(2015) 06 BOM CK 0002

In the Bombay High Court

Case No : Chamber Summons No. 2135 of 2014 in Admiralty Suit No. 1134 of 2014 and Notice of Motion No. 2927 of 2014

In Re: Amrut Dredging and Shipping Limited

Date of Decision : 09-06-2015

Acts Referred:

Citation : (2015) 4 BomCR 271

Hon'ble Judges : S.C. Gupte, J

Bench : Single Bench

Judgement

S.C. Gupte, J.—The Notice of Motion is for vacating the arrest of a ship. The Applicant is a third party purchaser, who has purchased the ship before its arrest for the maritime claim of the Plaintiff against the former owner of the ship. By consent of parties, on 26 December 2014, pending the hearing of this Motion, the arrest order was vacated, but the Applicant was restrained from disposing of, alienating, encumbering or creating third party rights in respect of the ship. That injunction has continued till today.

2. The accompanying Chamber Summons is the Plaintiff''s application for joinder of the Applicant as a party defendant to the suit. The vessel under arrest now having been purportedly claimed to be owned by the Applicant, whose contract of purchase is assailed by the Plaintiff contending inter alia that the Applicant is merely an alter ego of Defendant No. 3, the erstwhile owner of the vessel, it is necessary and in the interest of justice that the Applicant be joined as a party defendant to the present suit. Such joinder is necessary to determine the real controversy in the suit. The Chamber Summons is, accordingly, allowed in terms of prayer clauses (a) and (b). The amendment shall be carried out within two weeks from today.

3. Coming now to the merits of the Motion, the arrest is objected to by the Applicant newly added Defendant No. 4 on several grounds. It is firstly claimed that the alleged claim for the Plaintiff against Defendant No. 3 and in respect of the 2nd Defendant vessel for necessaries supplied is not a maritime claim. Learned Counsel for Defendant No. 4 relies on the various admiralty statutes and

seeks to explain the judgment of the Supreme Court in M.V. Elisabeth and Others Vs. Harwan Investment and Trading Pvt. Ltd., Hanoekar House, Swatontapeth, Vasco-De-Gama, Goa, AIR 1993 SC 1014 : AIR 1992 SC 1014 : (1992) 2 JT 65 : (1992) 1 SCALE 490 : (1993) 2 SCC 433 Supp : (1992) 1 SCR 1003 in support of her submission that the claim is not a maritime claim and the vessel cannot be arrested for the same under the admiralty law applicable in India. Secondly, it is submitted that this Court has no admiralty jurisdiction over an Indian flag flying vessel registered under the Indian laws and the vessel cannot be arrested in pursuance of admiralty jurisdiction. Learned Counsel for Defendant No. 4 relies on judgments of the Kerala High Court in cases of Fithaly Fernando Vs. Principal Officer and Shipping Master, (2010) 3 KLT 741 and Chembolaparambu General Engineers Pvt. Ltd. Vs. M.V. Kavarathi, (2014) 4 KLT 237 and the judgment of Calcutta High Court in the case of Porto Maina Maritime Sa Vs. Owners and Parties Interested in The Vessel M.V. Gati Majestic, AIR 2014 Cal 47 : (2013) 4 CALLT 512 : (2014) 1 CHN 126 : (2014) 1 WBLR 1003 in support of this submission. Based on this submission and in the light of the judgments referred to, learned Counsel seeks to persuade this Court to take a different view from the view of another learned Single Judge of this Court (Dharmadhikari, J.) in Crown Maritime Co. (I) Ltd. Vs. Barge Salina II and Others, (2008) 1 BomCR 143 and refer the matter to a Division Bench. In Crown Maritime Co. this Court has taken the view that a plaintiff can invoke the admiralty jurisdiction of this Court even against an Indian flag flying vessel. It is submitted that this decision is not correct and the matter needs to be heard by a Division Bench. Thirdly, it is submitted that Defendant No. 4 is a third party transferee of the suit vessel, such transfer having taken place before the arrest of the vessel. It is submitted that the suit claim not having given rise to any maritime lien, the claim is not enforceable against the vessel in hands of a third party.

4. I propose to decide the Motion only on this last point, since I am of the view that the Plaintiff has failed to show how the vessel can be arrested in the hands of a third party. My reasons for this view are as follows :

5. There is controvertible evidence before the Court concerning the title acquired by Defendant No. 4 to the 2nd Defendant vessel M.V. Apsarika before the plaintiff sought arrest of the vessel. The following are some of the pertinent documents:

(i) Agreement for sale dated 15 March 2014 executed between Jaisu Dredging and Shipping Ltd., the registered owners of the vessel, and Defendant No. 4. (There are clear documents of title held by Jaisu Dredging and Shipping Ltd., the transferor of the vessel such as Certificate of Registry issued by the Gujarat Maritime Board.)

(ii) Payment Receipt of Rs. 54,45,000/-towards the consideration for sale (together with the cheques issued by the purchaser and the redacted bank statement evidencing payment).

(iii) Document of allotment of shares to Jaisu Dredging and Shipping Ltd.

towards part consideration of sale (together with the share application form and share certificate).

(iv) Sale Deed dated 22 March 2014 executed between Jaisu Dredging and Shipping Ltd. and Defendant No. 4.

(v) Bill of sale dated 22 March 2014.

(vi) Protocol of Delivery dated 22 March 2014.

(vii) Full and Final Payment Receipt issued by Jaisu Dredging and Shipping Ltd. on 22 March 2014.

Apart from these documents of title, there are various other documents which support the case of ownership of the 2nd Defendant vessel by Defendant No. 4 on the date of the arrest of the vessel.

6. The defendant vessel not having been owned by the person liable in personam for the suit claim, the same cannot be subjected to arrest. The claim of necessaries supplied to a vessel, not being a claim giving rise to a maritime lien, cannot be enforced against the vessel in the hands of a third party transferee. This Court has explained the law on the point in the case of Jones P. Company Vs. M.V. Kamal XXXXI and Anr. ADMS 67-14, Coram S.C. Gupte, J. dated 7/4/15.

7. The Plaintiff, however, submits that Defendant No. 4 is nothing but an alter ego of Defendant No. 3 and requires the Court to pierce the corporate veil to find the real owner of the vessel under arrest. The Plaintiff also questions the legality of the transfer of ownership of the vessel to Defendant No. 4. The Plaintiff submits that having regard to (i) the lack of authority in the person who purportedly acted on behalf of Jaisu Dredging to effect the transfer, (ii) the fact of the alleged transfer being financed through issuance of shares, which is a highly unusual type of transaction, and (iii) lack of evidence of any actual payment towards the alleged transfer, the transfer was a sham transaction executed only with a view to defeat the legitimate claims of creditors such as the Plaintiff.

8. In the first place, piercing of corporate veil is permissible only in the case of an established fraud. There is no evidence of such fraud in the present case, requiring the Court to lift the corporate veil to identify the real entity owning the ship. Secondly, a challenge to the transfer of a vessel, even if it is with a view to defeat or defraud the creditors, cannot lie before an admiralty court. An admiralty court gets its jurisdiction to proceed in rem against the vessel by reason, and on the basis, of the critical link between the ship sought to be arrested and the person liable in personam at two junctures, namely, at the time of accrual of the cause of action and at the time of arrest, as explained by this Court in the case of Jones P. Company (supra). It has to find these jurisdictional facts on the basis of evidence placed before it. In the present case, the validity of the transfer will have to be first adjudicated upon and only in the event of an established invalidity of the transfer can the link between the ship and the person

liable at the time of arrest be established and the admiralty court be approached for arrest on that basis. It is jurisprudentially impermissible to launch a judicial dispute aimed at nullifying a transaction of sale or transfer before the very court, which gets its jurisdiction only in the event of declaration of such nullity.

9. In any event, none of these facts have even been prima facie established by the Plaintiff so as to even claim a best arguable case. The Plaintiff has not shown or indicated any basis for challenging the authority of Mr. Vaghariya. The onus is on the Plaintiff to challenge such authority. Mr. Vaghariya is the Managing Director of Jaisu Dredging and Defendant No. 4 is well within its rights to rely on his authority to act on behalf of Jaisu Dredging. It is not for the Plaintiff to question the transaction of sale by challenging the manner of payment of consideration, namely, partly by cash and partly by issuance of equity. Such payment would be perfectly legal. The allotment of shares is backed by (i) a letter of allotment together with the share certificate, (ii) a certificate of net worth of Defendant No. 4 and (iii) a certificate of calculation of book value per share of Defendant No. 4. There is nothing questionable about any of these documents. There is adequate evidence produced by Defendant No. 4 to show part payment by cash of the consideration of transfer including the cheques, bank statements and receipts in connection therewith. There is, in other words, nothing to indicate that the transfer was a sham transaction.

10. In that view of the matter, the Plaintiff has failed to make out any case for continuing the arrest of the vessel or the injunction granted by this Court earlier.

11. The Notice of Motion is, accordingly, made absolute in terms of prayer clause (a). The ad-interim injunction granted by this Court on 26 December 2014 is vacated forthwith. Costs to be the costs in the cause.