

Santosh

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ADMIRALTY & VICE ADMIRALTY JURISDICTION
IN ITS COMMERCIAL DIVISION**

**INTERIM APPLICATION NO. 895 OF 2021
IN
COMM ADMIRALTY SUIT NO. 11 OF 2021**

The Board of Trustees of the Port of Mumbai ...Applicant
In the matter between
Irwin Edmund Sequeira & ors. ...Plaintiffs
Versus
M. V. KARNIKA (IMO-8521220) ...Defendant

Mr. Prathamesh Kamat, a/w Osama Butt, i/b Renata
Partners, for the Plaintiffs in COMAS No.11/2021.
Mr. Ajai Fernandes, a/w Ms. Sneha Pandey and Ms.
Annamaria Gonsalves, i/b Motiwalla & Co., for the
Applicant in IA/895/2021.

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CORAM: N. J. JAMADAR, J.

DATED : 22nd MARCH, 2022

Order:-

1. This application is preferred to allow the applicant to intervene in admiralty suit instituted by plaintiffs – crew members, against M. V. KARNIKA – the defendant vessel.
2. The admiralty suit is instituted by the plaintiffs with the assertion that they are seafarers serving on board the defendant vessel M. V. KARNIKA in various ranks and capacities. They are holders of valid Continuous Discharge Certificates evidencing their true and correct identity and a record of their continuous

service on board. They were appointed by the registered owners of the defendant vessel. The registered owners have, however, committed default in payment of wages due to the plaintiffs. The total claim of the plaintiffs is in the sum of US\$ 308,607.80 along with interest on the principal sum of US\$ 7,945.02 at the rate of 18% p.a. from the date of the suit till payment and/or realization.

3. By an order dated 28th October, 2020, in Sheriff's Report No.53 of 2020 in Commercial Admiralty Suit (L) No.3579 of 2020, the defendant vessel was sold by this Court to auction purchaser M/s. NKD Maritime Limited at a price of US\$ 11.65 Million.

4. The applicant has preferred this application with the assertion that the applicant, a statutory body constituted under the provisions of Major Port Trust Act, 1963 is the owner of the Docks and Harbour and port facilities at Port of Mumbai. The applicant renders various services to the vessels coming to the Port of Mumbai. The defendant vessel came to the Port and Harbour of Mumbai on 17th April, 2019 and lay at V-1 Anchorage. The defendant vessel was arrested by this Court on 17th March, 2020 in Commercial Admiralty Suit (L) No.11 of 2020. During the stay of the said vessel in the Port and

Harbour of Mumbai the defendant vessel made use of various facilities and services provided by the applicant such as anchorage, port facilities, pilot facilities etc. apart from other charges and services. The total amount due and payable to the applicant by the defendant vessel works out to Rs.34,99,85,919/- as of 31st August, 2020. Despite bills having been raised, the amount remains outstanding.

5. Since the applicant has rendered services to the defendant – vessel, the applicant is interested in the defendant vessel for recovery of its maritime lien. The applicant avers that the statutory dues of the applicant rank above the priorities of the plaintiffs in the instant suit as well as the plaintiffs in other connected suits. Thus, the applicant be allowed to intervene in the present suit and to join as party defendant and the applicant be paid out its statutory dues from the sale proceeds of the defendant - vessel as if the same formed a part of the Sheriff's expenses, plus Rs.17,17,082/- per day from 1st September, 2020 towards anchorage and other charges.

6. The application is resisted by the plaintiffs.

7. I have heard Mr. Fernandes, the learned Counsel for the applicant – Port and Mr. Kamat, the learned Counsel for the plaintiffs, at some length.

8. Mr. Fernandes, the learned Counsel for the applicant, at the outset, submitted that, at this stage, the applicant is not pressing for pay out in priority namely, prayer Clause (b), which reads as under:

“(b) To pay to the applicant its statutory dues amounting to Rs.34,99,85,919/- as of 31/08/2020 from the sale proceeds of the Defendant Vessel as if the same formed a part of the Sheriff’s expenses plus Rs.17,17,082/- per day from 01/09/2020.”

9. The remit of the application thus gets restricted to the entitlement of the applicant to intervene in the instant suit.

10. Mr. Fernandes, the learned Counsel for the applicant, would urge that it can hardly be gainsaid that the applicant is a person, who has an interest in the sale proceeds of the vessels M. V. KARNIKA. Once this position is appreciated, according to Mr. Fernandes, under Rule 1086 of the “Rules for Regulating the Procedure and Practice in cases brought before the High Court under the Admiralty (Jurisdiction and Settlement of the Maritime Claims) Act, 2017”, the applicant deserves to be allowed to intervene in the suit. Lest, the applicant would suffer irreparable loss.

11. Mr. Fernandes would further urge that the fact that the applicant has maritime lien and is also entitled to be paid in priority under Section 10(1)(a) of the Admiralty Act, 2017 can

hardly be put in contest. Therefore, according to Mr. Fernandes, the resistance sought to be put-forth on behalf of the plaintiffs is untenable.

12. Per contra, Mr. Kamat, the learned Counsel for the plaintiffs, would submit that the applicant who has instituted an independent admiralty suit being Commercial Admiralty Suit No.42 of 2021, cannot be permitted to intervene in the instant suit for the purpose of disproving the claim of the crew members for wages. Since there is no privity of contract between the plaintiffs and the applicant, it is inconceivable as to how the applicant can contest the claim of the plaintiffs. Mr. Kamat further submitted that in a case of this nature which essentially turns upon the contents of Continues Discharge Certificate, the impleadment of the applicant would serve no purpose other than delay the disposal of the suit and deprive the plaintiffs of their legitimate dues as crew members, whom Section 9(1)(a) of the Admiralty Act, 2017, accords highest priority.

13. Mr. Kamat further submitted that the very premise of the application that the applicant is entitled to be paid in priority to the plaintiffs is flawed. Inviting the attention of the Court to the averments in paragraphs 15 and 16 of the application wherein

the applicant has claimed that the claim for statutory dues is paramount and ranks above all priorities, Mr. Kamat strenuously submitted that the said claim is in teeth of the *inter se* priority on maritime lien prescribed under Section 9 of the Admiralty Act, 2017, whereunder the claims for wages and for other sums due to the seafarers stand at first place and those of the applicant-*port* stand at fourth place [Clause (a) and Clause (d) of Sub-section (1) of Section 9]. To bolster up the submission that a party cannot be permitted to intervene to disprove the claim of the plaintiffs, Mr. Kamat placed reliance on a judgment of Gujrat High Court in the case of *Enmal TD Corporation vs. Credit Suisseag.*¹

14. Since the submissions revolve around the import of the provisions contained in Rule 1086 of the Admiralty Rules framed by this Court, it may be expedient to extract Rule 1086 and Rule 1087, which bear upon the controversy. They read as under:

“1086. Interveners.-

(a) Where a ship against which a suit in rem is brought is under arrest or money representing the proceeds of sale of that ship is in court, a person who has interest in that ship or money but who is not defendant to the suit may, with the leave of the Judge, intervene in the suit.

(b) An application for grant of leave under this rule may be made ex-parte by an affidavit showing the interest of the

1Civil Application (OJ)(For Joining Party) No.1 of 2021 in Admiralty Suit No.17/2020, dated 1st February, 2021.

applicant in the ship against which the suit is brought or in the money held in court.

(c) A person to whom leave is granted to intervene shall thereupon become a party to the suit and shall file an appearance in person or by vakalatnama within the period specified in the order granting leave. On filing such appearance or vakalatnama, the intervener shall be treated as if he were a defendant in the suit.

(d) The Judge may order that a person to whom he grants leave to intervene in a suit, shall, within such period as may be specified in the order, serve on every other party to the suit such pleading as may be specified.

1087. Order for sale of ship and determination of priority of claims.-

(a) Where in a suit in rem the ship proceeded against is sold and the sale proceeds are paid into court, any party who has obtained or obtains a decree or judgment against such ship or proceeds of sale may apply to the court by interim application for an order determining the order of priority of claims against the proceeds of sale of such ship."

15. Sub-clause (a) of Rule 1086 provides that where an action in rem is brought against a ship, which is under arrest, or the sale proceeds of the ship, (which is in deposit with the Court), a person, who has interest in that ship or sale proceeds may intervene in the suit, with the leave of the Judge, if he is not party defendant to the suit. On a plain reading, four postulates emerges. One, an action in rem must have been brought against the vessel. Two, the vessel must be either under arrest or, post its sale, the Court holds seisin over the sale proceeds of the ship. Three, the person who seeks to intervene must have an interest in the said vessel or its sale proceeds. From the point of view of the intervener, what has to be established is the

existence of an interest in the vessel or the sale proceeds. Four, it is in the discretion of the Court to allow a party to intervene.

16. In order to appreciate, the nature and extent of interest which would justify an application for intervention, it is necessary to note the purpose of an action in rem against the vessel. In the case of *The Board of Trustees of the Port of Mumbai in the matter between Raj Shipping Agencies Ltd. vs. Barge Madhava and Anr.*² on which reliance was placed by Mr. Kamat, the learned Single Judge of this Court expounded the nature and legal import of action in rem against the ship. The observations in paragraphs 22, 23, 25 and 31 are instructive and hence extracted below:

“22. A ship or a vessel as commonly referred to is a legal entity that can be sued without reference to its owner. The purpose of an action in rem against the vessel is to enforce the maritime claim against the vessel and to recover the amount of the claim from the vessel by an admiralty sale of the vessel and for payment out of the sale proceeds. It is the vessel that is liable to pay the claim. This is the fundamental basis of an action in rem. The Claimant is not concerned with the owner and neither is the owner a necessary or proper party. The presence of the owner is not required for adjudication of Plaintiff's claim. That is why no writ of summons is required to be served on the owner of the vessel. The service of the warrant of arrest on the vessel is considered sufficient.

23. For the purpose of an action in rem under the Admiralty Act, the ship is treated as "a separate juridical personality, an almost corporate capacity, having not only rights but liabilities (sometimes distinct from those of the owner)" - (*M.V. Elisabeth and Ors. v. Harwan Investments and Trading Pvt. Ltd.* (1993 Supp(2) SCC 433).

25. The fundamental legal nature of an action in rem as distinct from its eventual object is that it is a proceeding against res. Thus, when a ship represents such res as is frequently the case, the action in rem is an action against the ship itself. The action is a remedy against the corpus of the offending ship. It is distinct from an action in personam which is a proceeding inter-partes founded on personal service on Defendant within jurisdiction, leading to a judgment against the person of the Defendant. In an action in rem no direct demand is made against the owner of the res personally (**Maritime Liens by D R Thomas, Volume 14, British Shipping Laws**).

31. The fundamental principle is that a maritime lien attaches only to the res in respect of which the claim arises. No other property is capable of being charged, not even other property which is in the same ownership as the res in respect of which the claim arises.”

17. In the case at hand, indubitably, both the applicant and plaintiffs have maritime lien. Clause (g) of Section 2(1) of the Admiralty Act, 2017, defines a maritime lien to mean a maritime claim against the owner, demise charterer, manager or operator of the vessel referred to in Clauses (a) to (e) of sub-section (1) of Section 9, which shall continue to exist under sub-section (2) of that section.

18. Clauses (a) and (d) of Section 9(1) read as under:

“Section 9. *Inter se* priority on maritime lien.- (1) Every maritime lien shall have the following order of *inter se* priority, namely;

(a) Claims for wages and other sums due to the master, officers and other members of the vessel’s complement in respect of their employment on the vessel, including costs of repatriation and social insurance contributions payable on their behalf.

.....

(d) Claims for port, canal and other waterway dues and pilotage dues and any other statutory dues related to the vessel.

.....”

19. Section 10 of the Admiralty Act, 2017 reads as under:

“Section 10. Order of priority of maritime claims.- (1) The order of maritime claims determining the *inter se* priority in an admiralty proceeding shall be as follows:-

- (a) a claim on the vessel where there is a maritime lien;
- (b) registered mortgages and charges of same nature on the vessel;
- (c) all other claims.

(2) The following principles shall apply in determining the priority of claims *inter se*-

- (a) if there are more claims than one in any single category of priority, they shall rank equally;
- (b) claims for various salvages shall rank in inverse order of time when the claims thereto accrue.”

20. In the context of the aforesaid provisions, the submission of Mr. Kamat that the claim of the applicant that the statutory dues/charges have priority over the claims of the plaintiffs-crew members is unsustainable, is well-grounded in facts and law. However, I find it rather difficult to accede to the submission of Mr. Kamat that on this count alone the application for intervention deserves to be jettisoned away. The claim of the applicant that its statutory dues rank above all is definitely unsustainable qua the claim of the plaintiffs, in view of the provisions contained in Section 9(1)(a) of the Admiralty Act, 2017. However, the issue is not merely of *inter se* priority. The Court cannot lose sight of the fact that if a person, who stands at a higher pedestal in the order of priority, as prescribed under Section 9, gets an unjustified claim, it has the effect of

diminishing the entitlement of the person, who stands at a lower stage in the order of priority.

21. In the aforesaid context, the question of propriety of allowing a competing maritime lien holder to intervene in the suit against the sale proceeds of the vessel, which was sold in an action in a rem, is required to be appreciated. Mr. Kamat is justified in canvassing a submission that a person, who has no concern at all either with the vessel or with the claim of the plaintiffs, cannot be permitted to intervene just to dispute or delay the realization of the plaintiff's claim. Undoubtedly, a busybody who has no semblance of interest cannot be permitted to intervene. It is for this reason that Clause (a) of Rule 1086 postulates that the essential and primary qualification 'to intervene' is the 'existence of an interest' either in the vessel or the sale proceeds. In a case where the applicant – intervener is a person holding maritime lien it would be rather difficult to urge that such applicant has, "no interest" in the vessel or sale proceeds.

22. The judgment of Gujarat High Court in the case of *Enmal TD Corporation* (supra), on its fair reading, seems to have turned on the peculiar facts of the said case. The Gujarat High Court, on facts, found that the apprehension of the applicant –

proposed intervener therein that a collusive decree was sought to be obtained by the plaintiff therein was misconceived. It was thus held that the applicant therein by way of filing an intervention application cannot oppose the claim of the plaintiff in the suit and deny the genuineness of the claim or make objection so as to defeat the genuineness of the outstanding claim of the plaintiff in the said case. It was more so, when the applicant had filed a separate and substantive suit before the same Court for adjudication of its claim.

23. With respect, in my considered view, the Gujarat High Court has not adverted to the question of the impact of the adjudication of the claim of a claimant, who stands at a higher degree of priority, over the entitlement of the claimant standing at a lower degree, where both hold maritime lien, if the former gets a decree for an unjustified sum. In a situation of this nature, where the credentials of the applicant as the person having interest in the vessel cannot be questioned (in the case at hand, indisputably, the applicant has instituted suit No.42 of 2021) the intervention of a competing maritime lien holder can be justifiably allowed to demonstrate that the plaintiffs are entitled to a decree only to the extent their claim is genuine and sustainable.

24. Mr. Kamat was justified in submitting that the Court may not grant an unjustifiable claim. However, in the light of the fact that eventually the decree may affect the entitlement of the maritime lien holder, who stands in a lower order of priority, in my considered view, it is necessary to allow the intervention for the limited extent to demonstrate that disingenuous and unjustifiable claim is not granted.

25. The matter can be looked at from a slightly different perspective. Under Clause (e) of Rule 1087, the notice shall, *inter alia*, state that any person having claim against the ship or the proceeds of the sale thereof shall file a suit to prove his claim before the expiration of the specified period. In a given case, pursuant to notice, a claimant may institute the suit and have the admiralty claim proved against the ship or sale proceeds. If such person ranks low in priority and a person standing higher in priority gets a decree for a sum in excess of the entitlement, and is paid out, nothing would remain for distribution to such decree holder, who ranks low in priority. The situation gets accentuated where the claim is against the sale proceeds and there is nobody to defend the suit.

26. The conspectus of aforesaid consideration is that in view of Rule 1086 of the Admiralty Rules, if the Court is satisfied that

the applicant has an interest in the vessel or the sale proceeds, he can be allowed to intervene in the suit for the limited purpose of demonstrating that the plaintiff is not entitled to a decree in excess of the genuine and sustainable claim. In short, a claimant, who is allowed to intervene, cannot definitely step into the shoes of original defendant – vessel and/or its owner, much less take all the defences which are open to such defendant. An intervener would be entitled to raise only those defences which are appropriate to his character as the competing maritime lien holder/ claimant. Thus, I am inclined to allow the application.

27. Hence, the following order:

: Order :

- (i)** The application stands allowed in terms of prayer Clause (a).
- (ii)** The plaintiffs shall amend the plaint and implead the applicant as a party defendant within a week from today and serve the copy of the plaint and accompaniments on the applicant – defendant no.2.
- (iii)** The applicant/defendant no.2 shall file written statement, within a period of 30 days of being served with the copy of the plaint, to raise defences restricted to the extent indicated in paragraph no.26.
- (iv)** No costs.

[N. J. JAMADAR, J.]