

IN THE HIGH COURT AT CALCUTTA  
Civil Appellate Jurisdiction  
ORIGINAL SIDE

APOT/413/2023  
WITH AS/5/2023  
IA NO. GA/1/2023, GA/2/2023

HINDUSTAN AEGIS LPG LTD.  
VS  
THE OWNERS AND PARTNERS INTERESTED IN  
THE VESSEL MT TSM POLLUX (IMO NO. 9266889)

BEFORE :  
THE HON'BLE JUSTICE SABYASACHI BHATTACHARYYA  
AND  
THE HON'BLE JUSTICE PARTHA SARATHI CHATTERJEE  
Date : 2<sup>nd</sup> November, 2023  
(Vacation Bench)

Appearance :

*Mr. Amitesh Banerjee, Sr. Adv.*  
*Mr. K.R. Thaker, Adv.*  
*Ms. Tannya Baranwal, Adv.*  
*Mr. Prathamesh Kamat, Adv.*  
*Mr. Nooruddin Dhillal, Adv.*  
*Mr. Dharmesh Singh Chauhan, Adv.*  
*Mr. Shahrukh Raja, Adv.*  
*...for the appellant*

*Mr. V.K. Ramabhadhran, Sr. Adv.*  
*Mr. Subhojit Roy, Adv.*  
*Mr. Deepnath Roy Chowdhury, Adv.*  
*Mr. Rohit Mukherji, Adv.*  
*Mr. Ramanuj Raychaudhuri, Adv.*  
*Mr. Aditya Sarkar, Adv.*  
*...for the defendant*

The Court : The present appeal arises out of an order dated October 19, 2023, modifying a previous order dated September 15, 2023 by which the concerned vessel MT TSM Pollux (IMO No. 9266889) along with her tackle, hull, engine, equipment, apparels, furniture and all movables lying

on board was directed to be arrested forthwith. The said order was to continue unconditionally till September 27, 2023. If in the meantime, the plaintiff filed an undertaking in terms of Section 11 of the Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017 to the effect as envisaged therein, the order of arrest was to continue until further orders.

It may be mentioned that the plaintiff/appellant has complied with such direction by filing the said undertaking.

It was further clarified in the order dated September 15, 2023 that in the event the defendant deposits an aggregate amount of USD 506,161 and Rs. 84,00,67,559/- in the suit as security with the Registrar, Original Side of this Court, the order of arrest of the vessel shall stand automatically vacated.

By the order impugned in the present appeal dated October 19, 2023, the learned Single Judge directed the defendant to deposit only Rs.4,77,70,265.93 as security with the Registrar, Original Side of this Court, instead of the total amount as directed vide order dated September 15, 2023.

Learned Senior Counsel appearing for the appellant contends primarily that the learned Single Judge, while passing the impugned order dated October 19, 2023, proceeded on an erroneous premise that the only documents disclosed were invoices raised by the appellant on account of bottling and throughput charges but the plaintiff had not disclosed any agreement with HPCL and the invoices disclosed did not refer to any particular berth, for example, HOJ-I or HOJ-II. It is required to be clarified

here that HOJ-I refers to Haldia Oil Jetty - I and HOJ-II refers to Haldia Oil Jetty – II respectively.

It was further observed that the entire projected loss of income for one year consequential to the damage of the loading/unloading arm of HOJ-I where the accident occurred is based on unsubstantiated figures. The learned Single Judge further observed that the plaint does not plead duty of care owed by the applicant owner to the plaintiff and the pleadings in the plaint suggest that the defendant was discharging cargo for HPCL, which is incorrect.

Despite observing that a claim for compensation or damages would have to meet the standard test of a reasonably best arguable case at the interim stage, the learned Single Judge observed that the plaintiff had not been able to substantiate its claim for business losses.

Learned Senior Counsel for the appellant places reliance on the averments made in the plaint as well as the documents annexed thereto, which include several invoices for a period of one year immediately prior to the claim being made. It is argued that the said invoices clearly show the income earned by the appellant from the business which was being done by the appellant by operation of twin ‘arms’ of the appellant in HOJ-I and HOJ-II respectively.

Thus, it is argued that the plaintiff sufficiently substantiated its claim for damages on account of business loss for the projected period of one year, which would be the requisite period for replacing the arm which was broken due to alleged negligence of the defendant.

It is argued that the plaintiff also substantiated the case of damage in so far as it is an admitted position that the vessel of the defendant was plying in the said port at the relevant juncture and it was going to unload its cargo at HOJ-I.

While so plying, the boom of the crane on board the vessel of the defendant was kept in an obtuse angle, projecting out of the body of the vessel, and not in a right angle, properly parked on the said vessel. Due to such utter negligence of the defendant, it is argued, one of the arms at HOJ-I was damaged beyond repair.

Learned Senior Counsel for the plaintiff/appellant also places reliance on a report given by the manufacturer of the said arm to substantiate his claim that the said arm cannot be repaired but has to be replaced. The entire process, it is argued, shall take about one year, which is also substantiated from such report. In fact, when the arm which has been damaged was initially procured, the total time taken for transport and installation of the same was more than 7/8 months.

Learned Senior Counsel argues that, thus, the premise on which the impugned order was passed is palpably erroneous, since the learned Single Judge did not take into account the substantial pleadings and materials in the plaint and annexed to the plaint of the appellant, which bolstered the claim of the plaintiff.

That apart, it is argued that the learned Single Judge also proceeded on the premise that there were three berths of the appellant. However, it is

an admitted position that the plaintiff only has a pair of twin arms, one at HOJ-I and the other at HOJ-II and there is no third arm.

It is argued by learned Senior Counsel appearing for the appellant, by placing reliance on the judgement of *Vohra Sadikbhai & Ors. vs. State of Gujarat & Ors.*, reported at (2016) 12 SCC 1, that in a nutshell, what needs to be examined is as to whether the damage to the property of the appellant was a result of an inevitable accident or unavoidable accident which could not possibly be prevented by the exercise of ordinary care, caution and skill i.e. it was an accident physically unavoidable.

In paragraph 15 of the said judgement, it was observed by relying on *Rylands v. Fletcher* that the true rule of law is that the person who, for his own purpose, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must kept it in at his peril; and if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape. It was further observed that the general rule as stated above seems on principle just.

It was also held that where a wrong has been committed, the wrongdoer must suffer from the impossibility of accurately ascertaining the amount of damages.

Learned Senior Counsel further places reliance on *Videsh Sanchar Nigam Ltd. Vs. M.V. Kapitan & Ors.*, reported at (1996) 7 SCC 127. In the said judgement it was inter alia observed that the admiralty action is an action in rem. In the said case, the Division Bench found that the claim was not vexatious but was triable.

There was strong evidence to show that at the relevant time the respondent vessel was within the vicinity of the damaged cable.

The Court went on to observe that the ship was a foreign ship and if it left the shores of Indian territorial waters it was difficult to get hold of it and it might not return to the jurisdiction of Indian courts. The claim thereby, even if successful, would remain inexecutable or land in trouble in private international law in its enforcement. Under such circumstances, the Court proceeded to form the opinion that the vessel may be released on condition of payment of certain sums of money.

It is argued that the same principle ought to be imported in the present case. Since the plaintiff has made out a sufficiently arguable case for damages by way of business loss, there was no justifiable reason to deny the plaintiff of such relief by the impugned order.

Learned Counsel appearing for the respondent places reliance on *Spartan Steel & Alloys Ltd. v. Martin & Co. (Contractors) Ltd.* In the said judgement, it was observed by the court of appeal, that in the said case, the plaintiff had a factory at Birmingham where they manufactured stainless steel which obtained electricity by a direct cable from a power station of the Midland Electricity Board. There was a massive power disconnection for which damages were claimed by the plaintiff. Such damages against the contractors were claimed on the ground of negligence. No evidence was given at the trial. It was observed that the question of recovering economic loss is one of policy. Whenever the Courts draw line to mark out the bounds of *duty*, they do it as matter of policy so as to limit the responsibility of the

defendant. Whenever the Courts set bounds to the *damages* recoverable – saying that they are, or are not, too remote – they do it as a matter of policy so as to limit the liability of the defendant.

By taking a cue from the judgment of *Managing Director, Kerala Tourism* reported at 2019(16) SCC 573, learned Counsel highlights that negligence as a tort is a breach of the duty caused by omission to do something which a reasonable man would do, or doing something which a prudent and reasonable man would not do. The element of tort of negligence consists in- (a) duty of care; (b) duty is owed to the plaintiff; (c) the duty has been carelessly breached. Negligence, it was observed, does not entail liability in law to exact the duty in the given circumstances to observe care. The duty is an obligation recognized by law to avoid conduct fraught with unreasonable risk or damages.

Thus, it was highlighted that the essential ingredient of a claim of damages is that the following requirements must be satisfied before a duty of care is held to exist,

- (i) foreseeability of the damage;
- (ii) a sufficiently proximate relationship between the parties and;
- (iii) even where (i) and (ii) are satisfied it must be just and reasonable to impose such a duty.

Learned Counsel also places reliance on *Wander Limited and Another* reported in 1990 (*Supp.*) SCC 727 where it was observed that the appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has

been shown to have been exercised arbitrarily or capriciously or perversely or where the Court has ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. In order to reiterate the said proposition, learned Counsel also relies on *Punjab and Sind Bank* reported at 2023 SCC OnLine SC 470.

Learned Counsel for the respondent also seeks to distinguish the judgments cited by the appellant on facts as well as law.

It is contended categorically by learned Counsel for the respondents that the learned Single Judge was sufficiently justified in passing the impugned orders by taking note of the fact that the plaintiff had utterly failed to substantiate its claim for damages on account of business loss. First, it is argued, in order to ascertain the actual business losses, the plaintiff was required to produce before the Court materials to substantiate its claims by segregating between the business done by the twin arms at HOJ-I and HOJ-II respectively. Despite having sufficient opportunity, it is argued that the plaintiff failed to do so.

Rather, from the invoices produced along with the plaint, the plaintiff/appellant clearly indicated that those were raised by the plaintiff for aggregate work done in respect of both the jetties in general, without distinguishing between the HOJ-I and HOJ-II. It is argued that unless it is proved by the plaintiff categorically that different vessels docked at both the said jetties and were loaded and unloaded simultaneously, the plaintiff's claim of damages, merely by adopting the device of dividing the total income of the plaintiff by two, cannot be justified.

By placing reliance on the documents annexed to the vacating application, learned Counsel for the respondents argues that in fact the respondents have substantiated that the plaintiffs are earning substantially from the HPCL from the undamaged twin arm at HOJ-II. Hence, the plinth of the argument of business loss is not credible.

Learned Counsel further submits that it is the plaintiff who was all along in possession of relevant documents to indicate the exact transactions being done by the damaged twin arm and the other twin arm separately. Since the plaintiffs have deliberately suppressed such transactions, the learned Single Judge, at the first instance while passing the order of arrest, was not justified in directing the defendant to secure the damages in lieu of business loss as well. Hence, in the impugned order dated October 19, 2023, the learned Single Judge rightly distinguished between the cost of damages with regard to the equipment, transport and installation of the damaged twin arm on the one hand and business losses sought to be projected by the plaintiff on the other.

Although detailed arguments are advanced by the parties, the cardinal premise of the orders at both the instances, while passing the first order of arrest and while passing the order of vacating the same, remains the same. Despite the respondents having sought to hit at the root of the claim of damages of the plaintiff altogether, it transpires from the plaint that sufficient proximity between the conduct/action of the respondents' vessel and the damages caused to the twin arm of the plaintiff has been established prima facie.

The argument of the respondents that liability may be cast on the port authorities as well, since it was the port's duty to navigate the vessel of the defendants/respondents properly, cannot be accepted vis-à-vis the nature of the present allegations.

In the event the vessel of the defendants itself had hit the twin arm, the said claim might have had some justification. However, in the present case, the boom of the crane of the defendants' vessel was jutting out apparently at an obtuse angle from atop the defendant's vessel, which was plying close to the jetty-in-question at the relevant point of time. During motion, the damage occurred; as such, prima facie there is sufficient material in the pleadings and the documents produced by the plaintiff to indicate that the respondents had duty of care to castigate them in respect of damages.

Another aspect of the matter cannot be overlooked. The challenge in the defendant's vacating application was primarily with regard to the component of business loss in the security directed to be deposited by the defendant and not the economic loss suffered by the plaintiff for damage which actually occurred to the equipment and the cost of replacing the same, including transport, installation etc. Insofar as the premise of the damages to the equipment is concerned, the same cannot be distinguished from the premise of the claim for business loss. The plinth of both the claims is the alleged negligence on the part of the defendants and the right of the plaintiff to claim damages from the defendants.

In the same breath, the defendants cannot impugn only the security directed to be paid by way of business loss on the premise that damage has been caused by the crane from its vessel on the one hand, while admitting on the other the claim of economic loss caused to the plaintiff on the count of repairs/replacement and ancillary charges owing due to the same act of damage. Hence, the said submission of the defendant regarding the very root of the duty of care and negligence cannot be accepted.

Thus, the present issue boils down to the liability of the defendants to secure the damages claimed by way of business loss by the plaintiff. Foreseeability, as rightly argued by the defendants, is an essential determinant in that regard.

A perusal of the plaint as well as the documents annexed thereto indicates that the plaintiffs only produced certain invoices for the year prior to the incident in question. From the invoices, it is seen that apart from throughput charges, bottling charges and GST have also been clubbed therewith. The defendants might have a justification in arguing that the GST component and the bottling charges claimed by the plaintiff are not related to the damage on business loss; however, the said challenge is a side issue, since even from the invoices produced by the plaintiffs, the different components for bottling, throughput charges and the GST component can very well be segregated, thereby arriving at the actual throughput charges which were apparently earned by the plaintiff during the relevant period.

The question is not what the plaintiff could have earned during the coming one year from operation of the damaged twin arm. The relevant issue is whether actual damages or loss has been or will be suffered by the plaintiff due to the damage caused to the twin arm, since the work of the two twin arms might very well have been done by the undamaged arm till the damaged twin arm was replaced.

The mere possibility of damages or loss cannot be an indicator in that regard. What the first Court did at the time of passing the order of arrest was merely to club the total income earned by the appellant during the relevant period and divide the same by two on the logic that the plaintiff has been operating two such twin arms at HOJ-I and HOJ-II.

However, the defendant is justified in arguing that only in one circumstance could it be justified that the plaintiff lost half of its revenue due to the crippling of one of the arms, it being that vessels are simultaneously serviced by both the arms for the purpose of loading and unloading.

An insinuation is sought to be made by the plaintiff in this regard to the effect that at the same time if one vessel is already docked for the plaintiff or for other operators in a particular jetty and an HPCL vessel comes for being loaded/unloaded by the plaintiff, the said vessel would have to wait indefinitely for loading and unloading. It has been argued by the plaintiff that for such purpose two twin arms are being operated, to distribute the load between the two.

However, not an iota of pleading in that regard finds place either in the plaint or in the pleadings relating to the vacating application at any point of time.

In any event, accepting such a proposition would be resorting to conjecture and surmise. We say so because even if we assume that a particular vessel is blocking the jetty at the relevant point of time, there is nothing to prevent both the jetties in question being blocked by different vessels at the same point of time, in which case, the plaintiff would then be remediless, having no other twin arm to operate. In such circumstances the plaintiff may very well have to wait indefinitely for the other vessels to move on.

That apart, we do not find anything on record to indicate as to whether the work which was being done by both the twin arms cannot be accomplished by the single twin arm which is now operating due to the other being damaged. In such view of the matter, we cannot resort to mere conjecture for the purpose of ascertaining or calculating the projected business loss of the appellant.

As rightly argued by the defendant, only if it was shown that simultaneously different vessels were being serviced/loaded/unloaded by both the twin arms of the defendants, could the plaintiff claim that the total income earned by the plaintiff should have been distributed between the two arms. However, the frequency of arrival of vessels to the jetties, as borne out by the plaintiff's invoices does not justify such conclusion.

Moreover, there is nothing on record to indicate as to the exact transactions during the relevant period of the last year with regard to the specific operations of each of the arms, which also weakens the plaintiff's claim of damages on account of business losses.

Even keeping in mind the scope of the admiralty jurisdiction and the probability that a foreign vessel may leave the waters of India thereby rendering the ultimate relief claimed by the plaintiff infructuous even if the suit is decreed, we cannot convince ourselves to take such a paranoid approach so as to make out such a case for damages on account of loss of business where the plaintiff itself could not make out such a case from the averments in the plaint or the materials annexed to the plaint.

During arguments, learned counsel for the respondents in his usual fairness had contended that the defendants are agreeable to display their bone fides, to deposit double the amount of security which has been directed in the impugned order, to cover additional costs which may be suffered by the plaintiff, due to rising cost of placing the arms, if ultimately the plaintiff is found entitled to the same.

In view of the above discussions, we are of the opinion that although the plaintiff has made out a *prima facie* case for the purpose of establishing that damages occurred to the plaintiff's twin arm due to the apparent negligence of the defendants' vessel in not properly mooring its crane, we are not convinced as to there being any fallacy in the impugned order with regard to refusal of the security amount on the count of loss of business.

In so far as the reference by the Learned Single Judge in the impugned order to a non-existent third twin arm is concerned, a careful perusal of the impugned order indicates that the ultimate conclusion of the order did not hinge on such observation. The said observation was made in the context when the Learned Single Judge was discussing that the non-disclosure of a particular berth is important since the plaintiff has many facilities in other berths including in HOJ-I, HOJ-II and HOJ-III. Even if we omit the last HOJ-III, the ultimate conclusion of the Learned Single Judge cannot differ because the ratio and the logic remain the same that the plaintiff failed to disclose the transactions of a particular berth to justify its claim that the lack of operation of the damaged arm would fetch it sufficient income which would justify the claim of damages on account of loss of business.

That apart, even if an alternative case is probable on the basis of the arguments of the plaintiff and in the opinion of this Court on the basis of the materials on record, it is well-settled, not only in intra-court appeals but in all other kinds of appeals, that the Appellate Court has only to see whether any perversity or patent illegality has been committed by the Learned Single Judge or the court against whose order the appeal has been preferred. The Appellate Court cannot substitute its own views merely because a second opinion is possible on the same materials on record just because such second opinion is available.

Keeping in view such cardinal principle of adjudication of appeals, we are of the opinion that there is no occasion to interfere with the impugned order in the present appeal.

Accordingly, APOT/413/2023 along with any pending application in connection therewith are dismissed without any order as to costs.

Liberty, however, is given to the parties to rely on the report filed pursuant to the judgment of the Co-ordinate Bench in connection with the appeal before the learned Single Judge when the main injunction application and/or the admiralty suit itself is being taken up for hearing, in accordance with law.

It is further clarified that the observations made above are tentative, made only for the purpose of adjudication of the appeal which arises out of an interlocutory order, and shall not operate as *res judicata* in any subsequent interlocutory application or the admiralty suit itself.

At this juncture, learned Senior Counsel appearing for the appellant seeks an order of stay in terms of the initial order passed in the appeal, on the ground that in the event the vessel leaves upon furnishing the reduced security as directed by the learned Single Judge in the impugned order, the ultimate decree, if obtained by the plaintiff, shall suffer in executability.

Learned Counsel appearing for the respondents opposes such prayer and points out that the defendant has already complied with the order of the learned Single Judge by depositing the requisite security and the detention of the vessel is causing huge day-to-day losses to the defendant.

Since we are of the opinion that sufficient arguable questions have been raised in the present appeal, the appellant should get an opportunity to have this judgment tested before a higher forum.

Accordingly, the order of stay of the order impugned in the appeal, as granted on October 26, 2023 by the co-ordinate Bench in connection with this appeal, shall stand extended for seven days from date, i.e., till the midnight of November 9, 2023.

No order as to costs.

Urgent certified website copies of this order, if applied for, be supplied to the parties subject to compliance with all requisite formalities.

(SABYASACHI BHATTACHARYYA, J.)

(PARTHA SARATHI CHATTERJEE, J.)