

(2005) 02 CAL CK 0031

In the Calcutta High Court

Case No : G.A. No. 3922 of 2004 and A.P.O.T. No. 10 of 2004

State of Ukraine

APPELLANT

Vs

Md. Shafique Khan

RESPONDENT

Date of Decision : 21-02-2005

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 27, Order 7 Rule 11, 140, 141, 86

Citation : (2005) 3 CHN 203

Hon'ble Judges : Altamas Kabir, Acting C.J.; Asit Kumar Bisi, J

Bench : Division Bench

Advocate : I.P. Mukherjee and R. Ghosh, for the Appellant; Tilok Bose and V.N. Mishra, for the Respondent

Judgement

Altamas Kabir, A.C.J.

1. While considering the application for stay, on consent of the parties, the appeal itself was taken up for hearing since the issue raised in the appeal involved a point of law which was capable of being decided on the materials already on record.

2. The appellant in the instant appeal is the State of Ukraine and claims to be the owner of a vessel by the name of "M.V. Toyvo Antikaynen" registered at Odessa in the State of Ukraine. According to the case as made out, the said vessel is registered in the name of the Black Sea Shipping Company which was at all material times the operating agent of the vessel and is an instrumentality of the State of Ukraine. The said vessel arrived at the Port of Calcutta on 5th May, 1997, for discharging cargo and was berthed at Khidirpur Docks in Calcutta. At the relevant point of time the appellant had entered into a time charter with one Asia Express Shipping Agency and the said charter was subsisting when the vessel was berthed at Calcutta. The Diamond Shipping Company is the agent of the Asia Express Shipping Agency. While the ship was berthed in Calcutta Dock some time in the middle of 1997, three business organizations, namely, Spence & Company, Bombay Marine Company and Elitarius Limited, caused the said

vessel to be arrested in the Port of Calcutta. According to the appellant, in each of the suits which the said parties had filed, applications were made on behalf of the appellant herein under Order 7 Rule 11 of the CPC to take the plaint off the file, inter alia, on the ground that the said vessel was owned by the State of Ukraine and that the suit had been filed without obtaining sanction of the Central Government to prosecute a Foreign State and/or to maintain an action against the vessel of the said State u/s 86 of the Code of Civil Procedure. The said plea of sovereign immunity was rejected by this Court and against the order of the Division Bench rejecting such plea the appellant moved the Hon"ble Supreme Court which did not, however, grant any stay against the order of the Division Bench of this Court.

3. Meanwhile, various parties had instituted proceedings against the said vessel in this Court and in each suit applications were filed on behalf of the appellant under Order 7 Rule 11 of the Code of Civil Procedure. One such suit was A.S. No. 15 of 1997 (Diamond Shipping Company Ltd. v. Owners and parties interested in the vessel "M.V. Toyvo Antikaynen"). In the said suit, after dismissing the application under Order 7 Rule 11 of the CPC on 27th March, 1998, by a further order dated 3rd April, 1998, the learned Trial Judge appointed Joint Special Officers to make an inventory of the vessel. Pursuant to such inspection, a report was filed by the Joint Special Officers stating that the vessel was not sea-worthy, and, ultimately, by an order dated 21st August, 1998, this Court confirmed sale of the vessel in favour of Lala Shyamlal Jain Ship-Breaking Company on 21st August, 1998. The crew of the vessel had also filed a suit in respect of their dues and were directed to be paid out from the moneys lying in the hands of the Joint Special Officers by diverse " orders passed from time to time. The Calcutta Port Trust Authorities and other claimants were also directed to be paid by this Court. However, on 24th November, 1998, having regard to the pendency of the appeal before the Hon"ble Supreme Court, this Court directed that no further sums were to be disbursed from the amounts held by the Joint Special Officers.

4. While the matter was pending before the Hon"ble Supreme Court, on or about 19th June, 1998, the respondent herein filed the admiralty suit, being A.S. No. 16 of 1998, against the owner and parties interested in the aforesaid vessel, for a claim of about Rs.7,20,493.35P.

5. The appeal before the Hon"ble Supreme Court was finally heard on 21st August, 2001. According to the appellants, since at the time of hearing of the appeal it was noticed that the ownership of the vessel had not been established, the appellant decided to withdraw the appeal keeping all the questions of law arising therein open. By its order dated 21st August, 2001, the Hon"ble Supreme Court granted leave to the appellants to withdraw the appeal and the SLP leaving the question of law that arose therein open for consideration in the event the appellant succeeded in establishing its ownership.

6. Thereafter, the appellant tendered one Mr. Surendra Sancheti, the authorised representative of the State of Ukraine to look after their Court matters all over

India, as a witness in order to establish sovereign immunity. By his judgment and decree dated 9th August, 2004, the learned Trial Judge rejected the plea of sovereign immunity and decreed the suit for a sum of Rs. 7,20,493.35P along with interim interest and interest on judgment at the rate of 6 per cent per annum.

7. Aggrieved by the said judgment and decree dated 9th August, 2004, the appellant filed a review application which was also dismissed on 14th September, 2004.

8. The instant appeal is directed against the judgment and decree of the learned Trial Judge dated 9th August, 2004.

9. Appearing in support of the appeal, Mr. I.P. Mukherjee reiterated his plea of sovereign immunity regarding the suit filed by the respondent herein. In this regard, Mr. Mukherjee first referred to Section 86 of the CPC which, inter alia, provides that no Foreign State may be sued in any Court otherwise competent to try the suit except with the consent of the Central Government certified in writing by a Secretary to that Government.

10. Mr. Mukherjee urged that the Black Sea Shipping Company, which is the registered owner of the vessel in question, is an instrumentality of the State of Ukraine and if, ultimately, the appellant was able to prove its ownership of the vessel the suit filed by the respondent would be incompetent, having been filed without the consent in writing of the Central Government to file the suit.

11. Mr. Mukherjee submitted that the Hon"ble Supreme Court had noticed the fact that the ownership of the vessel had not been established and had consequently granted leave to the appellant to establish its ownership over the vessel so as to attract the provisions of Section 86 of the Code of Civil Procedure. In support of his submission Mr. Mukherjee firstly referred to the decision of the Hon"ble Supreme Court in *M.V. Elisabeth and Others Vs. Harwan Investment and Trading Pvt. Ltd., Hanoekar House, Swatontapeth, Vasco-De-Gama, Goa*, where the scope and action in rem in admiralty jurisdiction fell for consideration of the Hon"ble Supreme Court. Mr. Mukherjee submitted that in the said decision it was observed by the Hon"ble Supreme Court that Indian statutes lagged behind in the development of international law in comparison to contemporaneous statutes in England and other maritime countries and that although the Hague Rules are embodied in the Carriage of Goods Act, 1925, India never became a party to the International Conventions laying down those rules. Mr. Mukherjee also pointed out that the Hon"ble Supreme Court had taken note of the fact that India had not adopted the various Brussels conventions on the arrest of sea-going ships.

12. Mr. Mukherjee then referred to another decision of the Hon"ble Supreme Court in the case of *Veb Deautfracht Seereederei Rostock (D.S.P. Lines) a Department of the German Democratic Republic Vs. New Central Jute Mills Co. Ltd. and another*, wherein it was held that where a foreign company was found to be a Foreign State within the meaning of Section 86 of" the Code of Civil

Procedure, the suit filed against it for breach of contract, without obtaining the consent of the Central Government, was not maintainable. In the said decision reliance was placed on an earlier decision of the Hon''ble Supreme Court in the case of *Mirza Ali Akbar Kashani Vs. United Arab Republic and Another*, , in which it was held that Section 86(1) of the CPC proceeds to prescribe limited liability against Foreign States and that the limitation under liability of Foreign States to be sued is two-fold. The first limitation is that such a suit cannot be instituted except with the consent of the Central Government certified in writing by a Secretary to that Government. The second limitation is that the Central Government shall not give consent unless it appears to the Central Government that the case falls under one or the other of Clauses (a) to (d) of Section 86(2) of the Code of Civil Procedure. It was observed further that the requirement showed the anxiety of the legislature to save Foreign States from frivolous and unjustified claims. On the applicability of Section 86 of CPC to admiralty suits of the instant nature, Mr. Mukherjee contended that it was an established principle of law that when there was a conflict between international law and convention on the one hand and municipal law on the other, the municipal law of the country would prevail. If, however, two constructions of municipal law are possible, the Court should lean in favour of adopting such construction as would make the provisions of the municipal law to be in harmony with international law on treaty obligations. In support of his contention Mr. Mukherjee referred to and relied on the observations made by the Hon''ble Supreme Court in the case of *People's Union of Civil Liberties (PUCL) Vs. Union of India (UOI) and Another*, .

13. Having completed his submissions on the question relating to the applicability of Section 86 of the CPC to admiralty suits, Mr. Mukherjee then turned to the question involving ownership of the vessel in question having regard to the fact that the appeal before the Hon''ble Supreme Court had been allowed to be withdrawn for the said purpose of establishing ownership of the vessel in question.

14. In this regard Mr. Mukherjee urged that since the Black Sea Shipping Company was the registered owner of the vessel in question and was also vested in the State of Ukraine and was an instrumentality of the State as had been held in other proceedings, the ownership of the vessel cannot be in doubt. Mr. Mukherjee submitted that although no direct evidence had been produced regarding the ownership of the vessel by the State of Ukraine, other documents had been produced which would indicate that the Black Sea Shipping Company was wholly owned by the State of Ukraine and that all vessels belonging to the said company therefore belonged to the State of Ukraine. Mr. Mukherjee submitted that the status of the Black Sea Shipping Company had fallen for consideration before the Court of Appeal in England in the case of *Nazym Khikmet*, reported in 1996 Vol. 2 Lloyd's Law Reports Page 362, and it had been held therein that the State of Ukraine was the owner of the Black Sea Shipping Company.

15. Mr. Mukherjee also produced a certificate said to have been issued by the Consul General of Ukraine on 13th May, 1997, confirming that the Black Sea Shipping Company, Odessa, Ukraine, is hundred per cent owned by the Government of Ukraine and that all ships operated by the said Black Sea Shipping Company are owned by the Government of Ukraine and are State public property.

16. Apart from the above, Mr. Mukherjee also produced an extract from the Lloyd's Register of International Shipowning Groups showing the Black Sea Shipping Company to be the owner of the vessel "M.V. Toyvo Antikaynen".

17. Mr. Mukherjee submitted that through inadvertence the said documents, which go to establish the ownership of "M.V. Toyvo Antikaynen" by the State of Ukraine, had not been produced before the learned Single Judge though leave had been granted by the Hon'ble Supreme Court to prove such ownership before the learned Trial Judge. Mr. Mukherjee submitted that since the said documents would unequivocally prove the ownership of the vessel in question in the State of Ukraine, leave could now be given to the appellant to bring on record the said documents by way of additional evidence in the appeal itself under Order 41 Rule 27 of the Code of Civil Procedure, or an opportunity could be given to the appellant to prove the documents relating to ownership before the learned Trial Judge on remand, inasmuch as, said question had a direct bearing on the applicability of Section 86 of the CPC to the admiralty suit filed by the respondent.

18. Mr. Mukherjee lastly contended that the language of Section 86 of the CPC being absolutely clear and without any ambiguity, the same should be read in its literal context without trying to superimpose other conditions not mentioned therein.

19. Appearing for the respondent, Mr. Tilok Bose urged that the issue now being sought to be raised by Mr. Banerjee was no longer *res integra* having been decided in other proceedings. Mr. Bose submitted that the question of ownership of the vessel was not relevant having regard to the fact that the applicability of Section 86 of the CPC to admiralty suits had been considered and settled in other suits involving the same company and other vessels owned by it. Mr. Bose contended that though the procedural provisions of the CPC would be applicable in admiralty suits having regard to the provisions of Sections 140 and 141 thereof, the provisions of Section 86 would have no application on account of the fact that the provisions of Section 86 were not procedural but substantial in nature.

20. Mr. Bose submitted that the very object for arrest of a ship relating to commercial transactions would be rendered meaningless if the power to arrest the ship had to be invoked only after the consent in writing of the Central Government. Mr. Bose submitted that in this regard various International Conventions had been signed for the unification of rules concerning the immunity of the State-owned ships.

21. Reference was firstly made to the Brussels Convention of 10th April, 1926 to which reference had been made by the Hon''ble Supreme Court while deciding questions involving the arrest of foreign ship. Mr. Bose referred to Article 3 of the said Convention which, inter alia, provides that the articles relating to private owners or private cargos would have no application to ships of war, State-owned yachts, patrol vessels, hospital ships, fleet auxiliaries, supply ships and other vessels owned or operated by a State and employed exclusively at the time when the cause of action arose on Government and noncommercial service and such ships shall not be subject to seizure, arrest or detention by any legal process, nor to any proceedings in rem. Mr. Bose contended that exceptions from arrest had been made only in the case indicated above, involving non-commercial activities of a State owned vessel.

22. Reference was then made to the 1952 Brussels Convention and the 1999 Brussels Convention relating to arrest of ships. Mr. Bose contended that the same provisions relating to the arrest of State-owned ships of foreign countries have been incorporated both in the 1952 Convention as well as in the 1999 Convention. Referring to Article 8 of the 1999 Arrest Convention Mr. Bose submitted that the Convention would not apply to any war ship, naval auxiliary or other ships owned or operated by a State and used for the time being only on Government non-commercial service. Apart from such exemption, the Convention made it possible for a foreign-owned ship to be arrested in respect of permissible maritime claims. Mr. Bose contended that the provisions of the different Arrest Conventions had, in fact, been considered by the Hon''ble Supreme Court and this High Court and it had consistently been held that although India may not have been a signatory to the Brussels Conventions of 1952 and 1999, its provisions must be adopted as common law of the country and in such circumstances, it would have an overriding effect over the local municipal law.

23. In this regard, Mr. Bose also referred to the decision of the Hon''ble Supreme Court in the case of *M.V. Elisabeth* (supra) relied upon by Mr. Mukherjee. Referring to paragraph 90 of the judgment Mr. Bose pointed out that the Hon''ble Supreme Court had also referred to the International Maritime Conventions under the British Shipping Laws which contained the unified rules of law written from different legal systems. Mr. Bose submitted that the Hon''ble Supreme Court had gone on to observe that although many of these Conventions have yet to be ratified by India they embodied principles of law recognised by the generality of the maritime states and can, therefore, be regarded as part of our common law.

24. Mr. Bose then contended that even as late as in 1977 the Privy Council had in the case of *Philippine Admiral* (owners) and *Wallem Shipping* (Hong Kong Ltd.), reported in Appeal Cases at Page 373, had held that the restrictive theory with regard to immunity would apply to suits in rem meaning thereby that if a vessel was used for commercial purposes the absolute doctrine of immunity would not apply. The Privy Council applied the provisions of the 1926 Brussels Convention

in deciding the said case.

25. Mr. Bose then referred to the Bench decision of this Court in the case of *State of Ukraine v. Elitarious Ltd.*, reported in 1999(1) CLJ 141, involving the same vessel owned by the Black Sea Shipping Company. In the said decision the case of the plaintiff was that it had supplied stores and provisions to a vessel called *M.V. Kapitan* berthed in Calcutta and owned by the Black Sea Shipping Company, Odessa. The owner of *Kapitan* sailed away from Calcutta without paying the dues of the plaintiff amounting to Rs. 20,24,910/-. When the vessel in question arrived in Calcutta the plaintiff filed an admiralty suit against the same owner, *M/s. Black Sea Shipping Company*, for realisation of its dues and also for arrest and sale of the vessel.

26. Referring to the decision of the Hon''ble Supreme Court in the case of *M.V. Elisabeth* (supra) the Division Bench held that there was no bar in arresting a sister ship if the maritime claim is not in the nature of any of categories mentioned in Article 1 of the Brussels Convention. After considering the various decisions on the subject, the Division Bench held that the provisions of Section 86 of the CPC being substantive in character the same had no application to a proceeding under the admiralty jurisdiction of the Court. On an overall assessment of the law the Division Bench rejected the claim of sovereign immunity and dismissed the appeal preferred by the State of Ukraine with regard to the same ship.

27. Distinguishing the decision of the Hon''ble Supreme Court in the *V.D.S. Rostock* case (supra) Mr. Bose urged that the said decision relates to a commercial suit and not an admiralty suit in which the German Democratic Republic was a party. The said judgment could, therefore, have no application to a suit in the admiralty jurisdiction of this Court.

28. It was lastly contended by Mr. Bose that the question of ownership of the *M.V. Kapitan Kud*, also belonging to the Black Sea Shipping Company, had first of all fallen for consideration of the Bombay High Court, and, thereafter, the Hon''ble Supreme Court in the case of *Videsh Sanchar Nigam Ltd. Vs. M.V. Kapitan Kud and others*, . The undertaking given by the Captain of the vessel that if in any event the suit was decreed they would honour the decree, though accepted by the Bombay High Court, was not accepted by the Hon''ble Supreme Court which was of the view that ultimately even if the claims succeeded, the same could remain inexecutable. Accordingly, the Hon''ble Supreme Court allowed the ship to sail subject to deposit of a sum of Rs. 10 crores and the Ukrainian Government giving an undertaking that in the event of the suit being decreed they would comply with the decree without reference to execution.

29. Mr. Bose submitted that the said judgment of the Hon''ble Supreme Court should set at rest the issue of sovereign immunity repeatedly raised by Mr. Mukherjee and the appeal was, therefore, liable to be dismissed with costs.

30. We have carefully considered the submissions made on behalf of the

respective parties and the decisions cited by the learned. Counsels in support of their respective submissions. Although, the question now being raised by Mr. I.P. Mukherjee had been considered by a Division Bench of this Court in the case of *State of Ukraine v. Elitarious Ltd.*(supra) the issue appears to have been differently answered by the Hon''ble Supreme Court.

31. It appears to us that the provisions of Section 86 of the CPC imposes a restrictive bar and not an absolute bar in respect of suits filed against Foreign States. In view of the decision of the Hon''ble Supreme Court in the case of *V.D.S. Rostock (D.S.P. Lines) Department of G.D.R. (supra)* and *Videsh Sanchar Nigam Limited*(supra), we are inclined to hold that a suit in the admiralty jurisdiction against a vessel owned by a Foreign State is competent, subject to compliance with the provisions of Section 86 of the aforesaid Code. As was observed by the Hon''ble Supreme Court in the earlier of the two aforesaid cases, it is neither the purpose nor the scope of Section 86 to protect foreign traders who have committed breach of the terms of a contract causing loss and injury to the plaintiff. But at the same time, it is also not the intention of the Central Government to encourage frivolous litigation against a Foreign State. In the *Videsh Sanchar Nigam Limited* case which was one arising out of an admiralty suit filed in the Bombay High Court, although, the provisions of Section 86 were not noticed, the Supreme Court imposed certain conditions both on the State of Ukraine as well as the Captain of the vessel before allowing the ship to leave the harbour.

32. Both the said two cases emphasised the fact that an admiralty suit may be filed against a foreign-owned vessel. Consequently, in our view, Section 86 with its restrictions would apply to such action. In fact, in the *V.D.S. Rostock* case, while discussing the provisions of Section 86 of the Code of Civil Procedure, the Hon''ble Supreme Court held that without permission having been obtained from the Central Government, the suit as filed against the vessel in question was incompetent.

33. On the question of the applicability of Section 86 of the CPC to suits in the admiralty jurisdiction we are of the view that the provisions of Section 86 are not absolutely substantive in character but a combination of both substantive and procedural rights. We are, therefore, unable to accept Mr. Bose's submissions that Section 86 of the CPC cannot be applied to suits in the admiralty jurisdiction being substantive in character, notwithstanding the provisions of Sections 140 and 141 of the said Code.

34. Furthermore, in the different Arrest Conventions, which have been applied by the Hon''ble Supreme Court in deciding cases of similar nature the provisions relating to arrest of foreign-owned vessels involved in commercial pursuits have been upheld and the said Conventions have been engrafted into the common law of the country. Regard may be had to paragraph 23 of the decision rendered by the Hon''ble Supreme Court in the *PUCL* case (supra) wherein it was stated that it is almost an accepted proposition of law that the rules of customary

international law which are not contrary to the municipal law shall be deemed to be incorporated into the domestic law.

35. However, having regard to the restrictive nature of the bar imposed u/s 86 of the Code of Civil Procedure, we are of the view that the ownership of the vessel by a Foreign State has to be established before the bar u/s 86 of the CPC can be invoked.

36. In the instant case, although the SLP in the Hon''ble Supreme Court was allowed to be withdrawn with leave to prove the ownership of the vessel in question, the appellant does not appear to have produced the relevant evidence in support of the ownership of the vessel in question. Mr. Mukherjee has tried to fill up the lacunae by producing before us the judgment of the Court of Appeal in England in the Nazym Khikmet case(supra) and extracts from the Lloyd's Register of International Ship Owning Groups, which supported by the Certificate issued by the Consul General of Ukraine on 13th May, 1997, confirming that the Black Sea Shipping Company, Odessa, Ukraine, is hundred per cent owned by the Government of Ukraine and that all ships operated by the said company are owned by the Government of Ukraine, seem to point to the fact that the State of Ukraine is, in fact, the owner of the vessel in question.

37. Having regard to the leave granted by the Hon''ble Supreme Court on 21st August, 2001, we are inclined to give the appellant another chance to adduce evidence in support of its claim of ownership of the vessel forming the subject-matter of the admiralty suit.

38. Since we have held that Section 86 of the CPC applies to suits in the admiralty jurisdiction, we allow the appeal to the limited extent of remanding the suit to the Trial Court to decide afresh the issue of ownership of the vessel in question upon giving the parties an opportunity of adducing additional evidence relating to ownership of the vessel. We also set aside the judgment and decree appealed against and direct that the suit be decided afresh on the basis of such fresh evidence.

39. In view of this judgment, the Joint Special Officers shall not for the present disburse any of the funds which they are holding and any further disbursement will be subject to the fresh decision in the suit. In that view of the matter, the Joint Special Officers will invest the money lying in their hands in a short-term Fixed Deposit to be made in the State Bank of India, Main Branch and shall keep the same renewed from time to time, subject to further orders that may be passed in the suit.

40. The learned Trial Judge is requested to try and dispose of the suit in terms of this judgment and order within three months from the date of communication of the same.

41. There will be no order as to costs.

42. The concerned Bank, Joint Special Officers, Department and all parties are to

act on a xerox signed copy of the operative portion of this judgment and order on the usual undertaking.

Asit Kumar Bisi, J.

13. I agree.