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Application No.1795 of 2023
in C.S.No.797 of 2004



IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 15.09.2023

PRONOUNCED ON : 29.09.2023

CORAM:

THE HONOURABLE MS.JUSTICE R.N.MANJULA

Application No.1795 of 2023
in C.S.No.797 of 2004

M/s.Cargo Care International
Leeges Buildings,
G.V.Iyyer Road,
Willington Island,
Kochi - 682 003.
Represented by its Managing Partner
Benny Francis

...

Applicant /
Plaintiff

versus

1.The Owners and Parties Interested
In the Vessel M.V.Norasia Tegesos,
Rep. by its Master
Presently lying at Tuticorin Port.

2.M/s.Norasia Container Lines Limited,
P.B.No.569, Avenue Beauregard,
10, Fribourg, Switzerland,
ZIP – 1701
Rep. by its Managing Director

3.Nortrans Marine Services (P) Ltd.,
HINA House, K.P.K.Menon Road,
W.Island, Cochin - 682 023. ...

Respondents /
Defendants



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4.The West of England Ship Owners
Mutual Insurance Association (Luxembourg),
Rep. by P & I Services Pvt. Ltd.,
Flat 2-B, 2nd Floor,
KG Vallencia,
No.57, 1st Main Road,
Gandhi Nagar, Adyar,
Chennai - 600 020.

...

4th Respondent /
Guarantor

PRAYER: Application filed under Order XIV Rule VIII of Original Side Rules read with Section 145 of the Code of Civil Procedure read with Rule 160 of Civil Rules of Practise and Circular Orders read with Rule 23 under Section 16 of the Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017, praying to direct the 4th respondent / third party, The West of England Ship Owners Mutual Insurance Association (Luxembourg) to pay a sum of US \$ 1,77,078 being the amount guaranteed vide letter of indemnity dated 08.10.2004 in favour of the applicant.

For Applicant : Mr.K.M.Vijayan
for M/s.King Partridge

For Respondent No.4 : Mr.S.Raghunathan

ORDER

This Application has been filed by the applicant to direct the fourth respondent / third party, The West of England Ship Owners Mutual Insurance Association (Luxembourg) to pay a sum of US \$ 1,77,078 being the amount guaranteed vide Letter of Indemnity (LOI) dated 08.10.2004 in favour of the applicant.



Application in brief:-

2. The applicant is the plaintiff. The applicant / plaintiff namely M/s.Cargo Care International, is represented through its Managing Partner. The plaintiff is engaged in the business of transportation of Cargo through Vessel M.V.NORASIA TEGESOS all over the world either by themselves or through their vast network of agents / physical suppliers. On 24.07.1999, a Cargo comprising of personal effects was entrusted to the second respondent herein to be carried to the Port of Kochi from Abu Dhabi. The Bill of Lading was issued by the Abu Dhabi Shipping Agency, Abu Dhabi, who signed the Bill of Lading dated 24.07.1999.

2.1. As per the contract, the applicant was the consignee of the cargo in respect of the Bill of Lading at Kochi. The second respondent accepted the consignment and the same was shipped by the Vessel "M.V.Euro Express" and later transhipped by the vessel "M.V.Fasgulf". The cargo entrusted by the applicant to the second respondent was not received and on enquiry, the applicant was informed that the cargo was lost at Sea. Despite several reminders, the second respondent did not come forward to settle the claim and therefore, the applicant filed a suit before the Principal



Sub Court at Kochi against the second and third respondents in O.S.No.105 of 2000, claiming a sum of US \$ 1,42,081. The learned Principal Subordinate Judge, Kochi passed a decree dated 30.06.2004 in favour of the applicant.

2.2. Aggrieved over the said judgement and decree dated 30.06.2004, separate appeals were preferred by the second and first respondents in R.F.A.Nos.672 and 673 of 2004. After hearing both the parties, the High Court of Kerala passed a judgment dated 10.11.2020 in R.F.A.Nos.672 and 673 of 2004 by allowing the appeals in part and decree of the trial Court is modified as under:-

*“**20.2.** In view of the above discussion and reasons, the claim made in USD is upheld and the plaintiff is entitled to recover USD 94,605/- (U.S.Dollor Ninety Four Thousand Six Hundred and Five only) towards damages for loss of cargo at the applicable rate of exchange when realised from the defendants with interest at 6% per annum from the date of the suit till the date of realisation. The plaintiff is entitled to proportionate costs throughout from the appellant/defendant nos.1 and 2. The plaintiff shall pay the difference of Court fee*



before executing the decree as undertaken in paragraph no.8 of the plaint.”

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2.3. Further, the learned counsel for the applicant has submitted that the applicant is entitled to recover US \$ 94,605 along with 6% interest from the date of the suit till the date of realization, subsequent to the decreetal order passed by the learned Principal Sub Judge, High Court of Kerala, the second and third respondents were liable to pay the said sum to the applicant.

2.4. While matter stood thus, the first respondent Vessel owned by the second respondent, flying the flag of Cyprus, registered in Limassol, Cyprus arrived at the Tuticorin Harbour in the year 2004. Therefore, the applicant herein filed CS.No.797 of 2004 for an order of arrest, condemnation and sale of first respondent Vessel towards the satisfaction of the decree dated 30.06.2004 passed by the learned Principal Sub Judge, Kochi. After arresting the Vessel on 06.10.2004, a sum of Rs.10,00,000/- was deposited on behalf of the respondents 2 and 3 on 08.10.2004 by way of Demand Draft bearing No.073122 dated 08.10.2004 in favour of the



Registrar General of the High Court of Madras. While the suit was decreed by this Court vide judgment and decree passed in C.S.No.797 of 2004 dated 15.02.2010, no one appeared on behalf of the respondents and hence the said suit was decreed *ex parte*.

2.5. In the said judgment, a direction was given to keep the security furnished in the form of deposit to the tune of Rs.10,00,000/- intact till the dispute in the appeal in R.F.A.No.673 of 2004 which arose out of the judgment of the Principal Sub Court, Kochi, at Ernakulam made in O.S.No.105 of 2000. Indemnity Bond inducted to be executed by the insurer of the defendants for the remaining sum.

2.6. The above sum was directed to be transferred to the Manager, Reserve Bank of India and ordered to be kept in the Court deposit standing to the credit of C.S.No.797 of 2004. On such deposit, the Manager, Reserve Bank of India, should invest in Fixed Deposit with Indian Bank, High Court Branch, Chennai - 600 104 initially for a period of two years in Re-Investment Scheme and thereafter, to extend the period of deposit from time to time until the final order is passed by the High Court of Kerala in



R.F.A.No.673 of 2004. Against the said judgment, no appeal has been preferred.

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2.7. In accordance with the said direction, the said amount has been deposited with the Indian Bank, High Court Branch on 21.02.2022. For further satisfaction of the decree amount, The West of England Ship Owners Mutual Insurance Association (Luxembourg), the Insurance Company of the first respondent, who is the fourth respondent / third party executed a Letter of Indemnity (LOI) dated 08.10.2004. In view of the said Indemnity, the first respondent Vessel was allowed to sail.

2.8. The High Court of Kerala allowed the appeals in R.F.A.Nos.672 and 673 of 2004 which were filed challenging the judgment and decree of the Principal Sub Court, Kerala, by slightly modifying the same and the details of which has already been furnished *supra* in paragraph no.4 -“20.2” of this order.

2.9. The Special Leave Petition has been preferred by challenging the above judgment and decree of the High Court of Kerala in S.L.P.No.6222 of 2022 was also dismissed on 04.01.2023. The applicant



was permitted to withdraw a sum of Rs.10,00,000/- along with interest and which was already deposited in pursuant to the earlier orders of this Court.

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2.10. As per the Letter of Indemnity dated 08.10.2004, The West of England Ship Owners Mutual Insurance Association (Luxembourg) had guaranteed to pay the applicant a sum not exceeding US \$ 1,77,078. Since the decree amount is more than the guarantee given by the fourth respondent, a notice of demand was issued by the plaintiff on 06.10.2022 and called upon the fourth respondent to pay the said sum within a week. But the fourth respondent did not settle the same as undertaken. Hence, no money has been received from The West of England Ship Owners Insurance Services Limited by the applicant / plaintiff.

2.11. The applicant caused another notice dated 28.12.2022 to the fourth respondent through their local agent P & I Services Pvt. Ltd., calling upon the fourth respondent to pay US \$ 1,77,078 along with interest @ 12% from 06.10.2022 within a week. The same was served on the third party / agent on 29.12.2022. In spite of the same, the money due and payable to the applicant has not been paid by the fourth respondent Indemnitor. Hence this



application has been filed to direct the fourth respondent to pay a sum of US \$ 1,77,078 to the applicant in terms of LOI dated 08.10.2004.

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Counter of the fourth respondent / Guarantor in brief:-

3. The application is not maintainable and it is liable to be dismissed. The Letter of Indemnity referred by the applicant is restricted to the liability of charterers of the Vessel M.V.NORASIA TEGESOS and that cannot be extended to the liability of the owners of the said Vessel or any other third party. The applicant has admitted in his plaint that the Vessel is owned by the second defendant Norasia Container Lines Limited.

3.1. The third defendant is the agent of the second defendant. The *ex parte* decree passed in the suit is only against the defendants 1 to 3. And the suit has been decreed against the defendants 1 to 3 and that has been confirmed by the Division Bench of the High Court of Kerala on 10.11.2020 in R.F.A.Nos.672 and 673 of 2004 and the same was further confirmed by the Hon'ble Supreme Court also. Since the charterers of M.V.NORASIA TEGESOS is not a party to the suit and no decree has been obtained against them. Hence, the LOI cannot be enforced against the fourth respondent. The



LOI was executed in favour of the applicant during the pendency of the suit in C.S.No.797 of 2004. The suit itself has been decreed on 15.02.2010 and hence the applicant is not entitled to seek any relief against the fourth respondent. And this application is also barred by limitation.

Discussion:-

4. The applicant / plaintiff has filed the suit in C.S.No.797 of 2004 seeking for an order of arrest, condemnation and sale of the first defendant's Vessel M.V.NORASIA TEGESOS and to adjust the sale proceeds towards the decretal amount awarded by the Principal Sub Court, Kochi in O.S.No.105 of 2000. O.S.No.105 of 2000 was filed by the plaintiff for recovery of a sum of US \$ 1,42,081 with interest against the defendants therein for the loss of its Cargo. The above suit was decreed by the Principal Sub Court, Kochi and the appeals preferred in R.F.A.Nos.672 and 673 of 2004 were also allowed by modifying the decree and the Special Leave Petition filed challenging the judgment of the High Court of Kerala was also dismissed and there is no dispute on the above points.



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5. However, the plaintiff has filed the present suit for granting an order to arrest the first defendant's Vessel M.V.NORASIA TEGESOS. The second defendant is the owner of the first defendant's Vessel. Since the defendants 2 and 3 did not own any assets in India, the plaintiff had invoked the Admiralty jurisdiction of this Court in order to arrest the first defendant Vessel belongs to the second defendant for the purpose of satisfying the decree amount.

6. Since the Vessel was arrested subsequently, by an order of this Court, a sum of Rs.10,00,000/- was deposited on behalf of the respondents 2 and 3 on 08.10.2004 in the Court. Thereafter, none of the defendants made their appearance in C.S.No.797 of 2004 and subsequently *ex parte* decree has been passed. For the sake of clarity, the order is extracted as under:-

"That the Registry be and is hereby directed to keep the security furnished in the form of deposit to the tune of Rs.10,00,000/-(Rupees ten lakhs only) and also the Indemnity Bond executed by the insurer of the defendants for the remaining sum are also to be kept intact till the dispute in the appeal in RFA No.673 of 2004, arising out of the judgement



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and decree passed in O.S.No.105 of 2000 by the Principal Sub-Judge, Kochi at Ernakulam is finally, disposed of.

2. That the Registrar General of this Court, do transfer to the Manager, Reserve Bank of India, Madras, a sum of Rs.10,00,000/- now in Court deposit standing to the credit of the above suit in C.S.No.797 of 2004.

3. That on such transfer as aforesaid, the said Manager, Reserve Bank of India, Madras, do with the privity of the Registrar General of this Court, invest the said amount incurring Commission in Fixed deposit with Indian Bank, High Court Branch, Chennai-104 initially for a period of two years in Re-Investment Scheme and thereafter, to extend the period of deposit from time to time till the final order is passed in the dispute pending before the Kerala High Court in RFA No.673 of 2004, and keep the same to the credit of the account of C.S.No.797 of 2004, on the file of the High Court, Madras".

7. Later, an application has been filed in A.No.983 of 2022 for releasing the said amount to the applicant / plaintiff. At that point of time, the appeals in R.F.A.Nos.672 and 673 of 2004 were disposed and the decree has been modified and confirmed for a sum of US \$ 94,605 with interest at the rate of 6% per annum which in Rupees equivalent to Rs.70,00,000/-. The



amount that was deposited in the Court was invested in a fixed deposit and the matured Fixed Deposit was Rs.21,27,111/-. Since the matured value of the fixed deposit is within the decretal amount, the plaintiff was allowed to take out the same.

8. So far as the Letter of Indemnity is concerned, it was given by the fourth respondent The West of England Ship Owners Mutual Insurance Association (Luxembourg) for the purpose of releasing the arrested Vessel by name M.V.NORASIA TEGESOS. The contents of Letter of Indemnity furnished to the Court is reproduced as under:-

“In consideration of your consenting to the release from arrest and/or refraining from taking action resulting in the arrest of M.V. “NORASIA TEGESOS” or any other ship or property in the same or associated ownership, management, possession or control, we hereby guarantee payment to you not exceeding US \$ 177,078 (United States Dollars One Hundred and Seventy-Seven Thousand and Seventy-Eight Only) including costs and interests within 30 days of your demand, of such sums as the charterers of M.V. “NORASIA TEGESOS” may be found legally liable to pay to you in respect of your claim for your alleged loss of container GSTU



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9689690 carried under Bill of Lading No.NSLUADSAUH002510 which was lost over board the vessel M.V. "FASGULF" on 27.07.1999 provided it be found legally liable to pay you by the final order passed in C.S.No.797 of 2004 and the matter and the decree of Sub Court Cochin in O.S.No.105 of 2000 attains finality."

9. The above Letter of Indemnity was given for an amount of US \$ 1,77,078. The said amount is less than the decretal amount of US \$ 94,605 with interest at the rate of 6% per annum which aggregated to US \$ 2,25,160. It is made specific that the Indemnity would extend until the decree passed in O.S.No.105 of 2000 attains finality. The said decree attained finality only on 04.01.2023 with the order of the Hon'ble Supreme Court.

10. The outcome of O.S.No.105 of 2000 was always in favour of the applicant / plaintiff and the entitlement to recover the damages as ordered by the Court was not lost at any stage of the proceedings. There is no dispute on all these facts. However, the learned counsel for the fourth respondent submitted that Indemnity given by the fourth respondent on



08.10.2004 in favour of the plaintiff is only for the liability if any found to be payable by the charterers of M.V.NORASIA TEGESOS and not the owner of M.V.NORASIA TEGESOS who is the first defendant in the suit.

11. While giving guarantee the fourth defendant knows pretty well that the liability for which the LOI is granted is only in respect of the decree that has to be attained finality in O.S.No.105 of 2000. Even though the charterers were not added as parties to O.S.No.105 of 2000, the fact remains that the fourth respondent is aware of the appeal proceedings pending against the decree in O.S.No.105 of 2000. The reference has also been made in C.S.No.797 of 2004 which has been filed for an order of arrest of the first respondent Vessel. Having given such LOI, the fourth respondent cannot turn around 180 degrees and say that the guarantee given to him is only in respect of the liability of the charterers and not in respect of the owner of the Vessel. In fact the Indemnity given by the fourth respondent is only in respect of the suit amount in O.S.No.105 of 2000, which has to be attained finality in O.S.No.105 of 2000, irrespective of the parties to the said proceedings. In fact, the indemnitor's liability would arise due to the



indemnity given by him, when the third party fails to make the payment to the indemnee or the indemnity holder.

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12. In fact only in view of the undertaking given by the fourth respondent, the Vessel was allowed to sail. If the fourth respondent has not come forward to give any LOI, the Vessel would have been sold for realising the decretal amount due to the applicant / plaintiff. Having given the Indemnity the fourth respondent cannot evade to honour his words by dodging to honour his own indemnity.

13. The fourth respondent cannot seek shelter on the point of limitation, in view of the fact that the decree in O.S.No.105 of 2000 attained finality only on 04.01.2023. Hence, there is no question of expiry of limitation as submitted by the fourth respondent.

14. In view of the above stated reasons, the applicant / plaintiff is entitled to get the relief as sought for.

In the result, the application in A.No.1795 of 2023 is allowed and the fourth respondent / third party, The West of England Ship Owners Mutual



Insurance Association (Luxembourg) is directed to pay a sum of
US \$ 1,77,078 being the amount guaranteed vide Letter of Indemnity dated
08.10.2004 to the applicant / plaintiff.

29.09.2023

Speaking order

Index : Yes

Neutral Citation : Yes

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in C.S.No.797 of 2004



R.N.MANJULA, J.

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Pre-Delivery Order made in
Application No.1795 of 2023
in C.S.No.797 of 2004

29.09.2023