
(2000) 03 BOM CK 0068

In the Bombay High Court

Case No : Notice of Motion No. 3202 of 1999 in Admiralty Suit No. 85 of 1999

Berner Shipping Inc. and another

APPELLANT

Vs

Mrs. Kala Ramchandran and others

RESPONDENT

Date of Decision : 30-03-2000

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2
Merchant Shipping Act, 1958 — Section 352
Specific Relief Act, 1963 — Section 41

Citation : (2003) 1 ALT 9 : (2000) 4 BomCR 565

Hon'ble Judges : F.I. Rebello, J

Bench : Single Bench

Advocate : D.C. Gomes, for the Appellant; E.P. Bharucha, Amrut Vernekar, Hemant Narichania, Sudeep Dasgupta, Ms. Kashmiri Bharucha, instructed by y Narichania and Narichania and Ms. F. Sethana, instructed by y Nadar Dunmmorr and Sett, for the Respondent

Judgement

F.I. Rebello, J.—Plaintiff No. 1 is a company incorporated under the laws of Liberia and were the owners of the vessel m.v. "CARDIGLIERA", flying the Panama Flag which hereinafter shall be referred to as "the vessel". On 13th November, 1996 the vessel sailed out from the port at Durban, South Africa for Cape Town in South Africa. The vessel sank off the coast of Durban, South Africa on 13th November, 1996 with all hands on board, which included officers and crew members. The plaintiff No. 2 as Agent had entered into an Agreement with the deceased either at Mumbai or Delhi. Defendants are being sued as claimants to the estate of the deceased and/or their legal heirs. The suit by, the plaintiffs is in a nature of limitation suit seeking to limit the liability of the owner of the vessel and also for injunction to restrain the defendants herein from pursuing the suit filed in London under Case No. 1998/Folio No. 1339 in the High Court of Justice, Queen's Bench Division, Commercial Court, London, England. Various other reliefs have also been prayed for which have been set out in the plaint.

2. By the present Notice of Motion, the plaintiffs have prayed for an injunction to

restrain the defendants herein either by themselves and/or by or through any other person or parties from filing and/or continuing the London proceedings pending the hearing and final disposal of the suit. Affidavit in support of the Notice of Motion has been filed by one Chandrahas Dattatray Phansekar as Constituted Attorney of the 1st plaintiff and Bombay Office Manager of 2nd plaintiff. It is contended on behalf of the plaintiffs that the parents of the deceased Electrical Officer Manuel J. Fernandes, defendant Nos. 27 and 28 have filed a suit before this Court being Admiralty Suit No. 56 of 1999, arising out of the death of their son on account of sinking of the vessel. Similarly, the parents of one Brian H. Gracias have filed a suit in a local Court in Goa being Inventoried Proceedings No. 43 of 1997. The first wife of the Bosun, M.I.A. Maulana has filed a suit in the City Civil Court in Mumbai. It is contended that they apprehend other suits will be filed by the cargo owners and others and the liability of the plaintiffs will exceed Rs. 1,74,85,550/-. It is contended that by virtue of Part X-A of the Merchant Shipping Act, 1958 the plaintiffs are entitled to maintain this suit limiting their liability for claims/damages arising out of the sinking of the vessel on 13th November, 1996. It is also contended that they are entitled to have a limitation fund constituted by this Court to determine the different claims of various claimants including the abovenamed defendants. It is further contended that the employment contracts with the officers and crew members were all entered into in India (Bombay and Delhi) within the Admiralty and Vice-Admiralty Jurisdiction of this Court. The said contracts were intended to be and are subject to and governed by the laws of India. The natural forum for these claims would be this Court. The defendants are not entitled to and cannot be permitted to go forum shopping. The proceedings in London, it is contended, are one such attempt and in these circumstances the plaintiffs are entitled to the injunction as prayed for. The employment contracts, it is contended are subject to and governed by the laws of India. The defendants who are claiming as legal heirs/nominees/next-of-kin reside and/or are gainfully employed in India, within the Admiralty and Vice Admiralty Jurisdiction of this Court. In these circumstances, it is this Court that would have the jurisdiction to hear and decide the present suit. It is further contended that the vessel at all material time as also when it sailed from the port of Durban was fit and seaworthy in all respects. The vessel sank on account of Vis Majeure/Force Majeure and the occurrence that is the sinking of the vessel giving rise to the purported claims have not arisen on account of any fault or privity or negligence of the plaintiffs herein. It is alleged that the legal heirs of the deceased seamen/officers apart from claiming compensation in terms of the Agreement are also claiming damages on the ground that the vessel was not fit and unseaworthy at the time it sank on 13th November, 1996 off Durban, South Africa. The proceedings in London have been filed through one Deirdre Fitzpatrick. Locus standi of the aforesaid Deirdre Fitzpatrick is questioned. The letters of administration obtained by the aforesaid Deirdre Fitzpatrick are disputed. It is pointed out that the High Court of Justice, Queen's Bench Division, Commercial Court, London has no jurisdiction over the plaintiffs therein, as they do not reside within the jurisdiction of that Court. No part of the

cause of action has arisen therein. None of the defendants reside and/or are gainfully employed there. The plaintiffs also do not reside within the jurisdiction of that Court. The proceedings in London are to harass the plaintiffs. It is further contended that the defendants have made false, dishonest, fraudulent and malicious allegations regarding Indian Courts and the Indian Judicial System in the London proceedings. The paragraphs purporting to that effect are reproduced in paragraph 11 of the affidavit. In these circumstances, it is contended that the injunction as prayed for be granted.

3. On behalf of the defendants one Jonathan Chaimovic, an Assistant Solicitor in the firm of Clyde & Co., instructed by the plaintiffs in the London suit namely International Transport Workers Federation ("the ITF") has filed an affidavit. It is contended that the affidavit is filed for the limited purpose of contesting the jurisdiction of this Court to entertain and try the suit and/ or to oppose the grant of any relief sought for in the Notice of Motion. The action in England, it is contended, has been commenced on behalf of the defendants as the vessel sank on account of over loading of the main deck with granite blocks causing the deck to buckle and/or collapse and water to Enter No. 1 hold. (There was no doubt that the vessel was designed to take water on deck and given the sea conditions, that she would have taken water on deck during the subject voyage without endangering the safety of the ship or the crew) and the collapse of the ship's structure due to corrosion related structural weakness and massive consequent structural failure. (In addition, further water ingress into holds could have occurred due to defective hatch covers). Reference is thereafter made to the preliminary investigations carried out by the South African Department of Transport. Affidavit sets out the steps taken to find out the cause of the sinking by actually undertaking dives over a period of four days. It is averred that Capt. Turner based on the dives carried out in March, 1998, informed that the cause of sinking could not have been a freak wave. In para 15, it is set out that it is highly appropriate that the matter be dealt with by the English High Court of Justice in the English proceedings commenced and known to the plaintiffs herein. The grounds listed for continuation of proceedings in England are :---

(1) The sinking was caused by one or a combination of events, the first primarily the responsibility of charterers, the second of ship owning interest;

(2) The charterers of the vessel are the first, seventh, eighth and ninth defendants in the English proceedings or alternatively those four parties acting together. Defendant Nos. 1 and 7 are the Companies incorporated and trading in the United Kingdom, The 8th defendant is a Gibraltar company and 9th defendant a Swiss company. None of the vessel's chartering interests are Indian nor do they appear to have any connection with India whatsoever. The 4th defendant in the English proceedings, is purported to be a Non Resident Indian.

(3) In so far as the suit filed herein, it is contended that the 1st plaintiff is a Liberian Corporation and the 2nd plaintiff is an Indian Company which claims only to be acting as agent of the true Manager of the vessel and presumably the

alleged responsible party, a Liberian Corporation called Wing Tak Shipping Limited. The Indian plaintiffs' connections to India more imagined than real. The 2nd plaintiffs claims it was merely an agent of a Liberian Principal and may therefore seek to escape liability on that basis.

(4) Though the English plaintiffs are Indian dependents of the deceased seafarers, the proceedings are being conducted by the Trade Union, the ITF on behalf of those defendants. The ITF is headquartered and based in England.

(5) The claim in English proceedings against the Indian plaintiffs and Mr. Sinha is based on the condition of the vessel, in particular the allegation that she suffered a massive structural failure due, inter alia, to corrosion. The records pertaining to annual survey and repairs of the vessel are kept at Lloyd's Register Office in London. The various records set out therein and it is set out are of Central importance are immediately accessible in London.

(6) The vessel was entered with the Ocean P & 1 Club which was at all material times managed from the U.K. Under the Club Rules, the Managers were authorised to inspect and survey the vessel and the Club were authorised to make recommendations. Those documents are available in England. Apart from that dive on the vessel were organised by Ocean and the dive report and video footage and other documentary evidence relating to casualty are in England.

(7) The claim against the charterers is based on the loading operations which were not carried out in India but in South Africa. It is learnt that the charterers were entered with the Charterers Mutual Assurance Association Limited in London and had commissioned one Mr. Brinks to produce a report following the sinking on behalf of the charterers. Various documents relevant to the casualty would have been detained therein.

(8) It is also pointed out that arbitration proceedings between the owners, the first Indian plaintiffs and charterers have been commenced in London and will take place in London.

(9) The cargo interests have commenced arbitration proceedings in London pursuant to a sub-charter party in relation to cargo lost.

(10) The dive inspections carried out in January, 1998 and commissioned by the ITF were in the management of Blue Water Recoveries Ltd., a U.K. company and in particular Mr. David Mearns, who lives and works in U.K. advised on all aspects of the survey and managed the diving inspections.

Some other details have been set out.

It is pointed out from this, the obvious suitability and appropriateness of the English Court as the proper forum to deal with the matter, is not in any way meant as a disrespect to this Court specifically, to the Indian Courts generally or the Indian legal system. It is further pointed out that no allegation let alone a derisive or derogatory allegations have been made against the Indian judicial

system. The reference is to the delays in the Indian judicial system. This does not amount to any derisive or derogatory allegation as sought to be alleged or at all. I need not advert to various other averments set out in the said affidavit. There is an additional affidavit dated 13th March, 2000 filed on behalf of the defendant Nos. 1 to 26.

4. With the above background, it needs to be decided as to whether the injunction as prayed for ought to be granted. At the hearing of the Notice of Motion, both the learned Counsels for the plaintiffs and defendants have reiterated the submissions as set out in their respective pleadings, Notice of Motion and replies. Basically, the contentions are that this Court would be the natural forum to institute the proceedings considering that the Agreements, were entered into in India. The defendants and/or legal heirs of all the deceased seafarers reside and/or carry on their business within the Admiralty and Vice Admiralty jurisdiction of this Court. It is further contended that once proceedings in Admiralty jurisdiction, of this Court has been invoked the plaintiffs could have maintained a counter-claim. Once that be so independently a suit could be filed to limit the claims in terms of Chapter X-A of the Merchant Shipping Act, In these circumstances, it is contended that the reliefs as prayed for ought to be granted.

On the other hand on behalf of defendants, it is contended that no part of the cause of action has arisen within the jurisdiction of this Court. The Charterers reside and/or have their offices in England. The vessel sank off the port of Durban, South Africa. The 1st plaintiff itself is a Liberian Corporation. The material evidence would be available in England and more specifically the suit in England is filed on basis of the actual fault or privity of the owners. That being the case, an action in limitation cannot be filed before this Court. Once that be the position, the question of the Court restraining the defendants from pursuing the English proceedings do not arise. Even otherwise, considering the nature of the evidence which has been gathered and the fact that the owners/managers would not be seriously prejudiced, it would be but appropriate that this Court reject the Notice of Motion.

5. With that background a few provisions of the Merchant Shipping Act, 1958 need be adverted to. In the first instance u/s 352-A the limitation of liability of owner for damages in respect of certain claims will arise in the event the occurrence giving rise to the claim did not result from the actual fault or privity of the owner. The onus of proving that it was not the fault of the owner is on the owner. u/s 352-F the limitation of liability can be invoked by an owner of the vessel and shall also apply to the charterer, manager and operator of the vessel, to the master, members of the crew and other servants of the owner, charterer, manager or operator acting in the course of their employment in the same manner as they apply in relation to the owner. In the instant case, therefore, as far as the present suit is concerned, Plaintiff No. 1 is the owner of vessel which sank. The role of plaintiff No. 2 was merely as an Agent who entered into agreement with the Seafarers (crew/officers). Prima facie, therefore, if the action

is an action for damages because of the sinking of the vessel on account of the fault of the owner, and the English proceedings are to that effect, then an action for limitation as contemplated by Chapter X-A would not be maintainable. The limitation of liability is specific, it excludes claims arising from the actual fault or privity of the owner. It is only in the event that the claim arises, not on account of the fault or privity of the owner, then an action for limitation could be instituted in this Court. At this stage what has to be considered are the pleadings and the documents in support of the pleadings including the report of DOD, South Africa. The other situation where an action for limitation can be instituted is once Admiralty action was instituted in this Court. This Court would then have jurisdiction to entertain a limitation suit. An Admiralty Suit in fact has been filed. A copy of the Admiralty Suit No. 56 of 1999 has been made available in these proceedings. In paragraph 4 of the plaint, it is averred that deceased Manuel Josefate Fernandes is survived by widow and a five year old daughter Pranita Fernandes. The plaintiffs in the Admiralty Action are the father and mother of the deceased Manuel Josefate Fernandes. Their address is shown as that of Goa. There are various other averments to indicate and show that the widow and the daughter of the deceased are residents of Goa. There is no material on record today to indicate whether the marriage took place in Goa. Prima facie if the marriage was solemnised in Goa, it is the widow and the daughter Pranita Fernandes who will be entitled to the estate of the deceased. If that be so, prima facie, this Court would not grant any relief in so far as the estate is concerned at the instance of the plaintiffs and in their favour. Even if it is held that the suit is maintainable it can only be to pursue the interest of the widow and the daughter. Assuming that there are other proceedings instituted in the Civil Court which gave rise or would result in the plaintiffs maintaining an Admiralty action in this Court for limiting the damages, let us examine the law as settled by the Apex Court and see whether considering the tests as laid down, whether this would be a fit and proper case to grant the reliefs as prayed for.

6. At the out set useful reference need to be made to the judgment of the Apex Court in the case of World Tanker Carrier Corporation Vs. SNP Shipping Services Pvt. Ltd. and Others, . While considering what is an action in limitation, the Apex Court has observed as under :---

"27. The provisions regarding a limitation action have reduced to a statutory form in Part X-A of the Merchant Shipping Act, 1958. Part X-A was introduced in the Merchant Shipping Act, 1958 by Amending Act 25 of 1970, in order to give effect to the Brussels International Convention of 1957 relating to the limitation of liability of the owners of sea-going ships, to which India is a signatory. Part X-A consists of sections 352, 352-A and 352-F. u/s 352-A the owner of a sea-going vessel may limit his liability in respect of any occurrence to his vessel resulting in loss of life or personal injury or loss of property or damage to cargo either in respect of persons or property carried on his vessel or on another vessel as also any liability in respect of damage to a vessel. The owner is entitled to limit his liability in respect of all such claims arising from one occurrence, in the manner

provided in section 352-B provided that the occurrence giving rise to the claims did not result from the actual fault or privity of the owner. The burden of proving that the occurrence which has given rise to a claim against the owner of a vessel did not result from his actual fault or privity, shall be on the owner."

Proceeding further the Apex Court has observed a limitation action in Admiralty Jurisdiction cannot be filed in a Court where a part of the cause of action arises, when all the claimants who are defendants to the action are foreigners who reside outside India, who do not carry on business in India and who have not submitted to the jurisdiction of any Court in India, and have not filed a liability action here and are not likely to do so. Considering the above, can it be said that the action could have been entertained within this jurisdiction. Admittedly, the charterers who are also liable along with the plaintiff No. 1 are mostly residing or having their offices in London. The plaintiff No. 1 itself is registered outside the territorial jurisdiction of this Court. The plaintiff No. 2 has merely stepped in as an agent. Prima facie, therefore, considering the nature of the action and the liability of those and/ or reliefs sought, it is doubtful at this prima facie stage to hold that an action in limitation could have been filed within the Admiralty and Vice Admiralty Jurisdiction of this Court.

7. The next question would be assuming that this Court would have jurisdiction, whether considering section 41 of the Specific Relief Act this Court could grant injunction to restrain the English Court from proceeding with the proceedings. I need not dwell at length on that issue as in my opinion that question has been answered by the Apex Court in *Oil and Natural Gas Commission of India Vs. The Western Company of North America*, . The Court while addressing itself to the question whether an Indian Court could grant relief to restrain a foreign Court from proceeding with an action, has observed that this Court (Apex Court) rarely exercises jurisdiction to restrain the parties from proceedings further with an action in a foreign Court. Dealing with section 41(b) of the Indian Specific Relief Act, the Apex Court observed that provision in its opinion will be attracted only in a situation where an injunction is sought to restrain a party from instituting or prosecuting any action in a Court in India which is either of co-ordinate jurisdiction or is higher to the Court from which the injunction is sought in the hierarchy of courts in India. The Apex Court then noted the ratio of the judgment in the case of *Cotton Corporation of India Limited Vs. United Industrial Bank Limited and Others*, . The Apex Court went on to observe that there is nothing in *Cotton Corporation case (supra)* to support the proposition that the High Court has no jurisdiction to grant an injunction or a restraint order in exercise of its inherent powers in a given situation. In other words, this Court in a suitable case would have jurisdiction to grant an injunction in the exercise of its inherent power. Tracing this jurisdiction, the Apex Court noted with approval the following passage extracted in paragraph 1039 of *Halsbury's Laws of England-Vol. 24* at page 579, which reads as under : ---

"With regard to foreign proceedings the Court will restrain a person within its

jurisdiction from instituting or prosecuting proceedings in a foreign Court whenever the circumstances of the case make such an interposition necessary or expedient, in a proper case the Court in this country may restrain person who has actually recovered judgment in a foreign Court from proceeding to enforce that judgment. The jurisdiction is discretionary and the Court will give credit to foreign courts for doing justice in their own jurisdiction."

8. With that we may now consider the relief as sought for. It has been described as an anti suit injunction. Such an injunction has been granted when it is required to prevent injustice. Useful reference for that purpose may be made to the judgment of the House of Lords in *Airbus Industries G.I.E. v. Patel and others*, 1998 WLR 686.

"It is at this point that, in the present context, the jurisdiction to grant an anti-suit injunction becomes relevant. This jurisdiction has a long history, finding its origin in the grant of common injunctions by the English Court of Chancery to restrain the pursuit of proceedings in the English Courts of common law, thereby establishing the superiority of equity over the common law. In the course of the 19th century we can see the remedy of injunction being employed to restrain the pursuit of proceedings in other jurisdictions within the United Kingdom, and even in other jurisdictions overseas. The principles upon which the jurisdiction may be exercised have recently been examined and restated by the Privy Council in *Societe Rationale Industrially Aerospatiale v. Lee Kui Jak* 1987 A.C. 871, and it is therefore unnecessary for me to restate them in this judgment. I wish to record however that the principles the restated have found broad acceptance in the Supreme Court of Canada See *Amchem Products Inc v. Workers' Compensation Board* 102 D.L.R. 96, in which the judgment of the Court was delivered by Sopinka, J., and the High Court of Australia see the judgment of the majority of the Court in *C.S.K. Ltd. v. Cigna Insurance Australia Ltd.*, 1997 146 A.L.R. 402; and a similar jurisdiction is exercised by the Indian Courts as the present litigation shows. The broad principle underlying the jurisdiction is that it is to be exercised when the ends of justice require it. Generally speaking, this may occur when the foreign proceedings are vexatious or oppressive. Historically, these terms have different meanings (see the *Aerospatiale* case, at pp. 893 B-E and 893H-849G); but in the *Amchem Products* case Sopinka, J., at p. 119 expressed a preference for a formulation of the principle based simply on the ends of justice, without reference to vexation or oppression. But as was stressed in the *Aerospatiale* case (see, in particular, at p. 895 D-H), in exercising the jurisdiction regard must be had to comity, and so the jurisdiction is one which must be exercised with caution; see at p. 892 E-F. This aspect of the jurisdiction has been stressed both by the Supreme Court of Canada (see the *Amchem Products* case, at pp. 120-121, per Sopinka, J.) and by the High Court of Australia (see the *C.S.R.* case at p. 436), and it is in my opinion, of particular relevance in the present.

I must stress again that, as between common law jurisdictions, there is no

system as such, comparable to that enshrined in the Brussels Convention. The basic principle is that each jurisdiction is independent. There is therefore as I have said, no embargo on concurrent proceedings in the same matter in more than one jurisdiction. There are simply these two weapons, a stay (or dismissal) of proceedings and an anti-suit injunction. Moreover, each of these has its limitations. The former depends on its voluntary adoption by the State in question, and the latter is inhibited by respect for comity. It follows that although the availability of these two weapons should ensure that practical justice is achieved in most cases, this may not always be possible."

I may also at this stage refer to the judgment in the case of *National Thermal Power Corporation Vs. The Singer Company and others*, . That was the case where the Court was considering as to which would be the appropriate forum for the parties to institute a suit. Useful reference may be made to paragraphs 16, 17, 18 and 19 of that judgment.

9. Considering the above, can it be said that the plaintiffs have made out and/or satisfied the requirements of grant of an injunction in their favour. It may be set out that even in the case of granting an anti-suit injunction the plaintiffs have to satisfy the predicates, required for the grant of an injunction, namely a strong prima facie case, balance of convenience and irreparable loss and injury. Have the plaintiffs done so. In my opinion, even if it is prima facie held that an action of limitation may lie, nonetheless plaintiffs have been unable to show that the balance of convenience is in their favour and/or that irreparable injury or loss would be occasioned if the injunction is not granted.

When the suit was filed English proceedings had commenced. An overwhelming majority of defendants in the English Court are not Nationals or residents of India. Arbitral proceedings arising from the sinking of the ship have been filed and are being proceeded with in England. Action is based on the fault or privity of the owner. No doubt, proceedings have also been commenced before this Court. It was however pointed out that these were initiated as the jurisdiction of the English Court had been assailed and to save limitation, in the event the English Court took the view that it had no jurisdiction. Most of the defendants in English proceedings have their offices there. Considering all these circumstances it can safely be said that balance of convenience is not in favour of the plaintiffs.

In so far as the irreparable loss is concerned, the action is based on the fault or privity of the plaintiffs. It is an action for damages/compensation. In these circumstances, no irreparable injury will be occasioned to the plaintiffs.

On the other hand, the defendants have been able to satisfy that the parties against whom they are claiming are residents outside this country. Most of the available evidence is outside this country and in fact is easily accessible to the English Courts. That being the case, in my opinion, the reliefs as prayed for cannot be granted. Once that be so, the Notice of Motion has to be rejected. Notice of Motion accordingly rejected.

10. In the circumstances of the case, each party to bear their own costs.
11. All authorities concerned to act on the ordinary copy of this Court duly authenticated by the Associate of this Court.
12. P.A. to give ordinary copy of this Order to the parties concerned.
13. Notice of Motion rejected.