

IN THE HIGH COURT AT CALCUTTA
ADMIRALTY JURISDICTION
ORIGINAL SIDE
[Commercial Division]

BEFORE:

The Hon'ble Justice Ravi Krishan Kapur

AS/3/1996
IA NO: GA/1/1997, GA/2/1997,GA/3/1997,GA/5/2003,
T/7/2003,T/8/2003, GA/10/2006

IN THE MATTER OF
THE TINPLATE CO. OF INDIA LIMITED
VS
OWN. & PARTIES INT.VESSEL ESPERANZA-III

For the Plaintiff	: Mr. Jishnu Saha, Senior Advocate Mr. Ovik Sengupta, Advocate
For the Defendant	: Mr. Ramabhadrawn, Senior Advocate Mr. Krishnaraj Thakker, Advocate Mr. S. Prasad, Advocate Mr. P. Bose, Advocate Mr. N. Banerjee, Advocate
Judgment on	: 07.05.2024

Ravi Krishan Kapur, J.:

1. This is a suit seeking arrest of the vessel "ESPERNZA III" and a decree directing the defendant to deliver 263 TABP coils of prime quality tin mill black plates in coils weighing 2,510,173 kgs. The invoice value of the goods was USD 1703527.52.
2. Briefly, the plaintiff imported the goods by carriage on the vessel. Upon receipt of the goods, the defendant issued a bill of lading dated 28 December, 1996 and agreed to carry the goods to Kolkata and to

deliver the same to the plaintiff. The vessel arrived at Sand Heads on 16 February 1996 and was scheduled to arrive at the port of discharge i.e. Khidderpore Dock on 28 February 1996. Although a bill of entry for warehousing was prepared by the plaintiff on 16 February 1996 and the goods were to be delivered on 17 February 1996, the defendant failed and was unable to deliver the goods on the ground that the vessel was detained at the docks in view of an ongoing strike by the Calcutta Port Pilots.

3. In this background, alleging wrongful detention and breach of agreement, the plaintiff instituted the present suit seeking arrest of the vessel with an alternative claim for specific delivery of the goods.

The relevant portion of the plaint reads as follows:

“11. The defendants are wrongly contending that due to strike by the Calcutta Port Pilots the said Ocean Vessel Esperanza III has been “detained” and the plaintiff will have to pay to the defendants “detention charges” yet to be ascertained.

12. The plaintiff states that neither in law nor in fact the said Ocean Vessel has been detained and as such the question of payment of any detention charges by the plaintiff does not arise. The purported claims of the defendants by way of “detention charges” are wrongful, untenable and the defendants are not justified in withholding delivery of the said goods covered by the said Bill of Lading. Such withholding delivery of the plaintiff’s goods is in breach of the agreement and breach of duty as common carrier and/or public carrier and the defendants are liable to pay all losses and damages suffered and that might be suffered by the plaintiff as a result thereof.

13. The plaintiff is entitled to and claims delivery of the said goods forthwith and claims damages for the wrongful withholding of delivery of goods.”

4. Upon filing of this suit, the plaintiff had filed an interlocutory application. By an order dated 28 February 1996, read with the order

dated 29 February 1996, the defendant was directed to issue a delivery order for the goods upon the plaintiff furnishing security of Rs. 68 lacs alongwith interest which was to be deposited with the Registrar, Original Side to secure the claim of the defendant. Pursuant to interim orders, the plaintiff duly furnished a bank guarantee for a sum of Rs.68 lacs, and the defendant issued a delivery order to the plaintiff for the goods.

5. Thereafter, the parties completed their pleadings. By an order dated 3 October 2012, the defendant also without prejudice to their rights, amended the written statement to include a counter claim and also sought encashment of the bank guarantee.
6. Pursuant to orders of Court, a Commissioner was appointed for recording of evidence. At the meeting held before the Commission on 10 January 2017, the plaintiff unconditionally submitted that they did not want to adduce any evidence nor want to proceed any further with its claim. The relevant portion of the Minutes of the Commissioner dated 10 January 2017 is as follows:

“Mr. Sukrit Mukherjee submitted that the plaintiff does not wish to adduce any evidence as the plaintiff does not wish to proceed with its claim.

7. The defendant led evidence by examining two witnesses one being Gopal Krishna Bhattacharjee (DW1), working at the relevant point of time with Oceanic Shipping Agencies Pvt. Ltd., who were agents of Cargo Levant and the other being, Dilipkumar Chatterjee (DW2) working with the P & I Services Pvt. Ltd. During the course of examination, the defendant's witness inter-alia proved the bill of lading (Exhibit-1), invoices, notices issued to the plaintiff. DW1

further deposed that the reason for the vessel detention was an ongoing strike. DW1 also produced a letter dated 7 June 2008 (Exhibit-8) being the reply from the Calcutta Port Trust in which the Port Authorities had confirmed that there was a pilot's strike from 5 February 1996 to 26 February 1996. The plaintiff extensively cross-examined both the witnesses.

8. It is contended on behalf of the plaintiff that the defendant's counter claim is barred by limitation. The interim order directing release of the goods was passed on 29 February, 1996. The defendant filed its written statement on 3 January 1997. By orders dated 3 August 2012 and 6 August 2012, it was clarified that the order for amendment would not preclude the plaintiff to contend that such counter claim was barred by limitation. The amendments sought to include a counter claim seeking encashment of the bank guarantee were made only in 2012 beyond the period of limitation. Hence, there was no contemporaneous demand for release of the bank guarantee. In any event, the defendant is not entitled to any detention charges since the defendant had acted contrary to the agreement by not discharging the goods at the nearest port nor making any attempt to mitigate their losses. It is also alleged that the suit has been filed by a person who is not the defendant but is masquerading to be the defendant. It is further alleged that none of the witnesses had any authority to depose on behalf of the owners of the vessel.
9. On behalf of the defendant, it is submitted that, the plaintiff has failed to discharge the burden of proof. The burden of proof was squarely on the plaintiff who had complained of the breach. In such

circumstances, the plaintiff having chosen not to adduce any evidence and abandon the suit after having enjoyed the interim orders, the suit is liable to be dismissed on that ground alone and the bank guarantee be encashed in favour of the defendant. The defendant also seeks interest on the aforesaid amount of Rs.68 lacs. It was also submitted that the counter claim had been filed without prejudice to the rights of the defendant and there was no need to file the counter claim.

10. For convenience, sections 101, 102 and 103 of Indian Evidence Act, 1872 reads as follows:

101. Burden of proof- Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

102. On whom burden of proof lies.- The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

103. Burden of proof as to particular fact.- The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

11. The sections embody a test for ascertaining on which side the burden of proof lies. On a combined reading of sections 101, 102 and 103 of the Act, a person who asserts a particular fact has to prove the same. Until such burden is discharged, the other party is not required to be called upon to prove their case. The Court has to examine as to whether the person upon whom the burden lies has been able to discharge this burden or not. It means that when the burden of proof lies on a party, that party must fail if it fails to discharge the burden

by giving evidence [*State of Madhya Pradesh vs Ushadevi*, (2015) 8 SCC 672, *Vidhyadhar vs Manikrao*, (1999) 3 SCC 573].

12. An action for “detention” is a wrong independent of contract and is founded in tort. Any act which is an interference with the dominion of the true owner of the goods is a conversion of those goods. A person who is in possession of goods and unjustifiably refuses to deliver the goods is guilty of conversion by detention. Briefly, the tort of conversion by detention is an act of willful interference without lawful justification with any chattel in a way inconsistent with the rights of another, whereby that other is deprived use and possession of it (*Dhian Singh Sobha Singh and Ors vs The Union of India*, AIR 1958 SC 274).
13. The suit is one for wrongful detention of goods and for breach of agreement. The burden of proving these facts was squarely on the plaintiff. The plaintiff deliberately and consciously opted not to adduce any evidence nor prove their case. The plaintiff has also chosen not to lead any evidence to prove that the defendants were in breach of the agreement as pleaded in the plaint. The burden of proving this fact is always on the person who asserts such fact. Until such burden is discharged, the defendant is not obliged to adduce any evidence.
14. In any event, having taken advantage of an interim order, which virtually amounted to the final relief, the plaintiff cannot now contend that there is no obligation of plaintiff to discharge the burden of proof and prove its case. It is true that the defendant had (without prejudice) amended its written statement, to include a counter claim.

But, this does not absolve the plaintiff from proving its case. In *Vidhyadhar vs. Manikrao (1999) 3 SCC 573* it has been held as follows:

“17. Where a party to the suit does not appear in the witness-box and state his own case on oath and does not offer himself to be cross-examined by the other side, a presumption would arise that the case set up by him is not correct. If a party abstains from entering the witness-box, it would give rise to an adverse inference against him.”

15. Admittedly, pursuant to the interim orders, the plaintiff had obtained delivery of the goods. The interlocutory reliefs being in aid of the main relief, the plaintiff cannot having enjoyed the fruits of interim reliefs abandon the main relief and contend that there is no obligation to prove its case. The plaintiff cannot be unjustly enriched. In such circumstances, the deliberate and conscious course of not leading any evidence and abandoning their claim is akin to committing *harakiri* and is a glaring omission of the plaintiff.
16. The other issue raised by the plaintiff of the defendant's counter claim being barred by limitation is also without substance. The counter claim was filed without prejudice to the rights of contentions of the defendant. It is true that the defendant's witnesses had deposed and were cross examined. In any event, regardless of the counter claim, the burden of proof always remained with the plaintiff to prove its case which it has deliberately abandoned.
17. DW1 had at the time of cross examination deposed that he had affirmed the written statement as an agent of the Owner of the vessel MV Esperanza-III and that the principals of the vessel had authorized him to affirm the same. There is nothing contrary on record to

controvert such allegation. Accordingly, there is no merit in the allegation that, the suit has been affirmed by a person masquerading as the defendant and the same is rejected.

18. For the above reasons, AS 3 of 1996 is dismissed. In view of the aforesaid, nothing further survives in any of the pending interlocutory applications being GA 1 of 1997, GA 2 of 1997, GA 3 of 1997 GA 5 of 2003 and GA 10 of 2006 and the same are also dismissed by consent of the parties as infructuous.
19. Upon the dismissal of the suit, the parties must be restored to same position in which they would have been if the interim order would not have existed. The test is whether an act of Court has resulted in one party gaining an advantage which it would not have otherwise earned. In view of the above, all other issues are irrelevant and require no adjudication. [*South Eastern Coalfields Ltd. vs. State of Madhya Pradesh (2003) 8 SCC 648*].
20. In the above circumstances, the defendant is entitled to the benefit of the bank guarantee furnished in terms of the interim orders dated 28 February 1996 and 29 February 1996 respectively. The Registrar, Original Side is directed to encash the bank guarantee and in view of the Power of Attorney dated 30 May, 2002 transfer the proceeds thereof to the defendant's carrier Cargo Levant. The Advocate on Record of the defendant shall within 7 days from date intimate the Registrar, Original Side the details of the bank account of the defendant's carrier.
21. In view of the fact that the transaction between the parties is commercial in nature, the plaintiff is also directed to pay interest @

6% per annum in the same manner on the amount of Rs.68 lacs commencing from 25 April 1996 till the date of payment. However, there shall be no order as to costs.

(Ravi Krishan Kapur, J.)

Later:

After pronouncement of the judgment, the plaintiff prays for stay of operation of the decree.

The prayer for stay is considered and rejected.

(Ravi Krishan Kapur, J.)