(2022) 11 BOM CK 0044

In the Bombay High Court

Case No : Admiralty Suit No. 77 Of 2013

Axis Bank Ltd — APPELLANT

Vs

M. T. Pratibha Koyna And Others — RESPONDENT

Date of Decision : 15-11-2022

Acts Referred:

Companies Act, 1956 — Section 446
Admiralty (Jurisdiction And Settlement Of Maritime Claims) Act, 2017 — Section 4(1)(c), 10(1)

Citation : (2022) 11 BOM CK 0044

Hon'ble Judges : N.J. Jamadar, J

Bench : Single Bench

Advocate : Firoz Bharucha, Mayur Bhojwani, M. K. Ambalal, Mutahar Khan

Final Decision : Partly Allowed/Disposed Of

Judgement

N. J. Jamadar, J

1. This suit is instituted to recover the sums of US$16,752,568.82 and Rs.8,14,610/- along with further interest from Pratibha Shipping Co. Ltd. (in liquidation). The plaintiff also seeks a declaration that the aforesaid amount is duly secured by a valid and subsisting mortgage of defendant nos.1 to 3 vessels, of which Pratibha Shipping Co. Ltd. (in liquidation) was the erstwhile registered owner.

2. Initially the suit was instituted against Pratibha Shipping Co. Ltd. (Pratibha) (defendant No.4) and defendant nos.1 to 3 and 5 to 8 vessels, which were owned by defendant no.4. During the pendency of the suit, Pratibha, defendant no.4, was ordered to be wound up and the Official Liquidator came to be appointed as liquidator, by an order dated 28th July, 2014. By orders dated 11th December, 2014 and 18th December, 2014 leave was granted to the plaintiff under Section 446 of the Companies Act, 1956 to proceed with the instant admiralty suit and, consequently, Official Liquidator has been impleaded as defendant no.4 in place of the company (in liquidation).

3. At the outset it may be expedient to note that intervention applications were taken out by A/S Dan Bunkering Ltd. and Praxis Energy Agents S.A. to implead them as party defendants to this suit. By orders dated 14th September, 2016 in Chamber Summons Nos.1122/2014 and 1128/2014, the prayer for intervention was allowed and above entities were ordered to be impleaded as party defendants to the suit. Accordingly A/S Dan Bunkering Ltd and Praxis Energy Agents S. A. came to be impleaded as defendant nos.9 and 10.

4. Having noted the position of the parties, the material averments in the plaint can now be stated, in brief, as under:

(a) The plaintiff is a banking company under Banking Regulation Act, 1949. Defendant no.4 - Pratibha is a company registered under the Companies Act, 1956. Defendant nos.1 to 3 vessels were motor tankers flying Flag of India and registered at the Port of Mumbai. Likewise defendant nos.5 to 8 vessels (referred to as “the sister ships”) were also motor tankers flying Flag of India and registered at Port of Mumbai.

(b) Under a Facility Agreement dated 31st July, 2008 entered into between Pratibha and the plaintiff, in the capacity of Security Trustee, the plaintiff’s Singapore Branch (as the agent), Bank of Baroda, London Branch, UCO Bank, Singapore Main Branch, and UCO Bank, Hong Kong, the lenders made available to Pratibha – defendant no.4 an External Commercial Borrowing (ECB) term loan facility of upto US$ 22,500,000/-. In furtherance of the said agreement, Pratibha executed a Mortgage Deed dated 24th September, 2008 creating-

(i) a first ranking mortgage over defendant no.1 vessel MT Pratibha, Koyana.

(ii) a second ranking mortgage over defendant no.2 MT Pratibha Tapi and defendant no.3 MT Pratibha Neera. Subsequently the second ranking mortgage over defendant no.2 MT Pratibha Tapi was converted into a first ranking mortgage.

(c) Pratibha had availed the financial facility from the lenders to fund the acquisition of MT Sovereign, which was latter renamed MT Pratibha Koyna, defendant no.1. Under the terms of the facility agreement executed by and between the parties on 31st July, 2008, Pratibha was to repay the loan in ninety successive installments, the first following due six months after utilization date. Pratibha agreed to pay interest at the rate of six month LIBOR plus 3.45% margin. Pratibha undertook to keep a valid first preferred mortgage on defendant no.1 and a second preferred mortgage on defendant nos.2 and 3. The events of default, inter alia, included failure on the part of the Pratibha to pay any amount which had fallen due and/or failure to maintain insurance cover and/or abandonment of the vessels. The parties agreed that in the event of a default the plaintiff in the capacity of the security trustee was authorised, inter alia, to enforce the transaction security.

5. Pratibha duly executed a Mortgage Deed on 24th September, 2008 creating

first and exclusive statutory mortgage on defendant no.1 and second ranking statutory mortgage on defendant nos.2 and 3. The said mortgage deed was registered with the Marine Mercantile Department qua defendant no.1 on 16th October, 2008, qua defendant no.2 on 16th December, 2008 and qua defendant no.3 on 5th December, 2008. On 13th February, 2009, the charges were duly registered with the Registrar of Companies.

6. In the month of August, 2010, Pratibha availed loan under the Facility Agreement. Initially Pratibha was prompt in repayment. 41 installments were paid by or on behalf of Pratibha. Sometime in early 2012 Pratibha started experiencing financial difficulties and failed to service its installments and interest component under the terms of the Facility Agreement. Upon being apprised by one of the lenders, the plaintiff repeatedly called upon Pratibha to pay the outstanding amount along with accrued interest. Pratibha was also called upon to pay annual trusteeship fees Rs.8,14,610/- and facility agreement annual fees US$ 10,000.

7. Pratibha initially sought time to make the outstanding payment to the plaintiff and the lenders were requested to give no objection for sale of defendant no.2 vessel. Despite no objection dated 3rd January, 2013, Pratibha could not take steps to sell defendant no.2 vessel. Pratibha continued to commit defaults and also failed to keep defendant nos.1 to 3 insured, despite the insurance policy having lapsed on 31st December, 2012. Negotiations were held. Numerous opportunities were given to Pratibha. However, to no avail.

8. On the contrary, it transpired that Pratibha had been embroiled in several controversies since late 2012 and had failed to pay its creditors. Resultantly, many of Pratibha's vessels were placed under arrest including defendant nos.1 to 3 and 5 to 8 vessels. As of the date of the institution of the suit Pratibha owed a sum of US$ 16,752,568.82/- under facility agreement to the consortium of lenders, a sum of US$ 10,000 towards annual facility agreement fees and a sum of Rs.8,14,610/- towards trusteeship annual fees. Hence, the plaintiff was constrained to institute the suit for recovery of the outstanding amount and also for a declaration that the amount due under the facility agreement was secured by a valid and subsisting mortgage of defendant nos.1 to 3 vessels, as it constitutes a maritime claim.

9. Pratibha – defendant no.4 resisted the claim by filing written statement. Pratibha claimed that as of the date of the filing of the written statement i.e. 20th December, 2013, defendant no.2 – MT Pratibha Tapi, defendant no.3 – MT Pratibha Neera, defendant no.5 – MT Pratibha Indrayani and defendant no.8 – MT Pratibha Warna vessels were sold by public auction in exercise of admiralty jurisdiction. Defendant no.1 was in the control of Arab Shipbuilding and Repair Yard (ASRY) of Bahrain, which was exercising possessory lien over the said vessel. Defendant no.6 lay under arrest at the Port of Mormogoa in Admiralty Suit Nos.15/2013, 79 of 2013 and 9 of 2013. Defendant no.7 was in Zhoushan Xinya Shipyard Ltd. China, which was exercising possessory lien over the said

vessel.

10. Pratibha did not dispute that a facility agreement was executed on 31st July, 2008 between Pratibha, the plaintiff, as the Security Trustee, and the consortium of lenders to make available an External Commercial Borrowing (ECB) term loan facility upto US$ 2,25,00,000/- upon the terms set out thereunder. Pratibha, however, denied that as a condition of facility agreement, Pratibha had entered into a Mortgage Deed on 24th September, 2008. Likewise, the averments in the plaint reflecting upon the alleged various defaults on the part of the Pratibha in complying with the terms and conditions of the facility agreement were sought to be denied.

11. Pratibha contended that, Pratibha had been in severe financial constraints. Many of the Pratibha's vessels were under arrest and/or were sold in auction. Pratibha made an endeavour to deny the claim of the plaintiff in its entirety.

12. Defendant no.9 – A/S Dan Bunkering Ltd. in its written statement contended that the plaintiff had not been careful in sanctioning and disbursing the loan to Pratibha as the plaintiff had failed to undertake due diligence in the light of the precarious financial condition of Pratibha. Defendant no.9 further alleged that the suit has been instituted in collusion with the defendants so as to deprive the legitimate claims of genuine creditors. Defendant no.9 has denied transaction as well as execution of instruments between the plaintiff and Pratibha for want of knowledge. Nothing was stated to be due and payable by Pratibha to the plaintiff.

13. The written statement of Praxis Energy Agents SA – defendant no.10 also proceeds on an identical line.

14. In the wake of the aforesaid pleadings, initially, following issues were settled:

ISSUES

FINDINGS

1

Whether the suit is maintainable?

In the Affirmative.

2

Whether Defendant No.4 availed of a loan of US$ 22,500,000 under the Facility Agreement dated 31st July, 2008?

In the Affirmative.

3

Whether the Defendant No.4 committed any defaults of the terms of the Facility Agreement dated 31st July 2008?

In the Affirmative.

4

Whether Defendant No.4 executed the Mortgage Deeds dated 24th September 2008 and thereby created a First Charge on Defendant No.1 vessel in favour of the plaintiff and a Second charge on Defendant Nos.2 & 3 vessels in favour of the ECB Lenders?

In the Affirmative.

5

Whether the ECB Lenders' second charge on Defendant No.2 vessel created under the Mortgage Deed dated 24th September 2008 was subsequently converted to a first charge on the said Defendant No.2 vessel asstated by the plaintiff in paragraph Nos.12 & 13 of the plaint?

In the Affirmative.

6

Whether Defendant No.4 is liable to pay a sum of US$ 16,752,568.82 and sum of Rs.8,14,610/- as per particulars of claim annexed and marked as Exhibit “L” to the plaint?

Partly in the Affirmative.

7

. What decree, what order?

Suit partly decreed.

After the written statements came to be filed by defendant nos.9 and 10, the following additional issues were framed:

ISSUES

FINDINGS

1

Whether the plaintiff carried out the diligence before sanctioning the Financial Facility in question to Defendant No.4 (now in liquidation)?

In the Negative.

2

Whether Defendant Nos.9 & 10 prove that the plaintiff and Defendant No.4 (now in liquidation) acted in collusion?

In the Negative.

15. I have recorded my findings against each of them for the reasons to follow:

: REASONS :

16. In order to substantiate the averments in the plaint, the plaintiff has examined three witnesses namely Ms. Smita Patange (PW-1), the then Assistant Vice President - Stressed Assets, Mr. Kailash Choudhary (PW-2), the then Senior Manager – Stressed Assets and Subramanian K. Iyer (PW-3), the then Vice President of the plaintiff. The plaintiff has also tendered numerous documents evidencing the transaction between the parties including the Mortgage Deed and documents evidencing registration thereof with the competent authorities.

17. Defendant no.4 has not led any evidence. Similarly on 3rd October, 2018 a statement was made on behalf of defendant nos.9 and 10 that they do not intend to lead any evidence. The suit thus came to be posted for final hearing.

18. I have heard Mr. Bhojwani, the learned Counsel for the plaintiff and Mr. Khan, the learned Counsel for the Official Liquidator (defendant no.4). Defendant nos.9 and 10 made a statement that defendant nos.9 and 10 do not propose to contest the suit.

19. Before adverting to deal with the contentious issues,it may be expedient to note uncontroverted facts. First and foremost, the fact that Pratibha was the erstwhile registered owner of defendant nos.1 to 3 and 5 to 8 vessels, is not much in contest. Secondly, the facts that the Pratibha was ordered to be wound up and liquidator came to be appointed, are incontrovertible. By and large, there is not much dispute over the fact that on account of the precarious financial position Pratibha found itself in, many of its vessels including defendant nos.1 to 3 and 5 to 8 were arrested in exercise of admiralty jurisdiction and majority of them have been sold as well. Fourth, it is pertinent to note that, Pratibha did not dispute that a Facility Agreement came to be executed on 31st July, 2008 under which ECB term loan upto a sum of US$ 22,500,000 was granted to Pratibha. Fifthly, the execution of the Deed of Mortgage on 24th September, 2008 has also not been specifically denied. What was sought to be contended that was that the mortgage was not executed as a condition of the facility agreement.

Issue Nos.1 to 4:

20. In the light of the nature of the defence put-forth by Pratibha and virtually no contest on behalf of the Pratibha, during the course of recording evidence, and the statement on behalf of defendant nos.9 and 10, who had cross-examined the plaintiff’s three witnesses, that they do not wish to contest claim of the plaintiff, in my view, it may not necessary to delve deep in to the thickest of facts and issue nos.1 to 4 can be conveniently decided by a brief common reasoning.

21. As noted above, there is no qualm over the fact that the facility agreement dated 31st July, 2008 (Exhibit-P12) was entered into by and between Pratibha and consortium of lenders. In fact, in paragraph 6 of the written statement, Pratibha conceded in no uncertain terms that the facility agreement and the

sanction letters issued by the consortium of lenders are matters of record and speak for themselves. It is also imperative to note that the Pratibha made an endeavour to deny the claim of the plaintiff by simply making the denials for the sake of denial. It is trite that bare and evasive denials do not constitute traverse in true sense and, instead, for want of specific denials the averments can be deemed to have been admitted.

22. The endeavour of Pratibha to deny the execution of the Mortgage Deed in fulfillment of the condition of the facility agreement is, therefore, required to be appraised through the aforesaid prism.

23. The Facility Agreement (Exhibit-P12), inter alia, records that the loan facility was extended for acquisition of the targeted vessel. The Mortgage Deed (Exhibit-P18) under which first exclusive statutory mortgage of defendant no.1 vessel and second ranking statutory mortgage of defendant nos.2 and 3 vessel were created, records in clear and explicit terms that it was a condition of the facility agreement that the borrower (Pratibha) would enter into the said Deed of Mortgage. The execution of the said Mortgage Deed is further reinforced by registration of the mortgage qua defendant no.1 with the Registrar of Indian Ships, Marine Mercantile Department vide letter dated 7th October, 2018 (Exhibit-P31), qua defendant no.2 vide letter dated 5th December, 2008 (Exhibit-P3) and qua defendant no.3 vide letter dated 17th December, 2008 (Exhibit-P4). Pratibha had also registered the charges on defendant nos.1 to 3 vessels with the Registrar of Companies as evidenced by the registration certificates (Exhibits-P5, P6 and P7).

24. In the face of the aforesaid contemporaneous record, the bald denials in the written statement sans any evidence in support thereof, is of no significance. Once the factum of execution of the mortgage is satisfactorily proved, the tenability of the suit can hardly be put in contest.

25. Under Section 4(1)(c) of the Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017 ("the Admiralty Act, 2017") any claim arising out of a mortgage or a charge of the same nature on a vessel, constitutes a maritime claim. Under Section 10(1) of the Admiralty Act, 2017 registered mortgages and charges of same nature command second priority, next to a claim on the vessel where there is a maritime lien. Resultantly, the instant suit is maintainable and this Court in exercise of its admiralty jurisdiction can entertain, try and decide the suit.

26. Though an endeavour was made during the course of the cross-examination of the plaintiff's witnesses by defendant nos.9 and 10, to draw home the point that the loan has, in fact, not been disbursed, yet the same pales in significance as Pratibha has not contested the said fact. Moreover there are documents which lend credence to the plaintiff's claim that the lenders had disbursed the amount, in the nature of SWIFT receipts (Exhibit-P-33), statement of account maintained by one of the lenders i.e. Bank of Baroda, (Exhibit-P44), acknowledgment by

Pratibha dated 18th March, 2010 (Exhibit-P34) and 20th March, 2012 (Exhibit-P35).

27. The material on record thus establishes beyond the pale of controversy that Pratibha had executed the instruments and availed financial facilities thereunder, repaid part of the loan availed and on account of the financial constraints Pratibha found itself in, since the year 2012, there were defaults in repayment of the balance amount. Issue nos.1 to 4, therefore, deserve to be answered in the affirmative.

Issue No.5:

28. The conversion of the second charge over defendant no.2 vessel into a first charge, according to the plaintiff, was consequent to retiring of the erstwhile facility availed by Pratibha from the plaintiff. In the facts and circumstances of the case, this question does not assume much significance. In any event, the said fact is substantiated by an admission of Pratibha in the letter dated 22nd November, 2012 (Exhibit-P18), wherein it was stated in explicit terms that defendant no.2 MT Pratibha Tapi was offered as a collateral security (second charge over the vessel) against the facility of US$ 25,50,000 Million and, on satisfaction of the first charge, the second charge became as first charge of the ECB facility lenders. Likewise, in another communication dated 19th December, 2012 (Exhibit-P36) the said fact was again reiterated. In view of these admissions, issue no.5 can be safely answered in the affirmative.

Additional Issue nos.(i) and (ii)

29. In view of the statement on behalf of defendant nos.9 and

10 that they no more wished to contest the plaintiff’s claim, in strict sense, aforesaid issues do not warrant determination. Nonetheless, it would suffice to note that defendant nos.9 and

10 have endeavoured to draw home the point that the plaintiff had advanced the facility to Pratibha in a reckless manner, without carrying out requisite due diligence. Defendant nos.9 and 10 further allege that the plaintiff and defendant no.4 acted in collusion. In the very nature of these defences, especially the alleged collusion between the plaintiff and Pratibha, the onus lay on defendant nos.9 and 10 to buttress the same by leading cogent evidence. Defendant nos.9 and 10 chose not to lead any evidence.

30. Even otherwise, the alleged want of due diligence on the part of the plaintiff and collusion between the plaintiff and Pratibha appeared to be more in the nature of imaginary defences. There is material on record to show that the plaintiff had followed standard banking practices. At one point of time, Pratibha was the registered owner of as many as of eight vessels, Pratibha had retired its earlier debts. Pratibha had paid 41 out 90 installments of loan. The transactions were duly registered with the competent regulatory authorities, including Mercantile Marine Department and the Registrar of Companies. In the

circumstances, by no stretch of imagination, either want of due diligence or collusion can be attributed. Thus I am persuaded to answer additional issue nos. (i) and (ii) in the negative.

Issue Nos.6 and 7:

31. The particulars of the claim (Exhibit-L) give a break-up of the principal amount, interest from 13th July, 2012 to 30th June, 2013, and penal interest at the rate of 2% p.a. from 13th July, 2012 to 30th July, 2013 in accordance with the terms of the contract aggregating to US$ 16,742,568.82. The plaintiff has also claimed annual facility agent fees of US$ 10,000 and security trusteeship annual fees of Rs.8,14,610/-. Since the liability arising out of facility agreement is contractual one, I do not find any impediment in awarding the sum as claimed by the plaintiff. However, as regards the payment of interest post the institution of the suit in view of the order of winding up of Pratibha, different considerations come into play. The plaintiff would be entitled to interest from the date of the institution of the suit only till the date of the winding up order i.e. 28th July, 2014 at a rate to be determined by this Court. As regards interest post winding up order, it would be for the Official Liquidator to adjudicate the claim in accordance with the law. Issue no.6 is therefore answered partly in the affirmative, to the aforesaid extent. Resultatly, the suit deserves to be decreed.

32. Hence, the following order:

: ORDER :

I. The suit stands partly decreed against defendant no.4 in terms of prayer Clause (b) to the following extent.

(a) There shall be a decree against defendant no.4 and in favour of the plaintiff in the sums of US$ 16,752,568.82 and Rs.8,14,610/- along with simple interest at the rate of 7% p.a. from the date of the institution of the suit till the date of the winding up order of Pratibha (defendant no.4) i.e. 28th July, 2014.

(b) The claim for interest for the period beyond the date of winding up order shall be adjudicated by the Official Liquidator in accordance with law.

II. The plaintiff is entitled to costs of Rs.5,00,000/-.

III. Decree be drawn up accordingly.