



A.Nos.1119, 1423 & 1424
in C.S.No.42 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : **09.03.2023**

DELIVERED ON: **20.03.2023**

CORAM:

THE HON'BLE MR.JUSTICE K.KUMARESH BABU

A.Nos.1119, 1423 & 1424 of 2023
in C.S.No.42 of 2023

M/s.Sarat Chatterjee & Co. (Visakhapatnam) Pvt. Ltd.,
Rep. by Authorised Signatory Mr.V.Palaniappan,
28-2-47, Daspalla Centre Suryabagh,
4th Street, Vishakapatnam,
Andhra Pradesh – 503 020.

... Applicant in all Applns.

Vs.

1.ACS Marine Services Pvt. Ltd.,
Rep. by its Director,
502/B1, Nadupangu Paradise,
Dharapuram Road,
Tirupur – 641 608.

2.M/s.Poompuhar Shipping Corporation,
IV Floor, 692, Anna Salai,
Nandanam, Chennai – 600 032.

... Respondent in all Applns.

Prayer: Original Applications filed under Order XIV Rule 8 of Original Side Rules r/w Order 38 & Rule 5 of CPC, to grant the following prayers:

i.to pass an order directing the 1st respondent to furnish security for a sum of Rs.5,56,56,993/- (Rupees five crore fifty six lakhs, fifty six thousand and nine hundred and ninety three only) towards loss of charter hire and cost of bunkers



when then injunction and status quo order wrongfully obtained by the 1st respondent was in force failing which this Court may be pleased to order attachment of the assets of the 1st respondent including the vessel MV Mahavir before judgment.

ii.to pass an order directing the 1st respondent to furnish for a sum of Rs.5,56,56,993/- (Rupees five crore fifty six lakhs, fifty six thousand and nine hundred and ninety three only) towards loss of charter hire and cost of bunkers when the injunction and status quo order wrongfully obtained by the 1st respondent was in force failing which this Court may be pleased to order attachment of the assets of the 1st respondent including the Bank Account No.400000005055 with RBL Bank.

iii.For such further and other reliefs as the nature and circumstances of the case may require and thought fit by this Court.

iv.For the costs of the present application.

For Applicant in all Applns. : Mr.P.S.Raman, Senior Counsel
for Mr.B.Deepak Narayanan

For Respondent in all Applns. : Mr.R.Murari, Senior Counsel for R1
for Mr.B.Dhanaraj

COMMON ORDER

Application No.1119 of 2023 and Application No.1423 of 2023 have been filed seeking to order the first respondent to furnish security for a sum of Rs.5,56,56,993/- failing which to pass an order of attachment of the assets of the



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first respondent including the vessel M.V.Mahavir and order of attachment of the bank account of the first respondent with RBL Bank, Tiruppur Branch respectively.

2.Application No.1424 of 2023 has been filed for a direction to direct the first respondent to disclose on affidavit true and complete details of the bank account of the first respondent available with ICICI Bank.

3.Heard Mr.P.S.Raman, learned Senior Counsel for Mr.B.Deepak Narayanan, learned counsel for the applicant and Mr.R.Murari, learned Senior Counsel for Mr.B.Dhanaraj, learned counsel for the first respondent.

4.Mr.P.S.Raman, learned Senior Counsel appearing for the applicant would submit that the second respondent herein being a Public Sector undertaking owned by the Government of Tamil Nadu with the responsibility of the shipment of coal along the East Coast of India, had issued a global tender for chartering a vessel of a particular specification to aid in transportation of thermal coal from the Ports of Paradip/Dhamra/Kakinada to Ennore with a capacity of 50000 to 86000. That the applicant was declared successful bidder as being the lowest bidder having satisfied the technical qualifications.



5.The applicant had originally offered vessel M.V.Prabhu Sumat for carrying out the transportation. As there was some delay in finalizing the contract and the aforesaid vessel being a commercially viable vessel had been engaged for other purposes and hence, the applicant had offered another vessel M.V.Prabhu Puni for a single voyage till M.V.Prabhu Sumat could arrive at the load port. The reason for the swap for the first voyage was due to the prescribed layover in the contract. The said offer was also accepted by the second respondent.

6.Learned Senior Counsel for the applicant would submit that the first respondent had challenged the said decision by instituting a Writ Petition in W.P.No.27323 of 2022 and that by misleading this Court, he had obtained an order preventing the second respondent from entrusting transportation of coal to the applicant by grant of an order of status quo.

7.He would submit that the said order came to be passed on 13.10.2022. Immediately, the applicant had filed a detailed counter statement and the second respondent herein also filed a detailed counter. Thereafter, when the writ petition came up for further hearing on 09.11.2022, this Court after hearing the parties had held that no arbitrariness as claimed by the first respondent was found and that there has been no violation of the tender documents and therefore dismissed the



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writ petition filed by the first respondent. He would submit that the first respondent having lost the tender has been frivolously trying to prevent the applicant from complying with the terms of tender. He would submit that the conduct of the first respondent in misleading this Court by obtaining an interim order in the writ petition filed by him, had caused huge loss on various accounts and therefore is liable to compensate the applicant. Hence, he had instituted the present suit seeking for claiming damages under various heads as enumerated in paragraph No.9 of the plaint.

8.He would submit that the applicant has prima facie case on merits and is confident that this Court will award the appropriate compensation as prayed in the suit. He would submit that considering the past conduct of the first respondent and also that the first respondent will dispose of his assets within a short period, will cause the suit itself to be rendered as infructuous. He would further submit that the applicant bonafidely has an apprehension that the first respondent will not have any significant assets left, against which if a decree is granted by the Court could not be executed. He would also submit that the applicant bonafidely believes that the first respondent would sell the only vessel available by transferring its title and ownership. He would also further submit that the first respondent is maintaining accounts with the RBL bank, Tiruppur Branch and ICICI Bank.



9.The details of the ICICI bank are not available with the applicant, therefore the applicant had taken out an application for a direction to the first respondent to provide such information so as to take out an appropriate application seeking for attachment of the bank account.

10.In support of his arguments, Mr.P.S.Raman, learned Senior Counsel for the applicant would rely upon a judgment of the Hon'ble Apex Court reported in **2011 (8) SCC 249** and **2022 (1) SCC 165** and contend that whenever a frivolous litigation is initiated by a person and by which it causes damages both to its reputation and money of the other party, then the person who had initiated such frivolous writ petition should be directed to compensate the individual who had suffered the damages.

11.In the present case, he would submit that frivolous writ petition filed by the applicant had led to severe damages to the applicant, for which he had preferred the present suit. Further, he would submit that as the first respondent had not satisfactorily answered the claim of the applicant and that he had also not made any sufficient details before the Court as to the availability of assets or his credibility to satisfy the decree that if any to be passed in the present suit. Hence seeks this Court to grant the appropriate relief prayed in the applications.



12.Countering his arguments, Mr.R.Murari, learned Senior Counsel appearing for the first respondent would submit that the claim of the applicant in the present applications are without any basis. At the outset, he would submit that the application under Order 38 Rule 5 in the present suit would not be maintainable at all. He would submit that the suit is seeking for damages that the applicant had suffered based upon an interim order granted by this Court in a writ petition filed by him. He would submit that the writ petition filed by him was not frivolous or with an intent to dislodge the applicant.

13.He would further submit that as per the tender conditions, the applicant had indicated a particular vessel to be used for transportation. But, however, by the internal agreement between the applicant and the second respondent, a new vessel was substituted which according to the first respondent does not conform to the tender document. This Court accepting the contentions of the applicant and the second respondent had come to a conclusion that there was no violation of the tender document. This Court in the writ petition had interpreted the conditions of the tender document to come to such a finding. According to him, the Writ Court had not given a finding that the writ petition filed by the first respondent was frivolous, malicious or with an ulterior motive.



14.He would vehemently submit that when that being the position, the present suit filed by the applicant claiming for damages is based on facts which have to be proved during the course of the trial. The suit instituted by the applicant is not based upon any contract that had been entered upon between the applicant and the first respondent where the first respondent had failed to honour its commitment for payment of money agreed under the contract.

15.He relying upon the judgment of the Hon'ble Apex Court reported in **2008 (2) SCC 305** and **2010 SCC OnLine (Mad) 1590**, would submit that firstly the applicant should prove that he has a prima facie case. In this case, he would submit that the applicant does not have a prima facie case as he would refute the contention that the writ petition filed by the petitioner was frivolous by pointing out the Writ Court had not rejected the claim of the petitioner as being frivolous or malicious. However, the Writ Court had found that there was no arbitrariness in the action of the second respondent herein to hold that there was a violation of the tender document. This according to him would be that there was an action beyond the scope of the tender document which has been found to be not arbitrary by the Writ Court.



16.He would further submit that even if the Court comes to a conclusion that there is a prima facie case, he would submit that the applicant had only made certain remarks that there is an apprehension that the first respondent will do away his assets. He would submit that such an averment would not be sufficient to invoke the provisions of Order 38 Rule 5 by relying upon the aforesaid judgment.

17.As regards the application calling for details of the bank account of the ICICI Bank, learned Senior Counsel would submit that the applicant is trying to make a roving enquiry to find out the assets which should not be entertained by this Court.

18.He would further submit that the applicant should substantiate that the first respondent is trying to dispose of the asset that too with an intention to defeat the execution of the decree which would be available to the applicant. Therefore, learned Senior Counsel would submit that the applicant had not substantiated the aforesaid twin test and therefore, he would request this Court to reject the applications filed by the applicant.

19.Learned counsel appearing for the second respondent would submit that only due to the frivolous litigation initiated by the first respondent not only the



applicant had suffered huge damages, the second respondent has also suffered the brunt of frivolous and malicious action. He would submit that the first respondent has been unsuccessful in various tenders due to his avaricious tendency to quote higher amounts. He would also support the case of the applicant.

20.I have considered the rival submissions made by the learned Senior Counsel appearing on either side and perused the materials available on record.

21.These applications are primarily seeking for a direction to the first respondent to furnish a security invoking the provisions of Order 38 Rule 5 and upon failure to furnish security to order attachment of the assets of the applicant viz., the vessel M.V.Mahavir and the bank account. Originally, the applicant had moved an application in A.No.1119 of 2023 seeking for a relief to direct the first respondent to furnish security failing which to order attachment of assets of the first respondent including the vessel M.V.Mahavir. The first respondent had filed a counter refuting the claims of the applicant. Thereafter, he had taken out two applications viz., A.No.1423 of 2023 seeking for a direction to direct the first respondent to furnish security and in failure to do so, to an order of attachment of bank account of the first respondent with RBL Bank, Tiruppur Branch. A further application in A.No.1424 of 2023 had been filed seeking for a direction to direct



the first respondent to disclose true and complete details of the bank account of the first respondent available with the ICICI Bank.

22.It will be relevant to analyze the scope of Order 38 Rule 5. Order 38 Rule 5 is to safeguard the plaintiff from any damage caused or likely to be caused by the defendant by trying to dispose of the assets with an intention to defeat the decree that may be granted in favour of the plaintiff. The order of attachment before judgment is a punitive remedy as it significantly interferes with the defendant rights over the property which he is otherwise legally entitled to.

23.Therefore, the burden is upon the plaintiff, firstly to establish his prima facie claim as being substantive and genuine and secondly satisfy the Court that the defendant intended to impede the property by disposing of all or part of his property to delay the execution of any decision that may be made against him. Therefore, it is not only the duty of the plaintiff to establish that the defendant is trying to deal with the property but also establish that such dealing of property is to defeat the right or delay the execution of any decision that may be made against him. Hence, I would propose to first venture upon as to whether the applicant herein had prima facie made out a case against the first respondent for the suit claim.



24.The primary contention of the applicant is that the first respondent had initiated a Writ Petition before this Court in W.P.No.27323 of 2022 with an oblique malicious motive raising frivolous grounds. Upon such pleadings in the writ petition, the first respondent had persuaded the Court to grant an order of status quo thereby preventing the second respondent from placing further orders with the applicant. The said writ petition had been dismissed after hearing all the parties concerned.

25.Mr.P.S.Raman, learned Senior Counsel appearing for the applicant had placed strong reliance on the judgment of the Hon'ble Apex Court reported in **2011 (8) SCC 249** and **2022 (1) SCC 163**.

26.A bare perusal of the judgment reported in **2011 (8) SCC 249** would show that the Hon'ble Apex Court in that case has come to a conclusion that the appellants in that case has been harassing the respondent there in for almost four decades in a totally frivolous and dishonest litigation. In the judgment reported in **2022 (1) SCC 163**, the Hon'ble Apex Court had imposed cost considering the fact that when the party continuously seeks to challenge the award of tenders unsuccessfully, they would be liable to pay the cost of the litigation to the successful party.



27.In the case on hand, a perusal of the order in the writ petition would show that the learned Judge had not given a finding as to the effect that the writ petition was frivolous or malicious. The claim of the petitioner that the said writ petition is frivolous and malicious could only be decided after the completion of trial in the present suit.

28.In paragraph No.29 of the plaint, the applicant had assessed the damages that he had suffered, the same has also been annexed as document No.27 to the plaint document. I am afraid that the applicant along with the plaint documents had not produced any materials to substantiate the particulars of claim given in paragraph No.29 of the plaint and document No.27 of the list of documents.

29.Hence, in my view, the applicant had not produced any prima facie materials to substantiate that he had incurred the damages pleaded by him. Ofcourse, it is always open to him to produce necessary documents during the course of trial to substantiate his claim.

30.Even though, the applicant had not made out a prima facie case as to his entitlement to the claim, since arguments have been made for seeking attachment, I would also propose to answer the said issue. The plain reading of the averments



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made in the applications only presupposes an apprehension on the part of the applicant that the first respondent would dispose of his assets to defeat the lawful claim of the applicant. There is no pleadings that the applicant is attempting to do away with the assets except the apprehension of the applicant.

31.Hence, in my view the twin test as enumerated supra has not been satisfied by the applicant. Hence, I hold that the applications are without any merits and in fine, all the applications are dismissed. However, there shall be no order as to costs.

20.03.2023

Index: Yes/no
Speaking order:Yes/no
Neutral citation:Yes/no



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K.KUMARESH BABU, J.

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Pre-delivery Common order in
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