
(2013) 01 BOM CK 0280

In the Bombay High Court

Case No : Notice of Motion (L) No. 2924 of 2012 in Summary Suit (1) No. 2558 of 2012

SJJ Marine Pte Ltd.

APPELLANT

Vs

Pisces Exim (India) Private Limited and Another

RESPONDENT

Date of Decision : 10-01-2013

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 38 Rule 5

Citation : (2013) 2 ALLMR 765 : (2013) 3 BomCR 192 : (2013) 3 MhLj 684

Hon'ble Judges : S.J. Kathawalla, J

Bench : Single Bench

Advocate : D.D. Madon, Along with Mr. Rahul Narichania, Mr. Aditya Krishnamurthy and Mr. Nihal Shaikh, Instructed by M/s. Bose and Mitra and Co, for the Appellant; P.S. Pratap , Instructed by Mr. M.R. Khatri for Defendant Nos. 1 and 2, for the Respondent

Judgement

S.J. Kathawalla, J.—The Plaintiff has filed the above Summary Suit against Defendant Nos. 1 and 2 for an order and decree against the Defendants to jointly and/or severally pay to the Plaintiff USD 1,570,500.20 together with interest at the rate of 8 per cent per annum from the date of filing the suit till payment and/or realisation thereof, and for costs. The Plaintiff has taken out the above Notice of Motion in the Suit under Order XXXVIII Rule 5 of the Civil Procedure Code, 1908 inter alia (I) for an order and injunction restraining the Defendants from selling and/or creating third party right, title and interest and/or dealing with the cargo of 40,000 WMT of Iron Ore Fines belonging to Defendant No. 1 and presently lying and stored at Berth No. 9 at Mormugao Port; (ii) directing the Defendants to disclose on oath all their assets, bank accounts, list of debtors, creditors and list of all pending suits, arbitrations and legal proceedings filed by and against the Defendants; (iii) for an order and direction against the Defendants to furnish security in the sum of USD 1,570,500.20; and (iv) allow attachment of all the assets, properties and bank accounts of the Defendants.

2. The facts in the matter are briefly set out as under:

3. According to the Plaintiff, Defendant No. 1 and Defendant No. 2 are alter ego's of each other. The only Shareholders and Directors of the Defendant No. 1 Company are Mr. Soumit Ranjan Jena and his wife Mrs. Preeti Jena. The sole Shareholder and Director of the Defendant No. 2 Company is Mr. Soumit Ranjan Jena.

4. The Plaintiff and Defendant No. 2 entered into Charterparty Agreements dated 26th April 2012 with respect to the vessel M.V. Dubai Crown and Charterparty dated 7th May 2012 with respect to the vessel M.V. Peristil, under which the Plaintiff as disponent owners chartered and the Defendant No. 2 had agreed to take on charter the Plaintiff's vessels M.V. Dubai Crown and M.V. Peristil, for voyages from Ports in India to Ports in China.

5. According to the Plaintiff, Defendant No. 2 failed to pay freight, demurrage and detention dues arising under the aforesaid two Charterparties. Pursuant to clause 8 of the aforesaid Charterparties, the Plaintiff exercised a lien over the cargo on board the vessels M.V. Dubai Crown and M.V. Peristil at the discharge Port in China. In view thereof, according to the Plaintiff, Mr. Jena, entered into an Agreement dated 18th July 2012 with the Plaintiff on behalf of Defendant No. 1, wherein he agreed on behalf of Defendant No. 1 to pay to the Plaintiff on or before 30th July 2012 a cluster of claims arising under the aforesaid Charterparties between the Plaintiff and Defendant No. 2 comprising of the following:

(a) the discharge port demurrage/detention of M.V. Peristil which was agreed between USD 500,000 and USD 570,000;

(b) freight of M.V. Dubai Crown USD 870,500.20; and

(c) demurrage/detention at load port for M.V. Dubai Crown USD 170,000.

6. According to the Plaintiff, on 20th July 2012, the Defendant No. 2 and the Plaintiff reached an agreement that the discharge port demurrage/detention of M.V. Peristil would be USD 530,000. However, in blatant breach of the Agreement dated 18th July 2012, Defendant No. 1 failed and neglected to clear its admitted sums on or before 30th July 2012. The Defendant No. 2 on various occasions admitted liability towards the Plaintiff's debts and expressed its inability to clear the same on account of financial difficulties. However, Mr. Jena on various occasions requested the Plaintiff to waive their lien over the cargo on board M.V. Dubai Crown and offered to provide the Plaintiff alternative security in favour of the Plaintiff. Mr. Jena had made a number of representations to the Plaintiff on 3rd August 2012, whilst they were exercising a lien over the cargo on board M.V. Dubai Crown, that he would create a lien over the cargo in Goa in favour of the Plaintiff in lieu of the Plaintiff promptly discharging the cargo on board M.V. Dubai Crown and waiving their right to exercise a lien over the cargo. However, Mr. Jena later stated that the cargo over which he was supposed to create a lien in favour of the Plaintiff in August 2012 was already sold in April 2012. According to the Plaintiff, Mr. Jena and/or Defendant No. 1 have therefore perpetrated a fraud

over the Plaintiff inasmuch as he assured the Plaintiff that he would create a lien over the cargo which he and/or Defendant No. 1 did not own. According to the Plaintiff, whilst the Plaintiff was exercising a lien over the cargo on board M.V. Dubai Crown, Mr. Jena had offered other forms of securities such as lien over an alternative cargo in Goa and/or a personal guarantee from Mr. Jena to secure the Plaintiff's claim, so that the Plaintiff would give up its lien over the cargo on board M.V. Dubai Crown and promptly discharge the cargo on board the said vessel in China. According to the Plaintiff, Mr. Jena has committed contempt of Court by making false statements on oath stating that he did not offer a personal guarantee or that he did not offer alternative security to Mr. Kim, the representative of the Plaintiff.

7. According to the Plaintiff, the balance-sheet of 31st March 2011 of the Defendant No. 1, indicates that they are in a poor financial state and have assets only worth Rs. 1,13,12,292. Defendant No. 1 has failed to file its balance-sheet dated 31st March 2012. Defendant No. 1 has mortgaged their office premises for Rs. 8,40,00,000/- in favour of Saraswat Co-operative Bank and the Plaintiff has a claim 8 times the value of their fixed assets. Admittedly Defendant No. 2 has been declared as bankrupt and the Plaintiff has no other option but to move Defendant No. 1 to satisfy their claims. According to the Plaintiff, Defendant No. 1 and Defendant No. 2 are the alter ego's of each other. The website of Defendant No. 1 had earlier described Defendant No. 2 as their overseas representative albeit there is no reference to Defendant No. 2 in their newly uploaded website. According to the Plaintiff, Mr. Jena in addition to the Plaintiff has deceived a number of other ship owners by entering into charter parties for the shipment of iron ore from India to China. Mr. Jena has entered into a Settlement Agreement with Emrat Maritime LLC and has defaulted on the same. Defendant No. 1 has downsized its office i.e. reduced its office space and has employed minimal staff. Defendant No. 1 has not filed their annual returns for the financial year 2011-12. Defendant No. 1 presently does not have any substantial fixed assets in Goa, its office premises are rented, its trucks and fancy cars are also chartered, its land where it parks its truck is also leased. According to the Plaintiff, Defendant No. 1 is not a leaseholder for the excavation of iron ore. Defendant No. 1 procures its iron ore from one Mr. Kamath. Mr. Kamath is alleged to be involved in an illegal mining scam. Defendant No. 1 no longer trades in iron ore in Goa. According to the Plaintiff, the Plaintiff apprehends that the common management of the Defendant No. 1 and Defendant No. 2 Companies will strip off the assets of the Companies and will siphon off and dissipate the assets in order to avoid liability. It is alleged that the Pisces Group is in a financially embarrassed state. It is therefore submitted on behalf of the Plaintiff that considering the circumstances of the instant case, this Court may look behind the facade created by Defendant Nos. 1 and 2 and pierce the corporate veil and pass appropriate orders.

8. The Learned Senior Advocate appearing for the Defendants has first submitted that the allegations made by the Plaintiff against the Defendants are false,

reckless and baseless and are denied by the Defendants. It is submitted that the Plaintiff's claim is against Defendant No. 2 for freight and demurrage under the two charterparties in respect of the vessels M.V. Dubai Crown and M.V. Peristil. Defendant No. 2 has been ordered to be wound up by the High Court of Hong Kong on 22nd October, 2012. It is submitted that the Plaintiff seeks attachment before judgment on the basis of the Plaintiff's claim under an Agreement dated 18th July 2012. Save and except for bare allegations made in paragraph 8 of the Affidavit in support of the Notice of Motion, there is no material produced by the Plaintiff or particulars provided to even prima facie show that Defendant No. 1 is siphoning off and dissipating assets to avoid liability. It is not the case of the Plaintiff that Defendant No. 1 has disposed of any assets after the Agreement dated 18th July 2012 under which the Plaintiff is claiming from Defendant No. 1 so as to create or justify any apprehension. It is submitted that relying on the decision of the Hon'ble Supreme Court in the case of Raman Tech. and Process Engg. Co. and Another Vs. Solanki Traders, and the decision of the Calcutta High Court in Premraj Mundra Vs. Md. Maneck Gazi and Others, , this Court has laid down the principles in its order dated 9th October 2012 in the case of The Bank of New York Mello, London Branch vs. Zenith Infotech Limited and others. It is submitted that the Plaintiff has failed to make out any case under Order XXXVIII Rule 5 of the Civil Procedure Code, 1908. It is submitted that even if the Plaintiff may have a valid claim against the Defendants, that by itself will not entitle the Plaintiff to an order of attachment before judgment unless the Plaintiff also establishes that the Defendant is attempting to remove or dispose of its assets with the intention of defeating any decree. It is not the case of the Plaintiff that the Defendant No. 1 has started disposing of the property after the Agreement dated 18th July 2012 or upon getting notice of the Plaintiff's claim or prior to the institution of the suit or during the pendency of the suit. It is submitted that even otherwise the Plaintiff does not have a prima facie case against Defendant No. 1. The Plaintiff's claim is under two charterparties entered into with Defendant No. 2 and for which the Plaintiff cannot have a claim against Defendant No. 1 as there is no privity of contract between the Plaintiff and Defendant No. 1. It is submitted that without there being any legal liability to settle the claims of the Plaintiff against the Defendant No. 2, Defendant No. 1 entered into an Agreement dated 18th July 2012 with the Plaintiff to pay certain amounts by a particular date but expressly provided that only if this was done, was the Plaintiff required to alter its position and discharge the cargo on which the Plaintiff was exercising a lien. Defendant No. 1 could not make payment and consequently the Plaintiff was not obliged to discharge the cargo. The Plaintiff therefore did not alter its position on the basis of the Agreement dated 18th July 2012 but thereafter entered into a separate Agreement with the Receivers of the cargo and discharged and delivered the cargo. Consequently the Plaintiff does not have a prima facie case against Defendant No. 1 who is not a party liable under the two charterparties. It is submitted that the cargo of 40,000 metric tons iron ore fines lying at Mormugao Port does not find any mention in the Agreement dated 18th July 2012 as it was not owned by Defendant No. 1 and

neither was any lien created on the said cargo. It is therefore submitted on behalf of the Defendants that no case is made out for grant of any reliefs as prayed for by the Plaintiff in the Notice of Motion and therefore the Notice of Motion deserves to be dismissed with costs.

9. I have considered the submissions advanced on behalf of the learned Senior Advocates appearing for the parties. Admittedly the Plaintiff's claim is against Defendant No. 2 for freight and demurrage under the two charterparties in respect of the vessels M.V. Dubai Crown and M.V. Peristil. Under two charterparties, the Plaintiff's vessel M.V. Dubai Crown and M.V. Peristil had carried Defendant No. 2's cargo from Ports in India to Ports in China. Defendant No. 2 failed and/or neglected to pay the Plaintiff's freight, demurrage and detention dues arising under the aforesaid two charterparties. The Plaintiff exercised a lien over the cargo shipped on board the two vessels. Since the cargo of Defendant No. 2 Company was under arrest, Defendant No. 1 agreed to pay the amounts as set out in the Agreement dated 18th July 2012 entered into by and between the Plaintiff and Defendant No. 1. In clause 5 of the said Agreement, it was agreed that upon receipt of payment mentioned in clauses (1) and (2) of the said Agreement and a letter as agreed in clause 4 of the Agreement, the Plaintiff will have to discharge the cargo of M.V. Dubai Crown and keep 10000 metric tonnes of the cargo under their or protective agents custody. In the said Agreement it was further provided that if the Defendant No. 1 fails to adhere to the Agreement qua payments, the Plaintiff and the Defendant No. 1 shall mutually discuss about discharge of cargo on the vessel M.V. Dubai Crown and the payment schedule. In the said Agreement, admittedly there is no mention about the cargo of 40,000 metric tonnes iron ore lying at Mormugao Port. Even the suit against Defendant No. 1 is filed only on the basis of the Agreement dated 18th July 2012. In fact, admittedly the receivers of the cargo on the vessel M.V. Dubai Crown applied to the Qingdao Maritime Court in China and obtained ex parte order of arrest against M.V. Dubai Crown. In order to vacate the order of arrest, which was causing prejudice to the Plaintiff, the Plaintiff immediately discharged the cargo pursuant to an agreement with the Receivers. Therefore, upon failure of Defendant No. 1 to make the payment as agreed in the Agreement dated 18th July 2012, the Plaintiff was to continue with the lien on the cargo on board the vessel M.V. Dubai Crown. The Plaintiff has not discharged the cargo at the instance of Defendant No. 1 but have done so on their own, pursuant to an agreement with the receivers. Therefore, the Plaintiff was aware at the time of entering into the agreement that the Defendant No. 1 may not be in a position to pay the amounts as agreed and had provided in the Agreement itself the consequences of such non-payment viz. that the lien of the Plaintiff over the cargo on board M.V. Dubai Crown shall continue and the parties shall mutually discuss about the discharge and payment schedule. It appears that prior to the discharge of the cargo on board the vessel M.V. Dubai Crown by the Plaintiff under an agreement with the receivers, Defendant No. 1 had offered to the Plaintiff to try and create a lien in their favour on a quantity of 40,000

metric tonnes of iron ore fines lying at Mormugao Port. This cargo, as explained by Defendant No. 1 in paragraph 6 of its affidavit dated 11th October, 2012, was not in the ownership of either Defendant No. 1 nor Defendant No. 2 but had been sold in April 2012 by Pisces Exim, a sole proprietary concern of Mr. Jena to Presidency Exports and Industries Ltd., Kolkata who had paid the full value of the cargo to Pisces Exim. Mr. Jena as explained in paragraph 6, suggested to the Plaintiff to transfer the lien to this cargo and if the Plaintiffs were agreeable, he would negotiate with Presidency Exports to release the cargo and offer them alternative cargo to replace the said 40,000 metric tone of iron ore fines, once the shipping season resumed in October 2012, because shipment could only take place thereafter as Goa Port is closed during the monsoon period. According to the Defendant No. 1, this was not acceptable to the Plaintiff and consequently no agreement was reached and Mr. Jena did not approach the Presidency Exports to replace the said cargo/consignment. The Plaintiff therefore cannot allege that a fraud is perpetrated on the Plaintiff by Mr. Jena/Defendant No. 1.

10. Attachment before judgment is levied where the Court on an application of the Plaintiff is satisfied that the Defendant, with intent to obstruct or delay the execution of any decree that may be passed against him is about to dispose of the whole or any part of his property or is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court. The Hon'ble Apex Court has in the case of Raman Tech. and Process Engg. Co. and Another Vs. Solanki Traders, inter alia held as under:

4. ... It is well settled that merely having a just or valid claim or a prima facie case, will not entitle the plaintiff to an order of attachment before judgment, unless he also establishes that the defendant is attempting to remove or dispose of his assets with the intention of defeating the decree that may be passed. Equally well settled is the position that even where the defendant is removing or disposing his assets, an attachment before judgment will not be issued, if the plaintiff is not able to satisfy that he has a prima facie case.

5. The power under Order 38 Rule 5 CPC is a drastic and extraordinary power. Such power should not be exercised mechanically or merely for the asking. It should be used sparingly and strictly in accordance with the Rule. The purpose of Order 38 Rule 5 is not to convert an unsecured debt into a secured debt. Any attempt by a plaintiff to utilise the provisions of Order 38 Rule 5 as a leverage for coercing the defendant to settle the suit claim should be discouraged. ...

6. ... A plaintiff should show, prima facie, that his claim is bona fide and valid and also satisfy the court that the defendant is about to remove or dispose of the whole or part of his property, with the intention of obstructing or delaying the execution of any decree that may be passed against him, before power is exercised under Order 38 Rule 5 CPC. Courts should also keep in view the principles relating to grant of attachment before judgment. (See Premraj Mundra Vs. Md. Maneck Gazi and Others, for a clear summary of the principles).

11. As stated earlier, the Agreement dated 18th July 2012 itself provided the consequence of non-payment of the amount by the Defendant No. 1. The letters addressed by the Advocates for the Plaintiff to the Defendant No. 1/their Advocates dated 28th August 2012 and 24th September 2012 does not make a whisper about there being any promise/agreement qua the 40000 M.T. of iron ore fines lying at Mormugao Port. In my view, in the present case, the Plaintiff has not even made out a prima facie case that the Defendant is attempting to remove or dispose of its assets with the intention of defeating any decree. It is not the case of the Plaintiff that Defendant No. 1 has started disposing of its property after the Agreement dated 18th July 2012 or upon getting notice of the Plaintiff's claim or prior to the institution of the suit or during the pendency of the suit. A mere allegation as appearing in paragraph 8 of the affidavit-in-support of the Notice of Motion that the Plaintiff apprehends that Defendant No. 1 would sell off its assets without stating the basis for such allegation is not sufficient to make out a case under Order XXXVIII Rule 5 of the Code of Civil Procedure. As held by the Hon'ble Apex Court, the power under Order XXXVIII Rule 5 is a drastic and extraordinary power and should be used sparingly and should not be exercised mechanically or merely for the asking. The Plaintiff has only a money claim against Defendant No. 1 and at best can claim to be an unsecured creditor. The liability of the Plaintiff is disputed by the Defendant No. 1. The purpose of Order XXXVIII Rule 5 is not to convert an unsecured debt into a secured debt. Under the circumstances, I am of the view that the Plaintiff is not entitled to any reliefs in the above Notice of Motion and the Notice of Motion is dismissed with costs.