

(2014) 02 BOM CK 0309

In the Bombay High Court

Case No : Appeal (L) No. 508 of 2013 in Company Petition No. 1015 of 2008 and Company Application (L) No. 546 of 2013

P.C. Acharya

APPELLANT

Vs

The Official Liquidator and Others

RESPONDENT

Date of Decision : 27-02-2014

Acts Referred:

Constitution of India, 1950 — Article 352, 352(1)
Merchant Shipping Act, 1958 — Section 145, 146, 148, 21, 412

Citation : (2014) 02 BOM CK 0309

Hon'ble Judges : S.J. Vazifdar, J;B.P. Colabawalla, J

Bench : Division Bench

Advocate : S.A. Jabbar and Dilip Satale, Advocates for the Appellant; L.T. Satelkar, Advocates for the Respondent

Judgement

B.P. Colabawalla, J.—Admit. By consent of parties, the Appeal is heard finally.

2. In the present appeal, exception is taken to the order of the learned single Judge dated 5th December 2013 confirming the sale of a vessel M.V. Crown 1 belonging to the Company in liquidation (respondent No. 1) in favour of Respondent No. 2 whose bid of Rs. 1.5 crores was the highest.

The appellant was a Master on the said vessel. According to him, the said vessel cannot be sold before his wages are paid in view of section 42(2A) read with section 148 of the Merchant Shipping Act, 1958 (said Act).

3. The question that falls for consideration is whether the provisions of section 42(2A) apply to the sale of a vessel, conducted by a Court.

4. The facts stated briefly are as follows:-

The Company, M/s Crown Maritime Co.(India) Pvt. Ltd. is the owner of the said vessel. The appellant contends that he was the Master of the said vessel since 11th June 2009. The company was ordered to be wound up by the Company

Court in or around March 2010. On 21st April 2011, the Official Liquidator arrested the said vessel.

5. After the arrest, several attempts were made to sell the vessel but without success. Finally, the Official Liquidator filed a report before the Company Court *inter alia* informing the Court that the Official Liquidator had called for bids from interested parties and two bids were received. Out of the same, the bid of Respondent No. 2 of Rs. 1.5 crores was found to be the highest bid. The learned Judge, after setting out the facts in detail about how (i) a substantial amount of time had been invested to ensure disposal of the said vessel; (ii) the ex-Directors of the Company were trying to thwart the sale at every stage and reneged on their undertakings; and (iii) the said vessel was in a dangerous condition, confirmed the sale in favour of the highest bidder (Respondent No. 2).

6. The appellant contends that in view of sections 42(2A) and 148 of the said Act, the vessel cannot be sold till his wages are paid.

7. The submission is not well founded. Our attention has not been invited to any judgment that interprets the provisions of section 42(2A). The interpretation of section 42(2A) requires a consideration of several provisions of the Act including as they stood prior to them being amended. We have done so with the able assistance of Mr. Dhond, learned senior counsel who appeared as *amicus curiae*. We must express our gratitude to him for his efforts and able assistance.

8. Section 42 as it stood before its amendment in 1993, read as under:-

"42. Transfer of ships or shares (1) No person shall transfer or acquire any Indian ship or any share or interest therein without the previous approval of the Central Government and any transaction effected in contravention of this provision shall be void and unenforceable.

(2) The Central Government may, if it considers it necessary or expedient so to do for the purpose of conserving the tonnage of Indian shipping, refuse to give its approval to any such transfer or acquisition.

(3) Subject to the other provisions contained in this section, an Indian ship or a share therein shall be transferred only by an instrument in writing.

(4) The instrument shall contain such description of the ship as is contained in the surveyor's certificate or some other description sufficient to identify the ship to the satisfaction of the registrar and shall be in the prescribed form or as near thereto as circumstances permit and shall be executed by the transferor in the presence of and be attested by at least two witnesses."

Section 42 prior to its amendment imposed a complete embargo on any person transferring or acquiring an Indian ship without the previous approval of the Central Government. The unamended provision was an embodiment of the legislative expectation that the Central Government would protect the interest of the crew whilst granting any permission for transfer / acquisition, as the case

may be.

9. Before considering the other provisions of the Act it is important to note the legislative history which prompted the amendment of certain provisions of the Act in 1993. One of the objectives of the Act was to encourage the development of Indian shipping and ensure the efficient maintenance of an Indian Mercantile Marine in a manner best suited to serve the National interests.

In the year 1990-91, the overall share of Indian ships in the total overseas trade was estimated at around 36%. During the year 1991-92, this figure came down to about 30%. From these figures, it appeared that the main objectives of the Act as well as that of the shipping policy were not being achieved. In view of the acute scarcity of foreign exchange at that time, Indian companies intending to acquire ships either new or second-hand were encountering serious difficulties in the matter of raising funds in foreign currency from the international market. Certain provisions of the Act with regard to registration, transfer of ships and rights of mortgagees were perceived by foreign funding agencies as impediments to the enforcement of the rights of the lenders in case of loan defaults and consequent requirements to foreclose the mortgage. In view thereof, the shipping industry requested for amendments to sections 21, 42, 51 and 412 of the Act on a priority basis, as delay in the said amendments was expected to further jeopardise the interests of Indian ship owners.

Keeping the request of the shipping industry in mind, the legislature chose to amend sections 21, 42 and 51 and to delete section 412 and section 414 (b) and (c). The aforesaid amendments were brought about by the Amendment Act 68 of 1993 which came into force with effect from 27th October 1993. For the purposes of the present controversy, we will have to examine the amendments in sections 42 & 51 keeping in mind the above legislative intent.

10. After the Amendment Act 68 of 1993, section 42 reads as under:-

"42. Transfer of ships or shares (1) No person shall transfer or acquire any Indian ship or any share or interest therein 1 [at any time during which the security of India or of any part of the territory thereof is threatened by war or external aggression and during which a proclamation of emergency issued under clause (1) of article 352 of the Constitution is in operation] without the previous approval of the Central Government and any transaction effected in contravention of this provision shall be void and unenforceable.

(2) The Central Government may, if it considers it necessary or expedient so to do for the purpose of conserving the tonnage of Indian shipping, refuse to give its approval to any such transfer or acquisition.

[(2A) No transfer or acquisition of any Indian ship shall be valid unless -

(a) all wages and other amounts due to seamen in connection with their employment on that ship have been paid in accordance with the provisions of this Act;

(b) the owner of the ship has given notice of such transfer or acquisition of the ship to the Director General.]

(3) Subject to the other provisions contained in this section, an Indian ship or a share therein shall be transferred only by an instrument in writing.

(4) The instrument shall contain such description of the ship as is contained in the surveyor's certificate or some other description sufficient to identify the ship to the satisfaction of the registrar and shall be in the prescribed form or as near thereto as circumstances permit and shall be executed by the transferor in the presence of and be attested by at least two witnesses."

11. Keeping in mind the request of the shipping industry, the complete embargo on transfer of an Indian ship without the prior approval of the Central Government was done away with, except in cases where the security of India was threatened by war or aggression and during an emergency declared under Article 352(1) of the Constitution. Now, since the transfer/acquisition could be done without the approval of the Central Government (who before the amendment would have safeguarded the interests of the crew), the legislature also inserted sub-section (2A) which inter alia provided that no transfer or acquisition of an Indian ship was valid without first paying all the wages and other amounts due to seamen in connection with their employment on that ship. Sub-section (2A) of Section 42 was introduced as a safeguard against sales of ships that would jeopardize the wages and other amounts due to seamen in connection with their employment on that ship. In view of the amendment to sub-section (1), in the absence of sub-section (2A) there would be nothing to protect the wages and other amounts due to seamen in respect of their employment on the ship that is transferred.

12. The fallacy in Mr. Jabbar's submission on behalf of the appellant is apparent on a comparison of the provisions of Section 42 with certain other provisions of the Act. As the learned amicus curiae rightly submitted, the Act deals with three types of transfers viz. voluntary transfers, transmissions on death and insolvency and transfers pursuant to the orders of a Court.

13. Section 44 of the Act which provides for transmission of property in an Indian ship on death, insolvency etc of the registered owner, reads as under :-

"44. Transmission of property in Indian Ship on death, insolvency, etc. ----(1) Where the property in an Indian ship or share therein is transmitted to a person on the death or insolvency of any registered owner, or by any lawful means other than by a transfer under this Act, ---

(a) that person shall authenticate the transmission by making and signing a declaration in the prescribed form (in this Act referred to as a declaration of transmission) identifying the ship and also a statement of the manner in which and the person to whom the property has been transmitted;

(b) if the transmission is consequent on insolvency, the declaration of

transmission shall be accompanied by proper proof of such claim;

(c) if the transmission is consequent on death, the declaration of transmission shall be accompanied by a succession certificate, probate or letters of administration under the Indian Succession Act, 1925 (39 of 1925), or a duly certified copy thereof.

(2) The registrar, on receipt of the declaration of transmission so accompanied, shall enter in the register book the name of the person entitled under the transmission as owner of the ship or share the property in which has been transmitted, and, where there are more persons than one, shall enter the names of all those persons, but those persons however numerous shall, for the purpose of the provisions of this Act with respect to the number of persons claiming to be registered as owners, be considered as one person:

Provided that nothing in this sub-section shall require the registrar to make an entry in the register book under this section, if he is of opinion that by reason of the transmission the ship has ceased to be an Indian ship."

(emphasis supplied)

14. Section 44 provides the procedure to be followed for change in ownership of an Indian ship on the death or insolvency of any registered owner of the said ship. Section 44 makes a clear distinction between a transmission and a transfer as contemplated under the Act. This is clear from the words "or by any lawful means other than by a transfer under this Act, ---" appearing in section 44(1). What is important is that there is no provision in Section 44 similar to sub-section (2A) of section 42.

15. Section 46 provides for the contingency of a transfer of a ship on a sale by an order of the court.

"46. Transfer of ship on sale by order of court Where any court, whether under section 45 or otherwise, orders the sale of any ship or share therein, the order of the court shall contain a declaration vesting in some person named by the court the right to transfer that ship or share, and that person shall thereupon be entitled to transfer the ship or share in the same manner and to the same extent as if he were the registered owner thereof, and every registrar shall obey the requisition of the person so named in respect of any such transfer to the same extent as if such person were the registered owner."

Section 46 also does not have a provision similar to Sub-section (2A) of Section 42. There is nothing in Section 42 or in any other provision that makes sub-section (2A) thereof applicable to Section 46.

16. Section 51 prior to its amendment in 1993 read as under:-

"51. Rights of mortgagee - (1) A registered mortgagee of a ship or share shall be entitled to recover the amount due under the mortgage in the High Court, and when passing a decree or thereafter the High Court may direct that the

mortgaged ship or share be sold in execution of the decree.

(2) Subject to the provisions of sub-s. (1), no such mortgagee shall merely by virtue of the mortgage be entitled to sell or otherwise dispose of the mortgaged ship or share."

Section 51 as it originally stood allowed a mortgagee to enforce its mortgage only through the court and not otherwise.

This clearly establishes that the Act treated "transmission" and a "court sale" differently from a "transfer" or "acquisition" as contemplated under section 42. The unamended provisions of section 42 did not impose any restrictions or conditions on a "transmission" or a "court sale". They were governed by sections 44, 46 and 51.

17. Section 51 was also amended by the Amendment Act 68 of 1993. Section 51 as amended reads as under :-

1 "[51. Rights of mortgagee - (1) Where there is only one registered mortgagee of a ship or share, he shall be entitled to recover the amount due under the mortgage by selling the mortgaged ship or share without approaching the High Court.

(2) Where there are two or more registered mortgagees of a ship or share they shall be entitled to recover the amount due under the mortgage in the High Court, and when passing a decree or thereafter the High Court may direct that the mortgaged ship or share be sold in execution of the decree.

(3) Every registered mortgagee of a ship or share who intends to recover the amount due under the mortgage by selling the mortgaged ship or share under sub-section (1) shall give an advance notice of fifteen days relating to such sale to the registrar of the ship's port of registry.

(4) The notice under sub-section (3) shall be accompanied with the proof of payment of the wages and other amounts referred to in clause (a) of sub-section (2A) of section 42.]"

(emphasis supplied)

18. After the amendment, section 51 gave a right to a single mortgagee of a ship or a share therein to recover the amount due under the mortgage by selling the mortgaged ship or share without approaching the High Court, provided (i) an advance notice of fifteen days relating to such sale was given to the registrar of the ship's port of registry; and (ii) the said notice was accompanied with the proof of payment of the wages and other amounts referred to in clause (a) of sub-section (2A) of section 42. It is pertinent to note that no notice to the registrar as contemplated under section 51(3) or proof of payment of the wages of the seamen as contemplated under section 42(2A)(a) was required to be furnished when the mortgagee was enforcing his mortgage by selling the ship through the High Court as set out in section 51(2). This to our mind clearly

indicates the legislative mandate that court sales were not brought within the rigours of section 42(2A) and the said sub-section only applied to voluntary transfers/acquisitions made inter-vivos. Thus the Legislature specifically provided for the applicability of Section 42(2A) when it wanted to. Had it been the intention of the Legislature to make court sales under section 46 and transfers / transmissions under Section 44 subject to Section 42(2A), it would have done so specifically.

19. It is also important to note that section 42(2A) was introduced by the Act of 1993. At the time when the amendment was introduced, bringing about the restriction on transfers / acquisition, the legislature was aware of the specific provisions of Sections 44 and 46 which dealt with "transmission" of an Indian Ship and a "court sale". Had the legislative intent been to make even court sales subject to the rigours of Section 42(2A), the amendment would not have been inserted in Section 42 alone. The conscious decision to amend only Section 42 and not similarly amend Sections 44 and 46, makes it evident that the mandate of section 42(2A), is not applicable, and was not intended to be made applicable to court sales.

This view is reinforced by the absence of any non-obstante clause at the beginning of section 42(2A). All these factors clearly go to show that the transfer or acquisition as contemplated in section 42(2A) is a voluntary transfer made inter-vivos as opposed to a transmission on death or insolvency or transfer / pursuant to a court sale.

20. Even section 146 indicates that section 42(2A) applies only to voluntary transfers inter vivos and not to court sales. Section 146 reads as under :-

"146. Restrictions on suits for wages. ---A proceeding for the recovery of wages due to a seaman or apprentice shall not be instituted by or on behalf of any seaman or apprentice in any civil court except where -

(a) the owner of the ship has been declared insolvent;

(b) the ship is under arrest or sold by the authority of any court;

(c) [a Judicial Magistrate of the first class or a Metropolitan Magistrate, as the case may be] refers a claim to the court.

(emphasis supplied)

Section 146 deals with the restrictions on suits to be filed by the seamen for recovery of wages. It clearly states that the proceedings for recovery of wages due to seamen shall not be instituted by or on behalf of any seaman in any civil court except inter-alia in cases of the ship being sold by the authority of any court. If we were to hold that the rigours of section 42(2A) even applied to court sales, Section 146 would be rendered otiose. In fact, section 146 contemplates a situation of a seaman seeking to recover his dues by filing a proceeding in the civil court after the ship has been sold by and under the authority of any court.

Such a provision would be unnecessary if section 42(2A) applied to court sales because under section 42(2A) no sale could take place without first paying the wages of the seamen. There would therefore be no need for filing any proceedings for recovery of their dues. The fact that section 146 permits a seamen to institute proceedings for recovery of his dues after the ship has been sold by the court clearly indicates that a court can sell a ship before the payment of the wages and other dues of the seamen as contemplated under section 42(2A).

21. A conjoint reading of the above sections leads us to the inescapable conclusion that Section 42(2A) cannot apply to court sales and would apply only to voluntary transfers/acquisitions made inter vivos.

22. A view to the contrary would lead to the most startling results. It could result in a ship never being sold such as for instance where the value of the ship is less than the amount due to a seaman or seamen. It would result in the ship being abandoned, becoming a total wreck, and its value diminishing almost entirely. This would be to the detriment even of the seamen. The Legislature could never have intended such an illogical and unreasonable result. More often than not, a court orders a sale of an Indian ship where the owner is in financial difficulty (in the present case under liquidation). In such cases, the sale proceeds represent the only real opportunity to pay the crew and other creditors even if only in part. If it is held that the crew must be paid first and only then a sale must take place, it will be to no one's benefit including the crew. This is because it is the sale of the vessel which will realise the funds to pay the crew. To insist that the crew be paid first before the sale would be a self defeating proposition.

23. We, therefore, find that on every rule of interpretation and construction, restrictions laid down in Section 42(2A) cannot apply to a sale of a vessel conducted by the court. The transfer or acquisition as contemplated under section 42(2A) is only in respect of voluntary transfers/acquisitions made inter-vivos.

24. In view of the above finding, we hold that the submission made on behalf of the Appellant that the learned Judge could not have confirmed the sale in favour of Respondent No. 2 without first paying his wages is not well founded.

25. We however hasten to add that in this judgement, we have not decided the issue of priorities as the same did not arise for consideration before us. The appellant for instance contends that as a master of the said vessel, his wages have a first maritime lien by virtue of sections 42(2A), 145, 146 and 148 of the said Act. This issue is left open to be agitated by the Appellant before the Official Liquidator or the Company Court, as the case may be.

26. Subject to the above clarification, the order of the learned single Judge is confirmed and the appeal is dismissed.

There shall be no order as to costs.

1Amendment Act 68 of 1993, sec. 3 (w.e.f. 27-10-1993)