

(2011) 12 BOM CK 0119

In the Bombay High Court

Case No : Appeal (L) No. 763 of 2011 in Notice of Motion No. 3030 of 2011 in Admiralty Suit (L) No. 2688 of 2011

M. Xin Xiang An and Others

APPELLANT

Vs

Sinoriches Enterprises Co. Ltd. and Others

RESPONDENT

Date of Decision : 08-12-2011

Acts Referred:

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

Citation : (2012) 2 BomCR 724 : (2012) 114 BOMLR 264

Hon'ble Judges : Mohit S. Shah, C.J.;Roshan Dalvi, J

Bench : Division Bench

Advocate : Aspi Chinoy, with Mr. Rahul Narichania, Mr. Anitav Majmudar, Shiv Iyer, Mr. Sidhharth Ranka, Mr. Aditya Krishnamurthy, Mr. Sujan Malhotra instructed by M/s. Bose and Mitra and Co, for the Appellant; Prashant Pratap with Mr. Manoj Khatri, for the Respondent

Final Decision : Dismissed

Judgement

1. The Appellants (Defendants 1 and 2 in the original suit) have challenged the order of the learned single Judge of the Admiralty Court dated 19 October 2011 dismissing the Notice of Motion taken out by them for dismissal of the suit and for vacating the order of arrest of Defendant No. 1 Vessel dated 27 September 2011.

2. The Plaintiff sued the Defendants upon a maritime claim by the Plaintiff consequent upon its rights under a charter party executed by Defendant No. 3. Defendant No. 1 is the relevant vessel arrested under the aforesaid order dated 27 September 2011. Defendant No. 2 is stated to be the owner of the vessel. Defendant No. 2 is stated to have entered in to a charter party Agreement dated 25 September 2009 (Time Charter [TC]) with Defendant No. 3. The Defendant No. 3 is stated to have sub chartered the vessel under another TC to the Plaintiff dated 21 December 2009.

3. It is the claim of the Defendants 1 and 2 that Defendant No. 2 has entered

into a charter party agreement by way of TC not with Defendant No. 3, but with one Yang Pu Zhe Hai Shipping (Hong Kong) Co. Ltd.(H.K. Co.) and H.K Co., entered into a charter party agreement with Defendant No. 3 who in turn entered a sub charter party agreement with the Plaintiff.

4. It is admitted by the Defendant that the charter party agreement entered into by H.K. Co., with Defendant No. 3 is the same as the charter party agreement shown by the Plaintiff to have been entered into by Defendant No. 2 with Defendant No. 3 on 25 September 2009.

5. Hence we find that whereas the Plaintiff's case is constituting a chain of agreements between Defendant No. 2 - Defendant No. 3 - the Plaintiff. The agreements stated by the Defendant to 1 & 2 have been executed form a chain of agreements between Defendant No. 2 - H.K. Co., - Defendant No. 3 - Plaintiff.

6. The TC between Defendant No. 3 and H.K. Co., is not produced by the Defendant. The agreements relied upon by the Plaintiff are produced as Exhibits A & B to the plaint. The agreement between Defendant No. 2 and Defendant No. 3 is dated 25 September 2009 and the agreement between Defendant No. 3 and the Plaintiff is dated 21 December 2009. If the contention of the Defendant is correct, it can be tested only upon the production of the charter party agreement alleged by the Defendant to have been executed with H.K. Co., It would be seen that on 25 September 2009 the Defendant No. 2 entered into another agreement with H.K. Co., the day on which the H.K. Co., itself entered into the agreement with Defendant No. 3. During the subsistence of that agreement Defendant No. 3 has admittedly entered into the agreement with the Plaintiff.

7. The agreement relied upon by the Plaintiff, Exhibit A to the plaint, is stated by the Plaintiff to have been executed by Defendant No. 2 with Defendant No. 3 and is stated by the Defendant to have been executed by H.K. Co., with Defendant No. 3. The agreement Exhibit A to the plaint is shown to be communicated under the Email dated 23 September 2009 of H.K. Co., to Defendant No. 3.

8. Under that TC the owner/Despondent owner is shown to be H.K. Co. The other party to the contract is shown to the Defendant No. 3. Clause 11 of the TC deals with hire payment. Clause 11(a) shows that upon failure to pay the hire charge regularly and punctually or upon any fundamental breach of the charterparty, the owner would be at liberty to withdraw the vessel from the service of the Charter without prejudice to other claims Clause 18 of the TC deals with subletting of the vessel. Under that clause the Charterer is at liberty to sublet the vessel during the time covered by the TC, but remained responsible for the fulfillment of the charterparty.

9. The Defendant No. 3, therefore, had specific liability to pay the hire charges of the TC. Defendant No. 3 had liberty to sublet the vessel, but even after subletting its responsibility for the payment of hire charges remained.

10. The general data relating to the Defendant No. 1 Vessel specifically showed

Defendant No. 2 as the despondent or TC owner.

11. The cargo questionnaire relating to the data of the Vessel showed specifically Defendant No. 2 as the owner as also the Manager of the Vessel with its contact particulars in clauses 1.8 and 1.9 respectively. Though Defendant No. 2 itself was shown to be the despondent or TC owner the particulars required of such contracting party under clauses 1.10 thereof remained blank. If the Defendant No. 2 had chartered the Vessel to H.K. Co., as the despondent owner, this clause would require to show when the vessel was delivered to the despondent owner. If the vessel was at that time on any TC that fact would have had to be mentioned under the said clause. No particulars of H.K. Co., are given.

12. The only reference to H.K. Co., is as owner/despondent owner in the operative part of the agreement showing H.K. Co., as the contracting company in Part II. This is directly contrary to the general data specifically annexed to the TC showing the name of Defendant No. 2 alone.

13. A reading of the TC makes no mention of any other TC of the same date between Defendant No. 2 and H.K. Co., if there was one. No such TC is produced. Defendant No. 2 is shown to be and claims to be the owner of Defendant No. 1 vessel by both the parties. The only aspect with which the parties are in dispute is with regard to the other TC stated to have been executed by the Defendant No. 2 with H.K. Co. There is no intrinsic evidence of such a contract in the TC dated 25 September 2009, Exhibit A to the plaint and none can be seen in the absence of the production of the contract itself.

14. The Defendant No. 3 entered into a similar TC with the Plaintiff called back to back agreement. The clauses of both the TCs are identical though the Defendant No. 3 is not shown as the owner, but only as the despondent owner. Under clause 11 of the TC the Plaintiff is required to pay hire charges much as Defendant No. 3 was required to pay the hire charges under the TC of September 2009. Under clause 11(a) upon the failure of the Plaintiff to punctually and regularly pay the hire charges, much like that of Defendant No. 3 in the earlier TC, or upon any fundamental breach of the TC Defendant No. 3 was entitled to withdraw the vessel from the services of the Plaintiff as the charterer without prejudice to other claims.

15. The general data relating to Defendant No. 1 vessel annexed to the TC in both the TCs shows Defendant No. 2 as the despondent or TC owner.

16. Even the cargo questionnaire annexed to the TC of December 2009 with the Plaintiff shows Defendant No. 2 as the owners and managers under clause 1.8 and 1.9 respectively much as in the TC of September 2009 between Defendant No. 2 and Defendant No. 3. Though the Defendant No. 3 is shown as despondent owner, no particulars are stated in clause 1.10 in the TC of December 2009 much as in the TC of September 2009.

17. There has been no breach of clause 11 of the TC shown to have been

committed by Defendant No. 3 or the Plaintiff. There is no fundamental breach of the TC shown to have been committed also. Nevertheless the vessel was withdrawn during the period the TC of the Plaintiff was in force and the Plaintiff was informed of the withdrawal under an Email dated 10 June 2011.

18. The Plaintiff contends that the Defendant No. 2 withdrew the vessel. The Defendant No. 2 contends that it has not withdrawn and that H.K. Co., has withdrawn the vessel. The Email of withdrawal does not mention the reason for the withdrawal. Mr. Chinoy on behalf of Defendant No. 2 contended that the only reason for withdrawal of the vessel was the nonpayment of the hire charges under the TC.

19. The contention is incorrect. Clause 11 relates to the nonpayment of hire charges as also the commission of the fundamental breach. Though nonpayment of hire charges would be specific failure of payment of a given month, the fundamental breach would be much wider. If any such breach is committed by the charterer the notice of withdrawal must give its particulars. Hence upon the withdrawal of the vessel the charterer must know the reason for the withdrawal, be it the nonpayment of hire charges or any fundamental breach. The cryptic Email of withdrawal which constitutes a notice of termination of the charter party and its aftermath was in the following terms:

>>Dear Agent,

>>Good day.

>We are the shippowner of M.V. "xinxiangan". We had withdrew the vessel from Hong Kong China Glory

>>Please note that the Vessel are to enter the shipyard in Zhoushan after completion of discharge.

>>

>>Tks & brgds

>>Yang Pu Zhe Hai

>>Luo Yan

(reproduced with errors therein)

20. The Email is sent from the Email Id of one Luo Yan on behalf of Yang Pu Zhe Hai (YPZH). The domain name of the Email is also YPZH. It shows the H.K. Co. at the said domain name thus:

21. The Plaintiff through its lawyers replied the Email on 9 June 2011 at two Email Ids., with the same domain name YPZH.

22. The Defendant No. 2 replied the Plaintiff's Email through its lawyers the very next day on 10 June 2011 refuting that it had entered into any TC with

Defendant No. 3 and also that it had withdrawn the vessel "from their Time Charterer's service".

23. Upon the premise that the unilateral withdrawal tantamount to a breach of the TC and is accordingly a tort, the Plaintiffs sued Defendants 2 and 3 and got the vessel arrested.

24. The first contention of Defendant No. 2 for the dismissal of the suit is that the Admiralty Court has no jurisdiction in admiralty law since the Plaintiff's claim is not a maritime claim. It is not shown under which provision of the CPC the application is made though it is claimed to be under Order 7 Rule 11(d) of the CPC. We may mention that the case of defendants 1 and 2 does not fall within the provision contained in Order 7 Rule 11 of the CPC requiring the Court to reject the plaint upon the cases illustrated therein. Before the learned Single Judge it was contended that the maritime claim arising out of the International Convention Relating to the Arrest of Seagoing Ships (Convention of 10 May 1952) had to be a claim arising inter alia out of the hire of a ship under a TC or relating to the carriage of goods under such TC. The Plaintiff's claim is not of either kind and the Plaintiff's claim in tort upon a breach stated to have been committed by Defendant Nos. 2 and 3 by withdrawal of the ship is not a maritime claim *stricto sensu*.

25. Such a contention cannot arise under Order 7 Rule 11(d) of the CPC as a bar created by any law. Article 1 of the above convention only shows the meaning of the maritime claim. It would have to be tested in the suit itself whether the Plaintiff's claim is the maritime claim or not. Merely upon the averments in the plaint shown by the Defendants, even if the Plaintiff's claim cannot be taken to be maritime claim the suit cannot be taken to be barred under the convention and the jurisdiction of the Admiralty Court in a claim made by the Plaintiff upon a Charterparty Agreement (TC) cannot stand barred requiring the plaint itself to be rejected. The learned Judge is correct in not exercising such discretion under prayer (a) of the Notice of Motion.

26. Defendants 1 and 2 also applied for vacating the order of arrest dated 27 September 2011 under prayer (b) of the Notice of Motion. This was on the merits of their case. It is the case of the Defendants that Defendant No. 2 who is the owner of the Defendant No. 1 chartered Defendant No. 1 to H.K. Co., which is a separate legal entity though it is its associate company. H.K. Company chartered it to Defendant No. 3 who in turn "appears to have" chartered it to the Plaintiff. This seminal aspect is shown by the operative part of the TC of September 2009 alone, without more. As aforesaid this clause is directly contrary to the general data annexed to the said TC showing Defendant No. 2 and not the H.K. Co. as the owner/despondent owner of the vessel.

27. Further though the withdrawal Email is sent by and on behalf of YPZH, Defendant No. 2 has claimed that it has not sent the Email but that H.K. Co. has sent it. Despite the clauses 18 in the TC relating to subletting of the vessel,

Defendant No. 2 has claimed that neither itself nor H.K. Co., had any contract of carriage or charter party with the Plaintiff and consequently had not committed any breach thereof. It, however, claimed that both Defendant No. 2 as well as H.K. Co., had the right of withdrawal to the knowledge of the Plaintiff. It further claimed that Defendant No. 1 vessel did not belong to the H.K. Co., who were only the despondent owners. Consequently, Defendant No. 2 disclaimed liability of the claim made under a charter party despite the fact that it was the owner of the vessel under the TC on the premise that it had not entered into any charter party with Defendant No. 3 and that H.K. Co., who entered into the charter party with Defendant No. 2 was not the owner though admittedly it was its associate company having the same domain name in its Email Id.

28. Mr. Chinoy on behalf of Defendant Nos. 1 & 2 drew our attention to the case of *Scandinavian Trading Tanker Co. A.B...Respondents And Flota Petrolera Ecuatoriana ...Appellants* 1983 3 W.L.R. 302 relating to the entitlement of the ship owner to withdraw services of the vessel from the charterer under the TC upon failing to pay installments of hire purchase in compliance with the provisions of the charter. It is held in that judgment that the TC transfers no interest to the charterer or gives any right of possession of the vessel to him. It is only a contract for services to be rendered to the charterer by the ship owner. Therefore the use of the vessel by the ship owner's own servants, masters and crew is not specifically enforceable. Consequently, only a remedy in damages for breach of contract would arise under the TC and if there is withdrawal of the vessel upon nonpayment of the installment in precise compliance with the TC the ship owner would be taken not to have committed any breach of contract and hence even the remedy in damages would not be open to the charterer.

29. Mr. Pratap on behalf of the Plaintiff drew our attention to the judgment in the case of *Samick Lines Co. Ltd. Vs. Owners of the Ship "Antonis P. Lemons"* 1985 (1) Lloyd's Law Reports 283 HL. That was also the case of TC. The subcharter contained an express guarantee relating to the vessels maximum draught on arrival at the port which had not to exceed 32 ft., in salt water. The vessel exceeded 32 ft. in salt water since it was overloaded. The vessel was not allowed in the port until it lightened by discharge of part of its cargo, causing a delay and the consequent additional expense which were claimed as damages. This would tantamount to a fundamental breach of the terms of the TC constituting the tort of negligence. It was held that such a claim was a maritime claim arising out of an agreement relating to carriage of goods in a ship or to use or hire of a ship analogous to clause (d) and (e) of Article 1 of the Convention. An action upon such a claim would, therefore, be within the jurisdiction of the Admiralty Court.

30. The learned Judge has considered the case of Defendant No. 2 relating to its alleged charter party and the total lack of any documentary evidence to substantiate that claim. He has, therefore, rightly concluded that such a claim would have to be gone into in the suit upon trial.

31. Indeed the Defendant No. 2 has not made out a case for vacating the order

of arrest upon its seminal case of not having entered into the TC with Defendant No. 3 and it is further case of the H.K. Co., having entered into the TC with Defendant No. 3 and it having entered into the TC with H.K. Co., without producing the document substantiating their fact.

32. Consequently the dismissal of the Notice of Motion of the Defendant is correct.

33. The Appeal is dismissed.