
(2015) 02 SC CK 0042

In the Supreme Court Of India

Case No : Civil Appeal No. 6156 of 2005

Petromarine Products Ltd.

APPELLANT

Vs

Ocean Marine Services Company Ltd. and Others

RESPONDENT

Date of Decision : 17-02-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 52, Order 42 Rule 11
Merchant Shipping Act, 1958 — Section 3(15)

Citation : (2015) 4 AD (SC) 496 : AIR 2015 SC 1487 : (2015) 3 CDR 622 :
(2015) 3 CTC 92 : (2015) 2 LW 962 : (2015) 2 MLJ 452 : (2015) 2 SCALE 443 :
(2015) 7 SCC 229 : (2015) 3 SCJ 103

Hon'ble Judges : Shiva Kirti Singh, J.;M. Yusuf Eqbal, J.

Bench : Division Bench

Advocate : Fereshte D. Sethna, Kuber Dewan and B. Vijayalakshmi Menon, for the Appellant; P.B. Suresh, Vipin Nair, Udayaditya Banerjee, Vishnu Shankar Jain, Kushal Bolmal, Advs. for Temple Law Firm, Nikhil Nayyar, Subramonium Prasad and Rajiv Dalai, Advocates for th

Final Decision : Dismissed

Judgement

M. Yusuf Eqbal, J.—This appeal is directed against the judgment and order dated 27.11.2003 passed by a Division Bench of the High Court of Madras in OSA No. 175 of 1998, dismissing the appeal of the Appellant, upholding inter alia the disbursements made by Single Judge of the sale proceeds received by sale of the ship in question named as motor vessel "Eleni".

2. The factual matrix of the case is that in February, 1997 Respondent No. 1 filed a suit being C.S. No. 97 of 1997 under the Admiralty Jurisdiction of High Court of Madras, for recovery of US\$ 22,705.84 against Respondent No. 3 herein along with an application praying for an order of arrest of the vessel which arrived at Port of Madras. The High Court in terms of Order dated 27.2.1997 issued arrest warrant. Whereas in the Bombay High Court, Appellant filed an admiralty suit A.S. No. 27 of 1997 in March, 1997 for recovery of amount of US\$ 39,712.97 i.e. the security of Appellant's suit claim. On 19.03.1997, Bombay High Court

directed the order of arrest of Vessel M.V. Eleni.

3. Meanwhile, High Court of Madras appointed Respondent No. 2 as the Advocate Commissioner. On 25.04.1997, terms and conditions for sale were approved by the Madras High Court. Publications with respect to the sale of the said vessel were made in various newspapers. Unaware of such proceedings, Bombay High Court, on 11.09.1997, passed an ex-parte decree in the suit filed by the Appellant for a sum of US\$ 50,081.74 with interest, which was communicated to the Advocate Commissioner (Respondent No. 2), appointed by the Madras High Court, with a request to take note of their claim against the Vessel. The Sheriff of Mumbai also communicated to Respondent No. 2 on 21.10.1997 that the Vessel MV ELENI was arrested in due compliance of Warrant of Arrest dated 18.03.1997 and 21.03.1997 passed by the High Court of Bombay and requested them to take note of the arrest order passed by Bombay High Court. Before the aforesaid decree transmitted by the Bombay High Court was received by the Madras High Court on 24.1.1998, learned Single Judge of the Madras High Court confirmed the sale in favour of M/s. Jansee Steel Industry Pvt. Ltd. on 24.10.1997. In the execution petition moved by the Appellant in February, 1998, Bombay High Court issued notice Under Order 21 Rule 52 of the Code of Civil Procedure requesting the Madras High Court to hold the decretal sum in an aggregate amount of US\$ 58,325.64 from and out of the funds deposited by M/s. Jansee Steel Industries.

4. It is worth to note here that the tender of M/s. Jansee Steel Industries had been challenged by another company M/s. Bancorex by way of another suit being O.S.A. No. 15 of 1998, which ultimately was allowed on 23.4.1998 by Madras High Court by setting aside the confirmation of sale made in favour of M/s. Jansee and the matter was remanded to the Single Judge to ensure that the best possible price is secured. Consequently, learned Single Judge accepted the only bid of M/s. Jansee Steel Industry Pvt. Ltd. for a sum of US\$ 4,70,000 and they were directed to pay the balance consideration within three weeks, failing which the earnest money deposited by them would stand forfeited. Advocate commissioner was also directed to deposit the entire amount to the credit of the suit. Madras High Court confirmed the sale made in favour of M/s. Jansee Steel Industry Pvt. Ltd. on 05.10.1998 and ordered reimbursement of cost of sale, payment to the crew members and charges to the statutory authorities.

5. On 25.09.1998, Bombay High Court informed the passing of ex-parte decree in favour of Appellant and asked Registrar of the Madras High Court to remit the funds lying attached pursuant to Order 21 Rule 52 Notice. On 7th October 1998, Bombay High Court made a further order in favour of the Appellant who filed execution petition in the Bombay High Court. The Registry of Bombay High Court sent letters dated 28.01.1999, 09.03.1999 and 11.03.1999, requesting the Registrar of the Madras High Court to give reply for non-remittance of the attached funds. Finally, on 03.09.1999, Bombay High Court gave liberty to the Appellant, to obtain suitable orders from the Madras High Court and closed the Execution Application.

6. Meanwhile after the confirmation of the sale, the sale proceeds were disbursed to the crew members of statutory authorities and a direction was issued on 6.10.1998 to the commissioner to deposit the balance amount of Rs. 12,38,164/-.

7. Thereafter, Appellant challenged the order dated 06.10.1998 passed by single Judge in Application No. 1217 of 1997 in C.S. No. 97 of 1997, pleading before the Division Bench of the Madras High Court that on the service of notice issued by the Bombay High Court Under Order 21 Rule 52 Code of Civil Procedure, the Appellant was entitled to the decretal amount alone and the amount attached ought not to have been disbursed to third parties and the custody court namely the Madras High Court has no authority to make rateable distribution. Per contra, it was submitted on behalf of the Respondents before the Madras High Court that the Appellant failed to bring to the notice of the Bombay High Court that the Madras High Court was already seized with the matter. Had the Appellant brought to the notice of the Bombay High Court about the proceedings entertained by the Madras High Court, which were much prior to the suit filed by them, the Bombay High Court would not have passed the attachment order.

8. After hearing Learned Counsel for the parties, Division Bench of the Madras High Court dismissed the application keeping it open for the Appellant to lay their claim Under Order XLII Rule 11 of Original Side Rules. The Division Bench held that once the suit is filed invoking admiralty jurisdiction of the Madras High Court, the suit in rem, it decides the interest of not only parties to the suit but also other parties who are interested in the property under arrest or in the fund. The High Court observed thus:

Madras High Court, while deciding the issues in the suit filed under admiralty jurisdiction has considered the interest and also priorities of all interveners and also parties to the suit. We follow the judgment of Apex Court in *M.V. Elisabeth and Others Vs. Harwan Investment and Trading Pvt. Ltd., Hanoekar House, Swatontapeth, Vasco-De-Gama, Goa*, . The catena of judgments relied on by the Appellant are no way useful to them. The Appellant ought to have made the claim Under Rule 11 of Order XLII of O.S. Rules. In the ordinary course, no Court is so prestige-conscious that it will stand in the way of legitimate legal proceedings for redressal or relief sought for by the litigant. We find that necessary parties are not impleaded by the Appellant herein and Jansee Steel Industries Pvt. Ltd., which is sought to be impleaded as seventh Respondent in this appeal, is not a necessary party to resolve the disputes involved in this appeal. It is not open to the Appellant to convert the appeal against the order dated 05.10.1998 instead of 06.10.1998, as the leave was granted to file the appeal only against the order dated 06.10.1998. Liberty was granted to Appellant to file their claim Under Order XLII Rule 11 of O.S. Rules. 9. Hence, this appeal by special leave by the Appellant.

10. Ms. Vijaylaxmi Menon, Learned Counsel appearing for the Appellant, assailed the impugned order passed by the Madras High Court on various grounds. At the very outset, Learned Counsel submitted that the High Court erred in holding that

money lying with the Advocate Commissioner was custodial legis. Learned Counsel contended that the High Court in the impugned judgment overlooked that the Appellant-execution creditor attempted to intervene in the pending admiralty suit in the Madras High Court on 12th December, 1997 leading to an order dated 24th January, 1998, whereby the Appellant was directed to work out its remedies in execution. In other words, the Appellant was not allowed to intervene in the pending admiralty suit in the Madras High Court. On the contrary, the High Court held that the Appellant ought to have been intervened in the suit with its application Under Order 42 Rule 11 of the Original Side Rules of the Madras High Court.

11. Ms. Menon further contended that there is nothing in the aforesaid O.S. Rules that requires a decree holder, who has secured a valid attachment, to seek to intervene in the pending admiralty suit, particularly, when in the previous application filed by the decree holder, an order has already been passed directing the decree holder to work out its remedies in execution.

12. Learned Counsel further contended that the High Court overlooked the grievances of the Appellant and failed to appreciate the fact that the custody Court was acting in a dual capacity of an admiralty Court vested with the higher degree of responsibility and accountability upon both the Registrar of Madras High Court and the Advocate Commissioner appointed in the pending admiralty suit.

13. Lastly, Learned Counsel submitted that the order of Bombay High Court dated 3rd September, 1999 at no stage ever ordered dismissal of the Appellant's Execution Application, either before or after the disbursal of monies by the Madras High Court. Thus, no scope or requirement arose for the Appellant to challenge the Order dated 3rd September, 1999 of the Bombay High Court. The surrounding circumstances preceding such order are important, viz. that faced with a brazen silence and the lack of explanation, since the Registrar of the Madras High Court failed to respond despite order of the Bombay High Court, the only restrained option left to the Bombay High Court was to enable the Appellant to urge matters before the Madras High Court. Ordinary remedies of contempt of Court in relation to non-compliance of orders of the Bombay High Court by the Registrar of the Madras High Court were available, but were rather too harsh for the Appellant to pursue, hence the Appellant pursued its Appeal already pending before the Madras High Court.

14. Mr. P.B. Suresh, Learned Counsel appearing for the Respondent Nos. 1 to 4, firstly submitted that the Bombay High Court by order dated 3.9.1999 had directed the Appellant to make its claim before the Madras High Court, but the Appellant had not challenged that order, which attained the finality. Moreover, the High Court of Madras by order dated 27.11.2003, had given liberty to the Appellant to lay the claim before it Under Order 42 Rule 11 of the Rules of the Madras High Court. Learned Counsel then submitted that there are seven other creditors, whose claims are pending before the Madras High Court. Those

creditors are parties to the suit and they have lost their claim before the Madras High Court against the sale proceeds lying in the High Court.

15. Learned Counsel then submitted that the Madras High Court being the transferee Court had jurisdiction to determine the inter-se priorities of all the creditors or the claimants, in terms of proviso to Order 21 Rule 52 of the Code of Civil Procedure, 1908 as the vessel/ship was sold free from all encumbrances, being a sale conducted in an action in rem.

16. Learned Counsel submitted that the Appellant had knowledge of the proceedings pending before the learned Single Judge of the Madras High Court, where all the creditors were seeking relief for disbursement of fund. The Appellant had chosen not to object to the said disbursement and not participated in the proceeding. The Appellant, who is an unsecured creditor, by standing outside the Court cannot claim exclusively on the basis of an order of attachment.

17. We have elaborately heard the Learned Counsel appearing for the parties. It has been pleaded on behalf of the Appellant that the Appellant had obtained a decree for a sum of US\$ 50,081.74 with interest from the Bombay High Court in a suit against the judgment debtor and had also obtained an order of sale of a ship of the judgment debtor which was lying in the territorial waters of India at Madras. The said ship had also been attached by the orders of the Madras High Court in a suit filed by Respondent No. 1 for US\$ 15,975.04. The Division Bench of the Madras High Court on 17.4.1997 appointed an Advocate Commissioner in order to bring the said ship to sale, with a view to preserve/prevent her from deterioration and thereby protect her creditors. It is further pleaded that in April, 1997 the ship was brought to sale and on 26.5.1997 an earnest money of Rs. 35,60,000/- was received by the Advocate Commissioner from one M/s. Jansee Steel Industries Pvt. Ltd. On 24.8.1997, the bid of Jansee Steel Industries Pvt. Ltd. was accepted and the Madras High Court confirmed the sale in its favour and the balance amount was directed to be remitted. The Advocate Commissioner was informed about the decree of the Appellant on 25.9.1997. On 24.1.1998, the Madras High Court again confirmed the sale in favour of M/s. Jansee Steel Industries Pvt. Ltd. In April 1998, however, the said sale was set aside in appeal and a fresh sale was directed.

18. It is Appellant's case that in an execution application filed by the Appellant, Bombay High Court on 17.3.1998 issued an attachment order Under Order 21 Rule 52 of the Code of Civil Procedure directing attachment of a sum of US\$ 58,325.64 (approximately Rs. 20 lakhs) from and out of the funds deposited by M/s. Jansee Steel Industries Pvt. Ltd. until further orders of the Madras High Court. The said order of attachment was received by the Madras High Court on 16th June, 1998. Meanwhile, on 23.4.1998, the sale was set aside and a fresh tender was directed by the Division Bench of the Madras High Court. However, the amount of earnest money lying with the Advocate Commissioner was not returned to M/s. Jansee Steel Industries Pvt. Ltd. On 1.9.1998, Madras High Court accepted the only bid of M/s. Jansee Steel Industries Pvt. Ltd. and directed

that the moneys be held over to the account of the suit. On 7.9.1998, Registry of the Madras High Court effected the attachment and returned the notice of the Bombay High Court with a pro order to the Bombay High Court confirming that the monies directed by the Bombay High Court to be attached stood duly held to the credit of the Appellant. On 25.9.1998, Bombay High Court passed an order directing the Registrar of the Madras High Court to remit the funds lying pursuant to the Order 21 Rule 52 attachment.

19. The Appellant's case in a nutshell is that ignoring the decree and the attachment of the Bombay High Court, the Madras High Court on 5.10.1998 paid moneys to the crew and other charges to other creditors who have no decree in their favour. On 6.10.1998, on an application filed by the Advocate Commissioner showing the disbursements, the Madras High Court confirmed the disbursements and directed that the balance amount be placed in a fixed deposit in view of the order of the Bombay High Court which, it is specifically stated, was brought to its notice on 6.10.1998 only. Learned Counsel vehemently contended that the aforesaid events would show that even though the Appellant was a decree holder and had priority over all other creditors, money was disbursed without there being any adjudication of priority or dispute of title by the Madras High Court, which disbursement could only have been done by Bombay High Court. Learned Counsel for the Appellant also contended that Madras High Court had no jurisdiction to deal with the moneys once the same were attached Under Rule 52 of Order 21 Code of Civil Procedure.

20. It is the case of the Respondent that the Appellant had knowledge of the proceedings before the Madras High Court right from its inception and despite this, the Appellant did not participate in any of the proceedings before the learned Single Judge and allowed orders to be passed. Division Bench of the Madras High Court vide impugned judgment has, therefore, given liberty to the Appellant to make its claims before the learned Single Judge Under Order XLII Rule 11 of O.S. Rules of the Madras High Court. It has been further contended that the Appellant specifically stated in its suit filed before the Bombay High Court that the subject vessel is lying in the port at Chennai and it is only to conveniently avoid the contest with other creditors who have all lodged their claims before the Madras High Court the suit was filed in Bombay. Further, the Appellant was the lone claimant before the Bombay High Court whereas all the other claimants were pursuing their claims before the Madras High Court, which alone has jurisdiction to decide on the rights of the parties and the inter se priorities amongst them.

21. Admittedly the vessel is berthed at the Madras harbor and, therefore, the Madras High Court alone had jurisdiction to entertain any claim against the subject vessel as per provisions of Section 3(15) of the Merchant Shipping Act, 1958. The arrest of vessel by the Madras High Court being the first arrest, the vessel and the sale proceeds are custodial legis of the said court and no proceedings in Bombay High Court can be maintained subsequently without leave

of the Madras High Court. It is also not in dispute that after the decree got transmitted to the Madras High Court, Appellant had again moved Bombay High Court and obtained attachment order without notice to the creditors and claimants before the Madras High Court, which act of the Appellant clearly exposes that it conveniently wanted to avoid any contest of its claim by other creditors/claimants.

22. We have gone through the relevant provisions of Order XLII of Madras High Court Original Side Rules: The said Rule reads as under:

Rule 3. In suits in rem a warrant for the arrest of the property maybe issued at the instance either of the Plaintiff or of the Defendant at any time after the suit has been instituted, but no warrant of arrest shall be issued until an affidavit by the party or his agent has been filed, and the following provisions complied with:

A. The affidavit shall state the name and description of the party at whose instance the warrant is to be issued, the nature of the claim or counter-claim, the name and nature of the property to be arrested, and that the claim or counterclaim has not been satisfied.

B. In a suit of wages or of possession, the affidavit shall state the national character of the vessel proceeded against; and if against a foreign vessel, that notice of the institution of the suit has been given to the consul of the State to which the vessel belongs, if there be one resident in Madras and a copy of the notice shall be annexed to the affidavit.

C. In a suit of bottomry, the bottomry bond and if a foreign language also a notarial translation thereof, shall be produced for the inspection and perusal of the Registrar, and a copy of the bond, or of the translation thereof, certified to be correct shall be annexed to the affidavit.

D. In a suit of distribution of salvage, the affidavit shall state the amount of salvage money awarded or agreed to be accepted, and the name and address and description of the party holding the same.

8. In suits in rem, service of summons or warrant against ship, freight or cargo on board is to effected by nailing or affixing the original writ or warrant for a short time on the main mast or on the single mast of the vessel and by taking off the process leaving a true copy of it nailed or affixed in its place.

11. In a suit in rem, any person not named in the writ may intervene and appear on filing an affidavit showing that he is interested in the property under arrest or in the fund in the Registry.

23. Perusal of the aforesaid Rule would show that in a suit in rem warrant of arrest of vessel is issued by the High Court, all interested persons shall have a right to intervene and lay their claim by filing an affidavit showing that he is interested in the property under arrest.

24. In the impugned judgment, Madras High Court has discussed elaborately the

sequence of events and reasons of disallowing the claim of the Appellant.

25. Indisputably in admiralty proceedings, where several persons have lodged their claim, even the attachment made by Bombay High Court has to be decided only if an application for payment of attached amount is made. Admittedly the Appellant without approaching the admiralty proceedings sought a declaration that it is not entitled to priority. Being fully aware of the development of the proceedings and suits in the Madras High Court, the Appellant did not raise any objection. In the result, the learned Single Judge of the Madras High Court after hearing all the parties, who had approached the Court, passed the order. In our considered opinion, once the decree was transferred and transmitted by the Bombay High Court to the Madras High Court, the Appellant could not have moved the Bombay High Court and obtained an order without notice to the creditors and claimants. We are further of the view that when the property was in the custody of Madras High Court, being the transferee court in question of title of priority arisen between the person having decree in his favour and person not being the judgment debtor is to be determined by the transferee court. We are unable to accept the submission of the Learned Counsel for the Appellant that after order of attachment Under Order XXI Rule 52 Code of Civil Procedure, the Registry of Madras High Court had to remit the amount to Bombay High Court ignoring the pendency of proceedings in the Madras High Court.

26. The decision in Shivshankar Gurgar Vs. Dilip, relied upon by Mrs. Menon, Learned Counsel appearing for the Appellant, for the proposition that the executing court cannot go behind the decree is not at all applicable in the facts of the present case. In the said decision, while considering an order of modification of the compromise decree by the executing court it was held that it will amount to modification of decree and, therefore, the same is without jurisdiction. Similarly, the decision in the case of ONGC Ltd. Vs. Modern Construction and Company, , for the proposition that in the absence of any challenge to the decree the executing court cannot go behind the decree, will also be of no help to the Appellant.

27. Further Mrs. Menon relied upon a decision in the case of Shaukat Hussain alias Ali Akram and Others Vs. Smt. Bhuneshwari Devi (Dead) by Lrs. and Others, with regard to the power of the court which passed the decree and the transferee court where the decree is transferred will equally have no application in the present case where the Madras High Court exercised admiralty jurisdiction.

28. It is worth to mention here that the Bombay High Court on 3.9.1999 gave liberty to the Appellant to move the Madras High Court for appropriate order for disbursement of amount. The Bombay Court held that no further direction is required. For better appreciation, the order dated 3.9.1999 in the admiralty suit filed by the Appellant is quoted hereinbelow:

According to the office of the Prothonotary the position remains the same as 31st august, 1999. In other words, no communication has been received from the

Madras High Court. However, Ms. Sethna, Learned Counsel appearing for the Plaintiff, has very fairly brought to the notice of this Court an order passed by the Madras High Court on 6th October, 1998. After noticing the orders passed by this Court, the Madras High Court is directed that the amount of Rs. 12,38,164/- should be deposited in a fixed deposit for a period of 46 days renewable periodically if necessary in the name of the Registrar, High Court, Madras to the credit of the suit. As noticed earlier, the Plaintiff has already filed Appeal No. 175 of 1998 in the Madras High Court. In view of the above the Plaintiffs are at liberty to move the Madras High Court for appropriate orders for disbursement of the aforesaid amount on the basis of the decree passed by this Court.

In view of the above no further directions are required.

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29. It has not been disputed by the Appellant that the Bombay High Court while passing the order of attachment was not aware about the fact that the vessel was seized by the Madras High Court much prior to the filing of the suit by the Appellant in Bombay High Court. The Division Bench in the impugned order has recorded the finding that Madras High Court while deciding the issues in the suit filed under admiralty jurisdiction had considered the interest and also priorities of all interveners and also parties to the suit. It was held that the Appellant ought to have made claim Under Order XLII Rule 11 of the OS Rules. The Division Bench rightly held that no court is so prestige conscious that it will stand in the way of legitimate legal proceedings for redressal or relief sought for by the litigant. The Court also took notice of the fact that the necessary parties who had led their claims had not been impleaded by the Appellant in the proceedings.

30. In the facts and circumstances of the case and having regard to the law settled, so far the admiralty jurisdiction of the Court is concerned, we do not find any reason to differ with the findings recorded by the Division Bench of the High Court in the impugned order. For the reason aforesaid, we do not find any merit in this appeal, which is accordingly dismissed, however with no order as to costs.

31. Hon"ble Mr. Justice M.Y. Eqbal pronounced the judgment of the Bench comprising His Lordship and Hon"ble Mr. Justice Shiva Kirti Singh.

32. The appeal is dismissed in terms of the Reportable judgment, which is placed on the file.