

Sharayu Khot.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
ADMIRALTY & VICE ADMIRALTY JURISDICTION

COMMERCIAL ADMIRALTY SUIT NO. 16 OF 2023

Suraksha Asset Reconstruction Limited ...Plaintiff

Versus

Sale Proceeds of DLB Nand Gaurav ...Defendant

Rahul Narichania, Senior Counsel with Gopalkrishna Nayak, Gauri
Deshpande i/by Flavia Legal for the Plaintiff.

Rushabh Sheth for the Official Liquidator.

Ritik Anilkumar Singh, Plaintiff's witness present in Court.

CORAM : R.I. CHAGLA J

DATE : 5 April 2024

ORDER :

1. Heard Mr. Narichania, the learned Senior Counsel
appearing for the Plaintiff.

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2. The Affidavit of Evidence in lieu of Examination in Chief
on behalf of the Plaintiff dated 8th January 2024 as well as the
compilation of Plaintiff's documents in support of evidence Affidavit,

referred to and relied upon by the Plaintiff's witness, are tendered and taken on record and marked as **Exhibit "X"** and **Exhibit "Y colly."** respectively.

3. In addition, today Mr. Narichania has tendered the compilation of Plaintiff's documents for expenses of Rs. 5,47,10,557/- incurred towards preservation and maintenance of vessel DLB Nand Gaurav (MMSI : 419900783), which is taken on record and marked "**Z colly.**" for identification.

4. The Plaintiff has filed the present suit as an assignee of a debt assigned to it by Yes Bank in its favour. The Defendant Vessel was at the material time owned by Essar Offshore Subsea Ltd. Essar Offshore Subsea Ltd. (Borrower) who had taken a loan from Yes Bank which remained unpaid. Yes Bank had a charge on the DLB Nand Gaurav as stated in the plaint. By an Assignment Agreement dated 16th January 2018, Yes Bank assigned in favour of the Plaintiff, the entire debt owed by the Borrower with all underlying securities, pledges, guarantee and/or mortgage hypothecated securities etc. The Plaintiff has thus stepped into the shoes of Yes Bank.

5. The Original Lender/Assignors, predecessor of the Plaintiff, along with IDBI Bank had appointed Axis Trustee Services Ltd. as a security trustee to hold the security (including the charge over the Defendant Vessel created by the Borrower) on their behalf and for their benefit by entering into a Security Trustee Agreement dated 14th June 2017 (annexed and marked as **Exhibit “E”** to the Plaintiff).

6. The predecessor of Plaintiff i.e. Yes Bank had also entered into an Intercreditor Agreement with IDBI Bank Ltd. and Axis Trustee Services Ltd. which recorded the sharing of charge over the vessel DLB Nand Gaurav (MMSI:419900783) between Yes Bank and IDBI Bank Limited.

7. Resultantly, the charge over Vessel DLB Nand Gaurav (MMSI:419900783) was shared between Yes Bank and IDBI Bank Ltd on *pari-passu* basis as convened in Agreement dated 14th June 2017 (annexed and marked as **Exhibit “F”** to the Plaintiff).

8. IDBI Bank, subsequently by its letter dated 26th July 2017 issued a No Objection Certificate for conversion of the exclusive

charge on the Vessel DLB Nand Gaurav into a *pari-passu* charge with Yes Bank. By the said letter, IDBI Bank Ltd. in its capacity as foreign currency term loan lender recorded that it had no objection to amend its earlier exclusive charge created on DLB Nand Gaurav to *pari-passu* charge with Yes Bank. Letter dated 26th July 2017 issued by IDBI Bank Ltd. in favour of Yes Bank (annexed and marked as **Exhibit “G”** to the Complaint).

9. The charge was created in favour of Yes Bank by the owner of the vessel Essar Offshore Subsea Limited by way of an intestate of Memorandum of Hypothecation dated 14th June 2017. The said charge was also registered with Registrar of Companies (ROC) under the Companies Act, 2013, as amended by way of Form Charge CHG-1. Charge Form duly evidencing registration of the charge in ROC (annexed and marked as **Exhibit “H”** to the Complaint).

10. The aforesaid charge was also registered with Central Registry of Securitisation and Reconstruction and Security Interest (CERSAI) under SARFAESI Act, 2002. Search Report on CERSAI website (annexed and marked as **Exhibit “I”** to the Complaint). Thus the vessel DLB Nand Gaurav constituted the security as against

the debt.

11. Essar Offshore Subsea Ltd enjoyed and utilized the credit facilities but failed to maintain financial discipline and honor their payment obligations. The Plaintiff requested them to regularize their loan Account but they failed and neglected to do so. The Plaintiff accordingly addressed notices dated 24th August 2018 and 31st August 2018 to Essar Offshore Subsea Ltd. followed by a recall notice dated 10th September 2018 recalling an amount of Rs.3,31,47,99,809/-. No positive response was received from Essar offshore Subsea Ltd. who failed to make payments. Notices dated 24th August 2018, 31st August 2018 and Recall Notice dated 10th September 2018 (annexed and marked as **Exhibit “J”, “K” and “L** to the Plaintiff).

12. The owner of Defendant Vessel M/s. Essar Offshore Subsea Ltd. went into liquidation pursuant to an Order of Winding Up Petition dated 2nd August 2018 in Company Petition No. 347 of 2016 and the Official Liquidator came to be appointed.

13. The Defendant Vessel DLB Nand Gaurav (MMSI:

419900783) was sold by way of an Order dated 7th July 2022 passed by this Court in Interim Application No. 3260 of 2021 in Commercial Admiralty Suit (L) No. 18 of 2022 for a sum of Rs.76,66,88,000/-.

14. The said proceeds after deduction of the Sheriff's expenses were deposited with the Prothonotary & Senior Master, Admiralty Court.

15. The Plaintiff as secured creditor holding a charge, hypothecation against the Defendant Vessel in rem against the sale proceeds of Defendant Vessel seeks a decree in its favour as per prayer clauses (a) to (c). The Plaintiff has filed an Affidavit of Evidence of one Mr. Ritik Anilkumar Singh in support of its case, which has been marked as Exhibit X.

16. The relevant documents in respect of Plaintiff's claim in the present suit annexed to Plaintiff Witness Evidence Affidavit and forming part of the compilation marked as Exhibit Y colly. are as under:-

Sr. No.	Description of Document	Document	Pages
1.	Certified Copy of Deed of Hypothecation dated 13.7.2016	1	1-24
2.	Certified Copy of Security Trustee Agreement dated 14.6.2017 executed between Yes Bank, IDBI Bank, Axis Trustees Services and Borrower.	2	25-62
3.	Certified Copy of Original Unattested Memorandum of Hypothecation dated 14.6.2017 executed by Essar Offshore Subsea Ltd. in favour of Axis Trustee Services	3	63-127
4.	Photocopy of permanent certificate and registration certificate of the said Vessel DLB Nand Gaurav (MMSI: 419900783)	4	128
5.	Certified Copy of Intercreditor Agreement dated 14.6.2017 executed between Yes Bank and IDBI Bank Ltd. and Axis Trustee Services Ltd.	5	129-156
6.	Printout of Form No. CHG-1 dated 14.6.2017 registered with Registrar of Companies created in favour of Yes Bank by Essar Offshore Subsea Ltd.	6	157-163
7.	Certified True Copy of Original Assignment Agreement dated 16.1.2018 registered under Serial No. BBE-5/1695/2018 executed by Yes Bank and Plaintiff	7	164-209
8.	Notarised Copy of the Original Application No. 1312 of 2018 filed by Plaintiff for recovery of its dues before DRT – II, New Delhi	12	257-310
9.	Notarized Copy of Volume of Compilation of Documents filed along with the Original Application	13	311-693
10.	Certified Copy of the Order dated 1.12.2018 passed by DRT – II, New Delhi appointing Local Commissioner /Receiver of the said	14	694-696

	Vessel DLB Nand Gaurav (MMSI: 419900783)		
11.	Notarised Copy of Judgment and Order dated 15.9.2022 passed by DRT -II, New Delhi allowing the Original Application No. 1312 of 2018 filed by the Plaintiff.	20	732-739
12.	Copy of true copy of Recovery Certificate in favour of Plaintiff bearing No. 365 of 2022 dated 28.9.2022 passed by DRT -II, New Delhi.	21	740-752
13.	Office copy of the claim lodged vide letter having reference No. FL/337/2022 dated 19.10.2022 (without annexures) with Commercial Suits Department bearing its acknowledgment	22	753-777
14.	Office copy of Interim Application bearing No. 707 of 2023 (without annexures) filed by Plaintiff under Rule 1087 and 1088 of High Court Rules under Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017.	23	778-794

17. By way of background, it is to be noted that the Plaintiff had initially filed an action in personam by filing OA 1312 of 2018 before the DRT II, Delhi against the owners of the Defendant Vessel DLB Nand Gaurav (MMSI: 419900783) and the Official Liquidator. The Official Liquidator was represented and had filed reply in the said proceedings.

18. The DRT II, New Delhi after hearing the parties allowed the O.A by an order dated 15th September 2022 upheld the entitlement of Plaintiff for Rs.333,79,76,071/- along with pendent lite and simple future interest at the rate of 11% per annum from 21st September 2018 till realisation to be recovered from Essar Offshore Subsea Ltd. (in liquidation) from sale of the said Defendant Vessel DLB Nand Gaurav (MMSI: 419900783). The said Order dated 15th September 2022 in paragraph 5(ii) granted liberty to the Plaintiff to file its claim before the appropriate authority for priority as secured creditor on the sale proceeds of the said Defendant Vessel DLB Nand Gaurav (MMSI: 419900783). Paragraph 5(ii) of the said order is reproduced as under:-

“5(i)

5(ii) *In case of failure to pay to the Applicant FI, on the part of the Defendant No. 1, the aforesaid amount shall be recovered from the sale of hypothecated property of Defendant No. 1, being “DLB Nand Gaurav Barge bearing Registration No. M-7751 dated 20.04.2012”, with direction to compensate Defendant No. 1 from the excess amount realised over the outstanding amounts of Applicant FI, and Defendant No. 2, who, hold a pari-passu charge on the hypothecated asset, if any. Shortfall, if any, shall be recovered from the hypothecated assets, moveable and immovable, of Defendant No. 1, as well as the mortgage and other movable and immovable properties of other guarantors. The said hypothecated*

property “DLB Nand Gaurav barge bearing Registration No. M-7751 dated 20.04.2012” is reported to have been sold by auction, and the orders of the Hon’ble High Court of Bombay. The Applicant FI and Defendant No. 2 are at liberty to lay their claim, before the appropriate authority for priority as secured creditor, on the proceeds of the said “DLB Nand Gaurav barge bearing Registration No. M-7751 dated 20.04.2012”.

(Order dated 15th September 2022 is annexed and marked as **Exhibit “U”** to the Plaint.)

19. Thereafter, DRT- II, New Delhi issued a Recovery Certificate dated 28th September 2022 for recovery of a sum of Rs. 333,79,76,071/- plus interest at the rate of 11% per annum amounting to Rs.146,16,67,009.33 aggregating to a sum of Rs.479,96,43,080.33. (Order dated 28.09.2022 is annexed and marked as **Exhibit “V”** to the Plaint.)

20. It is pertinent to note that the Official Liquidator who appeared before the DRT II, New Delhi did not challenge or prefer any Appeal against the said Order dated 15th September 2022 issued by DRT II, New Delhi and therefore the said Order achieved a finality. The Plaintiff’s substantive claim was thus, established by order dated 15th September 2022 passed by DRT II, New Delhi and

the Recovery Certificate.

21. Mr. Rishabh Sheth appearing for the Official Liquidator concedes that in view of the judgment of this Court in **BPT Vs Barge Madhwa & Anr.**¹ at paragraphs 20 – 23, 207, 211 and 215, leave of the Court is not necessary for the Plaintiff to file the suit or to make the Official Liquidator a party to the suit. In view of the said decision, there is no opposition from the Official Liquidator to the present claim raised in the Suit. The Official Liquidator is neither a proper nor a necessary party and the suit filed by Plaintiff may be decreed.

22. Since the Defendant Vessel DLB Nand Gaurav (MMSI: 419900783) has been arrested and sold by the Orders of this Court viz. dated 25th November 2021 and 7th July 2022 respectively, the Plaintiff has filed this present suit in rem only against the sale proceeds of the DLB Nand Gaurav (MMSI: 419900783) in respect of a maritime claim that it has against the Defendant Vessel DLB Nand Gaurav (MMSI: 419900783) under Section 4(1)(c) of the Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017.

¹ 2020 SCC Online Bom 651

23. The present action in rem is separate and distinct from an action in personam. This distinction between an action in rem and an action in personam has been decided by this Court in the case of **Barge Madhwa** (Supra) and re-affirmed in an unreported order dated 3rd January 2022 of this Court in the case of **Angre Port Pvt. Ltd. Vs Tag15 (IMO.9705550) and Anr.**². Thus, the present suit is maintainable as an action in rem against the sale proceeds of DLB Nand Gaurav which is distinct from an action in personam.

24. The claim in the present suit is for a sum of Rs.479,96,43,080.33 together with interest from 16th September 2022 till the date of realisation. The difference between the amount decreed by the DRT II, New Delhi i.e. 333,79,76,071/- and amount of Rs.479,96,43,080.33 is the interest amount of Rs.146,16,67,009.33 that has accrued from 24th September 2018 till the date of the Order passed by DRT II, New Delhi which is clear on a plain reading of paragraph 30 of the Plaint.

25. Apart from the claim of the principal sum as aforesaid, the Plaintiff along with IDBI Bank Ltd. has also incurred

² IA 112 of 2021 in Com.Admiralty Suit No. 4 of 2020

expenses towards preservation and maintenance of the Defendant Vessel DLB Nand Gaurav (MMSI: 419900783) from the period January 2019 till 25th November 2021 i.e. post arrest in the sum of Rs.9,01,83,757/-. These amounts have been expended to maintain Defendant Vessel as a sea going seaworthy vessel. The expenses incurred have benefited all the creditors.

26. Out of the said amount of Rs.9,01,83,757/- incurred by Plaintiff along with IDBI Bank Ltd, this Court by an order dated 5th April 2022 in Admiralty Suit No.50 of 2022 filed by Axis Trustee Services Ltd. along with IDBI Bank Ltd., upheld share of expenses borne by IDBI Bank amounting to Rs.3,40,07,890/-. The said order dated 5th April 2022 is annexed to the Plaintiff's Witness Affidavit being Document No. 24 from pages 795 to 803.

27. Relevant paragraph of the said order dated 5th April 2022, reads thus:-

.....

“5. The Defendant Vessel was initially seized under an order dated 1st December 2018 passed by DRT – II, Delhi in OA No. 1312 of 2018 (filed by Suraksha ARC against the

Borrower). The expenses incurred by the local Commissioner were directed to be borne by the lenders (being the pari-passu charge holders). Consequently, the Plaintiff No. 2 and Suraksha ARC have shared expenses towards preservation and maintenance of the defendant vessel and as of the date of application, the total expenses of Plaintiff No. 2 towards preservation and maintenance of the defendant-vessel are to the tune of Rs.3,40,07,890/-.

28. In fact, this Court vide its order dated 20th March 2023 in Interim Application (L) No. 38384 of 2022 in Commercial Admiralty Suit No. 50 of 2022 filed by Axis Trustee Services Ltd. along with IDBI Bank (annexed as Document No. 25 from pages 804 to 813 in Plaintiff's Witness Evidence Affidavit in Volume III) has observed as under:-

.....

"11. He submits that the total expense, for the general maintenance of the Defendant vessel as detailed above, was of Rs.9,01,83,757/- out of which Rs.5,47,10,557/- was incurred by Suraksha and Rs.3,54,73,200/- by IDBI. IDBI's expense is allowed by the decree passed in their favour and the same can be paid from the balance sale proceeds. He submits that Suraksha's expenses aggregating to Rs.5,47,10,557/- should be kept aside to satisfy Suraksha's expense claim, which Suraksha will pursue in IA No. 707 of 2023. The same is accepted."

.....

"19. In view of the foregoing discussion, the following order

(a) The Prothonotary and Senior Master shall keep aside a sum of Rs.14, 00, 00,000/- to satisfy the decree which may be eventually passed in favour of Port in Commercial Admiralty Suit No. 18 of 2022. A further sum of Rs.5,47,10,557/- shall be kept aside towards the claim of Suraksha in IA No. 707 of 2023 in Commercial Admiralty Suit No. 18 of 2022.

29. The Plaintiff has also filed an Interim Application (L) No. 707 of 2023 in Commercial Admiralty Suit No. 18 of 2023 in respect of its expenses incurred for the preservation and maintenance of the said Defendant Vessel DLB Nand Gaurav (MMSI: 419900783) and has produced the relevant documents, which are now marked as **Exhibit “Z colly.”** for identification.

30. The original claim of the Plaintiff has already been adjudicated by DRT II, New Delhi. However that adjudication was in personam against the owners of the Defendant Vessel DLB Nand Gaurav (MMSI: 419900783), whereas the present action against the sale proceeds of DLB Nand Gaurav is one in rem. In order to partake in the sale proceeds and to claim priority of its claim during the determination of priorities of all claims held by various claimants, the Plaintiff is required to file Admiralty Suit against the sale proceeds of Defendant Vessel DLB Nand Gaurav (MMSI: 419900783) in rem.

31. The Plaintiff's claim constitutes a maritime claim under Section 4(1)(c) of the Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017.

32. Hence, the present suit has been filed by the Plaintiff for Rs.479,96,43,080.33 which is essentially the amount awarded by DRT II, New Delhi together with accrued interest. In addition to that a sum of Rs.5,47,10,557/- has been claimed for the expenses incurred towards the general upkeep and maintenance of the said Defendant Vessel DLB Nand Gaurav (MMSI: 419900783) as a sea worthy vessel.

33. In so far as the claim for maintenance of the Defendant Vessel is concerned, the Plaintiff in paragraph 39 of the plaint has pleaded that these expenses were incurred towards the maintenance and upkeep of the said vessel. The owner of the Defendant Vessel being in liquidation could not maintain the Defendant Vessel and hence, the vessel would have become a loss, but for the incurring of these expenses. The same was for the benefit of all the creditors and therefore the expenses ought to be accorded the highest priority and be treated as Sheriff's costs, charges and

expenses. Therefore, the Plaintiff is entitled to a decree in its favour for a sum of Rs.5,47,10,557/- as reflected in the particulars of claim annexed and marked as Exhibit Y to the Plaint. The documents in support of this claim are placed on record in a compilation of documents marked Exhibit Y colly. These claims would rank as Sheriff's costs, charge and expenses as they were incurred to maintain the vessel failing which it could have become a loss and may not have been available for the benefit of all the creditors. This Court vide its order dated 26th March 2024 in the case of **Louis Pappas Corporation Vs M.V. Kaptan Hasan Onal (IMO 9539559)**³ has considered a similar situation and ordered payments to be made out to the party who incurred similar expenses.

34. The suit is filed in time in view of the averments in paragraph 42 of the plaint. The Plaintiff has proved its claim with the relevant documents and through the evidence of its witness one Ritik AnilKumar Singh. The Recovery Certificate of DRT II, New Delhi also, substantiates this claim. Accordingly, the Plaintiff's claim deserves to be accepted and allowed.

³ **Commercial Admiralty Suit No. 14 of 2023**

35. Therefore, the Suit is decreed in terms of prayer clauses (a), (b) and (c) which reads thus:-

- “(a) an Order and Decree in favour of Plaintiff against the sale proceeds of said Vessel DLB Nand Gaurav (MMSI:419900783) lying with Prothonotary & Senior Master for a sum of Rs.479,96,43,080.33 in accordance with claim shown in Exhibit“Y” hereto together with further interest at the rate of 11% on the outstanding from 16.09.2022 till payment/realization and further costs, if so deem fit;*
- (b) For an Order and Decree in favour of the Plaintiff and against the sale proceeds of the said Vessel DLB Nand Gaurav (MMSI:419900783) lying with Prothonotary & Senior Master for a sum of Rs.5,47,10,557/- being the expenses incurred towards preservation and maintenance of the Vessel DLB Nand Gaurav (MMSI:419900783) for the period from January 2019 till 25/11/2021 with future interest at the rate of 11% from 25.11.2021 till payment/realization thereof and further costs if so deemed fit;*
- (c) For an order and declaration that the repayment of the principal amount and interest mentioned in prayer (a) above and costs of the suit and further costs, charges, expenses are secured and/or charged in favour of the Plaintiff by a charge thereon.”*

36. The Plaintiff is granted liberty to seek determination of priorities of its claim along with other claimants and seek payment out. Such an application will be decided in accordance with law.

37. Suit is disposed of accordingly. Costs of Rs. 25,000/- (Rupees Twenty Five Thousand only) is awarded to the Plaintiff.

[R.I. CHAGLA J.]