
(2014) 04 MAD CK 0283

In the Madras High Court

Case No : Application No. 3101 of 2013 in C.S. No. 387 of 2011

Sparebanken Sogn OG Fjordane

APPELLANT

Vs

Spence and Co.

RESPONDENT

Date of Decision : 25-04-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 10, 151

Citation : (2014) 7 MLJ 699

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

Bench : Single Bench

Judgement

R.S. Ramanathan, J.—The applicant in Application No. 3101 of 2013 is a third party and he filed the said Application under Order XIV, Rule 8 of O.S. Rules read with Section 10 and 151 of C.P.C., praying to pass an order directing the first respondent herein to pursue their claim against the second respondent and/or against the sale proceeds of M.V.BOS ANGLER only in the Hon'ble Bombay High Court in Admiralty Suit No. 24 of 2011 and consequently, stay all further proceedings in C.S. No. 387 of 2011 on the file of this Court. The facts which are necessary to appreciate the contention of the applicant/third party are as follows:

(i) C.S. No. 387 of 2011 was filed by the first respondent/plaintiff for recovery of Rs. 68, 76, 267 with interest @ 18% per annum from the date of plaint till the date of realisation, and for the arrest and sale of the second respondent vessel M.V. BOS ANGLER together with engines, tackles, cranes, derricks, machinery and the paraphernalia and other articles on board.

(ii) It is stated in the plaint that the plaintiff/first respondent is carrying on the business as ship chandlers, ship store suppliers. In the course of business, the plaintiff supplied provisions, ship stores to the second respondent vessel M.V. BOS ANGLER as well as her sister vessel MV. BOS ARCTIC, at the ports of Tuticorin, Kakinada, Mumbai and Vishakapatnam. On that account, the second respondent vessel has to pay US\$ 149484.07 to the plaintiff, equivalent to Rs. 68,76,267/- and the second respondent herein was dodging the payment and the

ship has come to Port of Tuticorin and therefore, the ship has to be arrested and the amount has to be recovered from the second respondent.

2. The above suit in C.S. No. 387 of 2011 was admitted on 06.06.2011. Earlier, Admiralty Suit No. 24 of 2011 was filed by the applicant before the Hon''ble Bombay High Court on 13.5.2011 for the recovery of Rs. 143.43 crores together with interest @ 12% per annum and an order of arrest of the vessel, M.V. BOS ANGLER was passed by the Hon''ble Bombay High Court in Admiralty Suit No. 24 of 2011 on 13.5.2011. Thereafter, the applicant moved Notice of Motion No. 1817 of 2011 in the Bombay High Court for judicial sale of the vessel on 16.6.2011 and by order dated 8.7.2011, directed valuation of the ship as part of the sale process, and on 11.7.2011, the first respondent/plaintiff in C.S. No. 387 of 2011 took out a notice of motion No. 2043 of 2011 in Admiralty Suit No. 24 of 2011 to intervene in that suit before the Bombay High Court and by order dated 20.07.2011, the Application filed by the first respondent/plaintiff to intervene in the Admiralty Suit No. 24 of 2011 was allowed, and on 3.8.2011, the Bombay High Court ordered sale of the second respondent vessel after hearing all the parties including the first respondent/plaintiff and the first respondent/plaintiff also filed written statement in Admiralty Suit No. 24 of 2011 on 12.8.2011 and the applicant was permitted to bid at the auction and on 30.11.2011, the Hon''ble Bombay High Court confirmed the sale of the vessel in favour of the applicant for US \$ 33.1 million. Later, the applicant filed Application No. 4072 of 2011 to get himself impleaded in C.S. No. 387 of 2011 and that was also ordered by this Court. The Hon''ble Division Bench of the Bombay High Court allowed the Appeal No. 679 of 2012 filed by the applicant in Notice of Motion No. 2659 of 2012 in Admiralty Suit No. 24 of 2011 and set aside the order of the learned single Judge dated 19.10.2012 passed in Notice of Motion No. 558 of 2012.

3. By virtue of the order of the Division Bench, it is contended by the learned counsel for the applicant that all the parties having claims against the vessel, have to make their claim only in the Bombay High court and therefore, the applicant filed A. No. 729 of 2013 for return of the Plaint in C.S. No. 387 of 2011 to be tried along with the Admiralty Suit No. 24 of 2011 and that petition was closed on 15.07.2013 granting liberty to the applicant to file proper application in accordance with law and thereafter, the present Application No. 3101 of 2013 was filed under Section 10 CPC for the relief aforesaid.

4. It is submitted by Mr. B. Giridhara Rao, learned counsel appearing for the applicant that the plaintiff/first respondent filed notice of motion No. 2043 of 2011 in the Admiralty Suit No. 24 of 2011 on the file of the Bombay High Court to permit him to intervene in that Admiralty suit and that was ordered and he was made as a party to the suit. As per the order passed by the Hon''ble Division Bench of the Bombay High Court, in Appeal No. 679 of 2012 in Notice of Motion No. 558 of 2012 in Admiralty Suit No. 24 of 2011, dated 30.11.2012 the first respondent/plaintiff has to file his claim to be adjudicated upon and applied for an order of priority in the Admiralty Suit No. 24 of 2011 in respect of the suit

claim made in C.S. No. 387 of 2011 and that has been made clear by Rule 949, 950 and 951 of the Original Side Rules of the Bombay High Court. For that purpose, the present application was filed and the first respondent/plaintiff is also bound by the order passed in Appeal No. 679 of 2012. He is also a party in the Admiralty suit No. 24 of 2011. He submitted that as per Rule 951 of the Original Side Rules of Bombay High court, all claims in respect of any sale proceeds ordered pursuant to the order of the Bombay High Court either on the Original Side or on the Admiralty jurisdiction can be made only before the Bombay High Court and admittedly, the ship which was sought to be arrested by the first respondent in C.S. No. 387 of 2011 was already arrested on 13.5.2011 and the ship was also ordered to be sold in public auction and the applicant was permitted to bid at the auction. He also purchased the ship in the auction by quoting US\$ 33.1 million and that was also confirmed by the Bombay High Court and the applicant also deposited the said amount with the Sheriff of Mumbai and in Appeal No. 679 of 2012, the Hon'ble Division Bench of Bombay High Court interpreting Rule 951 of the Original Side Rules of the Bombay High Court held that as per Rule 951(3), the object is to furnish information to all persons who may have a claim in respect of the vessel or the proceeds of the sale thereof and claimant who fails to bring a claim before the Admiralty Court may make claim in a suit in rem brought before the Admiralty Court but the claims have to be adjudicated upon and thereafter, order of priorities would have to be determined and therefore, the first respondent/plaintiff having intervened in Admiralty suit No. 24 of 2011 and having become a defendant has to prove his claim adjudicated in the Admiralty Suit No. 24 of 2011 and has to work out his priority of claim as per Rule 951 of the Original Side Rules of Bombay High Court and this has been made clear in the order of the Division Bench in Appeal No. 679 of 2012 and therefore, the first respondent may be directed to approach the Bombay High Court and file his claim in Admiralty Suit No. 24 of 2011 and till such time, the suit in C.S. No. 387 of 2011 has to be stayed.

5. He also relied upon the judgment reported in Chitivalasa Jute Mills Vs. Jaypee Rewa Cement, and Shipping Corporation of India Ltd. Vs. Machado Brothers and Others, and contended that the first respondent/plaintiff also filed a suit for recovery of the amount payable by the second respondent and the second respondent vessel was ordered to be sold, and purchased by the applicant in the auction and therefore, the first respondent/plaintiff has to work out his remedy only from the sale proceeds realised by auction sale of the vessel which is now available in the admiralty jurisdiction of Bombay High Court in Admiralty Suit No. 24 of 2011 and even after getting the decree in C.S. No. 387 of 2011 that decree has to be worked out only against the sale proceeds now available to the credit of Admiralty Suit No. 24 of 2011 and therefore, the suit in C.S. No. 387 of 2011 has to be stayed and the first respondent/plaintiff may be directed to pursue their claim against the second respondent from and out of the sale proceeds now available in Admiralty Suit No. 24 of 2011. He therefore, submitted that even though the petition is not maintainable under Section 10 CPC, the Court has got

inherent power to transfer the suit if the interest of justice calls for such exercise of power and having regard to the facts aforesaid, the first respondent/plaintiff may be directed to pursue his remedy in the Admiralty Suit and no purpose would be served by proceeding in this suit in C.S. No. 387 of 2011.

6. On the other hand, Mr. V. Aravamudhan, learned counsel for the first respondent/plaintiff submitted that the order passed in Appeal No. 679 of 2012 in Admiralty Suit No. 24 of 2011 cannot be pressed into service against the first respondent and even as per Rule 951 of the Original Side Rules of Bombay High Court, any party who has obtained or obtains a decree or order or order against the property or proceedings of the sale thereof, may apply to the Court by Notice of Motion for an order determining the order of priority of claims against the proceedings of sale of the suit property. Therefore, the first respondent/plaintiff is entitled to proceed against the sale proceeds available in Admiralty Suit No. 24 of 2011 only after obtaining the decree. Therefore, the present application is not maintainable. He also submitted that the applicant filed Application No. 729 of 2013 for return of the plaint in C.S. No. 387 of 2011 by raising the same plea and that Application was closed and liberty was granted to the applicant to file an appropriate application and on the very same allegation, the present application is filed and he suppressed the application filed in A. No. 729 of 2013. When a person approaches the court by giving false representation, he is not entitled to the discretionary relief of stay of the suit and relied upon the judgment reported in Mayar (H.K.) Ltd. and Others Vs. Owners and Parties, Vessel M.V. Fortune Express and Others, He also submitted that the present Application is not maintainable and the applicant cannot seek a direction directing the plaintiff to move the Bombay High court to get his claim adjudicated and apply for priorities and the cause of action for the suit filed in C.S. No. 387 of 2011 and the cause of action in Admiralty Suit No. 24 of 2011 are entirely different and hence, the provision of Section 10 of CPC cannot be invoked and if really, the applicant is interested, he ought to have moved the application before the Hon"ble Supreme court for transfer of the suit in C.S. No. 387 of 2011 to the Original Side of the Bombay High Court to be tried along with Admiralty suit No. 24 of 2011 and without taking any such step, he cannot file such Application seeking for stay of the suit and he cannot seek for a direction directing the first respondent to pursue his right from the sale proceeds available in Admiralty Suit No. 24 of 2011.

7. Heard the learned counsel appearing for the parties and perused the materials available on record.

8. It is seen from the plaint allegation in C.S. No. 387 of 2011 that the first respondent/plaintiff filed the suit for the recovery of Rs. 68,76,267/- for the goods supplied by it to the second respondent and Admiralty Suit No. 24 of 2011 was also filed by the applicant for a decree for an amount of Norwegian Kroners 176.500 million equivalent to Rs. 143.43 Crores together with interest. In the Admiralty Suit, they sought for arrest of the vessel and that was ordered on

13.5.2011 and that was prior to the filing of the suit in C.S. No. 387 of 2011. In Admiralty Suit No. 24 of 2011, the first respondent got himself impleaded in Notice of Motion 2043 of 2011 and that was allowed on 20.7.2011. Thus, the first respondent has become a party in Admiralty Suit No. 24 of 2011. Admittedly, the second respondent vessel was ordered to be sold by the Bombay High Court and that was objected to by the first respondent and the applicant was permitted to bid at the auction and he quoted higher price of US\$ 33.1 million and that was confirmed by the Hon''ble Bombay High Court on 30.11.2011 and the applicant also filed Application No. 4072 of 2011 in C.S. No. 387 of 2011 on the file of this Court to get himself impleaded and that was ordered. The applicant also deposited the sale proceeds with the Sheriff of Mumbai and that amount is available for distribution among the creditors of the second respondent.

9. In Admiralty Suit No. 24 of 2011, a motion was moved by the applicant/plaintiff seeking the following reliefs:

"(a) For an order and direction that the order of priority of claims against the sale proceeds shall be determined after the expiration of ninety days or of such other period as the court may specify from 4th January, 2012.

(b) For an order and direction that the Sheriff shall send for publication in such newspapers as the Court may direct, a notice complying with the provisions of Sub-rule 951(3) of the Bombay High court Rules stating, inter alia, that the order of priority of claims against the said proceeds shall be determined after the period mentioned determined by this Hon''ble Court with respect of prayer (a) and that any person having a claim against the property or the proceeds of sale thereof should file his claim before the Hon''ble Court before the expiration of the said period."

10. Learned Single Judge passed the following order:

"Obviously, Rule 951(1) and 951(2) of the said Rules are both designed to achieve determination of priorities. Mere issuance of notice inviting claims without any intention of deciding the priorities is not the idea of these two Sub-rules. In any event, as discussed above, no purpose is served by undertaking an exercise of fixing priorities by inviting claims within a specified period at the instance of a plaintiff who has yet to obtain a decree and in fact, such an exercise may well be an exercise in futility."

11. The learned single Judge was of the view that the purpose of Rule 951 of the Original Side Rules of the Bombay High Court is to determine the priorities amongst different claimants who have proved their claims against the property proceeded or its sale proceeds and no purpose would be served by inviting claims within a specified period at the instance of the plaintiff who was yet to obtain decree and it would be undeniable to require persons to prove their claims and to obtain decrees on the plaint of such plaintiff. That order of the learned single Judge was set aside by the Hon''ble Division Bench in Appeal No. 679 of 2012 by interpreting Rule 951 permitting issuance of notice inviting claims within the

meaning of Rule 951(3) of the Rule.

12. Rule 951 of the Bombay Original High Court Rules is as follows:

"951. Order for sale of property and determination of priority of claims-

(1) Where in a suit in rem the Court has ordered the property proceeded against to be sold, any party who has obtained or obtains a decree or order of order against the said property or the proceeds of sale thereof may-

(a) In a case where the order for sale contains the further order referred to in sub-rule (2), after the expiration of the period specified in the order under sub-rule rule (2)(a), or

(b) in any other case, after obtaining judgment, apply to the Court by Notice of Motion for an order determining the order of priority of the claims against the proceeds of sale of the said property.

(2) Where in a suit in rem the Court order the property proceeded against to be sold, it may further order - (a) that the order of priority of the claims against the proceeds of sale of the property shall not be determined until after the expiration of ninety days or of such other period as the court may specify, beginning with the day on which the proceeds of sale are paid into court;

(b) that any party to the suit or to any other suit in rem against the property proceeded against or the sale proceeds thereof may apply to the Court to extend the period specified in the order.

(c) that within seven days after the date of payment into Court of the proceeds of sale, the Sheriff shall send for publication in, such newspapers as the Court may direct a notice complying with the provisions of sub-rule (3).

(3) The notice referred to in sub-rule (2) shall state-

(a) that the property (particulars to be specified) has been sold by the order of the High Court in a suit in rem giving the number of the suit and the names of the parties to the suit;

(b) that the gross proceeds of the sale, specifying the amount thereof, have been paid into Court;

(c) that the order of priority of the claims against the said proceeds will not be determined until after the expiration of the period (specifying it) specified in the order of sale;

(d) that any person having a claim against the property or the proceeds of sale thereof, should apply to the court for leave to intervene and prove his claim before the Court and obtain a decree before the expiration of that period.

(4) The Sheriff shall lodge in the registry a copy of each newspaper in which the notice referred to in sub-rule (2)(c) has appeared.

(5) The expenses incurred by the Sheriff in complying with an order of the Court under this rule shall be included in his expenses relating to the sale of the property.

(6) An application to extend the period referred to in sub-rule (2)(a) shall be made by Notice of Motion, which shall be served on the parties to the suit and on all persons who have obtained leave to intervene in the suit."

13. While interpreting Rule 951, the Hon"ble Division Bench of the Bombay High Court held that Sub-rule (1) of Rule 951, governs an application to the Court for an order determining the priority of claims against the proceeds of the sale of the arrested vessel. Before applying to the Court for the determination of priorities, an applicant must have obtained a decree or order against the property or proceeds of sale. It is only thereafter the application can be moved before the Court for an order determining priority of claims at the stages indicated in clause (a), or as the case may be, clause (b) of sub-rule (1). The object underlying the issuance of notice under sub-rule 3 of Rule 951 is to furnish intimation to all persons who may have a claim in respect of the vessel or the proceeds of the sale thereof. The essence of a notice is that it is an intimation to all claimants at large with claims against the vessel or the sale proceeds of the vessel in respect of which Admiralty Court has assumed jurisdiction following the arrest of the vessel and before that Court all claims must be brought and proved. A claimant who fails to bring a claim before the Admiralty Court, may nonetheless assert a claim in personam against the owner of the vessel, but once a vessel has been arrested and sold, a claim in a suit in rem has to be brought before the Admiralty Court exercising jurisdiction in rem and before that Court alone. The invitation of claims is a notice to all claimants who wish to assert a claim in rem in respect of the vessel or sale proceeds that have been realised. Once claims are received those claims have to be adjudicated upon and upon the adjudication of claims an order of priorities would have to be determined in a situation where the aggregate of the claims exceeds the value of the res that has been realised. Therefore, as per the interpretation of Rule 951 by the Division Bench of the Bombay High Court, with which I respectfully agree, the issuance of notice is to indicate the claimants to make their claims before Admiralty Court for the purpose of adjudication of their claims and upon adjudication, an order of priorities would have to be determined by the said Admiralty Court. Even though as per sub-rule (1) of Rule 951, any claimant or applicant, after obtaining decree, applies for notice of motion for an order determining the order of priorities against the proceeds of the sale of the said property, the order of priority of the claimant can be adjudicated only by the Court exercising admiralty jurisdiction. Therefore, even though the plaintiff/first respondent can proceed with the suit in C.S. No. 387 of 2011 and get a decree towards his claim, for realising claim, he has to approach the Admiralty Court of the Bombay High Court for determining the order of priority of his claim. In other words, decree to be passed in C.S. No. 387 of 2011 can be executed against the sale proceeds by adjudication of the claim after obtaining an order of priority.

14. As rightly submitted by the learned Counsel, Mr. B. Giridhara Rao, no purpose would be served by prosecuting the suit in C.S. No. 387 of 2011 and obtaining a decree and thereafter, approaching the Admiralty Jurisdiction of the Bombay High Court in Admiralty Suit No. 24 of 2011 by making an application to adjudicate upon the claim culminated by a decree for the purpose of priorities and on the other hand, the first respondent/plaintiff can straightaway file his claim and get the claim adjudicated and also apply for priorities after adjudication of the claim by filing necessary application before the Bombay High Court.

15. In the judgment reported in *Chitivalasa Jute Mills v. Jaypee Rewa Cement* (supra), the Hon"ble Supreme Court held that the Court has got power to consolidate two suits for the purpose of preventing the abuse of process of Court and to meet the ends of justice. In this case, admittedly, the first respondent/plaintiff got himself impleaded in Admiralty Suit No. 24 of 2011 and the first respondent/plaintiff can very well prove his claim against the sale proceeds in Admiralty Suit No. 24 of 2011 and for that purpose, there is no need to obtain decree in C.S. No. 387 of 2011. Even after obtaining the decree, he has to prove his priorities by getting adjudication and that process can be shortened by approaching Bombay High Court by filing Application under Rule 951 of the Original Side Rules of the Bombay High Court for adjudication of his claim made in C.S. No. 387 of 2011 and obtain an order of adjudication regarding priorities. By approaching Bombay High Court, parties are relieved of the need of adducing the same or similar documentary and oral evidence twice over in the two suits at two different trials. That would also avoid multiplicity of proceedings. Further, the Hon"ble Supreme Court held in the judgment reported in *Shipping Corporation of India Limited v. Machado Brothers and Others* (supra) that the Courts have all the necessary powers under Section 151 CPC to make a suitable order to prevent the abuse of the process of Court unless the exercise of such power is expressly prohibited by any other provisions of the Code. Further, the Court can take into consideration the subsequent events with regard to the relief sought. Having regard to the order passed in Appeal No. 679 of 2012 in Notice of Motion No. 558 of 2012 in Admiralty Suit No. 24 of 2011 dated 30.11.2012, the applicant is justified in asking for such a prayer and that would also prevent the multiplicity of proceedings and that would also help the first respondent/plaintiff to prove his claim in a better way.

16. Though it is open to the applicant to move the Hon"ble Supreme Court for transfer of C.S. No. 387 of 2011 on the file of this Court to the file of the Original Side of the Bombay High Court, to be tried along with Admiralty Suit No. 24 of 2011, having regard to the fact that the first respondent was already impleaded as one of the parties in Admiralty Suit No. 24 of 2011, and having regard to the provision of Rule 951 of the Original Side Rules of the Bombay High Court, multiplicity of proceedings can also be avoided by directing the first respondent/plaintiff in C.S. No. 387 of 2011 to pursue his remedy in Admiralty Suit No. 24 of 2011 and till such time, the suit in C.S. No. 387 of 2011 can be stayed. In the result, the Application is allowed as prayed for. No costs.