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(2004) 04 MAD CK 0189

In the Madras High Court

Case No : A. No''s. 627 to 630 of 2004 in A. No''s. 409, 466 and 566 of 2004 in C.S. No. 76 of 2004

ASM Shipping Ltd. — APPELLANT

Vs

Lyubarets Viktor and Others — RESPONDENT

Date of Decision : 17-04-2004

Acts Referred:
Merchant Shipping Act, 1958 — Section 143

Citation : (2005) 1 LLJ 235

Hon'ble Judges : R. Balasubramanian, J

Bench : Single Bench

Advocate : S. Vasudevan, for the Appellant; S.R. Raghunathan, for the Respondent

Judgement

R. Balasubramanian, J.—On various dates, the vessel in question (the same vessel) came to be arrested under orders of arrest of this Court, originally at the instance of the plaintiffs in the suit and subsequently at the instance of the crew members, who were allowed to intervene. The vessel, under orders of arrest of this Court, was detained in the Fort of Tuticorin. By filing Application Nos. 627 to 630/2004, the order passed ex parte arresting the vessel, was sought to be rescinded by the operator In India for the vessel in question. Considering the urgency shown, the vessel, which was in the Tuticorin Port at that time pursuant to the orders of arrest, was allowed to leave the Tuticorin Port on its onward journey to the Port of Visakapattanarn for unloading the cargo already loaded in it at Tuticorin, with a further direction that the vessel, on reaching the port at Visakapattanarn, would continue to remain arrested under orders of this Court by order dated February 17, 2004. Thus, the vessel continues to be detained in the port of Visakapattanam under orders of arrest passed by this Court as referred to earlier. Mr. S. Vasudevan learned counsel appears for the plaintiffs in the suit and for the other crew members and Mr. S.R. Raghunathan learned counsel appears for the operator in India for the vessel in question, each arguing to continue the order of arrest and to vacate the order of arrest respectively.

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2. Mr. S.R. Raghunathan learned counsel appearing for the operator in India for the vessel does not dispute the fact that wages still remain to be paid in respect of some of the crews and that whatever wages that remains due to any of the parties to the suit or to the intervenors, it would be paid at the time each one of them is signed off. He drew my attention to an averment to that effect in the affidavit of Sanjay Dasmunshy sworn to by him on February 28, 2004 and filed in the proceeding. The vessel remains arrested, as already stated, on the ground that wages payable to the plaintiffs and other crew members, who were allowed, to intervene, have not been paid. Inasmuch as there is no dispute that wages is still due atleast in respect of some crew members, who are on record before this Court, there is no question of releasing the vessel from the order of arrest at this stage. Mr. S.R. Raghunathan learned counsel would submit that this Court may be in a position to pass an order directing the release of the arrest order, on payment of the entire wages payable to the Parties to the proceedings and filing proof for the same. In my opinion, it appears to be an unworkable order. The parties are before this Court. Payment of wages and receipt of the same should be brought to the notice of this Court by the party paying and the party receiving it. Once that stands established, this Court may be in a position to release the vessel from the order of arrest.

3. However, the matter does not appear to end there. Mr. S. Vasudevan learned counsel appearing for the plaintiffs and other crews would state that besides the entitlement of wages, the parties to the proceedings namely, the plaintiffs in the suit and other crew members, who were allowed to intervene, are also entitled to payment of compensation. Compensation is yet to be paid. Therefore, release of the vessel from the order of arrest, on payment of wages alone, would be out of question, unless the owner of the vessel pays the compensation amount also to the parties to the proceedings. For this purpose, the learned counsel relies upon Section 143 of the Merchant Shipping Act, 1958. This claim for compensation is stoutly opposed by the learned counsel appearing for the vessel operating agent in India, by stating that even as on date, the cause of action to claim compensation has not arisen to any of the plaintiffs or to the crews. His submission is that, so long as there is no order of discharge of either the plaintiffs or the other crew members, Section 143 of the Merchant Shipping Act (hereinafter referred to as the Act) would not be attracted at all.

4. I applied my mind to the various materials available on record to find out whether the claim of compensation is well founded, or not. In deciding this question, the factual position as on this date between the plaintiffs to the suit and the other crew members of the vessel, who were allowed to intervene, vis-a-vis the vessel, must be taken note of. The pleadings in this case show the factual position. In paragraph 14 of the plaint it is alleged that the plaintiffs will have to be discharged from service only as per the contract of employment and if the discharge is irregular/improper, etc., the plaintiffs are entitled to compensation at the rate of three months wages payable by the defendant. The allegation in Paragraph 19 of the plaint is that, the plaintiffs continue to be under employment

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on board defendant''s vessel as on January 31, 2004. The plaint was verified on February 3, 2004 and presented before this Court on the same day. The vessel arriving at the Port of Tuticorin on January 28, 2004 is not disputed. There is nothing on record to show that either the plaintiffs or any of the crew members, who were allowed to intervene, have been discharged. However, from the affidavit sworn to by Sanjay Dasmunshy for and on behalf of the intervenor, namely, the Operating Agent in India of the vessel, it is seen that a stand had, been taken and it is as follows:

"The crew have been duly discharged at the Port of Visakapattanam as per the request made in their letter to the ITF Inspector and since the contract has worked itself out."

Written argument is filed on behalf of the plaintiffs referring to the above statement stating as follows:

"If that is the case, the crew would have been out of the ship and would have gone home. On the other hand, the fact is that all the crew continue to be on board the vessel without proper food and maintenance. Various Statutory provisions, which require to be followed in discharging a seaman/crew, have to be followed. However, none of the Statutory provisions namely, Sections 118, 119, 120 and 125 of the Act have been complied with. Therefore, the crew are, still on board the vessel, entitled to get wages upto the date of discharge from the defendant vessel."

Inasmuch as, the operating agent in India for the vessel in question had not produced any documentary evidence in support of his case that the parties to the suit had been discharged, it is not possible to accept that statement at this stage. If that is so, whether any of the parties to the suit namely, the plaintiffs or the crew members, who were allowed to intervene, have been discharged or not, has to be necessarily decided from what they plead. As already noted, there is no allegation in the plaint that the plaintiffs have been discharged. The affidavit filed in support of the application to allow the crew members to intervene, also does not throw any light on this. On top of this, the written submission made by the learned counsel for the plaintiffs and other crew members shows beyond doubt that all of them continue to be on board and that they are entitled to wages till the date of discharge.

5. Proceeding on the basis that there is no discharge, I applied my mind to Section 143 of the Act. It provides for payment of compensation as prescribed therein, if a seaman stands discharged, otherwise than in accordance with the terms of the agreement which he had signed, without fault on his part justifying the discharge and without his consent. Payment of compensation is, in addition to any wages, to which he is entitled to. A reading of Section 143 of the Act leaves no room at all to hold that the right to claim compensation would arise only when there is a discharge in violation of the terms of the agreement between the parties with no fault on the part of the person discharged or the

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same having been done without his consent. In other words, an order of discharge definitely should precede the claim for compensation and the right to compensation will have to be decided in the light of the requirement of Section 143 of the Act. Since, as on date there is neither pleading nor proof that any of the parties to the suit or the other crew members have been discharged in contravention of Section 143 of the Act (on the other hand, the pleading is that they continue to be on board), as rightly contended by the learned counsel appearing for the operating agent in India for the vessel there is no cause of action for any person to claim compensation at this stage. The tabular statement available on record shows that for some, contract period had already come to an end during voyage; for some, the contract had come to an end after the vessel reached the Port of Tuticorin and only in respect of one alone, the contract is still in force. Clause (10) of the contract provides that the agreement is terminated ipso facto upon the happening of any one of the events mentioned therein. One of the events mentioned therein is on the expiry of the agreed term, subject to clause (2) of the contract. Under clause (2) of the contract, it is seen that the operators will endeavour to relieve the employee on completion of the terms of the contract, but with a right to prolong until the completion of the voyage in progress. Therefore, if after the expiry of the contract between the crew on the one hand and the vessel on the other hand, they are not discharged as per the terms thereof, it only amounts to a failure on the part of the operator to discharge. Failure to discharge in terms of the contract, in my opinion, would not give a cause of action for the crew to come u/s 143 of the Act. Under that Section, if a seaman, having signed an agreement, is discharged in violation of the terms thereof on the grounds stated in the Section, then he alone would be entitled to compensation. The head-note of a Section always guides the Court in understanding the Section. The head-note of Section 143 of the Act says "compensation to seamen for premature discharge". If the Section is read, in the context of the head-note, then it is clear to my mind that the question of compensation would arise only when there is a premature discharge and not a discharge after the expiry of the period of contract. Even in such cases covered under the Section, it has to be found out whether such discharge is otherwise than in accordance with the terms thereof. Therefore, to decide whether a seaman is entitled to compensation or not, the Court has to find out whether any such seaman has been prematurely discharged otherwise than in accordance with the terms thereof. The validity or otherwise of the order of discharge, on a plain reading of Section 143 of the Act, has to be necessarily decided with reference to the terms of the agreement signed by the seamen and definitely not with reference to Sections 118, 119, 120 and 125 of the Act. At the risk of repetition, I would like to state that the claim for compensation provided for u/s 143 of the Act would arise only when there is a premature discharge and not in any other circumstances. Sections 118, 119, 120 and 125 of the Act prescribes the mode of discharge. It is not the case of the parties before this Court that those conditions are also incorporated in the terms of the agreement between the parties. Therefore, unless and until the requirements of the above referred to

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Sections are also incorporated in the contract itself as its part, it would not be possible for any of the plaintiffs or the crew members to fall back upon the above referred to provisions of law (really such a situation does not arise, because discharge is yet to take place, to claim compensation). Section 143 of the Act makes it very clear that a claim for compensation is maintainable only when there is a premature discharge otherwise than in accordance with the terms of the contract signed by the seamen.

6. Learned counsel for the applicant cited the following case laws namely,

(a) Steel Industrials Kerala Ltd. Vs. Capt. S.M. Rebello and Others, :

(b) Videsh Sanchar Nigam Ltd. Vs. M.V. Kapitan Kud and others, ; and

(c) an unreported judgment dated December 18, 2003 in A. No. 5413/2003 in C.S. No. 931/2003 of this Court,

to contend that if this Court comes to the conclusion that the vessel must be allowed to proceed further on its voyage by ordering its release, then it shall be done only after getting a security or a Bank Guarantee from them covering the claim amount. I applied my mind to the above referred to cases. In the first case, a master of the ship was before a learned Magistrate in Kerala u/s 145 of the Act. Admittedly, his tenure of contract was for a period of one year. However, his services came to be terminated within three months from the date of the contract. Claiming that he is entitled to be paid wages for the entire period of one year, the Master moved the Magistrate. The learned Magistrate found that the Master was entitled to compensation equated to three months alone. There were two appeals before the Hon''ble Supreme Court of India namely, one by the purchaser of the vessel challenging the validity of the order of the Court and the other by the Master himself, stating that he is entitled to a larger amount. The issue involved in those two appeals was whether the Master of a ship would be a seamen and whether the Master was entitled to wages for the entire period of one year by way of compensation? The answer was that the Master of a ship cannot be equated to a seamen and that, under the terms of the contract, he is entitled only to two months wages. On those findings, the appeals were disposed of. It must be noticed that, in that case decided by the Supreme Court, there was a premature discharge against the terms of the contract itself. In the case before me, there is no premature discharge. But the allegation is that, there is a failure to discharge as per the terms of the contract. Therefore in my respectful opinion, the first judgment of the Supreme Court referred to above would not apply to the case on hand. In the second judgment of the Supreme Court, there is a claim by VSNL against a foreign vessel in that the vessel had damaged the International cable. The Appellate Bench of the Bombay High Court, by modifying the order of the learned single Judge, directed the release of the foreign vessel. Aggrieved over that order of the Appellate Bench, VSNL was before the Supreme Court. There was no claim in the suit filed by VSNL coming under the provisions of the Merchants Shipping Act, 1958. It was a regular Admiralty suit. The Apex Court,

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finding a prima facie case in favour of the appellant before it, directed the release of the vessel from the order of arrest on certain conditions. It may be noticed here that in the said judgment, the Supreme Court gave guidelines as to what are the factors to be considered by a Court while releasing a foreign arrested ship? The said judgment was in the context of Rule 954 of the Admiralty Rules of the Bombay High Court, which contemplates that subject to the provisions of Rule 952, a property arrested under a warrant may be ordered to be released:

(a) on the defendant paying into Court the amount claimed in the suit; or

(b) on the defendant giving such security for the amount claimed in the suit as the Court may direct; or

(c) on any other ground that the Court may deem just.

7. The Supreme Court made it clear that the imposition of the above conditions are warranted only when the plaintiff shows prima facie a best case. Therefore, to put a condition on the vessel concerned in the case on hand for getting it released from the arrest warrant, the plaintiffs/intervenors should show a prima facie strong case. I have already discussed in the earlier portion of this order that the plaintiffs/intervenors do not appear to have a prima facie legal case to claim compensation u/s 143 of the Act. In the unreported judgment of this Court, full facts are not available. However, while passing orders in this case, the learned Judge had recorded the unconditional undertaking given before this Court by the vessel that it would give necessary Bank Guarantee to the satisfaction of this Court to meet the claim, if it ultimately ends in favour of the party asking for it. The learned Judge also while leaving the question open, namely whether the applicants are entitled to compensation for their discharge for being decided later, put a condition on the vessal that the claim amount should be secured. In other words, the order of this Court proceeds on the basis that there was a discharge. In the case on hand, I have found that discharge is yet to take place. Therefore, I respectfully state that none of the three judgments referred to above do apply to the case on hand. Accordingly, the earlier orders of arrest passed in the various applications referred to above stand confirmed and the corresponding application filed by the operating agent of the vessel in India to vacate the order stands dismissed. However liberty is given to the Operating Agent in India of the vessel in question to mention to this Court, after payment of the wages due to the plaintiffs and the other crew members of the vessel, to raise the order of arrest and at that time, this Court would consider the relief to be granted, after ascertaining the same from the parties claiming wages. For payment of admitted dues of wages to all the claimants namely, the plaintiffs and the crew members, the operating agent in India for the vessel is given time till April 24, 2004. List A. No. 1524/2004 on April 28, 2004 for orders.

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