
(2002) 04 GUJ CK 0012
In the Gujarat High Court
Case No : Admiralty Suit No. 5 of 2002

R.K. Industries (Unit 2)	Vs	APPELLANT
M.T. Chesapeake Ex Chesapeake City Ex Umm Madrabah		RESPONDENT

Date of Decision : 30-04-2002

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 45
Contract Act, 1872 — Section 17, 18, 19
Specific Relief Act, 1963 — Section 10, 14

Citation : (2002) 04 GUJ CK 0012

Hon'ble Judges : D.A. Mehta, J

Bench : Single Bench

Advocate : Mihir J Thakore, for Y.N. Ravani, for the Appellant; P.C. Kavina for Respondent Nos.2-3, for the Respondent

Judgement

D.A. Mehta, J.—The following reliefs have been sought by the plaintiff in the suit.

"15. The Plaintiff prays :

(A) that the Honourable Court be pleased to declare that the plaintiff is entitled to the ownership and possession of the vessel MT Chesapeake City and the defendants be directed to specifically perform the contract by transferring ownership rights, title and interest and handing over physical possession of the vessel along with its hull, tackle, machinery, apparel, equipment, stores, articles, things and other paraphernalia to the plaintiff;

(B) that the defendant vessel MT Chesapeake City together with hull, tackle, machinery, apparel, equipment, stores, articles, things and other paraphernalia be arrested and detained by a warrant of arrest by this Honourable Court and the defendants be permanently restrained from beaching the said vessel on any other plot;

(C) that pending the hearing and final disposal of this suit the defendant vessel MT Chesapeake City together with hull, tackle, machinery, apparel,

equipment, stores, articles, things and other paraphernalia be arrested and detained by a warrant of arrest by this Honourable Court and the defendants be restrained from beaching the said vessel on any other plot;

(D) for costs;

(E) for such further and other reliefs as the circumstances of the case require.

2. The brief facts necessary and relevant to the controversy may be stated. The plaintiff, a partnership firm entered into a Memorandum of Agreement (MoA) on 13-04-2002 with the Defendant No.2 for purchase of vessel named, MT CHESAPEAKE EX CHESAPEAKE CITY, which is a Motor Tanker. The said vessel has been joined as Defendant No.1 and Defendant No.3 is a Limited Company being the Agent of the owner, namely, Defendant No.2. The Defendant No.1 vessel is presently registered with Directorate General of Merchant Marine of Panama and is presently lying in the Harbour and Port of Alang (District Bhavnagar).

3. It appears that on 02-04-2002, Defendant No.3 on the basis of details of the vessel circulated amongst various shipbreakers entered into a Pre-Memorandum of Agreement whereby the plaintiff agreed to a purchase price of USD 2,506,544 on lump-sum basis payable in two installments as under : " US\$ 1,255,000 payable at 89 days from the date of Physical Delivery.

And US\$ 1,251,544 payable at 120 days from the date of Physical Delivery. "

4. As a consequence, the plaintiff purchaser deposited a sum of Rs.50 lacs which was returnable to the plaintiff at the time of opening of LC for the defendant No.1 vessel. It appears that the said Pre-Memorandum of Agreement's term was incorporated as Clause-1 of the Memorandum of Agreement (MoA) entered into 13-04-2002. The said Clause-1 reads as under :

"1. Total lumpsum price USD 2,506,544 (United States Dollars Two Million Five Hundred Six Thousand Five Hundred Forty Four Only). Light displacement ton excluding permanent ballast Net LDT being 17,707 Metric Tonnes or equivalent 17,428.15 Long tons after removals and excluding permanent ballast only."

5. Clause 8(a) of the Memorandum of Agreement (MoA) which is necessary for the present is in the following terms :

"8.1 The SELLER shall issue the notice of readiness for delivery only after the vessel has arrived at Alang and is ready in all respects for physical delivery as per this agreement along with the following certificates from a reputed licensed and independent Surveyor at the Port of delivery.

i. Port worthy certificate.

ii. Proof of lightweight : certificate confirming the LDT of vessel excluding permanent ballast and removals only as per the copy of the Trim and

stability booklet or Capacity Plan or Builders Letter sighted on board the vessel i.e. 17,707 Metric Tonnes or equivalent 17428.15 Long Tons."

6. Accordingly, notice of readiness was given by the defendant No.3- Agent on 23-04-2002, but the plaintiff purchaser vide letter dated 24-04-2002 disputed the LDT weight as not being 17707 MT but 16116 MT. As per correspondence exchanged between the parties the say of the defendant was that the LDT weight was represented by them at the figure 17707 MT on the basis of Trim and Stability approved by ABS, U.S.A. on 30-03-1993. The case of the plaintiff is that the LDT weight 16116 MT is based on the original Trim and Stability booklet prepared by the builder in 1981 and as thereafter no change or repair have been shown to have occurred, the plaintiff was given short weight to the said extent. Thus, according to the plaintiff the defendant must be directed to transfer ownership and possession in the vessel as per the contract i.e. LDT weight of 17707 MT.

7. At the time of hearing, Mr. M.H. Thakore, Sr. Advocate appeared with Mr. Y.N. Ravanion behalf of the plaintiff and sought permission to amend the plaint seeking specific performance of the contract or in the alternative Rs.2,15,58,000/- by way of damages.

8. Mr. P.C. Kavina appeared on behalf of defendants on Caveat and undertook to file his appearance. Various preliminary and other objections were raised by Mr. Kavina on behalf of defendants. 9. Having heard both the sides at length for the reasons that follow, it is not necessary for the Court to deal with various contentions in detail. In the Memorandum of Agreement (MoA) dated 13-04-2002, Clause-19 which pertains to Arbitration reads as under :

"19. If any dispute arises in connection with the interpretation in fulfillment of this agreement, same shall be decided by arbitration in New York, U.S.A. Law to apply and shall be referred to a single arbitrator to be appointed by the parties hereto. If the parties cannot agree on the appointment of the single arbitrator, the dispute shall be settled by three arbitrators, each party appointing one arbitrator, the third being appointed by the 2 so chosen. If either of the appointed arbitrators refuses or is incapable of acting, the party who appointed him, shall appoint a new arbitrator in his place.

If one party fails to appoint an arbitrator either originally or by way of substitution for five business days after the other party having appointed his arbitrator, has sent the party making default notice by mail, cable or telex to make the appointment, society of maritime arbitrators shall after application from the party having appointed his arbitrator also appoint on behalf of the party making default.

The award rendered by the arbitrators shall be final and binding upon the parties and may if necessary, be enforced by any court or any other competent authority in the same manner as a judgement in the court of justice."

10. Mr. Thakore contended that the contract was for purchase of vessel which could

not be treated generally as a movable property and hence can be enforced by seeking arrest of the vessel. In support of this contention, he relied upon Sections 10 and 14 of the Specific Relief Act, 1963. It was submitted that the plaintiff had not repudiated the contract; that the plaintiff was ready and willing to pay the full price for the vessel, however, taking into consideration the provisions of Section 19 of [The Indian] Contract Act, 1872 read with Sections 17 and 18 of the Contract Act it was apparent that the contract was voidable, the same having been obtained by fraud or misrepresentation.

Alternatively, the plaintiff was entitled to claim damages / compensation in view of the fraudulent statement of the defendants.

He further contended that the International Convention on Arrest of Ships, 1999 defines "Maritime Claim" and Clause 1(v) of the said definition stated that any dispute arising out of a contract for the sale of the ship would mean to be a Maritime Claim. That Clause-2 of the definition pertaining to "Arrest" stated any detention or restriction on removal of a ship by order of a Court to secure the maritime claim. Thus, the plaintiff having sought relief as to the ownership and possession of the vessel was entitled to seek arrest of the vessel.

11. Referring to the Arbitration Clause in the MoA, it was submitted that such a clause did not prevent the Court from granting the relief of arrest, at least till the time the Arbitral Tribunal decided whether any interim order was required to be made or not, because otherwise the purpose of specific performance of a contract or alternatively, claim of damages would stand frustrated in case the arbitration award was in favour of the plaintiff. Hence, it was submitted that the relief of arrest must be granted in aid of arbitration. He submitted that the additional documents (four in number) which were submitted during the course of hearing on 29-04-2002 went to show that the defendant was aware of the discrepancy in the weight i.e. LDT resulting in a right in favour of the plaintiff to claim differential amount under the contract.

12. Mr. Thakore read extensively from paragraph 3 of the plaint, which is as under :

"3. The plaintiff states that the defendants in the MOA and even otherwise had guaranteed to the plaintiff that the LDT of the vessel is 17707 MT. The plaintiff states that the price was negotiated on the basis of the said LDT and the MOA was also signed on the said guarantee being given by the defendants. The plaintiff says that the vessel was being purchased by the plaintiff for the purpose of demolition and since the plaintiff carries on business of demolishing vessels and selling the metal scrap, the LDT of the vessel which is indicative of the weight of ferrous and non-ferrous metal available in the vessel is a vital consideration in negotiating the price. The plaintiff states that this apart this particular vessel was a 1981 built vessel containing a main engine Suzler 5 RLA 90 of 17000 HP. This engine is not available in the older vessels which are coming for scraping and since such engines are presently installed in running vessels which would not come for scraping for some years more, the engine was a unique engine in the said vessel.

The plaintiff states that the uniqueness of the engine was a vital consideration for the plaintiff for such engine was intended to be used by him for the purpose of installing a captive power plant for the plaintiff's sister concerns consisting of one rolling mill and two oxygen plants. The plaintiff was interested in installing a captive power plant in family owned sister concerns in view of the consistent intermittent power shedding by GEB. The plaintiff says that it would be almost impossible for the plaintiff to get such a power plant installed at a viable price but for the availability of this engine.

to emphasize that the plaintiff was not ready to give up the contract because as stated in the aforesaid paragraph the main engine of this particular vessel had special value to the plaintiff though primarily the price was negotiated on the basis of LDT. In support of the various contentions, he relied upon various extracts from the book "Admiralty Jurisdiction Practice" by Nigel Meeson. The following decisions were also cited :

- (1) Videsh Sanchar Nigam Ltd. Vs. M.V. Kapitan Kud and others, .
- (2) M.V. Elisabeth and Others Vs. Harwan Investment and Trading Pvt. Ltd., Hanoekar House, Swatontapeth, Vasco-De-Gama, Goa, .
- (3) Schwarz & Co.(Grain)Ltd.Vs.St.Eleferio Arion (Owners), (1957) Probate Division 179.
- (4) M.V. "Sea Success I" Vs. Liverpool and London Steamship Protection and Indemnity Association Ltd. and Another, .
- (5) Unreported decision of the Bombay High Court, (Panji Bench) at Goa.

In the case of Primo International Ltd. Vs. M.V. Mariner IV and others, Civil Suit No. 1 of 1996 and Civil Application No. 175 of 1996 rendered on 8/11-11-1996.

13. Mr. Kavina appearing on behalf of Defendant Nos. 2 and 3 submitted that on a plain reading of the suit (plaint) and the accompanying annexures, no case was made out by the plaintiff entitling the plaintiff to seek any relief. Referring to the preliminary objection raised by Mr. Thakore that the defendants having not entered caveat in the proper form, had no right to be heard. Mr. Kavina pointed that he had undertaken to file appearance and furthermore on appearance, he could, and was waiving service of notice and hence, he should be heard on behalf of the defendants.

It was submitted by Mr. Kavina that taking into consideration the fact that there was a specific arbitration clause in the MoA and as could be seen from Clause-11 of the MoA, the plaintiff had guaranteed that the vessel was not being purchased for operation and that the vessel would be demolished as soon as possible after delivery, and will not be resold to any other party, it was just like any other chattel for which an ordinary suit would lie and this Court lacked jurisdiction to order arrest of the vessel. On the basis of averments in paragraph 8 of the plaint, it was contended that the plaintiff had categorically stated that the plaintiff

would never have purchased the vessel at the negotiated price in case the plaintiff was informed about the true LDT of the vessel as certified by the builders. Therefore, the plaintiff had not made out any case for specific performance of the contract and no case for relief was made out by the plaintiff, at least under the Admiralty Jurisdiction of this Court.

14. It was further submitted that the case of the plaintiff as stated in paragraph 9 of the plaint read with various documents annexed to the plaint was at the highest to the effect that there was a discrepancy in the LDT weight which according to the plaintiff was 16116 MT and which according to the defendant was 17707 MT. That the plaintiff had not discharged the onus which was on it to establish that the consent of the plaintiff to the contract had been obtained either by fraud or misrepresentation. In fact, Section 19 of the Contract Act itself provides for Exception and Explanation and the case on hand was aptly governed by the Exception or the Explanation and the plaintiff could not make any grievance.

15. Elaborating on this submission, attention was invited to Clause 8.a of the MoA and it was submitted that the Proof of light weight which the defendant was required to furnish pertained to certificate confirming the LDT of the vessel as per copy of the Trim and Stability booklet or Capacity Plan or Builders letter sighted on Board the vessel and such LDT had to be 17707 MT. That the defendant had specifically pointed out in reply to the plaintiff's letter dated 24-04-2002 that the MoA Clause 8.a did not mention Trim and Stability booklet of 1981 and as per various communications received from ABS, American S.I.E. American Bureau of Shipping, the ABS approved Trim and Stability booklet and indicated in its approval letter dated 30-03-1993 that the LDT weight was 17707 MT and the same was a valid light ship weight. Referring to the additional documents filed on behalf of the plaintiff it was submitted that ABS had categorically reiterated its stand and ABS had no plan to review original stability tests or to re-evaluate the 1992 deadweight survey. That from the Fax Message dated 25-04-2002 (Annexure-M), ABS had categorically stated that "As of this point in time, the approved light ship weight for each vessel is 17707 MT". 16. Mr. Kavin submitted that the plaintiff had not purchased the vessel as such i.e. as a vessel and for this purpose, he invited attention to paragraph 3 of the plaint, wherein according to him, the plaintiff had made it clear that the plaintiff was interested in main Engine of the vessel as the same was a unique engine and the uniqueness of the engine was a vital consideration for the plaintiff as the same was intended to be used for the purpose of installing a captive power plant for the sister concerns of the plaintiff.

17. Having considered the contentions raised on behalf of both the sides, I do not find this to be a fit case requiring exercise of the Admiralty Jurisdiction. As can be seen from the facts which have come on record, the MoA which was entered into on 13-04-2002 specifically states that if any dispute arises in connection with the interpretation in fulfillment of this agreement, the same shall be decided by arbitration in New York, U.S.A. In fact, during the course of hearing both the parties

stated that they are agreeable to have the dispute settled by the arbitrator. The only surviving question was whether in aid of arbitration it was necessary to order arrest of the vessel or seek any security (i) for fulfillment of the contract or, (ii) for satisfaction of the claim of damages.

18. The entire case of the plaintiff is based on provisions of Section 19 of the Contract Act to the effect that the consent of the plaintiff had been obtained by fraud or misrepresentation as regards the LDT weight of the vessel. There is no dispute and none could be raised on behalf of the plaintiff that the vessel is not being purchased for operation as a vessel and that it was being purchased only with a view to demolish the same. The insistence on the fulfillment of the contract by supplying LDT weight at the figure of 17707 MT itself goes to show that what the plaintiff had contracted to purchase is a condemned vessel for the purpose of obtaining iron and steel scrap therefrom. Furthermore, taking into consideration Clause 8.a of the MoA read with various annexures which have come on record, it is not possible to accept the averments of the plaintiff that the plaintiff was lured into entering into the contract by any fraud or misrepresentation.

19. The principles under which the admiralty jurisdiction can be exercised are well settled by various decisions and it does not bear repetition. Suffice it to state that a vessel could be arrested when it is likely that the ship which is a foreign ship would leave the territorial waters of India and thereafter it would be difficult to get hold of it as it may never return to the jurisdiction of Indian Courts. The claim, thereby, even if successful, would remain unexecutable or land in trouble in private international law in its enforcement. No such situation is present in the facts and circumstance of the case.

20. The Apex Court in the case of *Videsh Sanchar Nigam Ltd. Vs. M.V. Kapitan Kud and others*, has stated "the crucial question is whether the appellant has made out prima facie case." "The question, therefore, is whether the appellant has reasonably arguable best case in an admiralty action."

21. As can be seen from the facts of the case, at the cost of repetition, it requires to be stated that the plaintiff has failed to make out any case, much less a prima facie case, to the effect that its consent to the contract had been obtained by fraud or misrepresentation.

22. What is most important is that the dispute is liable to be resolved by availing and invoking the arbitration clause and the parties are directed to act accordingly. In light of what is stated, I do not find this a fit case necessitating an order of arrest.

23. That the dispute arising in connection with the interpretation in fulfillment of the MoA shall be referred to an arbitrator to be appointed by the parties as provided in Clause 19 of the MoA. In the view that I am adopting, I have taken note of provisions of Section 45 of the Arbitration and Conciliation Act, 1996, the said Section read as under :

"45. POWER OF JUDICIAL AUTHORITY TO REFER PARTIES TO ARBITRATION :-

Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (5 of 1908), a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in Sec. 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed. "

24. Thus, on a request made by either parties, the Court is under an obligation to relegate the parties to arbitration proceedings, and in fact, during the course of hearing Mr. Kavina had specifically referred to Clause 19 i.e. Arbitration Clause and requested that the parties be directed to act in accordance with the said clause. Hence the direction to abide by the terms of the said clause and go in for arbitration.

25. Needless to state that whatever has been expressed hereinbefore is only for the limited purpose of determining whether the plaintiff is entitled to an order of arrest. Any observations made during the course of the discussion shall not be taken as conclusive by the arbitral tribunal the same having been made at a stage when the suit has not been heard on merits.

26. The suit is adjourned sine die with the aforesaid directions.