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

SANTOSH SUBHASH KULKARNI

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Date: 2022.12.03 17:11:06 +0530

INTERIM APPLICATION NO. 1992 OF 2022
IN
COMM ADMIRALTY SUIT NO. 29 OF 2021

Angre Port Private Ltd. ...Applicant/ Plaintiff

Versus

Sale Proceeds of GP Asphalt I (IMO 9120891) ...Defendant

Mr. Prathamesh Kamat, a/w Ms. Pooja Tidke, Krushi Barfiwala, Rima Desai and Shlok Bodas, for the Applicant/Plaintiff.
None for the Respondent/Defendant.

CORAM: N. J. JAMADAR, J.
DATED : 29th NOVEMBER, 2022

ORDER:-

1. This is an application for summary judgment under Order XIII-A and order XII Rule 6 of the Code of Civil Procedure, 1908 ("the Code") against the sale proceeds of GP Asphalt I ((IMO 9120891), the defendant.

2. The plaintiff is a company incorporated under the Companies Act, 1956. It is a concessionaire under a Concession Agreement between the Maharashtra Maritime Board under a Build Own Operate Share Transfer Scheme. It is a port notified under the provisions of the Indian Ports Act, 1908. The plaintiff is the owner of the docks in the harbour and port facilities at the Port of Angre at Jaigadh. The plaintiff renders various services to the vessles coming to the Port of Angre.

3. GP Asphalt Shipping Corporation was the owner of the GP Asphalt I. M/s. Celestial Ship Management Pte. Ltd. was the manager of the defendant – vessel. At the instance of the Manager of vessel, the plaintiff agreed to provide its repair berth to the defendant – vessel. The vessel went into the repairs from 19th July, 2020 and, during the period of repairs, utilized berth space at the plaintiff's port. In the wake of the correspondence with the Manager of the defendant vessel, the plaintiff raised an invoice on 14th October, 2020 for Berth Hire and Shore Generator Hire charges. The vessel continued to remain at the plaintiff's berth.

4. Despite an assurance from the Manager of the defendant - vessel to pay the amount covered by the invoices raised by the plaintiff towards the services provided to the vessel, the Manager and the owner of the vessel committed default in payment. In the meanwhile, at the request of the Manager, the plaintiff was made to provide additional services and supplies to the defendant - vessel. Since the arrears of charges continued to mount and remained outstanding, the plaintiff addressed a legal notice on 15th December, 2020 calling upon the Manager and the Master on board, to pay the outstanding amount of Rs.74,73,979/-. The liability was neither disputed nor denied. On the contrary, vide communication dated 21st December, 2020, the Manager of the vessel assured to revert with a payment plan.

5. In the meanwhile, on 21st December, 2020, M/s. V8 Pool Inc. instituted an admiralty proceedings against the vessel in this Court. By Judge's Order dated 22nd December, 2020, the vessel came to be arrested. Post arrest, the vessel continued to occupy the berth space and also utilize other Port services from the plaintiff. Eventually, by an order dated 30th March, 2021, the vessel came to be sold to M/s. Deltacorp Pacefic HK Ltd. Hence the suit for recovery of a sum of Rs.3,06,71,564/- along with further interest at the rate of 15% p.a. from the date of the suit till payment.

6. Subsequently, by amending the plaint, the plaintiff has sought decree in the sum of US$ 4,02,536 along with interest and costs.

7. The plaintiff has taken out this application with the assertion that the plaintiff has a maritime claim which is in the nature of a maritime lien. It represents an admitted liability and there is no real prospect of successfully defending the plaintiff's claim, which is in rem.

8. I have heard Mr. Kamat, the learned Counsel for the applicant – plaintiff.

9. Since the plaintiff – applicant seeks a decree against sale proceeds of the defendant vessel, in rem, it is necessary to consider the tenability of the action. Mr. Kamat submitted that the instant action against the sale proceeds is in rem. It is not obligatory for a person having a maritime claim against the vessel to proceed against the owner and manager of the vessel. Mr. Kamat sought to draw support to the aforesaid submission from the judgment of this Court in the case of ***Board of Trustees of Port of Mumbai/Raj Shipping Agencies Vs. Barge Madhwa and another***[1] wherein, elucidating the nature of an action in rem, this Court observed as under:

> "21. ***Action in rem is against the ship and not the owner***
>
> **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

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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/s. Harwan Investments and Trading Pvt. Ltd.).*

24. .....

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*)."

10. The aforesaid pronouncement has been followed by this Court in the case of ***Anand Prakash Gupta and others vs. Sale Proceeds of Uma Prem and others.***[2] In view of the aforesaid enunciation, the plaintiff is entitled to proceed in rem against the sale proceeds of the defendant vessel, for enforcement of its claim.

11. The substance of the plaintiff's claim is that it had provided berth and other port facilities and supplies to the defendant – vessel, whilst it was undergoing repairs. In view of the provisions contained in Section 2(g) read with Section 9(1)(d) the claims for port, canal, and other waterways dues and

2MANU/MH/1135/2020.

pilotage dues and any other statutory dues related to the vessel constitutes a maritime lien. In any event, under Clause (n) of sub-section (l) of Section 4 Admiralty Act, 2017 the dues in connection with any port, harbour etc. amount to a maritime claim.

12. In the aforesaid context, I have perused the averments in the plaint and the interim application. The claim of the plaintiff that it had provided berth and shore generator facilities is supported by invoice dated 14th October, 2020 (Exhibit-J). Further claim of the plaintiff that as the defendant vessel continued to berth at the plaintiff's port it incurred further expenses and charges, is substantiated by the invoices (Exhibit-L to Exhibit-EE). These invoices were raised for wharfage charges, garbage charges and port charges in addition to berth hire charges and shore generator charges. It further appears that the plaintiff made the demands vide communications (Exhibit-FF to Exhibit-NN). The non-payment of the outstanding charges eventually led to legal notice dated 15th December, 2020, wherein a demand of Rs.74,73,979/- was made.

13. It would be contextually relevant to note that in response to one of the demands, the Manager of the vessel informed the plaintiff to provide the supplies and assured to arrange the payment, vide communication dated 30th October, 2020. By a communication dated 21st December, 2021, the Manager of the vessel informed the plaintiff that they had apprised the owner of the defendant vessel and the latter sought some time to revert on payment plan. It seems that vide communication dated 13th January, 2021, Chief Restructuring Officer informed the plaintiff that the owner's cash position was critical and it did not have sufficient cash to make any payment. The Chief Restructuring Officer proposed a restructuring report to trade creditors explaining the (then) current situation of the group and the CRO's view on the best pathway for stakeholders, and the plaintiff was requested to wait for an agreement on the restructuring proposal.

14. The fact that the defendant – vessel was under repairs at the berth provided by the plaintiff Port and thereby incurred expenses is rather incontestible. In none of the correspondence, the Manager or the owner of the defendant vessel ever disputed the liability. On the contrary, time was sought to make the payment. In the circumstances of the case, it does not appear that the defendant has any real prospect of successfully defending the plaintiff's claim, which is supported by documents of unimpeachable character.

15. In the aforesaid view of the matter, I do not find that there is any real prospect of the defendant successfully defending plaintiff's claim. Nor there is any compelling reason not to dispose of the claim without leading evidence.

16. The only issue which confronts the Court is the currency in which the suit claim deserves to be decreed. As indicated above, initially the plaintiff had claimed the amount in Indian currency furnishing the break-up in the particulars of the claim (Exhibit-SS). Subsequently, the plaintiff amended the plaint and sought to claim the amount in US Dollar. In my view, despite the amendment, the aspect as to whether the claim in foreign currency is legitimate requires consideration.

17. It is imperative to note that in the invoice (Exhibit-EE), the plaintiff had claimed the amount both in US Dollar and Indian Rupee. The initial demand (against the invoices Exhibits-FF, GG and HH) was also in Indian currency. Vide communication dated 1st December, 2020 again the demand was made in Indian currency (Exhibit-LL). In the notice dated 15th December, 2020, the plaintiff demanded the amount due as of 14th December, 2020 i.e. Rs.74,73,979/-, in Indian currency.

18. The documents on record thus indicate that not only invoices were raised in Indian currency but the amount covered by the invoices, individually and collectively, was also demanded in Indian currency. In my view, in the facts of the case, it cannot be said that the sum of money payable to the plaintiff has been expressed in foreign currency only. On the contrary, except the invoices, where the charges were also indicated in US Dollar, there is no material to show that the amount was expressed to be payable in US Dollar.

19. A useful reference in this context can be made to the judgment of the Supreme Court in the case of ***FORASOL vs. Oil and Natural Gas Commission***[3], wherein the Supreme Court set out the practice which ought to be followed in suits in which a sum of money expressed in a foreign currency can be claimed. The following observations in paragraph 70 are instructive and hence extracted below:

> "**70**. <u>It would be convenient if we now set out the practice, which according to us, ought to be followed in suits in which a sum of money expressed in a foreign currency can legitimately be claimed by the plaintiff and decreed by the court.</u> It is unnecessary for us to categorize the cases in which such a claim can be made and decreed. They have been sufficiently indicated in the English decisions referred to by us above. Such instances can, however, never be exhausted because the law cannot afford to be static but must constantly develop and progress as the society to which it applies, changes its complexion and old ideologies and concepts are discarded and replaced by new. Suffice it

3 1984 (Supp) Supreme Court Cases 263.

> to say that the case with which we are concerned was one which fell in this category. In such a suit, the plaintiff, who has not received the amount due to him in a foreign currency and, therefore, desires to seek the assistance of the court to recover that amount, has two courses open to him. He can either claim the amount due to him in Indian currency or in the foreign currency in which it was payable. If he chooses the first alternative, he can only sue for that amount as converted into Indian rupees and his prayer in the plaint can only be for a sum in Indian currency. For this purpose, the plaintiff would have to convert the foreign currency amount due to him into Indian rupees. He can do so either at the rate of exchange prevailing on the date when the amount became payable for he was entitled to receive the amount on that date or, at his option, at the rate of exchange prevailing on the date of the filing of the suit because that is the date on which he is seeking the assistance of the court for recovering the amount due to him. In either event, the valuation of the suit for the purposes of court-fees and the pecuniary limit of the jurisdiction of the court will be the amount in Indian currency claimed in the suit. The plaintiff may, however, choose the second course open to him and claim in foreign currency the amount due to him. ....”
>
> (emphasis supplied)

20. The aforesaid enunciation undoubtedly gives an option to the plaintiff to claim the money either in foreign or Indian currency. However, this option would be available where the money is shown to be expressly payable in foreign currency. That is not the case at hand. Having raised the invoice and even demanded the amount covered by those invoices, in Indian currency, it may not be open to the plaintiff to seek a decree in US Dollar. I am, therefore, inclined to partly allow the application and pass a summary judgment and decree in Indian currency.

21. Hence, the following order:

: O R D E R :

(i) The application stands allowed.

(ii) There shall be a summary judgment and decree in favour of the applicant and against the sale proceeds of GP Asphalt-I in the sum of Rs.3,06,71,564/- along with interest at the rate of 9% p.a. on the sum of Rs.2,95,08,503/- from the date of the institution of the suit till realization.

(iii) The plaintiff is entitled to costs of Rs.5,00,000/-.

(iv) The suit stands decreed in aforesaid terms.

(v) Drawn up decree dispensed with.

[N. J. JAMADAR, J.]