
(1984) 03 CAL CK 0033
In the Calcutta High Court
Case No : Suit No. 421 of 1982

State Bank of India

APPELLANT

Vs

Himalaya Shipping Co. Ltd.

RESPONDENT

Date of Decision : 01-03-1984

Acts Referred:

Merchant Shipping Act, 1958 — Section 139, 145, 146, 148

Citation : AIR 1985 Cal 85

Hon'ble Judges : Dipak Kumar Sen, J

Bench : Single Bench

Judgement

Dipak Kumar Sen, J.—Himalaya Shipping Co. Ltd., now in liquidation, was the owner of "M. V. Sri Kailash," a sea going vessel. The State Bank of India, in whose favour the said vessel had been mortgaged, instituted the present suit some time in 1982 for enforcement of the mortgage and a Receiver was appointed over the said vessel in the said suit to sell the same. More or less simultaneously, the crew and some of the officers of the said vessel initiated proceedings in the Court of the 16th Metropolitan Magistrate Bombay to recover their unpaid wages claiming a lien over the vessel for the same. The vessel was attached under the orders of the Magistrate in Bombay.

2. Under directions of this Court the Receiver paid off the claims of the crew and the officers of the vessel as determined in the proceedings before the Magistrate and signed off the crew, the officers and the Master of the said vessel.

3. The Receiver obtained release of the attachment from the Magistrate's Court and took possession of the said vessel.

4. The Master of the vessel who had not been a party to the proceedings before the Magistrate at that stage sought to initiate fresh proceedings in the Magistrate's Court. But a Receiver having already been appointed in this suit such proceedings were withdrawn. Directions were obtained in this suit from time to time at the instance and/or with the consent of the parties as follows : --

"22nd June, 1982 : The Master will obtain payment from the Receiver on his undertaking to refund any excess amount that will be finally determined.

The Receiver will pay to the Master Rs. 50,000/- on account of his remuneration in the first instance.

The Master will be entitled to seek further direction from the Court as regards balance payment."

"20th Aug., 1982 : The plaintiff is directed to pay to the Receiver in the first instance Rs. 96,000/- to be paid to the Master on account of the latter's claim.

In the event the Receiver sells such vessel the proceedings thereof will not be disbursed without leaving Rs. 65,000/- on account of further claims of the Master, Rs. 65,000/- will be disbursed according to further orders of this Court.

The application of the Master will remain part heard and is adjourned sine die with liberty to mention after the sale of the vessel."

"22nd Dec., 1983 : The Receiver is directed not to disburse any amount without setting apart a sum of Rs. 70,000/-.

The Receiver is directed not to disburse without setting apart a sum of Rs. 1,24,000/-".

5. It is a matter of record that the vessel has since been sold by the Receiver and delivered to the purchaser.

6. Two applications have been made on Notices of motion respectively dated the 11th Aug., 1982 and the 18th Jan., 1983. The first application is by the Master and the second by Saibal Kumar Sengupta, Samarendra Nath Ghose, Nirmalendu Bikash Saha, Govinda-rajapuram Chidambaram Kannan, D. Rakshit, Kamal Krishna Basu and P. C. Bhadra who claim to have been officers employed in the said vessel. The orders sought for are, inter alia.

(a) Leave be given to the petitioner to be examined pro interesse suo;

(b) Alternatively, leave be given to the petitioners to intervene in the proceedings;

(c) The Receiver be directed to pay the claims of the petitioners out of the sale proceeds of the vessel in preference to any other claim;

(d) Alternatively, another Receiver be appointed in the suit over the suit vessel.

7. In the petition of the Master, Subhas Mohan Gangahar, it contended, inter alia, that the Master of a ship has the same rights, liens and remedies for recovery of his wages as a seaman under the Merchant Shipping Act, 1958.

8. The proceeding filed in the Court of the Metropolitan Magistrate, Bombay, it is alleged was withdrawn by the Master on the expectation that his dues would be paid by the Receiver. Rs. 60,066.65 P., it is alleged still remains due and payable

to the Master on account of his outstanding wages and this amount has been certified by the Shipping Master. The Master also claims other amounts which, it is alleged, were deducted from his wages on account of provident fund contributions and Income Tax, if the same had not been credited by the company towards such dues.

9. The seven officers who are the petitioners in the other application allege that wages and allowances are due to them for service rendered in the said vessel during the years 1979, 1980 and 1981.

10. The applications are opposed by the State Bank of India.

11. The Chief Manager of the Overseas Branch of the plaintiff has affirmed an affidavit on the 16th Aug., 1982, which has been filed in opposition to the petition filed by the Master. It is alleged in this affidavit, inter alia, that the Receiver had appeared before the Magistrate in Bombay and had submitted that proceedings could not have been initiated by the master without leave from this Court. The Magistrate thereupon allowed the Master to withdraw his application. It is contended that the Master is not entitled to any further payment on his application as his claim has to be adjudicated in proper proceedings. It is also contended that a part of the claim of the Master in this application was not submitted to the Shipping Master and related to services rendered by the Master on a different vessel.

12. Similar objections have been raised by the Bank to the claims in the petition filed by the Officers. The Chief Manager, Overseas Branch of the Bank has affirmed an affidavit on the 12th Mar., 1983 which has been filed in opposition to the petition. It is contended in this affidavit inter alia, that the claims preferred by the petitioners were past claims arising prior to their discharge and the petitioners have not given any explanation as to how they were discharged from the vessel without their dues being paid in full.

13. At the hearing, learned Counsel for the parties reiterated the respective contentions in the pleadings. Learned Counsel for the Bank contended further that the disputed questions of fact arising on the claims of the petitioners could not be determined in this suit. Learned Counsel for the petitioners contended on the other hand that in view of the orders passed by this Court earlier, from time to time, the Court retained seisin over the disputes in respect of the claims of the Master and the other Officers. Learned Counsel for the petitioners submitted that the matter could be referred back to the Shipping Master, Calcutta or the Official Liquidator for a proper adjudication or alternatively this Court should act on the certificate issued by the Shipping Master.

14. By reason of the winding up order passed against the Company, the official Liquidator has taken charge of its assets and properties. So far as the Bank, is concerned, as a secured creditor, its claim stands unaffected by the winding up proceedings to the extent it is confined to the security. The claim of the Bank far exceeds the amount which has been realised by the sale of the vessel. After

meeting the claim of the plaintiff nothing remains to be made over to the Official Liquidator. The petitioners' claim arises on account of their unpaid wages for services rendered to the vessel. Under the general law, wages due to the officers or the Master of a vessel give rise to a maritime lien in their favour which is enforceable against the Vessel. The Merchant Shipping Act, 1958 also provides for such a lien. The petitioners, in my view, therefore must be held or deemed to be secured creditors and their claims cannot be adjudicated by or before the Official Liquidator.

15. The relevant provisions of the Merchant Shipping Act may be noted : --

Section 3(42) "Seamen" means every person (Except a master, pilot or apprentice) employed or engaged as a member of the crew of a ship under this Act, but in relation to Sections 178 to 183 (inclusive) includes a master.

Section 119. Certificate of discharge.-- (1) The master shall sign and give to a seaman discharged from his ship in India, either on his discharge or on payment of his wages, a certificate of his discharge in the prescribed form specifying the period of his service and the time and place of his discharge.

(2) The master shall also, upon the discharge of every certificate officer, whose certificate of competency has been delivered to and retained by him, return the certificate to the officer.

Section 125. Master to deliver account of wages.--(1) The master of every ship shall, before paying off or discharging a seaman under this Act deliver at the time and in the manner provided by this Act a full and true account in the form prescribed of the seaman's wages and of all deductions to be made therefrom on any account whatever.

(2) The said account shall be delivered, either to the seaman himself, at or before the time of his leaving the ship, or to the shipping master not less than twenty-four hours before the discharge or payment off.

Section 132(1) Where under the agreement with the crew any dispute arises at any port in India between the master, owner or agent of a ship and any of crew of the ship, it shall be submitted to the shipping master.--

(a) Where the amount in dispute does not exceed three hundred rupees, at the instance of either party to the dispute;

(b) in any other case, if both parties to the dispute agree in writing to submit the dispute to shipping master.

(2) The shipping master shall hear and decide the dispute so submitted and an award made by him upon the submission shall be conclusive as to the right of the parties, and any document purporting to be such submission or award shall be prima facie evidence thereof.

Section 139. Right to recover wages and salvage not to be forfeited.-- (1) A

seaman shall not by any agreement forfeit his lien on the ship or be deprived of any remedy for the recovery of his wages to which, in the absence of the agreement, he would be entitled, and shall not by any agreement -- abandon his right to wages in case of loss of the ship or abandon any right that he may have or obtain in the nature of salvage, and every stipulation in any agreement inconsistent with any provisions of this Act shall be void.

Section 145. Summary proceedings for wages.-- (1) A seaman or apprentice or a person duly authorised on his behalf may. as soon as any wages due to him become payable, apply to any Magistrate exercising jurisdiction in or near the place at which his service has terminated or at which he has been discharged, or at which any person upon whom the claim is made is or resides, and the Magistrate shall try the case in a summary way and the order made by the Magistrate in the matter shall be final.

(2) An application under Sub-section (1) may also be made by any officer authorised by the Central Government in this behalf by general or special order.

Section 146. Restrictions on suits for wages.-- A proceeding for the recovery of wages due to a seaman or apprentice shall not be instituted by or on behalf of any seaman or apprentice in any civil Court except where--

- (a) the owner of the ship has been declared insolvent;
- (b) the ship is under arrest or sold by the authority of any Court;
- (c) a Magistrate refers a claim to the Court.

Section 148. Remedies. of master for wages, disbursements, etc.-- (1) The master of a ship shall, so far as the case permits, have the same rights, liens and remedies for the recovery of his wages as a seaman has under this Act or by any law or custom.

(3) If in any proceeding in any Court touching the claim of a master in respect of such wages, disbursements or liabilities any set off is claimed or any counter claim is made, the Court may enter into, and adjudicate upon, all questions and settle all accounts then arising or outstanding and unsettled between the parties to the proceeding and may direct payment of any balance found to be due."

16. From the aforesaid provisions of the Act it appears that a mere certificate from the Shipping Master would not by itself entitle the seamen or the Master to payment of their claims. Even in the summary proceedings u/s 145 of the Act the Magistrate has to try the case and determine the amounts payable to the seamen or the Master concerned. Section 146 of this Act enables the seamen concerned to move a Civil Court where the ship is under arrest or is sold by the authority of any Court.

17. The question to be determined is whether this Court in this suit should adjudicate the claims of the petitioners. If this suit was filed in the Admiralty jurisdiction of this Court the same would have been an action in rem and it would

have then been open to the petitioners to move the Court to adjudicate their claims as of right. This suit is a money suit with a claim for realisation of a security i.e. the vessel. In this suit where the company in liquidation is a party it would not be convenient nor proper to adjudicate on the various claims of the officers and the Master. If a part of the petitioners' claim does not give rise to a maritime lien then the same has to be made before the Official Liquidator.

18. It is open to Bank to agree to refer the disputes raised by the petitioners for adjudication by the Shipping Master. But such an agreement is not forthcoming. I am also not satisfied if the claim of the Master can at all be referred u/s 132 of the Act for adjudication even under an agreement.

19. For the reasons above, I dispose of this application by the following order : --

The Receiver will keep the amounts directed to be set apart in a suitable deposit account with a nationalised Bank which may include the plaintiff Bank subject to further orders of the Court. The petitioners will be at liberty to institute appropriate proceedings for recovery of their dues in an appropriate forum as they may be advised. The petitioners will be at liberty to implead the Receiver and/or the Official Liquidator in such proceedings. The petitioners will also be at liberty to apply for the money set apart by the Receiver to be treated as security in their suit.

20. I make it clear that beyond what has been stated, I have not adjudicated on the merits of the claims of the petitioners in any manner nor that of the controversies raised on behalf of the Bank. If no suit is filed within six months from date, the Receiver will be at liberty to apply for further directions regarding the moneys kept apart.

21. This judgment covers both the petitions.