

(2001) 04 BOM CK 0070

In the Bombay High Court

Case No : Notice of Motion No. 81 of 2001 in Admiralty Suit No. 17 of 2000

Raj Shipping Agencies

APPELLANT

Vs

M.V. "Bunga Mas Tiga" and Another

RESPONDENT

Date of Decision : 11-04-2001

Acts Referred:

Admiralty Courts Act, 1861 — Section 5, 6

Citation : AIR 2001 Bom 451 : (2002) 1 ALLMR 145 : (2001) 4 BomCR 485 : (2001) 4 BOMLR 124 : (2001) 4 MhLj 324

Hon'ble Judges : D.K. Deshmukh, J

Bench : Single Bench

Advocate : V.C. Kotwal, A.K. Patel and J.R. Patwardhan, instructed by Bhatt and Saldhana, for the Appellant; G.A. Rebello and G.D. Marker, for the Respondent

Judgement

D.K. Deshmukh, J.—This Notice of Motion has been taken out by the first Defendant for rejection of the plaint, as the plaint does not disclose any cause of action against the first Defendant or its owner.

2. The facts that are material and relevant for the purpose of deciding this Notice of Motion are, according to the averments in the plaint, the Plaintiff is a partnership firm carrying on business in India. The first Defendant is a foreign flag vessel flying the flag of Malaysia. It is further averred that on the basis of two communications dated 22nd July, 1999 and 29th July, 1999 addressed by one M/s. North End Oil (Asia) Pvt. Ltd., to the Plaintiffs, the Plaintiffs were called upon to effect supply of 80 M. T. diesel oil/bunkers and 10 M. T. diesel oil/bunkers to the first Defendant vessel. The port of delivery was specified as Mumbai and the delivery date was 23rd July, as regards 80 M. T. diesel oil/bunkers and 29th to 30th July, 1999 as regards the 10 M. T. diesel oil/bunkers respectively. It is further averred on 24th July, 1999, while the vessel was at Bombay, in berth, 92.394 M. T. diesel oil/bunkers were supplied to the first Defendant vessel on the basis of the instructions received by the Plaintiff from M/s. North End Oil Pvt. Ltd. The receipt of the oil was acknowledged by the Chief

Engineer of the first Defendant vessel. According to the averments in the plaint, the Plaintiffs draw their invoices upon the said M/s. North End Oil Ltd. It is further averred that in the invoices the first Defendant vessel was shown as a consignee. According to the averments in the plaint, although the oil was supplied to the first Defendant, on the basis of the order placed by M/s. North End Oil Pvt. Ltd. and the invoices were drawn accordingly. According to the Plaintiffs, the receipt of the oil/bunkers by the first Defendant vessel is without any qualification as regards the quality, quantity and the price of the same and therefore, the first Defendant vessel is liable to the Plaintiffs for the value thereof. It is further averred that as the Plaintiffs did not receive any payment, a communication dated 4th September, 1999 was addressed to M/s. North End Oil Pvt. Ltd. calling upon them to make payment of the price of the oil bunkers supplied to the first Defendant. As there was no response from them, further communications were addressed demanding the payment. On inquiries being made, the Plaintiffs have stated in the plaint that they have come to know that the Administrative Receiver has been appointed on M/s. North End Oil Pvt. Ltd. The Plaintiffs have further stated that they have also lodged their claim against M/s. North End Oil Pvt. Ltd. with the Administrative Receiver in the sum of US \$ 32.563. According to the Plaintiffs presently, when the suit was filed the vessel was at Bombay Port and therefore as the Plaintiffs have maritime lien over the vessel and therefore for enforcement of that lien and for recovery of the price of the oil supplied to the first Defendant this suit was filed. It appears that this Court by an act-interim order had arrested the vessel, however, subsequently security has been furnished by the Defendant/vessel and therefore the vessel has been released.

3. By this Notice of Motion, the first Defendant contends that the plaint is liable to be rejected, because the plaint does not disclose any cause of action against the first defendant/vessel. According to the Defendant, an order for supply of the oil bunkers was placed with the Plaintiffs by M/s. North End Oil Pvt. Ltd. The communications, which have been placed on record by the Plaintiffs dated 22nd July, 1999 and 29th July, 1999 clearly show that buyer of the oil/bunkers was M/s. North End Oil Pvt. Ltd., and the seller was the Plaintiffs. According to the first Defendant, they had entered into the contract with M/s. North End Oil Pvt. Ltd. and for supply of oil bunkers to their vessel the first Defendant. In its terms M/s. North End Oil Pvt. Ltd. entered into the contract with the Plaintiffs for purchasing of oil bunkers, which M/s. North End Oil Pvt. Ltd. was to supply to the first Defendant. According to the first Defendants, therefore, there is no privity of contract between the Defendant and the Plaintiffs. The contract of the Plaintiffs was with M/s. North End Oil Pvt. Ltd. and their remedy for recovering of the price of the oil is against M/s. North End Oil Pvt. Ltd. The Defendant relies on the invoices of the Plaintiffs, which show that buyer of the oil is M/s. North End Oil Pvt. and the supply has been made by the order of M/s. North End Oil Pvt. Ltd.. According to the Defendant, the Defendant has also produced on record documents to show that the first Defendant vessel have made payment for the

oil that was supplied to the first Defendant to M/s. North End Oil Pvt. Ltd. It is further pointed out by the Defendant that it is clear from the invoices and the bills that M/s. North End Oil Pvt. Ltd. purchased from the Plaintiffs oil at the rate of US \$ 209 per metric tone, whereas M/s. North End Oil Pvt. Ltd. sold the oil to the first Defendant at the rate of 214,5 US \$ per M/ts. According to the Defendant, therefore, as the averments in the plaint themselves disclose that there is no privity of contract between the Plaintiffs and the first Defendant, there can be no cause of action for the Plaintiffs against the first Defendant and therefore, the plaint is liable to be rejected.

4. The learned Counsel appearing for the first Defendant relies on a judgment of the House of Lords in the case of *Northcote v. Owners of the Henrich Bjorn*, reported in *Maritime Law Cases*, as also the judgment of the High Court of Australia in the case of *Shell Oil Company v. The Ship "Lastrigoni"*, to claim that a maritime lien can be based only on existing right. He further submits that Sections 5 & 6 of the Admiralty Act, 1861 are the provisions which relate to providing of the remedies and they do not create any rights. Relying on the judgment of the House of Lords referred to above, the learned Counsel submits that the provisions of Sections 5 & 6 of Admiralty Act, 1861 do not have effect of altering the nature and legal incidents of the claim. The learned Counsel further submits that as the general rule of Admiralty, an action in rem cannot be maintained when there is no liability in the owners.

5. The learned counsel appearing for the Plaintiffs, on the other hand submits that it is an admitted position that oil is the necessity, which was supplied by the Plaintiffs to the first Defendant and that supply was accepted by the first Defendant. Therefore, relying on the International Convention for the Unification of certain Rules relating to the arrest of sea-going ships, Brussels, the learned Counsel submits that as oil was supplied to the vessel and as that oil was necessary for operation of the vessel, the claim of the Plaintiffs is maritime claim within the meaning of Brussels Convention. The learned Counsel, therefore, submits that as the claim of the Plaintiffs is the maritime claim against the first Defendant, their suit for recovery of the price against the first Defendant is competent. The learned Counsel submits that M/s. North End Oil Pvt. Ltd. was acting for and on behalf of the first Defendant for supply of oil by the Plaintiffs to the first Defendant and therefore the Plaintiffs have maritime lien as against the first defendant vessel. The learned Counsel in support of his submission relied on the judgment of the learned Single Judge of this Court in the case of *Trans Gulf Oil & Shipping Inc. v. M. V. Altair*,. He also relied on a judgment of the another learned Single Judge of this Court in the case of *Sigma Coatings B.V. v. M. V. "Agios Nikolaos"*. The learned counsel also invited my attention to some paragraphs from the judgment of the Supreme Court in the case of *M.V. Elisabeth v. Harwan Investment & Trading Pvt. Ltd.*

6. Now, if in the light of these rival submissions, if these plaint is perused it becomes clear that order for buying oil was placed by M/s. North End Oil with the

Plaintiffs. The price at which the oil was to be supplied was also stated in that contract. The oil, however, was to be delivered to the first Defendant vessel. In the plaint. I do not find any averment made that the M/s. North End Oil Pvt. Ltd. was acting as an agent of the first Defendant or its owner for purchase of oil from the Plaintiffs. On the contrary, the documents which have been placed on record by the Plaintiffs namely purchase order, invoices etc. show that so far as the Plaintiffs are concerned, M/s. North End Oil Pvt. Ltd. was buyer of the oil from the Plaintiffs. The oil was merely to be delivered to the first Defendant vessel. It is, thus, clear that so far as the substantive law is concerned, there is no privity of contract between the Plaintiffs and the first Defendant vessel or its owner. It is, however, contended on behalf of the Plaintiffs that though there was no direct contract between the Plaintiffs and the owner of the first Defendant vessel, the Plaintiffs have maritime lien over the vessel. Because, the oil was supplied to the first Defendant vessel. It is further to be seen that the present suit is the action in rem. The Supreme Court has considered this aspect of the matter in its judgment in *M. V. Elisabeth's* case. The observations of the Supreme Court in paragraphs 65 and 66 are pertinent and they read as under :- "65. Where statutes are silent and remedy has to be sought by recourse to basic principles, it is the duty of the Court to devise procedural rules analogy and expediency, actions in rem, as seen above, were resorted to by Courts as a device to overcome the difficulty of personal service on the defendant by compelling him to enter appearance and accept service of summons with a view to furnishing security for the release of the res; or, in his absence, proceed against the res itself, by attributing to it a personality for the purpose of entertain a decree and executing the same by sale of the res. This is a practical procedural device developed by the Courts with a view to rendering justice in accordance with substantive law not only in cases of collision and salvage, but also in cases of other maritime liens and claims arising by reason of breach of contract for the hire of vessels or the carriage of goods or other maritime transactions, or tortious acts, such as conversion or negligence occurring in connection with the carriage of goods. Where substantive law demands justice for the party aggrieved, and the status has not provided the remedy, it is the duty of the Court to devise procedure by drawing analogy from other systems of law and practice. To the Courts of the "Civil Law Countries" in Europe and other places, like problems seldom arise, for all persons and things within their territories (including their waters) fall within their competence to deal with. They do not have to draw any distinction between an action in rem and an action in personam.

66. It is likewise within the competence of the appropriate Indian Courts to deal. In accordance with the general principles of maritime law and the applicable provisions of statutory law, with all persons and things found within their jurisdiction. The power of the Court is plenary and unlimited unless it is expressly or by necessary implication curtailed. Absent such curtailment of jurisdiction, all remedies which are available to the Courts to administer justice are available to

a claimant against a foreign ship and its owner found within the jurisdiction of the concerned High Court. This power of the Court to render justice must necessarily include the power to make interlocutory orders for arrest and attachment before judgment."

7. It is clear from the observations quoted above that an action in rem is devised by the Court to overcome a difficulty of personal service on the owner of the vessel. For that purpose, the vessel itself is treated as a person, so that the liability of the owner of the vessel can be enforced against the vessel itself. It is thus clear that even for maritime lien there has to be an enforceable rights in the plaintiffs against the owner of the vessel. That right is enforceable against the vessel. But existence of a right in the Plaintiffs against the owner of the vessel. Is a must. Insofar as the present case is concerned, averments in the plaint do not disclose any existing right in the Plaintiffs against the owner of the vessel. In the present case, it is clear that there were two independent contracts in relation to purchase of oil. There was one contract between the owner of the Defendant No. 1/ vessel and M/s. North End Oil Pvt. Ltd. whereby the owner of the Defendant No. 1/ vessel agreed to purchase oil at the stated price from M/s. North End Oil Ltd., and the second contract was between M/s. North End Oil Pvt. Ltd. and the plaintiffs, whereby M/s. North End Oil Pvt. Ltd. agreed to purchase oil from the Plaintiffs at a stated price. The price of oil in both these contracts is different. Insofar as, the purchase of oil by the owner of the Defendant No. 1/ vessel is concerned, there is no privity of contract between the Plaintiffs and the owner of the Defendant No. 1/ vessel. Not only that but even a demand of the price was made by the Plaintiffs from M/s. North End Oil Pvt. Ltd. and the Plaintiffs have also lodged their claim with M/s. North End Oil Pvt. Ltd. The first Defendant has produced on record receipts which show that the owner of the first defendant vessel has already made payment of price of oil to M/s. North End Oil Pvt. Ltd.. It is further to be seen here that in case the Plaintiffs claim against the Defendant No. 1/ vessel and its owner is held to be maintainable then, the owner of the Defendant No. 1/ vessel would be liable to pay price of the oil to two parties, namely M/s. North End Oil Pvt. Ltd. as also the Plaintiffs. In my opinion, adopting such course of action would not amount to advancing justice. Insofar as the Judgment of the learned Single Judge in the case of Trans Gulf Oil & Shipping Inc. relied on by the learned Counsel for the Plaintiffs is concerned, it is clear from the observations in paragraph 10 of that judgment that in that case there was a specific averments made in the plaint that the master of the vessel himself had requested supply of bunkers from the Plaintiff. Thus the case disclosed in the plaint of that case was a direct contract between the owner of the vessel and the Plaintiff. In my opinion, that is the distinguishing feature between that case and the present case. In my opinion, supply of necessity would not make the owner of the vessel liable to pay the price of the supply, unless the Plaintiffs prove that the supplies were made at the instance of either the owner of the vessel or at the instance of the person authorised by the owner of the vessel.

8. In these circumstances, therefore, in my opinion, it is clear that the Plaintiffs

do not have a cause of action against the Defendant No. 1. The cause of action for recovery of price of the oil is against M/s. North End Oil Pvt. Ltd. and therefore as the plaint does not disclose any cause of action against the Defendant No. 1/ vessel or its owner, the plaint Is liable to be rejected, and therefore, this Notice of Motion is granted in terms of prayer clause (b). As the consequence of rejection of the plaint, ad-interim order of arrest dated 30th April, 2000 would not survive. As a consequence, the security furnished by the first Defendant pursuant to the order dated 16th May, 2000 be returned to the first Defendant with interest accrued on the amount, if any.

The amount deposited as security be permitted to be withdrawn by the advocate for the first Defendant. Notice of Motion disposed of.

At the request of the learned Counsel for the Plaintiffs, operation of this order is stayed for a period of four weeks today.

Prothonotary & Sr. Master & Parties to act on simple copy of the order duly authenticated by the Associate/Personal Secretary of the Court.