
(2010) 03 BOM CK 0148

In the Bombay High Court

Case No : Notice of Motion No. 739 of 2010 in Admiralty Suit (Lodging) No. 3263 of 2009

Chemoil Adani Pvt. Ltd.

APPELLANT

Vs

M.V. Hansa Sonderburg and Others

RESPONDENT

Date of Decision : 17-03-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 11

Citation : (2010) 112 BOMLR 1285

Hon'ble Judges : Anoop V. Mohta, J

Bench : Single Bench

Advocate : Vikram Nankani and Madhur Bay, for the Appellant; Virag Tulzapurkar and Rahul Naricharia, instructed by Gordhandas and Fozdar for Defendant Nos. 1 and 2, for the Respondent

Judgement

Anoop V. Mohta, J.—The Plaintiffs have filed this Admiralty suit on 19/10/2009, in relation to claim of supply of fuel to Defendant No. 1 Vessel (Bunker) as the same was requisitioned by Defendant No. 3, the time charterer of Defendant No. 1 Vessel, and also taken out Notice of Motion for interim and urgent relief's. The Court on 19/10/2009, based upon an affidavit and material available on record passed the order and accordingly the vessel was arrested on 19/10/2002. The same has been under arrest and attachment since then. The copies of the Plaint and order were served to the vessel's representatives on 21/10/2009.

2. Defendant Nos. 1 and 2 have filed the present motion on 17/11/2009 for vacating the arrest order so made. It was defective, as observed, on 24/11/2009. Therefore, a afresh motion was taken out on 14/12/2009.

3. Now, the Motion so filed after more than 2 months only by Defendant Nos. 1 and 2. There is no appearance or reply filed by Defendant No. 3 and even no motion taken out for vacation of the earlier order.

4. Defendant Nos. 1 and 2, the registered owner, taken out this Motion to set

aside the order of arrest of Defendant No. 1 - vessel and also to seek security from the Plaintiff in sum of USD 350944.95 (United States Dollars three hundred and fifty thousand nine hundred and forty four and ninety five cents) towards losses and/or damages suffered on account of wrongful arrest of the vessel and further a sum of USD 12101.55 per day until the release of the vessel.

5. Defendant Nos. 1 and 2 averred that there was no privity of contract with the Plaintiff. The supply was requisitioned by Defendant No. 3 as the Plaintiff contracted with Defendant No. 3 alone as per the averments made in the plaint itself. There is no denial to this fact that the Plaintiff and Defendant No. 3 through exchange of e-mails requisitioned the bunkers fuel during the chartered. After negotiations on e-mails, the Plaintiff supplied bunkers on the vessel at Mundra. Defendant No. 3 was supposed to pay to the bunkers within 30 days. All the invoices being raised on it for the 800 MT at US\$ 412 per MT based upon the concluded contract on 29th June, 2009 as recorded on invoices dated 5th July, 2009. The invoice is also drawn in the name of Defendant No. 3 as the buyer and consignee. There is no demand made by the Plaintiff against Defendant No. 1 and 2 for payment of invoices. The vessel is under time charter to Defendant No. 3.

6. There is nothing on record to show that Defendant Nos. 1 and 2 authorized Defendant No. 3 to act on their behalf.

7. Under a time charter party, the liability to provide and pay for fuel is on the time charterer alone. The Plaintiff have knowledge of the same. The charters obligations are as under:

Clause 7: Charterers' Obligations:

The Charterers shall provide and/or pay the costs of and/or ensure the following throughout the currency of this Charter Party:"

12d(i) Bunkering: The Charterers shall supply fuels of the specifications and grades stated in Box 8. The fuels shall be of a stable and homogeneous nature and unless otherwise agreed in writing, shall comply with ISO standards 8217 : 1996 or any subsequent amendments thereof. The Chief Engineer shall co-operate with the Charterers' bunkering agents and fuel suppliers and comply with their requirements during bunkering, including but not limited to checking, verifying and acknowledging, sampling, readings or soundings, meters, etc before, during and/or after deliver of fuels.

"Clause 13: MASTER: " The Master..." although appointed by the Owners, shall at all times during the currency of this Charter Party be under the orders and directions of the Charterers as regards employment, agency or other arrangements....

8. Therefore, any officer authorized by the Master or the Master signs any papers/ documents/receipts including any other arrangements, it is only because of Clause 12(d)(i) and 13 of the charter party It is the time charterers who are

bound by such receipts and requisitions and they are liable to make the payment also.

9. There is no serious dispute to the proposition that a supply of bunkers gives rise to "Maritime claims" (1) M.V. Elisabeth and Others Vs. Harwan Investment and Trading Pvt. Ltd., Hanoekar House, Swatontapeth, Vasco-De-Gama, Goa, . (2) Liverpool and London S.P. and I Asson. Ltd. Vs. M.V. Sea Success I and Another, , and (3) Premium Nafta Products Ltd. and Ors. v. Fiji Shipping Company Ltd. and Ors. [2007] UKHL 40.

10. The bunkers requisition signed by Defendant No. 3- Vessel's Chief Engineer/ Master and it was delivered accordingly on 05/07/2009. It is acknowledged by the vessel again through its Master/ Chief Engineer. The bunkers delivery note incorporated the Plaintiff's standard terms and conditions which provides that the marine fuel is to be supplied to the credit of the vessel. The signatures were without any qualification.

11. The Plaintiff's averments in paragraph Nos. 2 and 3 are as under:

2. The Plaintiff understands that the Defendant No. 3 has taken the Defendant Vessel on a time charter from the Defendant No. 2, under a Charter Party dated 16/04/2009, for the period upto 21.05.2010.

3. During the charter, the Defendant Vessel was in need of bunkers and the Defendant No. 3 enquired with the Plaintiffs for the supply of 800 MT of bunkers. After negotiations, the terms of supply were agreed in an exchange of emails between the Plaintiffs and the Defendant No. 3 on 29/06/2009. Under the said Agreement, the Plaintiffs were to supply 800 MT of bunkers to the vessel at Mundra @ US\$ 412 Per MT, and the Defendant No. 3 was to pay for the bunkers within 30 days of the Invoice being raised on it for the quantity of bunkers delivered to the Vessel.

12. Therefore, admittedly the vessel was under time Charter to Defendant No. 3. Therefore, considering the above reproduced clauses that under the time charter agreement, the liability to provide and pay for fuel is on the time charter alone. The Chief Engineer under these clauses needs to carry out with the Charterers bunkering agents, certain obligations; and complied with the inquiry during the bunkering. Therefore, the documents so relied, which were without the signatures of the master, just cannot be the reason and/or foundation to accept the case that Defendant Nos. 1 and 2 are liable for the fuel charges so claimed in spite of the undisputed position on record that there was specific contract of supply of fuel between the Plaintiff and Defendant No. 3, which was concluded by exchange of e-mails and therefore, as the Bunkers were ordered by Defendant No. 3 who were admittedly, the time charterers of Defendant No. 1 vessel. There was no privity of contract between the Plaintiff and Defendant Nos. 1 and 2. The Plaintiffs have no right to arrest Defendant No. 1/ vessel, as done in the present case.

13. There is nothing on record that Defendant Nos. 1 and 2 authorized Defendant No. 3 to act on behalf of them neither it is the case of the Plaintiff to that effect. The documents so relied including requisitions and receipts for bunkers, need to be considered referring to Clauses 12(d)(i) and 13 of the Charter party. Therefore, merely because there is a maritime claims that itself cannot be the reason to arrest Defendant No. 1 for want of privity of contract and specific contract between the Plaintiff and Defendant No. 3. The Plaintiff, therefore, cannot entitle to raise claim against these Defendants.

14. This is also supported by the Judgments of this High Court-

(i) In *Raj Shipping Agencies Vs. M.V. "Bunga Mas Tiga" and Another*, (Paragraph No. 8) holds:

But existence of a right in the Plaintiffs against the owner is a must.... In my opinion supply of necessities would not make the owner of the vessel liable to pay the price of the supply unless the Plaintiff prove that the supplies were made at the instance of either the owner of the vessel or in at the instance of the person authorized by the Owner of the Vessel

It may be noted there is no pleading that in the Plaintiff that the Defendant No. 3 was authorized by the Owner of the Vessel to requisition the supplies for and on behalf of the Vessel and/or the owners.

(ii) *Scandinavian Bunkers A.S. v. NV Chopol-II* in Adm. Suit No. 26 of 2001, dated 11th July, 2002. has taken a similar view. The relevant paragraph 15, reads as follows:

In my view, the plaintiff averments do not show that the supplies were made at the instance of either the owner of the vessel or at the instance of the person authorized by the owner of the vessel. The averments in that regard are clearly based on the fact that acceptance of bunkers by the vessel itself created a contract between the plaintiff and the owner. These averments do not disclose a contract between the owners and the Plaintiff.

15. The similar was the case in *Yuta Bondarovskaya* (1998) 2 Lloyd's

16. The same is the case of *Shell Oil v. Lastrigoni*, as observed by the High Court of Australia (1974) HCA : 27-(1974) 131 CLR 1 (4(tm) JULY. 1974).

17. The Master's requisition dated 05/07/2009, Landing Certificate dated 05/07/2009 and bunkers delivered on 05/07/2009. All these documents have been signed by the Chief Engineer of the Vessel without any qualification. This cannot be treated as signed by Master. All these documents are from part of the record, based upon the earlier concluded contract between the Plaintiff and Defendant No. 3. These documents cannot be read in isolated on the basic contract between the parties and the obligation of the Chief Engineer, just cannot be treated as the liability of the owners/ vessel in the present facts and circumstances of the case. The documents/requisition for the purpose of custom

authority and for closing of the shipping bills cannot be treated as concluded contract between the Plaintiff and Defendant Nos. 1 and 2. The post contractual and post performance documents not signed by the Master, cannot be treated as final and concluded document or contract between the Plaintiff and Defendant Nos. 1 and 2, specifically when there is no sign or signature or acceptance by the authority of Defendant No. 1 and/or No. 2. There is no invoices raised on first or second Defendant though Bunkers were delivered on 5th July, 2009 and Defendant No. 3 was to pay for the Bunkers within 30 days of the invoices being raised on it, i.e. on 4th August, 2009. The Plaintiff, however, without due notice to Defendant Nos. 1 and 2, invoked the admiralty jurisdiction of this Court. Therefore, the arrest of the vessel by claiming exorbitant expenses and charges of the alleged maritime claims in absence of any privity of contract and in view of specific agreement between the Plaintiff and Defendant Nos. 3 who is not contesting and/or appearing for the proceeding in respect of the service either to support or to oppose the plaintiff. This facet also in my view goes against the Plaintiff.

18. The High Court Judgments mentioned above and as cited by the Plaintiff are distinguishable, basically when in those cases there was privity of contract between the parties. In the present case there is no contract as referred above. Merely, because there is a maritime claim as raised that itself in my view is not sufficient to arrest the ship as done in the present case. It is difficult to accept the case that Defendant Nos. 1 and 2 are liable for the concluded contract of Defendant No. 3 specially, admittedly when the Bunkers have not been purchased by the owner and/or they were governed by the time charter party of terms and conditions. The Singapore Court Ruling in the *Tanto Utamo* (1995) 1 SLR 761, therefore, is also distinct and distinguishable on the facts itself. That was clear case of supply of bunkers at the request of the Master on behalf of the owner.

19. Even the USC Maritime Code Title 46, as relied by the Plaintiff provides that the Bunkers should be ordered by the owner or person authorized by them. It is not the case of the Plaintiff that Defendant No. 3 is authorized by the vessel to purchase the Bunkers. Considering the facts and circumstances of the case and the governing law in India that statute is also of no assistance to the Plaintiff to continue with the arrest as obtained. Therefore, the same is the case in the Judgment of the US Court in *Marine Fuel Supply and Towing Inc. v. M.V. Ken Lucky*. 869 F2d 473 as relied.

20. The reliance on clauses 6 of the BIMCO Standard Bunker Contract in the present facts and circumstances is also of no assistance to the Plaintiffs, specifically when even under the said contract the Master has a right to bunkering the requisition form. There was no reference to the Chief Engineer or Officer on the ship in that contract. Here, there is nothing on record to show that the Chief Engineer was authorized by the Master also.

21. The Plaintiff's reliance in *M/s. Crescent Petroleum Ltd. Vs. m.v.*

"MONCHEGORSK" and another, , is of no assistance as it is also distinguishable on the facts. That was the case of Order VII Rule 11 of the Cod of Civil Procedure (for short, CPC) based upon the averments made in the plaint. The present case is for vacating the order of arrest. In absence of agreement between the parties and in view of specific agreement between Plaintiff and Defendant and in view of the fact that the Plaintiffs, admittedly issued the invoices only in the name of Defendant No. 3 and not of Defendant Nos. 1 and 2, the same judgment is also of no assistance.

22. The Judgment of Gujarat High Court in M.V Sea Renown v. Energy Net Limited, where there was material to show the agreement. There was express acknowledgment by the Master and therefore, the liability is of the owner.

23. In the present case, the Plaintiffs were fully aware that they were dealt with the time charter Defendant No. 3 and directly placed the order for bunkers on the Plaintiff. There was no specific invoices in the name of Defendant No. 1 and 2 in the present case. The same is the case with the Judgment of Gujarat High Court of Adani Enterprises v. MT Maliau.

24. In view of the above, the vessel is entitled to be released forthwith, subject to the clearance from the concerned authorities in accordance with

25. Having once observed above, considering the scope and purpose of admiralty Act, read with undertaking for compensation so given in such matters and in view of the averments with regard to the compensation so claimed in para 12 Exhibit 5, of notice of motion, reproduced as under:

US\$

US\$

1

Loss of daily hire due to arrest of ship

9735.00

2

Bunkers (Fuel for ship's generators etc)

3.66 metric tons per day @ US\$ 492.00 per

day

1800.72

Cost of barging above bunkers @ US \$ 17.80 per metric ton

65.15

Total per day for bunkers

1865.87

4

Agency fee per day @ \$ 50 per day + 10.3 % service tax

55.15

5

Port dues (payable to Mumbai Port Trust) @ USD 0.2111 on each Gross ton of ship + 10.3 % service tax. GT of Ship = 18335. Hence payable every 30 days = \$ 4270. Payable Daily = 4270/30

142.33

6

Daily cost for using anchorage - payable to Mumbai Port Trust @ US\$ 0.00042 per GT per hour + 10.3% service tax. Hence per day anchorage fee is $(18335 \times .000442 \times 24) + 10.3\% \text{ tax} = \text{US } \$ 214.53$

214.53

7

Miscellaneous + communications expenses per month + \$ 750.00 or \$ 25 per day

25.00

8

Light dues - payable to Central Government once every 30 days @ INR 8 per Net Registered ton. Hence daily dues = $\text{INR } (10,744 \times 8)/30 = 2865.06$ or US \$ 63.67 (Exchange rate : INR 45 = 1 USD)

63.67

12101.55

(United States Dollars twelve thousand one hundred one and fifty five cents.)

I am inclined to allow this notice of Motion in terms of prayer Clauses (a) only. So far as Prayer Clause (b) for compensations/damages are concerned, as same need evidence and material, at this stage, I am not inclined for grant the same as prayed. However, the liberty is granted to take appropriate steps and proceeding, for the same. All points are kept open for the trial.

26. No order as to costs.

27. The learned Counsel appearing for the Plaintiff, submits that the effect and operation of the present order be stayed. Considering the reasonings so given and as further delay as causes injury and affects the purpose of vacation of interim order, as passed, but in the interest of justice to give one more chance, I

am inclined to stay the order for two weeks only.