

(2011) 11 MAD CK 0138
In the Madras High Court
Case No : O.S.A. No. 78 of 2009

M/s. Danmar Lines

APPELLANT

Vs

M/s. Vestas RRB India Ltd., M/s. United India Insurance
Company Ltd. and M/S. Hapag Lloyd Container Lines

RESPONDENT

Date of Decision : 17-11-2011

Acts Referred:

Limitation Act, 1963 — Section 14

Citation : (2011) 11 MAD CK 0138

Hon'ble Judges : R. Mala, J; R. Banumathi, J

Bench : Division Bench

Advocate : S. Raghunathan, for the Appellant; G. Guruswamynathan for M/s. Nageswaran and Narchania for R1 and R2 and Mr. Bijai Sundar for R3, for the Respondent

Final Decision : Dismissed

Judgement

R. Mala, J.—Challenge in this appeal is the order passed by the learned single Judge in A. No. 5538 of 2003 in C.S. No. 950 of 2003 filed under Order VIII-A(1) of the CPC read with Order V-A of the High Court Original Side Rules, for the purpose of claiming contribution towards the suit claim from a third party, who is not a party to the suit dismissing the same by stating that this Court has no jurisdiction as per the terms of Bill of Lading between the first defendant and the third party.

2. The facts, which are necessary for the disposal of this appeal are as follows:

(i) The first plaintiff, who is the first respondent herein, imported a consignment of Gear Boxes from a Company in Finland, which was insured with the second plaintiff/second respondent herein and the consignment was entrusted to the first defendant, who is a Sea Carrier, having registered office at Basel, Switzerland. The second defendant is the agent of the first defendant, who signed the Bill of Lading and acknowledged the entrustment of Cargo.

(ii) The said cargo was intended to be transhipped from Helsinki Sea Port to Chennai Sea Port. But the cargo was lost midway, resulting which, the suit was filed by the first plaintiff/first respondent. After receipt of summons, the first defendant had come forward with an application in A. No. 5538 of 2003 for impleading the third party under Order VIII-A(1) of C.P.C. read with Section V-A of the High Court Original Side Rules.

(iii) Applicant/first defendant is carrying on business as Carriers of cargo and they entrusted the cargo to the third party/third respondent herein, who is also a Sea Carrier, for transhipment from Helsinki to Chennai and the third respondent issued their Bill of Lading on 22.11.2002. As per the Bill of Lading, the second defendant was the shipper of the said cargo and M/S. Lee and Muirhead Ltd., Chennai, who are the agents of the first defendant at Chennai were the consignees. The third party/third respondent undertook to carry the said container by the vessel M.V. Carina from Helsinki to Hamburg and after transhipment at Hamburg, it was to be carried by the vessel M.V.Hongkong Express to Singapore. The said container was to undergo further transhipment at the port of Singapore from where, it was to be carried by a Vessel M.V.Tiger Sky to Chennai. Having issued a Bill of Lading, third party/third respondent herein was liable to deliver the said container in good order and condition at Chennai for being ultimately delivered to the first respondent (i.e.) first plaintiff.

(iv) Applicant/first defendant stated that the said container with the said cargo was not delivered at Chennai and enquiries were therefore made with the third respondent herein through their agents at Chennai and Singapore. Applicant/first defendant then came to know that the said container with the said cargo had not been landed even at Singapore.

(v) On 10.12.2002, there was a collision between two vessels viz., M.V. Hongkong Express and Sara Glory at Suez canal. Since the cargo has been entrusted with the third party, they alone responsible for delivering the said cargo and since they had not delivered, they committed the breach of contract. But the third party had not taken any action regarding the same. Even the third party had not informed the first defendant/appellant as to what happened to the cargo or as to how it was lost. As per the Bill of Lading, the third respondent alone is responsible for the safe delivery of the cargo at the port of discharge which they have failed and neglected to do and are therefore liable to compensate the applicant/Appellant herein for all the loss that they would suffer on account of the claim lodged by the first plaintiff/first respondent herein. Since the respondents 1 and 2 were claiming that they suffered loss, they are entitled to contribution and also liable to be indemnified by the third party, who is the third respondent herein in the event of the suit being decreed against them although the third party/third respondent is not a party to the suit. Since it is only the third respondent who would be ultimately liable for the non delivery of the said cargo and with a view to avoid multiplicity of proceedings, the first defendant had come forward with an application in A. No. 5538 of 2003 under

Order VIII-A of C.P.C. for issue of a third party notice to the third respondent and seek a cross decree and claim contribution. The loss of the said cargo had occurred when the cargo was in the custody of the third respondent and was on account of negligence and breach of contract of carriage by the third party/third respondent. So third party/third respondent herein is liable to compensate the applicant/Appellant herein for the loss suffered by them on account of the non-delivery of the said cargo.

(vi) Plaintiffs/respondents 1 and 2 had not raised any objection. But the third party has resisted the application by filing counter, opposing the grant of leave to serve a third party notice on them on the ground that this Court has no jurisdiction to entertain any dispute as against them.

(vii) In view of the Sea Way Bill dated 22.11.2002, the terms and conditions of clause-12, relates to Law and Jurisdiction and the learned single Judge had considered this aspect and dismissed the application stating that the Courts at India have no jurisdiction. The only remedy open to the first defendant/applicant/appellant is to proceed against the third respondent in accordance with the Terms of the Sea Way Bill and the applicant is at liberty to proceed so, independent of the present suit.

3. The learned counsel appearing for the respondents 1 and 2 would submit that the facts are admitted one.

4. The only point is to be decided that whether the third party notice is to be issued to the third respondent and whether the High Court of Madras is having jurisdiction to entertain such plea against third respondent?

5. The learned counsel appearing for the Appellant would submit that as soon as the suit has been filed, the applicant/Appellant has filed a written statement and also filed the application under Order VIII-A of C.P.C. within time. He has further submitted that the cargo was entrusted by the Appellant to the third respondent, who is the third party and he undertook to deliver the same to the discharge port (i.e.) at Chennai. But admittedly, there was a collision between vessels Hongkong Express and Sarah Glory at Suez canal. It is further submitted that it is true, in clause-12 of the Sea Way Bill, it was stated that the Courts at Hamburg is having exclusive jurisdiction. Since the respondents 1 and 2 have filed a suit for recovery of amount for damages, that to be paid and indemnified by the third respondent, to whom the cargo was entrusted and whom issued the Sea Way Bill, the third respondent has to be indemnified the amount to avoid multiplicity of proceedings. To substantiate his arguments, he relied upon the decisions in 1961 (II) MLJ 335 and Kerala Transport Co. Vs. Colonial Distributors and Another, .

6. The learned counsel for the appellant would further submit that if at all this Court does not accept his argument, u/s 14 of Limitation Act, he may be permitted to proceed against the third respondent before Courts at Hamburg, which is having jurisdiction. Thus he prayed for allowing of this appeal.

7. Refuting the same, Mr.Bijai Sundar, the learned counsel appearing for the third respondent would submit that this Court is not having jurisdiction. As soon as the cargo has been entrusted to the third respondent, the Sea Way Bill has been issued by the third respondent herein. As per clause-12 of the Sea Way Bill, the jurisdiction has been clearly mentioned. Since the Madras High Court has no jurisdiction, the first defendant/Appellant cannot work out his remedy by way of filing petition under Order VIII-A of C.P.C. what cannot be done directly cannot be permitted to done indirectly. As per clause-12 of Sea Way Bill, the first defendant/Appellant cannot file a suit for damages against the third respondent before the Courts in India. So he cannot be sought for remedy under Order VIII-A of C.P.C. before this Court. He further submitted that Section 14 of Limitation Act is not applicable in the Courts at Germany and hence, he prayed for dismissal of this appeal.

8. Considered the rival submissions made on both sides and the materials available on records.

9. It is appropriate for us to consider the object of Order VIII-A of C.P.C., which is extracted hereunder:

Order VIII-A-Third Party Procedure

1. Third party notice:--Where a defendant claims to be entitled to contribution from or indemnity against any person not already a party to the suit (hereinafter called a third party), he may, by leave of the Court, issue a notice (hereinafter called a third party notice) to that effect sealed with the seal of the Court. The notice shall state the nature and grounds of the claim. Such notice shall be filed into Court with copy of the plaint and shall be served on the third party according to the rules relating to the service of summons.

2. Effect of notice.-The third party shall, as from the time of the service upon him of the notice, be deemed to be a party to the action with the same rights in respect of his defence against any claim made against him and otherwise as if he had been duly sued in the ordinary way by the defendant.

3. Default by third party.--If the third party desires to dispute the plaintiff's claim in the suit as against the defendant on whose behalf the notice has been given, or his own liability to the defendant, the third party may enter appearance in the suit on or before the date fixed for his appearance in the notice. If he does not enter appearance he shall be deemed to admit the validity of the decree that may be obtained against such defendant, whether by consent or otherwise and his own liability to contribute or indemnify as the case may be, to the extent claimed in the third party notice provided always that a person so served and failing to appear may apply to the Court for leave to appear, and such leave may be given upon such terms, if any, as the Court shall think fit.

4. Procedure on default.--Where the third party does not enter appearance in the suit and the suit is decreed by consent or otherwise in favour of the plaintiff, the

Court may pass such decree as the nature of the case may require, against the third party and in favour of the defendant on whose behalf notice was issued, provided that execution thereof shall not be issued without leave of the Court until after satisfaction by such defendant of the decree against him.

5. Third Party directions.--If the third party enters appearance, the defendant on whose behalf notice was issued may apply to the Court for directions and the Court may, if satisfied that there is a question to be tried as to the liability of the third party to make the contribution or pay the indemnity claimed, in whole or in part, order the question of such liability, as between the third party and the defendant giving the notice, to be tried in such manner, at or after the trial of the suit, as the Court may direct, and if not so satisfied may pass such decree or order as the nature of the case may require.

6. Leave to defend.--The Court may, upon the hearing of the application mentioned in Rule 5 give the third party liberty to defend the suit upon such terms as may be just, or to appear at the trial and take such part therein as may be just, and generally may order such proceedings to be taken, documents to be delivered or amendments to be made, and give such directions as appear proper for the most convenient determination of the question or questions, in issue, and as to the mode and extent in or to which the third party shall be bound or made liable by the decree in the suit.

7. Costs.--The Court may decide all questions of costs, as between the third party and the other parties to the suit, and may order anyone or more to pay the costs of any other, or others, or give such direction as to costs as the as the justice of the case may require.

8. Question between co-defendants.--Where a defendant claims to be entitled to contribution from or indemnity against any other defendant to the suit, a notice may be issued and the same procedure shall be adopted for the determination of such questions between the defendants as would be issued and taken, if such last mentioned defendant were third party; but nothing herein contained shall prejudice the rights of the plaintiff against any defendant in the suit.

9. Further parties.--Where any person served with a third party notice by a defendant under these rules claims to be entitled to contribution from or indemnity against any person not already a party to the suit, he may, by leave of the Court, issue a third party notice to that effect and the preceding rules as to the third party procedure shall apply mutatis mutandis to every notice so issued and the expressions "third party notice" and "third party" in these rules shall apply to and include every notice so issued and every person served with such notice respectively.

10. As per Rule 2 and Rule 9 of Order VIII-A of C.P.C., in which, it was specifically stated that "otherwise as if he had been duly sued in the ordinary way by the defendant".

11. At this juncture, Order VIII-A Rule 1 of C.P.C., where a defendant claims to be entitled to contribution from or indemnity against any person not already a party to the suit, he may, by leave of the Court, issue a notice to that effect sealed with the seal of the Court. The notice shall state the nature and grounds of the claim. Such notice shall be filed into Court with copy of the plaint and shall be served on the third party according to the rules relating to the service of summons. The third party shall, as from the time of the service upon him of the notice, be deemed to be a party to the action with the same rights in respect of his defence against any claim made against him and otherwise as if he had been duly sued in the ordinary way by the defendant.

12. It is an admitted fact that the cargo of the plaintiffs/respondents 1 and 2 has been entrusted by the Appellant to the third respondent herein. At that time, the third respondent herein had issued Sea Way Bill, in which, there is a Law and Jurisdiction under clause-12. Now it is appropriate to consider clause-12 of Sea Way Bill, which is extracted hereunder:

(1) Except as otherwise provided specifically herein any claim or dispute arising under this Sea Way Bill shall be governed by the law of the federal Republic of Germany and determined in the Hamburg Courts to the exclusion of the jurisdiction of the Courts of any other place.

(2) In case the carrier intends to sue the merchant the Carrier has also the option to file a suit at the merchant's place of business.

(3) In the event this clause is inapplicable under local law then jurisdiction and choice of law shall lie in either the Port of Loading or Port of discharge at Carrier's option.

The above points 2 and 3 are options given to the Carriers not to forwarding Agents or Merchants. While considering this aspect, the Courts in Hamburg at Germany alone would have the jurisdiction to try any claim by the applicant as against the third respondent herein.

13. At this juncture, it is appropriate to consider the decision relied upon by the learned counsel Mr.Bijai Sundar, appearing for the third respondent in 1990 (48) E.L.T. 481 (S.C.) (British India Steam Navigation Co. Ltd., v. Shanmughavilas Cashew Industries), in which, the Apex Court has held that the contract of affreightment, entered into between a party in Quilon with a Sea Carrier in England for transshipment of cashew nuts from East Africa, to be delivered at Cochin. There was a short landing, leading to a claim for damages filed by the Indian Importer on the file of the Sub-Court Cochin. The suit was decreed by the Sub-Court and the decree was confirmed by the High Court, against which, the Foreign Carrier challenged the judgment of the Sub-Court and the High Court before the Supreme Court and the Supreme Court considered the effect of the jurisdiction clause contained in a Bill of Lading. It was specifically mentioned in paragraphs-7, 18 and 28 of that Judgment that the Courts had jurisdiction. The Supreme Court has held that the parties cannot by submission confer jurisdiction

on the Court to entertain proceedings beyond its authority to deliver at Cochin. So the Sub-Court at Cochin is having jurisdiction and the appeal has been disposed of.

14. The learned counsel Mr.S.Raghunathan, appearing for the appellant relied upon the decision of this Court reported in 1961 (II) MLJ 335 (Roy and Chatterjee Private Ltd., v. The Scindia Steam Navigation Co. Ltd., at present Messrs. Hindustan Shipyard Ltd., and another) and submitted that Order VIII-A Rule 2 of C.P.C. enables the third party to raise all grounds to the action as would be available to him as against the party-defendant who seeks to bring him on record; that is to say, if the petitioner, who is the third defendant in the suit, sued the third party in a separate action, such third party would be entitled to arise the question of the jurisdiction of the Court in defence. Such a defence would also open to the third party in the application to implead him as a party. In the last paragraph of the above citation, it is held as follows:

... The proposed third party carries on business at Visakhapatnam. The petitioner, who is the third defendant, also carries on business at Visakhapatnam, and the contract as between them relating to the delivery of scrap iron was entered into at Visakhapatnam and was fulfilled at Visakhapatnam. If the plaintiff's action against the proposed third defendant failed on the question of jurisdiction on the basis of the above facts, the position is exactly similar in so far as the third defendant's petition to implead the second defendant as third party is concerned. It was open to the proposed third party to raise the question of jurisdiction....

As per the above judgment, the third party/third respondent is entitled to raise a plea of jurisdiction in the application under Order VIII-A of C.P.C.

15. But the learned Judge of the Kerala High Court differed from the view taken by the Hon'ble Justice Mr.Srinivasan in the aforesaid decision in 1961 (II) MLJ 335 (Cited supra). In Kerala Transport Co. Vs. Colonial Distributors and Another, , the learned single Judge of the Kerala High Court expressed his view in paragraph-3 of his Judgment, which is stated as follows:

3. The next decision by Srinivasan J., held, on interpreting Rule 2 of Order VIII-A, that the third party could question the jurisdiction of the Court to consider the liability of the third party to the defendant for contribution or indemnification as if the question was the cause of action in a separate suit between them. The learned Judge held further that, if the Court where the suit was already pending had no jurisdiction to try that question the question of contribution or indemnification mentioned above, then the third party should not be impleaded. In other words, if the third party was residing outside the territorial jurisdiction of the Court, he should not be impleaded. With due respect to the learned Judge, I feel that the interpretation put upon Rule 2 of Order VIII-A by him is not in conformity with the intention of the legislature in enacting the said order. The third party procedure is intended to prevent multiplicity of proceedings; and if

the question of contribution or indemnification by the third party has to be treated as a separate suit, even for jurisdiction, and to be filed in another forum, the third party procedure can be applied only within very narrow limits. The intention of the legislature will be clearer if we see Rule 9 of Order VIII-A. Rule 9 provides that where any third party impleaded claims that he has a right of contribution or indemnification against another party, that party also can be impleaded in the suit following the third party procedure contemplated by Order VIII-A. If, in such a case also, the principle laid down by Srinivasan J., is applied, it is clear that Rule 9 of Chapter VIII-A will practically be a dead letter. Therefore, on the interpretation put upon Rule 2 of Order VIII-A by Srinivasan J., I do not agree with him. The third party has every right to contest his liability to contribute or to indemnify the defendant: he can also step into the shoes of the defendant and fight the plaintiff on all grounds, which are available to the defendant himself. But, that has to be done in the suit, as laid within the jurisdiction, against the defendant, because the third party's liability to contribute or indemnify arises, strictly speaking, only on the decision of the suit against the defendant.

The above citation was also incorporated in the order of the learned single Judge made in A. No. 5538 of 2003.

16. On considering both the citations along with provisions under Order VIII-A Rule 2 of C.P.C., the learned single Judge has clearly held that the third party has every right to canvass the point of jurisdiction. The learned single Judge has relied upon the judgment of *McCheane Vs. Gyles* 1902 1 Chancery Division 287.

17. Clause-12 of the Sea Waybill reads as under:

12. Law and Jurisdiction -Except as otherwise provided specifically herein any claim or dispute arising under this Sea Way Bill shall be governed by the law of the federal Republic of Germany and determined in the Hamburg Courts to the exclusion of the jurisdiction of the Courts of any other place. In case the Carrier intends to sue the Merchant the Carrier has also the option to file a suit at the Merchant's place of business. In the event this clause is inapplicable under local law then jurisdiction and choice of law shall lie in either the Port of Loading or Port of discharge at Carrier's option.

By a reading of the above, it is made clear that the contract between the 1st Defendant and third party/3rd Respondent is governed by the law of Federal Republic of Germany. When the contract between the parties is governed by law of Federal Republic of Germany, the Madras High Court would not have jurisdiction to entertain the claim against the 3rd Respondent.

18. As per the decisions of this Court as well as clause-12 of Sea Way Bill relating to law and jurisdiction, Rule 2 of Order VIII-A of C.P.C. treats the claim made by the defendant against the third party/third respondent, as if it is a suit duly instituted in the ordinary way by the defendant. Therefore, the restrictions that would apply to a suit instituted by the first defendant against the third party/

third respondent would equally apply to the third party procedure. So, as per clause-12 of the Sea Way Bill, this Court has no jurisdiction. The Courts at Hamburg at Germany alone is having jurisdiction. So what he cannot be done directly and the same cannot be permitted to be done indirectly. Now the applicant/Appellant instead of filing the suit for claiming damages against the third party before the Court of Hamburg, filing application under Order VIII-A of C.P.C. can not be permitted. Order VIII-A provides only an additional remedy to the defendant who is entitled to contribution or indemnity from the third party. It is an enabling provision relating to procedure and hence it cannot override the contract between the parties. It is admitted by the learned single Judge that the third party procedure itself is peculiar only to some of the states.

19. As per Clause-12 of Sea Way Bill, it excludes the jurisdiction of all the Courts other than the Courts at Hamburg. So the only remedy open to the appellant is to proceed against the third respondent in accordance with the terms of Sea Way Bill. Hence, we are of the opinion that the learned single Judge has considered this aspect in a proper perspective in para-25 of the order dated 11.07.2008, which is extracted hereunder:

25. In the light of the aforesaid decisions, I am of the considered view that the defendant is bound by clause 12 of the Sea Way Bill, relating to law and jurisdiction. As pointed out by Srinivasan,J., in Roy Chatterjee (Private) Ltd."s case, Rule 2 of Order VIII-A treats the claim made by the defendant against the third party, as if it is a suit duly instituted in the ordinary way by the defendant. Therefore, the restrictions that would apply to a suit instituted by the defendant against the third party would equally apply to the third party procedure. In other words, the right to sue, if circumscribed by an agreement valid in the eye of law, would not get enlarged merely because of the availability of an additional remedy under Order VIII-A C.P.C.

Hence we are of the considered view that the findings of the learned single Judge is with sound reasoning and therefore, we do not find any reason warranting interference with the findings of the learned single Judge.

20. The learned counsel Mr.S.Raghunathan, appearing for the appellant would submit that if the Court is not convincing and agreeing with the argument advanced by him, he putforth his request to file a suit before the Court of Hamburg at Germany invoking Section 14 of the Limitation Act.

21. It is pertinent to note that Limitation Act (36 of 1963) is applicable to all Courts in India and not for foreign countries. However, the first defendant/Appellant at liberty to proceed against the third respondent herein in accordance with law applicable to the local law of Federal Republic of Germany. The learned counsel for the appellant would submit that date of collision was on 10.12.2002 and the date of discharge at Singapore on 25.12.2002. But he filed the application on 24.12.2003 within a year within time. Hence he sought for exemption u/s 14 of the Act. But as already stated that Limitation Act is

applicable only in India not for Republic of Germany. So he is at liberty to file a suit subject to the local law applicable to the Federal Republic of Germany. The time spent in this litigation may be taken into account, if the local law applicable to Federal Republic of Germany permits.

22. In the result, confirming the order passed by the learned single Judge in A. No. 5538 of 2003 in C.S. No. 950 of 2003 dated 11.07.2008, this Original Side Appeal is dismissed. Both the parties are directed to bear their own costs. Consequently, connected Miscellaneous Petitions are closed.