earlier percentage basis is also not a matter that falls for decision today. It is not a question that arises before us. We see no reason to risk entering a judgment that would otherwise be completely obiter on such an question. That issue is left for decision in an appropriate case.

17. We note in any case that the relevant rule was amended subsequent to the impugned order of 17th January 2018.

18. The Appeal is dismissed with these observations and clarifications. There will be no order as to costs.

(Madhav J Jamdar, J)

(G. S. Patel, J)