

(2014) 04 BOM CK 0139

In the Bombay High Court

Case No : Summons for Judgment No. 31 of 2013 in Summary Suit No. 113 of 2013

SJJ Marine Pvt. Ltd.

APPELLANT

Vs

Pisces Exim (India) Pvt. Ltd. and Another

RESPONDENT

Date of Decision : 02-04-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 37 Rule 3, Order 38 Rule 5
Contract Act, 1872 — Section 133, 134, 135

Citation : (2014) 5 ALLMR 641 : (2014) 4 BC 72 : (2014) 3 BomCR 289

Hon'ble Judges : R.S. Dalvi, J

Bench : Single Bench

Advocate : Zal Andhyarujina, Advocate a/w. Mr. Aditya Krishnamurthy, Advocate i/b. Bose and Mitra and Co, Advocate for the Appellant; Prashant Pratap, Sr. Advocate a/w. Ms. Lavina Kripalani, Advocate for the Defendant No. 1, Advocate for the Respondent

Final Decision : Disposed Off

Judgement

Roshan Dalvi, J.—The Plaintiff has sued under the written agreement between the plaintiff and defendant No. 1 dated 18th July, 2012, Exh. F. to the plaint. Under that agreement defendant No. 1 confirmed payment by it for discharging certain freight charges and charges of demurrage and detention of certain goods of certain vessels of the plaintiff. The parties agreed to discharge the goods upon which the plaintiff had a lien upon such payment being made by defendant No. 1. The parties also agreed that they would discuss discharge and the payment schedule if the payment specified under the agreement was not made. The plaintiff was to discharge a part of the goods upon which the plaintiff has claimed lien upon the confirmation of the written agreement dated 18th July, 2012 itself. The plaintiff was shown as Party A in the agreement; defendant No. 1 was shown as Party B.

The relevant clauses of the agreement run thus:

1. Party B confirm that they would be paying the discharge port Demurrage/ Detention of Mv Peristil by 30th July, 2012. the amount to be in the range of USD 5,00,000-5,70,000. Exact amount is to be agreed later together with supporting evidence.

2. Party B confirm that they would clear the Freight of Mv Dubai Crown i.e. USD 8,70,500.20 along with Demurrage/Detention at Load port i.e. USD 1,70,000 on or before 30th July, 2012.

3.

4.

5. Upon receipt of payment mentioned in clause 1 & 2 and letter in clause 4 Party A have to discharge the cargo of Mv Dubai Crown and keep 10,000 mts of the cargo under their or protective agents custody. Failing which party A & B to be mutually discuss about discharge and payment schedule.

6. Upon confirmation of this agreement Party A to instruct their agents to discharge and release the cargo of Mv Peristil.

2. The plaintiff and defendant No. 2 had entered into two charterparty agreements on two separate vessels Mv Dubai Crown and Mv Peristil on 26th April, 2012 and 7th May, 2012 respectively. Defendant No. 2 failed to pay the freight, demurrage and detention charges of the goods on the plaintiff's vessels. Defendant No. 2 is the sister concern of defendant No. 1 incorporated in Hong Kong. Hence defendant No. 1 entered into the aforesaid agreement dated 18th July, 2012, Exh. F to the plaint with the plaintiff for discharge of the liability of defendant No. 2 with regard to the freight, detention and demurrage payable by defendant No. 2. Accordingly, defendant No. 1 confirmed that they would be paying those charges by 30th July, 2012. This confirmation is under clauses 1 and 2 above. Clause 1 relates to charges payable in respect of Mv Peristil. Clause 2 relates to charges payable in respect of Mv Dubai Crown. The charges payable in respect of Mv Peristil were not liquidated amounts. The parties agreed and recited that they would be in the range of USD 5 lacs to USD 5.70 lacs. The parties were to agree upon the exact amount later with supporting evidence. The supporting evidence would be the schedule of charges claimed by the port authorities by way of demurrage or detention.

3. Two days thereafter on 28th July, 2012, defendant No. 2, the sister concern of defendant No. 1 incorporated in Hong Kong emailed the plaintiff's representative that the charter company confirmed that amount of USD 5.30 lacs was the lumpsum amount towards the final payment in respect of Mv Peristil at the discharge port for demurrage and detention. The e-mail is short and interesting. It runs thus:

Reference to our agreement dated 18th July, 2012 " showing that defendant No. 2 and defendant No. 1 are in fact the same and incorporated as sister concerns.

4. Defendant No. 2 called upon the plaintiff's representative to confirm the same by its e-mail of 28th July, 2012 itself. Within four minutes the plaintiff's representative reconfirmed the lumpsum USD 5.30 lacs for Mv Peristil discharge port demurrage/detention. The plaintiff's representative called upon defendant No. 2 to keep the payment schedule on or before 30th July, 2012 in respect of the other vessel also. This payment schedule on or before 30th July, 2012 was, *stricto sensu*, to be made by defendant No. 1 under the written agreement, Exh. F to the plaint. However, because defendant No. 2 is the same as the defendant No. 1 being its sister concern the e-mails have been exchanged by and between the plaintiff and defendant No. 2 thus.

5. It may be mentioned that defendant No. 2 was the party to the charterparty with the plaintiff and not defendant No. 1. Defendant No. 2 had to make those payments initially. Defendant No. 2 had defaulted. Defendant No. 2 would know of the payments to be made and would obtain the particulars from the charters. Defendant No. 1 would not know those details. Hence the plaintiff and defendant No. 1 agreed upon the range within which the payment was to be made. The exact amount would be agreed only upon defendant No. 2 making the relevant enquiries for its initial liability which defendant No. 1 was to discharge upon its confirmation in clause 1 of the agreement.

6. Defendant No. 2 was ordered to be wound up by a Chinese Court. The plaintiff's vessel came to be arrested. The plaintiff could not recover any amount from defendant No. 2. Defendant No. 1 would have known financial position of defendant No. 2. Defendant No. 1 knew that the plaintiff had exercised lien upon the goods contracted by defendant No. 2 and to be discharged at the detention port to third parties who are the consignees of the goods. To prevent the exercise of the right of lien by the plaintiff's, defendant No. 1 confirmed the payment of the liability of defendant No. 2. Consequently the argument that the liquidated amount was confirmed by defendant No. 2 and not by defendant No. 1 though the agreement, Exh. F to the plaint, is between the plaintiff and defendant No. 1 and thus defendant No. 1 cannot be made liable for the exact amount as the liquidated amount payable to the plaintiff is, therefore, the bid to defeat the plaintiff's right under the agreement.

7. Of course, the supporting evidence to show that precise liquidated amount of USD 5.30 lacs has not been shown to defendant No. 1 or to the Court.

8. It is conceded by the plaintiff that the amount of USD 5.30 lacs may not be taken to be the liquidated amount payable under the contract. However, even if, the two e-mails of defendant No. 2 and the plaintiff are disregarded, the specific liability under the written contract is in the range of USD 5 lacs to 5.70 lacs so that the minimum liability of USD 5 lacs is shown in the contract and if that is not read into the contract it would render that part of the contract under clause 1 otiose. However, it is argued on behalf of defendant No. 2 that upon supporting documents the liability may fall outside the range set out by the parties and it could be lesser than USD 5 lacs.

9. This may stand to reason and hence the liquidated amount payable under clause 1 of the written contract Exh. F to the plaint cannot be taken to have been shown by the plaintiff.

10. Under clause 2 of the agreement dated 18th July, 2012, Exh. F to the plaint, defendant No. 1 further confirmed that it would clear the freight of Mv Dubai crown and the demurrage detention at the load port. In this clause the specified liquidated amount of freight of USD 8.70 lacs for demurrage of USD 1.70 lacs for detention is specifically set out. This is, therefore, the confirmed liability of two liquidated amounts. The confirmation is that the defendant No. 1 would clear those amounts. The defendant No. 1 can clear only by payments. This payment was to be made on or before 30th July, 2012. Hence not only the extent of the amount but also the date is specified.

11. The liability and obligations of defendant No. 1 under both the aforesaid clauses and 1 & 2 of the aforesaid agreement is, therefore, an unconditional obligation to pay the plaintiff, the specified sum; in case of Mv Peristil a range was specified; in case of Mv Dubai two specific amounts are stated.

12. Defendant No. 1 would contend that despite the confirmation of liability its obligation to pay is not unconditional and is conditional upon the discharge of cargo. It is argued on its behalf that the two clauses did not impose an unconditional obligation to pay irrespective of the discharge of cargo. It is argued that because the cargo was desired to be released from the plaintiff's lien that defendant No. 1 agreed to pay the aforesaid sum. It is argued that, therefore, the aforesaid clauses 1 and 2 must be read along with clause 5 stated above.

13. Clause 5 shows that upon the receipt of the payment under clauses 1 and 2 the plaintiff would discharge the cargo of Mv Dubai Crown. The clause further mentioned that upon failure to make payment the parties will discuss about the discharge and payment schedule. Consequently the reciprocal promises of the plaintiff would arise only after the discharge of obligation and the performance of the reciprocal promises of defendant No. 1. Mr. Pratap would argue that only if the payment is made by defendant No. 1, the plaintiff would discharge the cargo. He would further argue that if the payment is not made, the plaintiff would not discharge the cargo and continue to exercise its lien. This argument is misconceived. The exercise of lien is a right of an unpaid seller under a contract of sale of goods or under any specified contract between the parties. In this case the charterparty specified in clause 8 the right of the plaintiff as the owner to exercise the lien on the cargo of all the freight, demurrage and such other claims. The plaintiff is, therefore, never under any obligation to exercise its lien. The happening of the event or the violation of the plaintiff may result in the lien being lost or given up. The entitlement of the lien of the plaintiff has nothing to do with the confirmation of the liability and the obligation of defendant No. 1. Consequently the confirmation of the liability is indeed unconditional and absolute.

14. Defendant No. 1, the sister concern of defendant No. 2, is shown to have the same website and contact details. Defendant No. 2 had the primary liability to the plaintiff under the charterparties in respect of the aforesaid two vessels. Defendant No. 1 could not meet its liability. Hence the plaintiff exercised lien over the cargo on those vessels. The exercise of the plaintiff's lien exceeded the liability of defendant No. 2 on both the charterparties. Consequently defendant No. 1 and 2 desired to release certain cargo. The plaintiff agreed to release the cargo in stages.

15. Clause 6 of the agreement shows that upon the confirmation of the agreement by defendant No. 1 itself the plaintiff would release the cargo of one of the two vessels. The plaintiff would then have the lien over the cargo of only the other vessel. Upon defendant No. 1 making payment as per clauses 1 and 2 of the agreement dated 18th July, 2012 by 30th July, 2012, the plaintiff would release the remainder of the cargo. Consequently, the confirmation is not dependent upon the release or discharge of the cargo. The release and the discharge of the cargo is dependent upon payment being made as confirmed by defendant No. 1 being the sister concern of defendant No. 2 which was as much interested in getting the cargo released as defendant No. 2 would be. Hence it confirms that it would discharge the liability which was initially of defendant No. 2.

16. Upon the order of winding up of defendant No. 2 in October, 2012 by the Court in China the plaintiff's ship came to be arrested. Hence the plaintiff released the cargo which remained on Mv Dubai Crown. Accordingly the plaintiff lost its lien. However losing that lien cannot absolve defendant No. 1 from the liability of making payment of the liquidated amount confirmed by defendant No. 1. Hence even reading clause Nos. 1, 2 and 5 together and seeing the agreement as a whole, the absolute liability of the amount payable under clause Nos. 1 and 2 is clear. Clause 2 shows two liquidated amounts payable.

17. Both parties contend that defendant No. 1 is not the guarantor for defendant No. 2, though it is described as such in the clause showing the parties to the agreement. The confirmation of the liability by defendant No. 1 itself shows that it was the principal party to that contract. The contract itself does not show that the liability of defendant No. 2 would be discharged only if defendant No. 2 failed to make the payments. Hence we may accept that defendant No. 1 is not guarantor of defendant No. 2. That does not matter. Its liability as guarantor would be co-extensive with that of the principal debtor. It would be discharged only under the circumstances set out in Sections 133 to 135 of Indian Contract Act, 1872. As the principal party to the agreement also its liability would be primary only. The liability would even otherwise be there in view of the fact that defendant No. 2 had primary liability to plaintiff and it was the sister concern of defendant No. 2 who would pay plaintiff instead of defendant No. 2.

18. The last part of clause 5 is material. Upon the failure to pay stipulated amounts under clauses 1 and 2 by 30th July, 2012 the liability would not cease.

Then the parties were to discuss their payment schedule and the discharge. This would mean that if the lumpsum amount is not paid, defendant No. 1 would discharge its liability of payment by installments. That was to be discussed only upon failure of the defendants to pay as per clauses 1 and 2. Had the defendant discharged its liability as confirmed and agreed by 30th July, 2012, the plaintiff would be bound to discharge and release the cargo of Mv Dubai and over which the plaintiff was exercising lien. Only if that liability is discharged, can the plaintiff's obligations be enforced.

19. The contract is also not without consideration. Upon the confirmation of the defendant No. 1 in the agreement itself, the plaintiff released the entire cargo of Mv Peristil. The consideration is, therefore, good for the satisfaction of the confirmation. After getting a part of the cargo over which the plaintiff claimed lien, defendant No. 1 cannot be absolved of its liability as confirmed by it.

20. Consequently upon reading of the entire agreement dated 18th July, 2012 as whole an absolute and unconditional liability of defendant No. 1 to make payment as per clauses 1 and 2 is seen.

21. The plaintiff's suit as summary suit is, therefore, maintainable. The defendants have not shown any substantial defence to the plaintiff's claim. The plaintiff has sought to press the summons for judgment only against defendant No. 1 as defendant No. 2 has been wound up and the plaintiff cannot expect any recovery from defendant No. 2.

22. Aside from the interpretation of aforesaid agreement which has been seen by the court threadbare, defendant No. 1 would contend that this Court in an earlier order dated 10th January, 2013 refused the relief prayed for by the plaintiff in this suit. That application of the plaintiff was for attachment before judgment of certain properties of defendant No. 1. The parameters of the grant of that relief under Order 38 Rule 5 of the CPC are wholly different from the parameters of the grant of relief under Order 37 Rule 3 of the CPC in a summons for judgment taken out in the summary suit. In that order the Court saw that there was no fraud perpetrated by defendant No. 1 and that the plaintiff had given up its lien under certain agreement with the consignees/receivers of goods. The Court also considered that the consequence of non payment was provided in the agreement. This was upon the last part of clause 5. It would constitute a novation between the parties, which the parties would discuss for setting out the schedule of the payment and consequent discharge of goods. The Court only concluded that no case was made out that the defendant was disposing of its assets to defeat plaintiff's decree and hence the relief of attachment before judgment, injunction or security were refused.

23. Mr. Pratap on behalf of defendant drew the Court's attention to the judgment in the cases of Mechelec Engineers and Manufacturers Vs. Basic Equipment Corporation, and AIR 1990 2218 (SC) laying down the guidelines and principles for the grant of leave to defend. He would contend that the defence set up is not

illusory or sham or practically moonshine as it is on interpretation of the agreement.

24. The interpretation of defendant No. 1 is seen. No further oral evidence would be required to reject it.

25. There is no defence on merits shown by defendant No. 1. Consequently, the specific liquidated amounts under clause 2 of the agreement dated 18th July, 2010 would have to be deposited, if defendant No. 1 was to be granted leave to defend the suit. The plaintiff has claimed recovery of USD 5.30 lacs under clause 1 and USD 8.70 and USD 1.70 lacs under clause 2.

26. The plaintiff has not claimed any interest until the filing of the suit. The plaintiff has claimed interest @ 8% pa from the date of the filing of the suit until realisation.

Hence the following order:

1. Upon the defendants depositing in Court the equivalent in rupees of USD 10.40 lacs within 8 weeks from today defendant No. 1 shall have leave to defend the suit.
 2. If the amount is deposited the same shall be invested by the Prothonotary and Senior Master of this Court in FDR in a nationalised bank initially for a period of 37 months.
 3. If the amount is deposited defendant No. 1 shall file its written statement within 30 days of the deposit.
 4. If the amount is not deposited, the plaintiff shall place the suit on board for ex parte decree against defendant No. 1.
 5. The plaintiff shall serve Writ of Summons upon the liquidator/provisional liquidator of defendant No. 2 (in liquidation).
 6. The parties to place the suit on board at appropriate time for further directions.
- Summons for Judgment is disposed off accordingly.