

(1984) 12 MAD CK 0057
In the Madras High Court
Case No : O.S.A No. 208 of 1984

Transworld Shipping Services (I) (P) Ltd.	APPELLANT
Vs	
Owners and Other Persons Interested In The Vessel "M. V. Sister Star" and Universal Shipping Transport Inc.	RESPONDENT

Date of Decision : 15-12-1984

Acts Referred:

Contract Act, 1872 — Section 69, 70
Customs Act, 1962 — Section 116, 148, 42
Major Port Trusts Act, 1963 — Section 64

Citation : (1984) 12 MAD CK 0057

Hon'ble Judges : Maheswaran, J;Gokulakrishnan, J

Bench : Division Bench

Advocate : T. Dalip Singh for M/s King and Partridge, for the Appellant; T. Raghavan for Mr. C.A. Sundaram, Counsel for the first Respondent, Mr. V. Aravamudan, Counsel for the Second Respondent, for the Respondent

Final Decision : Dismissed

Judgement

Gokulakrishnan, J.—This appeal is directed against the order passed in Application No. 4960 of 1984 in C. S. No. 830 of 1984. That suit was filed by the appellant herein against the respondents herein inter alia alleging that the appellant has incurred an expense on behalf of the second respondent, who is the charterer of the first respondent vessel M.V. SISTER STAR to the tune of Rs. 43,80,000, that he has received towards that expenditure a sum of Rs. 25,80,000 and that the balance of Rs. 18,00,000 is due to the appellant. It is further alleged that these expenses were incurred towards demurrage charges, customs penalty, port charges, stewarding and other miscellaneous charges on behalf of the second respondent, of whom the appellant is the agent. Therefore, the appellant in the suit prayed for a decree and judgment against both the respondents for rupees 18 lakhs plus interest at the rate of 18% per annum from the date of filing of the suit and also for (i) costs and expenses for the arrest of the vessel M.V. SISTER STAR", and (ii) charge over the vessel M.V. Sister Star of

Korean Flag with Tackles, Apparels, Boats, machinery and furniture and/or its sale proceeds. Along with the suit, the appellant filed Application No. 4960 of 1984 praying to issue a warrant of arrest of the vessel "M.V. SISTER STAR" including its tackles, apparels, boats, machinery and furniture, which is now lying at West Quay II of the Madras Port Trust pending disposal of the suit. In support of this application, the appellant has filed an affidavit stating that the appellant has incurred expenditure on behalf of the defendants, that out of such expenditure incurred, a sum of Rupees 18 lakhs is due to the appellant and that the respondents have acknowledged the said dues by letter dated 5th November, 1984. It has been further alleged that the suit has to be filed on the Admiralty Jurisdiction of this Hon''ble Court in order to arrest the vessel or otherwise, the appellant would suffer irreparable loss and injury if the vessel is allowed to be removed from the jurisdiction of this Honourable Court.

2. The first respondent in his counter-affidavit filed in support of Application No 4960 of 1984 has inter alia alleged that under the chartered party, the second respondent is bound to pay all such port dues, pilotage, agency commission in terms of the charter party and that if the appellant has made any payment on behalf of the second respondent, he cannot seek to recover the same from the first respondent herein. It has been further alleged in the counter-affidavit of the first respondent that the plaint averments do not disclose any cause of action against the first respondent-much less the cause of Admiralty Jurisdiction of this Honourable Court.

3. The Second respondent in his counter-affidavit inter alia alleged that the vessel M.V. Sister Star was let on a Time Trip Charter on a daily hire of U.S. \$ 4,400 that according to clause 2 of the Charter Party, the Charterers have to pay all port charges, pilotages, agency commission and other expenses, that the second respondent had remitted so far a sum of U.S. \$ 2,15,000 to the appellant for meeting the expenses for the discharge of the cargo, that the money alleged to have been expended is not accepted and that the appellant is not right in seeking the arrest of the vessel under the Admiralty Jurisdiction of this Hon''ble Court.

4. With these averments, both the respondents prayed for the dismissal of Application No. 4960 of 1984.

5. The learned Single Judge of this Court after observing that there is no contractual relationship between the appellant and the first respondent, that Ex.A2 will not spell out any contractual relationship between the appellant and the first respondent, that the appellant is not entitled to invoke the powers under S.69 of the Indian Contract Act to bind the first respondent on the facts and circumstances of the present case, that in as-much as no specific contract is established between the appellant and the first respondent, it is not possible for the appellant to lay claim against the first respondent for the payment of port charges and customs duty and that the second respondent is not the beneficial owner of the first respondent ship, dismissed Application No. 4960 of 1984. While

dismissing Application No. 4960 of 1984, the learned Judge has also dismissed Application No. 5037 of 1984, which is for attachment of all bunkers including fuel, oil and diesel on board the vessel M.V. Sister Star now berthed at West Quay II, Madras Harbour. The learned Judge has also dismissed Application No. 5036 of 1984 filed by the first respondent for return of certain documents which were handed over to the appellant in the process for the purpose of customs formality, after observing that such a prayer can be made only by a properly constituted legal action after paying the necessary court fees. It is as against the dismissal of Application 4960 of 1984, which is for the arrest of the vessel M.V. Sister Star belonging to the first respondent, the present appeal has been filed by the plaintiff.

6. Mr. T. Raghavan, Counsel for the Caveator, the first respondent, took notice as soon as the appeal was admitted on 30th November, 1984 and offered to argue the main appeal itself since the arguments that can be advanced in the Interlocutory Applications, viz., C. M. P. Nos. 16209, 16250 and 10251 of 1984, filed in the main appeal will be the same as that of the arguments which can be advanced in the main appeal. Mr. T. Dulip Singh, learned counsel appearing for the appellant also consented for this request and as such, the main appeal itself was taken up for hearing on 30th November, 1984.

7. Mr. T. Dulip Singh, learned counsel appearing for the appellant, submitted that the appellant rendered services to the vessel M.V. Sister Star at Bombay, Kandla and Madras in paying customs duties, port dues and also doing stewarding, etc. According to him, the second respondent, who is the Charterer, is in possession of the ship and he is a beneficial owner, and as such, the ship is liable to be arrested for the dues payable. It is further submitted that unless the customs duties and port charges are paid, the ship would not have been allowed to sail out of the port. Hence, the payment of such charges by the appellant is on behalf of the first respondent, which the first respondent is liable to make good on the ground that the appellant is the agent of the first respondent also as per Ex. A.2 and that in any event, the first respondent is liable to pay the suit amount under S.69 of the Indian Contract Act. The learned counsel for the appellant pointed out Ss.42, 116 and 148 of the Customs Act and also S.64 of the Major Port Trusts Act, which spell out the liability to the discharged for a ship to get out of the port. Finally, he submitted that there is a maritime lien in and by which the liability can be fastened with the first respondent and thereby the ship can be arrested.

8. Mr. T. Raghavan, learned counsel for the first respondent submitted that Ex.A2 does not create any agency between the appellant and the first respondent, that Ex.A.Z is intended to satisfy the customs specification, that in the plaint there is absolutely no averment in respect of any claim against the first respondent, that the doctrine of beneficial ownership will not arise in this case, much less it will bind the first respondent ship for the claim made by the appellant, that S.69 of the Indian Contract Act cannot be invoked on the facts and circumstances of the

present case, that the decisions cited by the learned counsel for the appellant are applicable only in cases where there is a charter by demise and in as much as the present agreement between respondents 1 and 2 is time charter, the first respondent ship cannot be made liable, that the claim is for a quantified amount for the money expended and there is no pleading that there is any contingent liability, that in as much as the second respondent had paid more than rupees 25 lakhs towards the dues, the appellant ought to have utilised such payment for the port charges and customs dues, which claim priority over any other charges, that the learned single Judge of this Court has correctly refused to arrest the ship in the interlocutory application stage and that such a discretionary order cannot be interfered with. Mr. Aravamudan, counsel for the 2nd respondent endorsed the arguments of Mr. T. Raghavan.

9. The second respondent entered into a time charter agreement with the first respondent on 7th June, 1984 for the purpose of carrying its cargo. Clause 1 of the said agreement reads as follows :--

Whilst vessel is on hire the Owners shall provide and pay for all provisions, wages and consular shipping and discharging fees of the crew including legalisation fees for crew lists and ship as well as garbage removal, shall pay for the insurance of the vessel and watchmen also for all the cabin, duck, engine-room and other necessary stores including boiler water and luboil and maintain her class and keep the vessel and her cargo space in a thoroughly efficient state, in hull, machinery and equipment with all inspection certificates necessary to comply with the current regulations at port of call for and during the service.

Clause 2 of Ex.A-4 reads as follows:

"That whilst the vessel is on hire, the Charterers shall provide and pay for all the fuel except as otherwise agreed, port charges, compulsory pilotages, agencies except those levied for own business Commissions, Consular charges (except those pertaining to the Crew and ship and all other usual expenses except those before stated, but when the vessel puts into a port for causes for which vessel is responsible, then all such charges incurred shall be paid by the owners. Fumigations ordered because of illness of the crew to be for Owners account. Fumigations ordered because of cargoes carried or ports visited while vessel is employed under this charter to be for Charterers account.

Charterers are to provide necessary dunnage and shifting boards, also any extra fittings requisite for a special trade or unusual cargo, but owners to allow them the use of any dunnage and shifting boards already aboard vessel. Charterers to have the privilege of using shifting boards for dunnage, they making good any damage thereto."

There is also a clause for payment of hire charges. Clause 26 reads as follows:--

Nothing herein stated is to be construed as a demise of the vessel to the time Charterers. The owners to remain responsible for the navigation of the vessel,

Physical control and operation of the vessel and all times acts of pilots and tug-boats and line-boats and linesmen, except in case of strike as well as cargo claims, insurance, crew, and all other matters, same as when treading for their own account.

The abovesaid clauses in Ex.A-4 clearly spell out that the owners retain complete control of the ship and it is not a case where the ship has been demised to the charterer. Scrutton on Charter Parties, 17th Edition clearly states that the charter-Parties fall into three main categories: (1) Charters by demise; (2) Time charters (not by way of demise); and (3) voyage charters.

10. In the book "Chartering Documents" by Gram, "Voyage Charter" is defined as "Transportation by one ship on one voyage. The remuneration, called freight, is calculated upon the quantity of cargo, not according to the time used. The carrier must bear the risk of delay. The freight has to cover most of the expenses, some are covered separately". In the same book "Time chartering, typical features" are stated as follows: "By a time charter-party the owners place a fully manned ship at the disposal of the time charterers for a period, against payment of time freight (hire), usually per month. The Charter-party is for a named ship. The trading limits may be wide or narrow, but a time charter is only seldom agreed for a named voyage (time charter trip), charters for single or consecutive voyages are then used. A "contract of affreightment is used when there is no question of a named vessel." In the very same book, "Charter by demise" has also been explained by stating that the same is the hiring of the ship for a fixed sum per month, to be manned, provisioned and operated by the charterers for their account.

11. The abovesaid definitions clearly spell out that neither the legal ownership nor the beneficial ownership nor equitable ownership is given in the hands of the charterer in case of time charter agreement. In view of the above position, we do not think that the decision cited by Mr. T. Dulip Singh, learned counsel for the appellant, reported in *Sir John Jackson Ltd., v. Owners of The Steamship Salanche, Her Master And Crew* 1908 AC 129. (Law Reports), will have any application to the facts of the present case. That is a case in which a ship involved in a collision was sought to be made liable for payment of damages by the charterer of the ship. In that case, the charterer of the ship took it by way of charter by demise. It is also made clear in that decision that the charterer of a ship by demise, who has control over her and navigates her by his own master and crew is the owner of the ship within S.503 and 504 of the Merchant Shipping Act, 1894, and entitled to the limitation of liability to damages conferred upon owners by those Sections.

12. In *Smith's Dock Co. Ltd., v. Owners of the M.V.St., Merriel* 1963 (1) All. E.R. 537, the claim of the plaintiff for the repair work done for the ship against the owners of the ship, who are the defendants, was set aside. In that case, the defendants contended that the agents of the charterers had dealing with the plaintiff to have the ship repaired, that there was no contract for repairing the

ship between the owners and the charterer and that the plaintiff has prayed action against wrong persons. The defendants in that case, also contended that action was prayed for against wrong persons and the proceedings in rem were not allowable. No doubt under S.3(3) of the Administration of Justice Act, 1956, the Admiralty jurisdiction may be invoked by an action in rem "in any case in which there is a maritime lien or other charge on any ship of the amount claimed." Maritime lien did not attach to the vessel in respect of the cost of the owners' repairs. In the light of such contention it was held as follows:--

The writ must be set aside, because, although the plaintiffs had at the time when the writ was issued a possessory lien (as distinct from maritime lien) on the vessel, their rights and remedies did not amount to a charge within the meaning of the words "other charge" in S.3(3) of the Act of 1956 ("the meaning of which phrase did not extend beyond such charges as were referred to in the merchant shipping enactments mentioned at letter C above), with the consequent that the plaintiffs could not proceed by an action in rem.

In *The Andrea Ursula Medway Drydock & Engineering Co. Ltd., v. Beneficial Owners Of Ship Andrea Ursula* 1971(1) All. E.R. 821 : 1971 (2) WLR. 681, Brandon J., extended the principle of beneficial ownership even in cases where it is not a demise charter. The learned Judge observed as follows: --

If S.3(4) is to give full effect to Article 3, including in particular para 4 of that article, the expression "beneficially owned, must be given the second of the two meanings which I suggested earlier that it was capable of having, and not the first. In other words, "Beneficial owner" must be given a meaning which includes not only a demise charterer, but also any other person with similar complete possession and control who may thereby become liable on a claim within paras (d) to (r) of S (I) of the Act.

Thus, this principle enunciated by Brandon, J., differs from the principle enunciated in 1963 (1) All E.R. 537.

13. In *Congreso del partied* 1978 (1) All. E.R. 1169 the principle enunciated in 1971 (1) All E.R., 821 was not accepted but the principle enunciated in 1963 (1) All. E.R., 537 was accepted. But Justice Goffin of the Queen's Bench Division (Admiralty Court) (1978 1 All E.R.1169) has observed as follows :--

Of course, I recognise that, as a matter of policy, it might be desirable to provide for the arrest of a demise chartered ship, or even a time chartered ship, when for example, necessities have been supplied to the ship at the request of the charterer. But, the question whether such a policy should be adopted is a matter for Parliament, and as I read the 1656 Act. Parliament has decided not to adopt that Policy.

14. In *The Father Thames* 1976 2 Lloyds LR 364 the Queen's Bench Division (Admiralty Court) has observed as follows:--

I have the greatest respect for any decision of Mr. Justice Brandon, but having

heard this matter re-argued and having read and considered the judgment in *The Andrea Ursula* and I congres del Partido I have reached the conclusion that I ought to follow the latter decision. I hold that the words "beneficially owned as respects all the shares therein" appearing in Sub-S.(4) of S.3 of the Act do not apply to a demise charterer. I need not set out the reasons which have led me to this conclusion because those reasons are fully rehearsed in the judgment of Mr. Justice Goff with which I agree.

Thus, from the foregoing decisions, it is clear that the doctrine of beneficial owner and extending the liability cannot be invoked in the instant case and in any event, the Administration of Justice Act, 1956 which has influenced some of the decisions cited above is not applicable to this case.

15. The plaint averments in our case do not fasten any liability upon the first respondent. As a matter of fact in paragraph 5 of the plaint it is stated that the plaintiff is the agent of the second defendant company in the Union of India and represented the Charterers' interest at all the ports of call made by the vessel within the Union of India. In paragraph 7 of the plaint it has been stated that the second defendant alone has acknowledged its liability in respect of the amount paid by the plaintiff and it paid the plaintiff a sum of Rs. 18,00,000 approximately. No doubt, in paragraph 6 of the plaint it has been alleged that the plaintiff is also liable statutorily in respect of demurrage and customs penalty that may be incurred in respect of the vessel's liability arising in the Port of Call Except stating so, there is absolutely no reference with regard to Ex.A2 nor any agreement in between the first respondent and the appellant for paying the said charges. The time charter agreement clearly makes out that such charges have to be paid by the charterer. The plaint averments clearly establish that the appellant is representing only the charterer's interest at all ports of call. Even apart from this fact, the customs duties and port charges payable must take precedence over all other charges and the fact that when the second respondent has paid rupees eighteen lakhs approximately to the appellant, as stated in the plaint, it should have been expended for clearing such dues. The claim in the suit is for liquidated damages quantified and there is absolutely no break-up shown for the payment of any customs charges. The total amount incurred towards port dues when calculated for the ports of Bombay and Kandla comes to only Rs. 9,49,405-30. The suit claim is not for any port dues paid to the Madras Port. This also clearly exhibits the futile claim made by the appellant against the first respondent. The agency between the appellant and the first respondent has not at all been pleaded in the plaint. On the other hand, there is a positive assertion in the plaint that the plaintiff is the charterer's agent. Ex.A2 cannot spell out any agency between the appellant and the first respondent. It is neither pleaded nor explained as to for what purpose and under what circumstances Ex.A2 has come into being. As a matter of fact, there is absolutely no reference in the plaint as regards Ex.A2 except thrusting it during the course of the hearing of the interlocutory application. Agency being a question of fact, it must be pleaded and established. There is neither a pleading nor any acceptable evidence to spell out

the agency between the appellant and the first respondent. Further, as seen from Ex.A2, it is only for the port of Madras. In the analysis of the claim made, there is absolutely no claim by the appellant for port dues at Madras. This is clear from Exs A7, A9, and A10. From these documents, it is also clear that there is no claim against the first respondent for paying any customs duty. Hence, the argument as if under Ss. 116 and 148 of the Customs Act, the necessary charges payable for the ship have been by paid by the appellant cannot be sustained. Thus, there is absolutely no legal obligation on the part of the appellant to pay the amounts stated in Exs. A7, A9, and A10 on behalf of the first respondent. In any event, the appellant could have paid from out of rupees eighteen lakhs, which he had received from the second respondent, these legal dues as the first charge instead of himself segregating it and claiming the amounts from the first respondent with whom he has absolutely no agency agreement. We are also afraid that the appellant cannot have assistance from S.69 or 70 of the Indian Contract Act. The learned Single Judge of this Court has completely discussed all these aspects of the case and we are in complete agreement with the same. We do not also agree with the learned counsel for the appellant that as per the maritime lien, the first respondent is liable for the payment claimed by the appellant. Further, all the abovesaid conclusions arrived at by the learned single Judge of this Court and by us are only prima facie conclusions for the purpose of Application No. 4960 of 1984, which was filed for ordering arrest of the ship. The learned single Judge has correctly exercised his discretion and given a finding on all these aspects, and we are in complete agreement with the said reasoning. Prima facie we find that the appellant is the charterer's agent and not the agent of the first respondent, that as per the charter party agreement, the 2nd respondent is answerable for all the claims that by making the payments as stated in Exs.A7, A9 and A10, the appellant is performing only the obligation of the charter party who is the second respondent herein and that paragraph 7 of the plaint clearly spells out that the appellant is representing only the second respondent.

16. For the fore going reasons, we are obliged to dismiss the appeal and accordingly, the appeal is dismissed with costs. After the judgment was pronounced, Mr. Ramkumar on behalf of the appellant prays for leave of this Court to file an appeal in the Supreme Court. This appeal arises out of the order passed in Application No. 4960 of 1984 in the main suit. The prayer itself is for the arrest of the ship. The learned single Judge of this Court in his discretion found that the ship cannot be arrested since no claim can be made by the appellant against the first respondent. We have completely endorsed the reasoning and finding of the learned Judge Apart from that, we have found factually that there is absolutely no allegation in the plaint fastening the liability upon the first respondent. Thus, factually we found that the claim made by the appellant against the first respondent cannot stand and accordingly we refused to order the arrest of the ship belonging to the first respondent. We do not find that any substantial question of law of general importance arises in this appeal,

which requires to be decided by the Supreme Court. Hence, the oral leave prayed for is refused.