

(1999) 02 BOM CK 0036

In the Bombay High Court

Case No : Notice of Motion No. 3424 of 1998 in Admiralty Suit No. 93 of 1998

North End Oil Limited

APPELLANT

Vs

m.v. "Kim An" and another

RESPONDENT

Date of Decision : 25-02-1999

Acts Referred:

Evidence Act, 1872 — Section 101

Merchant Shipping Act, 1958 — Section 3(55)

Citation : AIR 1999 Bom 193 : (1999) 2 ALLMR 47 : (1999) 2 BomCR 448 :
(1999) 2 BOMLR 150 : (1999) 3 MhLj 15

Hon'ble Judges : D.G. Deshpande, J

Bench : Single Bench

Advocate : G.A. Rebello and E.D. Marker, instructed by Ruben Fernandes, for the Appellant; J. Dwarkadas and Rahul Narichania, instructed by Mulla and Mulla, for the Respondent

Judgement

D.G. Deshpande, J.—Heard Advocates for the applicant who has taken out this motion for vacating the order of arrest and the Advocate for the plaintiffs.

2. This motion is taken out by the applicant in the following circumstances.

The present suit was filed on 3-11-1998 for recovering a sum of US Dollars 50,000/- and odd together with interest etc. The arrest order was passed by this Court on 3-11-1998 i.e. on the same day of filing of the suit. In the Judge's Order that was passed by this Court for arrest option was given to the defendants to furnish bank guarantee to the extent of the amount claimed in the suit. But according to the applicant, the defendants vessel was purchased by him for the purpose of ship breaking much prior to the order of arrest and before the service of arrest warrant on 5-11-1998 and since demolition activities came to stand still he was required to furnish security under compulsion. According to the applicant, beaching of the vessel was done on 16-10-1998 and permission for demolition was granted on 27-10-1998. Demolition operation started on or from the same date i.e. from 27-10-1998 and by 5-11-1998 demolition was carried

out to the major extent. But apart from that once the vessel was purchased for breaking and demolition, it was no longer navigable vessel, and therefore, same could not have been arrested in the present suit. It was also contended that the applicant has complied all the statutory requirements and duties in that regard. Reliance was placed on the judgments of Justice Radhakrishnan and Justice Rane in support of the contention that a vessel purchased for demolition could not be considered as navigable vessel and hence according to the applicant, his motion is required to be allowed and order of arrest is liable to be set aside.

3. On the other hand it was contended by Mr. Dwarkadas Counsel for the plaintiffs that the claim of the plaintiffs was in respect of supplies of necessities and the change of ownership of the vessel did not affect the claim of the plaintiffs. Reliance was placed by him on justice Dhanuka's judgment reported in Sigma Coatings BV Vs. "Agios Nikolaos" and another, . It was further contended by him that the applicant had nothing with him to show that by 5-11-1998 the vessel was demolished to such an extent that it seems to be navigable or the identity of the vessel was lost. He also contended that even if it is accepted that breaking of ship started on 27-10-1998, the ship breaking could not have proceeded much within short span of nine days up to 5-11-1998. He further contended that the applicant has not come with necessary proof regarding demolition and no affidavit of photographer was filed. Further it was contended by him that once there is serious dispute regarding extent of demolition, the matter was required to be decided only after by recording evidence of the parties. He also contended that whether the vessel seems to be a vessel and was converted into goods could not be decided at this juncture. He also contended that the plaintiffs had maritime liens which did not seem to exist on account of change of ownership. Mr. Dwarkadas also placed reliance upon certain portion of Book "Maritime Liens" by Thomas published by Steven & Sons in 1980.

4. So far as case of the applicant regarding purchase of vessel for the purpose of demolition is concerned, same is required to be accepted even at this stage. The documents filed by the applicant in the compilation strongly support this case. These documents are in the form of Delivery of defendants vessel to the applicant by a letter dated 12-10-1998 accompanied with the details of sale of the same date between the applicant and owners of the vessel; undertaking given by the owners that delivery was free from all encumbrances, maritime liens, mortgage and any other debts. These are preceded by Memorandum of agreement dated 12-10-1998 between the owners and the applicant.; Notice of readiness dated 14-10-1998; Physical delivery certificate dated 14-10-1998; Letter written by the applicant to the Assistant Commissioner of Customs and Central Excise for beaching permission of the said vessel and for grant of such permission by Assistant Commissioner on the same day; Receipt regarding payments of beaching charges; Ship breaking permission granted by Superintendent of Customs on 27-10-1998 and payments of Customs duty by the applicant for importing vessel for the purpose of demolition dated 27-10-1998. All these documents strongly prove the case of the applicant that

the ship was imported only for the purpose of demolition and that the permission for demolition was granted to him by the Authorities on 27-10-1998.

5. Two questions, therefore, arise i.e. whether the demolition was started by the applicant on or from 27-10-1998 and what was the extent of demolition upto 5-11-1998 when the arrest warrant was served; and whether the vessel was a vessel that could have been used for navigable so as to constitute a vessel as it contemplates by definition of word "Ship" under Admiralty Courts" Act, 1861 and under the definition of word "Vessel" u/s 3(55) of the Merchant Shipping Act, 1958 and third question is, whether the plaintiffs claim for maritime liens would operate against the vessel firstly because of change of the owner and secondly, because by 5-11-1998 the vessel was still in existence though might be partially demolished as contended by Mr. Dwarkadas. So far as proposition of Mr. Dwarkadas in this regard is considered Justice Dhanuka has, in his judgment reported in Sigma Coatings BV Vs. "Agios Nikolaos" and another, held that a maritime liens does not affect change of ownership and goes with the vessel. I have no dispute about that proposition so far as the facts of this case are concerned, and therefore, it has to be held that even if the ownership of the vessel changed from original owner to the applicant, the maritime liens of the plaintiffs continued against the vessel. However, the crucial question is, whether the vessel was in existence on 5-11-1998 when the arrest warrant was served upon him and what was the extent of demolition.

6. It was argued by Mr. Dwarkadas that if it is accepted that the maritime liens of the plaintiffs went alongwith the vessel and the applicant is bound by the same because as per Thomas, the Author of Maritime Liens, maritime liens operates against corpus vessel being an action in rem. My attention was invited to page 299 para 529 of the said Book of Mr. Thomas on maritime liens.

7. However, crucial question is, firstly, whether the defendants vessel was a vessel as contemplated under the definitions of aforesaid two Acts i.e. Admiralty Court Act, 1861 and Merchant Shipping Act, 1958 and secondly on whom the burden of proving the existence of res at the time of arrest warrant lies ?

8. So far as first aspect is concerned, the ship has been defined under the Admiralty Court Act, 1861 as "Ship" shall include any description of vessel used in navigation not propelled by oars." and the expression vessel has been defined u/s 3(55) of the Merchant Shipping Act, 1958 as ""vessel" includes any ship, boat, sailing vessel, or other description of vessel used in navigation."

9. If both these definitions are considered, navigability of the ship is a dominate factor in deciding whether it is a ship or vessel. The navigability of the vessel or ship is depend not only on the mechanical navigability but also legal navigability because whether the vessel can be legally put to use for navigation is an important question. If this aspect of legal navigability is considered, and if the case of the applicant is accepted that he had imported vessel for demolition, that he had completed all the legal formalities as stated above and obtained

demolition permission on 27-10-1998, then it is clear that on the date of the order of the Court regarding arrest of the vessel, the same was not navigable because of having purchased the vessel for destruction. The applicant could not have found the vessel fit for navigation. Therefore, the arguments of Mr. Dwarkadas in this regard cannot be accepted.

10. The second aspect of the matter is, what was the condition or res of the vessel on the date of the arrest of the vessel or on the date of service of the warrant of vessel. Mr. Dwarkadas contended that there was nothing with the applicant to show that on 5-11-1998 the destruction of the vessel had gone to such an extent, that it no longer remained as a vessel and it stood converted into goods. I am in disagreement with the submission made by Mr. Dwarkadas because Author Thomas in his Maritime Liens in para 34 under the title "Property encumbered" has observed :--

"The fundamental principle is that a maritime lien attaches only to the res in respect of which the claim arises. It is only the particular res which perpetrates the damage or the particular res to the benefit of which services are rendered which is encumbrance."

The Author has further in paragraph No. 62 observed :--

"The fundamental legal nature of an action in rem, as distinct from its ulterior object, is that it is a proceeding against a res. Thus, when a ship represents such a res, as is frequently the case "the action in rem is an action against the ship itself."

Further in paragraph No. 63 it is observed as under :--

"The action in rem, being a proceeding against a res and whereunder the res may be appropriated to the satisfaction of the plaintiff's claim, is patently distinct from an action in personam."

Further in paragraph No. 66 the Author has observed :--

"The action in rem as a unique and distinct proceeding against a res is most plainly manifest when the classical pattern of arrest followed by judicial sale prevails."

11. From all these discussions regarding res and action in rem it is clear that when the plaintiff files for an action in rem and arrest of vessel, he must prima facie prove that the res was in existence on the date of its arrest. If the defendant denies the existence of res and contends that res was demolished, the burden is still on the plaintiff to prove that on the date of arrest the res was intact in existence and not demolished to such an extent so as to get converted into goods.

12. If the aforesaid test is applied, then it was for the plaintiffs in the present case to show that on the date of arrest of the ship and on the date of service of arrest warrant, the res was in existence and that vessel was used in navigation.

So far as second part is concerned, I have already held that the vessel was not used and could not have been used in navigation and so far as first part regarding existence of res is concerned, I am constrained to hold that the plaintiffs have miserably failed to prove the existence of the vessel on the date of arrest order passed by this Court or on the date of service of the said order on the vessel. There is nothing with the plaintiffs either in the form of photograph taken by the plaintiffs or their representatives or in the form of affidavit of witness who has seen the condition of the vessel as on 5-11-1998. As against this the applicant has come with specific case that he imported vessel for the purpose of demolition. Secondly from the chronology of the events that took place from the date of importing of vessel or on the date of delivery till getting permission for demolition on 27-10-1998 it is clear that the applicant was doing everything attempt with his limits to get the vessel demolished as early as possible. The steps taken by him in that regard show that he wanted the vessel to be demolished at the earliest. He did not allow any time to be wasted for removing procedural hazards and in that back ground when the applicant came with specific case that he started demolition from 27-10-1998 then in the absence of any proof in that regard coming from the plaintiffs, the case of the applicant has to be accepted that on 5-11-1998 the res was no longer in existence.

13. It was contended by Mr. Dwarkadas in this regard that the maritime liens goes alongwith the vessel and with every part of the vessel and unless the applicant proves the extent of demolition as on 5-11-1998 applicant's claim liable to be rejected. This argument cannot be accepted for two reasons, firstly the initial burden is on the plaintiffs to prove the existence of res i.e. vessel on 5-11-1998 and secondly, the applicant has come with a specific case regarding demolition and the same is required to be accepted as against the case of the plaintiffs for the reasons stated above. Consequently, I have to hold that on the date of arrest the defendants vessel was not used in navigation and could not have been used, and therefore, the same was not liable to be arrested and secondly, it has to be held that the plaintiffs have failed to prove the existence of vessel on 5-11-1998 for all these reasons the motion is required to be allowed. I therefore, pass the following order :--

"ORDER:

Order of arrest of vessel m.v. KIM AN is vacated unconditionally with costs of the motion on the plaintiffs.

Prayers (a) and (b) are allowed and made absolute.

So far as prayer (c) is concerned, viz. want of jurisdiction of this Court will be decided at appropriate stage for which the applicant will be at liberty to take out separate motion.

This motion is disposed of.

After this order was pronounced in the Court, the Advocate for the plaintiffs prayed for stay. Stay is granted for two weeks on a condition that if the plaintiffs prefer an appeal, they will give 48 hours notice to the other side.