

2012 C L D 1611

[Balochistan]

Before Qazi Faez Isa, C.J.

Messrs INTERNATIONAL BUNKERING MIDDLE EAST DMCC through Authorized Attorney---Plaintiff

Versus

M. T. TRIDONAWATI and 3 others---Defendants

C.M.A. No.115 of 2012 in Admiralty Suit No.1 of 2012, decided on 27th July, 2012.

(a) Civil Procedure Code (V of 1908)---

---O. VII, Rr.1(i) & 11(c)---Plaint without payment of court-fee filing of---Effect--- Discretion of court to proceed with such suit.

(b) Admiralty Jurisdiction of High Courts Ordinance (XLII of 1980)---

---Ss. 3(2)(i), 3 & 4---Suit for recovery of amount of furnace oil supplied to ship---Sale of ship by its previous owner to defendant before filing of such suit by plaintiff---Effect--- Where defendant had paid valuable consideration for ship and its beneficial ownership vested in him and he had no knowledge about suit claim, then in absence of any evidence to show that he was party to any sham transaction, he could not be made liable for plaintiff's claim.

Bangladesh Shipping Corpn. v. M.V. 'NEDON' PLD 1981 Kar. 246; The "Banco" [1971] Vol. 1 Lloyd's Law Reports 49; M.V. "Goloz" Ex-M.V. "Mustafa Bey" v. Pacmar Shipping (Pvt.) Ltd. 2010 CLD 660; Yukong Ltd. South Korean Co. v. M.T. Eastern Navigator PLD 2000 SC 57; The "Freccia del Nord" [1989] Vol. 1 Lloyd's Law Reports 388; "The Indian Grace No.2" [1998] Vol. 1 Lloyd's Law Reports 1; Alexander G. Tsavliris & Sons v. M.V. Rice Trader 1985 CLC 1355; The "Monica S." [1967] Vol. 2 Lloyd's Law Reports 113; In re ARO CO. Ltd. [1980] The Law Reports 1 Ch. 196; The "Daien Maru No.18" [1984] Part 5 Case 10 High Court of Singapore; Oriental Shipping Co. Ltd. v. Panaghia Odigitria 1991 MLD 148; Kuwait Flour Mills Co. Sak v. M.V. "Kashmir" 1990 MLD 2196 and Khadija Edible Oil Refinery (Pvt.) Ltd. v. M.T. "Galaxy" 2011 CLD 1329 ref.

(c) Letter of Credit---

---??????? Irrevocable Letter of Credit issued by Bank---Validity---Such letter could not be manipulated for back-dated as a number of formalities had to be met before Bank would issue such letter.

Omar Nisar for Plaintiff.

Shaiq Usmani and Osman Hadi for Defendant No.1.

Jawad A. Sarwana for Defendant No.2.

Date of hearing: 16th June, 2012.

ORDER

QAZI FAEZ ISA, C.J.---Through this application (C.M.A. No.115 of 2012) the plaintiff seeks the arrest and attachment before judgment of Motor Tanker Tridonawati (defendant No.1) (hereinafter "the ship").

2. It is the case of the plaintiff that they had supplied furnace oil worth United States Dollars (US\$) 1,074,954.65 to the ship when it was at Fujaira, United Arab Emirates ('UAL'), but received payment of only an amount of US\$ 352,000. The suit has been filed in respect of the balance outstanding amount, interest thereon and damages.

3. This suit was filed on February 3, 2012, during the court's winter vacations. The suit was put up before the learned Judge, who was sitting during vacations, with the following office note:--

"It is submitted that Mr. Omair Nisar Advocate from Karachi has filed above noted admiralty suit along with an urgent application as well as stay/arrest application praying herein that the above noted suit may kindly be fixed before the Court for Katcha Peshi today i.e. 7-2-2012.

It is pertinent to mention here that as per notification the admiralty suit on original side has been heard by the Hon'ble Chief Justice but the Hon'ble Chief Justice is not available due to winter vacations.

Orders are therefore solicited whether the above noted suit as well as stay application may perhaps be fixed before the Court for Katcha Peshi today i.e. 7-2-2012 or any other order which may kindly be deemed fit please."

On the above office note the learned Judge wrote, as under:--

"In view of Notification No.2883154-RHC dated 18th September, 2009, under section 7 of the Companies Ordinance 1984 (XLVII) a "Company Bench" comprising of his Lordship, Chief Justice Qazi Faez Isa has been constituted. Similarly all the petitions which cannot be disposed of at once are required to be heard on the re-opening of the court after winter vacations vide Notification dated 22nd October, 2011, as such, the office is directed to fix this case before the Hon'ble Chief Justice."

It appears that no effort was made to have the learned Judge sitting during vacations nominated as a Judge to hear admiralty suits or to seek affixation of the suit before me on an urgent basis.

4. The suit came before me, after winter vacations, on February 27, 2012 when the following order was passed, respectively on the urgent application (C.M.A. No.113 of 2012 listed at serial No.1) and application seeking extension of time for payment of court fee (C.M.A. No.114 of 2012, listed at serial No.2):--

"1. Granted.

2. Instant application seeks two weeks extension of time for payment of court fees; however, such two weeks have expired. Learned counsel however, undertakes to pay the court fees tomorrow. Let the case come up for hearing after payment of court fees. Learned counsel states that he will make payment of court fees either today or tomorrow and requests that the matter may be fixed tomorrow.

As suggested to come up on 28-2-2012".

5. On the next date, i.e. February 28, 2012, since the court fee had now been paid, I proceeded to hear the application seeking arrest of the ship (C.M.A. No.115 of 2012) and vide ex parte ad interim order had the ship arrested and further ordered that it should not be broken down for scrap. On March 3, 2012 Mr. Osman Hadi, the learned counsel for the defendant No.1 (the ship), and Mr. Jawad Sarwana, learned counsel for defendant No.2, entered appearance and by consent the order dated February 28, 2012 was varied, to the extent that the defendant No.1's new owner, namely Salam's International, was permitted to break the ship, however, the scrap of the said ship could not be sold, disposed or removed from the site. This order continued till the hearing of this application. There has however been no appearance by or on behalf of defendants Nos.3 and 4.

6. Mr. Omair Nisar, the learned counsel for the plaintiff, stated that the previous owner of the ship had acknowledged liability and had promised to make payment of the balance amount but had failed to do so. It was contended that the furnace oil supplied to the ship falls within the definition of 'necessaries' as mentioned in section 3(2)(1) of the Admiralty Jurisdiction of High Courts Ordinance, 1980 (hereinafter "the Ordinance") and an action in rem in respect of the same lies against the ship as stipulated in section 4(4) of the Ordinance. For ease of reference the aforesaid provisions are reproduced hereunder:--

Section 3(2)(1):

"Any claim in respect of necessaries supplied to a ship."

Section 4(4):

"In the case of any such claim as is mentioned in clauses (e) to (h) and (j) to (q) of subsection (2) of section 3, being a claim arising in connection with a ship, where the person who would be liable on the claim in an action in personam was, when the cause of action arose, the owner or characterer of, or in possession or in control of, the ship, the admiralty jurisdiction of the High Court may whether the claim gives rise to a maritime lien on the ship or not, be invoked by any action in rem against:

(A) that ship, if at the time when the action is brought it is beneficially owned as respects majority shares therein by that person, or

(B) Any other ship which at the time when the action is brought, is beneficially owned as aforesaid."

7. The learned counsel for the plaintiff referred to the documents attached with the plaint, which according to him, conclusively show that the furnace oil was supplied to the ship upon the request of defendant No.4, and stated that the request was made on behalf of defendants Nos.2 and 3. Reference was made to e-mails dated August 22, 2011 wherein inquiries about the furnace oil were made and the plaintiff issued 'Order Confirmation' agreeing to supply the furnace oil on credit, payment had to be made, 'in full within max 30 days from date of delivery.' The said Order Confirmation also stated that, 'Our general terms and conditions are to apply. Copy available upon request.' Reference was also made to the Bunker Delivery Note dated August 24, 2011 which shows that 1396.045 metric tonnes of Intermediate Furnace Oil (IFO) was received by Mr. Anup Kumar Singh, Chief Engineer of the ship. Invoice dated September 1, 2011 for the said furnace oil was issued by the plaintiff in the sum of US\$ 1,074,954.65. Mr. Nisar pointed out that the Invoice was acknowledged by defendant No.4 in e-mails dated January 5, 2012 and February 1, 2012, however the balance amount in respect of the supply of furnace oil remained unpaid.

8. Mr. Shaiq Usmani, Advocate, appearing for the ship's new owner, namely Salam's International, stated that his client had purchased the ship without having any knowledge that the stated fuel had been supplied to the ship or that the same had not been paid for. It was further stated that Salam's International is a ship-breaking concern and its sole proprietor Rafiq Muhammad son of Muhammad Salam had purchased the ship from a Singaporean public company namely, Yalumba Inc., and in this regard placed reliance upon the following

documents:--

- (1) Memorandum of Agreement dated February 2, 2012 executed between Yalumba Inc. and Salam's International, whereby the ship was sought to be purchased for its scrap value at the rate of US\$ 504 per tonne, total amounting to US\$ 1,074,954.65;
- (2) Documentary Letter of Credit No.1006 LC 26425/ 2012 dated February 3, 2012 issued by the Bank Al-Habib Ltd., Karachi, Pakistan;
- (3) Insurance policy ('Marine Hull Cover Note') issued by Habib Insurance Company Limited dated February 3, 2012;
- (4) Bill of Sale dated February 6, 2012 made out in the name of Bank Al-Habib Ltd. Karachi, Pakistan for the account of Salam's International;
- (5) Commercial Invoice dated February 6, 2012 issued by Yalumba Inc. in favour of Salam's International;
- (6) Customer Debit Advice dated February 8, 2012, whereby Bank Al-Habib Ltd. debited Salam's International account with an amount of Rs.922,559,952, being the amount of the sale price equivalent in Rupees, and the Bank's commission and other charges, total amounting to Rs.923,630,701.60;
- (7) Letter dated February 22, 2012 of the Customs Collectorate, Gwadar, Government of Pakistan, granting permission for breaking the ship to Salam's International. The said letter further records that Salam's International had paid an amount of Rs.9,791,614 in cash on February 17, 2012 as duty and taxes; and
- (8) Letter of Darman Maritime Trading, issued in their capacity as agent of Yalumba Inc., stating that the ship, "has arrived at Gaddani anchorage and she is presently lying at Gaddani anchorage". The said letter states that it was 'tendered' on February 8, 2012 at 09:15 Hours and 'accepted' on the same date at 10:45 Hours by Salam's International.

Learned counsel for Salam's International stated that his client first came to know about this suit (and thus the claim of the plaintiff) when the order of arrest of the ship dated February 28, 2012 was served upon the ship. It was next contended that the plaintiff in respect of the same claim had also instituted a suit in Bangladesh against another ship, claimed by the plaintiff to be owned by the same owners, and had obtained an order of arrest on February 26, 2012, which order was vacated on March 13, 2012, presumably after a contest. It is stated that the plaintiff did not disclose the fact of filing of the suit in Bangladesh to this court, and on the date when the ex parte ad interim arrest order was obtained from this court the order passed by the Bangladeshi court was also in the field. It was contended that Salam's International had acted bona fide and purchased the ship for valuable consideration and such payment was demonstrated by irrefutable evidence, in the shape of the documentary letter of credit, payment whereof was made by Bank Al-Habib Limited. It was contended that on the date the suit was filed (February 3, 2012) the ship was not within the territorial jurisdiction of this court. He further stated that section 4(4) of the Ordinance would not be attracted as the ownership of the ship had changed before issuance of the writ of arrest. Learned counsel sought to distinguish between an action in rem under section 4(2) and/or section 4(3) of the Ordinance, and an action in personam under section 4(4) which could be invoked by an action in rem against the ship provided at 'the time when the action is brought' the ship was owned by the person who would be liable in respect of an action in personam. He stated that the claim of the plaintiff was admittedly an action in personam against defendants Nos.2, 3 and 4, but none of them were the owners of the ship at the time the warrant of arrest of the ship was executed or received by the ship. He placed reliance upon the following cases:--

- Bangladesh Shipping Corpn. V.M. v. 'NEDON', 1981 PLD Karachi 246
- The "Banco," [1971] Vol. 1 Lloyd's Law Reports 49
- M.V. "Goloz" Ex-M.V. "Mustafa Bey" v. Pacmar Shipping (Pvt.) Ltd., 2010 CLD 660
- Yukong Ltd. South Korean Co. v. M.T. Eastern Navigator, PLD 2000 SC 57
- The "Freccia del Nord," [1989] Vol. 1 Lloyd's Law Reports 388
- The Indian Grace No.2," [1998] Vol. 1 Lloyds Law Reports 1

9. Mr. Jawad Sarwana, Advocate stated that whilst he represents defendant No.2 the defendant No.2 does not accept the jurisdiction of this court and has appeared only in deference to this court and to place certain documents on record. He further stated that the defendant No.2 having sold the ship does not claim any interest therein. It was lastly contended by him that the defendant No.2 is not liable for any liabilities in respect of the fuel supplied to the ship at the request of defendant No.3 and or defendant No.4.

10. Exercising his right of reply the learned counsel for the plaintiff stated that the suit filed in Bangladesh was filed on February 26, 2012, because this court was on vacation and orders for the arrest of the ship could not be obtained, and that the suit filed in Bangladesh was subsequently withdrawn. He also repelled the contention of Mr. Jawad Sarwana that a genuine sale of the ship had taken place, and stated that the defendant No.2 had catered into a fraudulent and or sham sale of the ship with a view to defeat the claim of the plaintiff. In this regard he stated that the Bill of Sale executed by defendant No.2 in favour of Sea Charm Shipping Inc. ('Sea Charm Shipping') states that the sale of the ship is for US\$1 and the subsequent sale transaction by Sea Charm Shipping too was fraudulent and sham as the ship was sold onwards to Yalumba Inc. also for only US\$1. Mr. Jawad Sarwana responded by pointing out that the Bills of Sale state that in addition to the US\$1 the sale consideration included, 'and other good valuable consideration' and that he will be bringing on record the documents showing such consideration at the relevant time. In rebuttal Mr. Omair Nisar stated that no other 'valuable consideration' has been shown and as such it can be presumed that sale was only for US\$1. He also placed reliance upon section 23 of the Contract Act, reproduced hereunder:--

"What considerations and objects are lawful and what not.

The consideration or object of an agreement is lawful unless it is forbidden by law; or

is of such a nature that if permitted, it would defeat the provisions of any law; Or

is fraudulent; or

involves or implies injury to the person or property of another; or

the Court regards it as immoral, or opposed to public policy.

In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void."

Mr. Omair Nisar stated that the corporate veil of the purchasers and sellers of the ship should be lifted to ascertain who the true owners of the ship were. Regarding, how to determine 'when the action is brought' (as mentioned in section 4(4)(A) of the Ordinance), Mr. Nisar stated that the term is equivalent to 'issuance writ,' which term has been imported from the Civil Procedure Rules of the United Kingdom which define and describe the term 'issuance of writ' and as per part 58, 61 and "Practice Direction of Part 61" an action in rem is commenced by 'issuance of a claim form,' which means when the claim form is submitted before the Registry. Learned counsel for the plaintiff stated that the relevant date for attracting liability under section 4(4)(A) of the Ordinance is the date of filing of this suit, i.e. February 3, 2012, on which date Salam's International had not acquired the title of the ship. He further stated that the issuance of summon, notice and or warrant of arrest is not relevant and placed reliance upon the following cases:--

- Alexander G. Tsavlis & Sons v. M. V. Rice Trader, 1985 CLC 1355
- The "Monica S.," [1967] Vol. 2 Lloyd's Law Reports 113
- In re A.R.O CO. Ltd., [1980] The Law Reports 1 Ch. 196
- The "Daien Maru No 18," [1984] Part 5 Case 10 High Court of Singapore
- Oriental Shipping Co Ltd. v. Panaghia Odigitria, 1991 MLD 148
- Kuwait Flour Mills Co. Sak v. M.V. "Kashmir," 1990 MLD 2196

11. Learned counsel for the plaintiff stated that the Salam's International had not acted in a bona fide manner and referred to section 41 of the Transfer of Property Act, and that the principles enumerated therein would be applicable herein. Section 41 of the Transfer of

Property Act stipulates, as under:--

"Transfer by ostensible owner.

Where with the consent, express or implied, of the persons interested in immovable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorized to make it: Provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith."

12. Mr. Shaiq Usmani exercising his right of reply stated that for a party to allege 'fraud' he has to provide particulars thereof and in this regard placed reliance upon Khadija Edible Oil Refinery (Pvt.) Ltd. v. M. T. "Galaxy," 2011 CLD 1329. He further stated that, even if it be accepted that defendants Nos.2, 3 and/or 4 had sold the ship to avoid liability of the plaintiffs claim, Salam's International had no knowledge of such claim and the plaintiff cannot demonstrate the same from any document, therefore, no mala fide can be attributed to Salam's International. He stressed that the sale consideration was paid through documentary letter of credit by a Pakistani bank, which payment/document cannot be manipulated.

13. It would be appropriate to first attend to the plaintiff's complaint that this court did not immediately proceed to hear the suit. Whilst a party should not be made to suffer on account of an act of court, however, in the present case I may observe that the actions of the plaintiff demonstrate that it was not eager to secure an order on the arrest application when the suit was filed or soon thereafter. Though the suit was filed on February 3, 2012, the plaintiff sought to have it heard on February 7, 2012. The suit was filed without affixation of the requisite court fee. The plaintiff was a foreign company with no office in Pakistan. Without payment of court fee it lay entirely in the discretion of this court to proceed with the suit. The plaintiff had initially, and surprisingly, sought two weeks time to pay court fee, but did not pay the same even within the said period. When the suit came before me for hearing on February 27, 2012 (and after the lapse of the solicited two weeks time) I only agreed to proceed with it provided the plaintiff first paid the court fee. The plaintiff therefore acquired the court fee on February 27, 2012 and affixed the same the following day. Moreover, when the suit came before the vacation Judge on February 7, 2012 and he had observed that he did not have the authority to hear it the plaintiff did not make a request that it be transmitted to me or that the vacation Judge be given the requisite authority.

14. I now proceed to determine whether the ship should be arrested or attached to secure the plaintiff's claim. It appears from the documents annexed by the plaintiff that 1396.045 Metric Tones of furnace oil worth US\$ 1,074,954.65 was supplied to the ship on August 24, 2011, when the ship was at Fujaira, UAE, but payment only of an amount

of US\$352,000 was made. Learned counsel for the defendants Nos.1 and 2 also did not dispute that the supply of furnace oil to the ship would not constitute 'necessaries supplied to a ship' in terms of section 3(2)(1) of the Ordinance. Admittedly, when the ship reached or was beached at Gaddani, Balochistan it did not contain the said furnace oil, nor has it been alleged that Salam's International had received the same. Needless to state that the party/parties on whose request the furnace oil had been supplied and who was/were the owners of the ship when the furnace oil was supplied to it would be liable to pay for the same. However, the question with which I am faced with is whether the ship can be arrested/attached to secure the recovery of the balance price of the furnace oil if the ship has already been sold. Admittedly, Salam's International purchased the ship for its scrap value and the ship was beached at the Gaddani ship-breaking yard. The plaintiff however alleges that Salam's International is not a bona fide purchaser for value without notice. However, on its part Salam's International has placed on record documents which show that valuable consideration was paid for the ship. The plaintiff has also not been able to point out that Salam's International was aware of the plaintiff's claim or that it acted collusively with the defendants Nos.2, 3 and or 4. Salam's International purchased the ship from Yalumba Inc. which had purchased the ship from Sea Charm Shipping Inc., but neither of these two entities were arrayed as defendants nor subsequently sought to be joined as defendants, even after the purchase of the ship by them had been mentioned by Salam's International/defendant No.1 and defendant No.2, with supporting documents. The question therefore of lifting or piercing the corporate veil to ascertain who the owners of these two entities are, even if this court had the jurisdiction to do so, does not arise.

15. The claim of the plaintiff is in respect of 'necessaries' supplied to the ship, therefore it needs examination whether the claim of the plaintiff is covered by subsection (4) of section 4 of the Ordinance. A claim in rem against the ship would lie provided, in the language of clause (A) of the said subsection, the "ship, if at the time when the action is brought it is beneficially owned ... by that person." The plaintiff however has not rebutted that the ship on the day when the action was brought (February 3, 2012) had already been sold to Sea Charm Shipping. In this regard 'Memorandum of Agreement' was executed by defendant No.2 on January 25, 2012 and 'Bill of Sale' executed in favour of Sea Charm Shipping on February 3, 2012 at Singapore. The time of the execution of the Bill of Sale has not been mentioned, however as Singapore lies to the east of Pakistan the day starts earlier there. On its part Salam's International has produced 'Memorandum of Agreement' executed in its favour by Yalumba Inc. on February 2, 2012. Salam's International had also established irrevocable letter of credit through Bank Al Habib Limited in favour of Yalumba Inc. as payment for the ship on February 2, 2012. Whilst two parties may manipulate dates on agreements or on bills of sale privately executed amongst themselves, an irrevocable letter of credit is issued by a bank and cannot be manipulated or back-dated, nor any allegation is made in this regard by the plaintiff. Salam's International had also obtained insurance (Marine Hull Cover Note) in respect of the ship on February 3, 2012 from Habib insurance Company Limited. A number of formalities have to be met before a bank will establish an irrevocable letter of credit or an insurance company provide insurance cover, and it is reasonable to presume that all this could not have been arranged at once, immediately upon learning about the filing of the suit. The documents establish that on the day the suit was filed (February 3, 2012) the ship was not 'beneficially owned' by defendants Nos.2, 3 and/or 4, a pre-condition for an action in rem against the ship in terms of section 4(4)(A) of the Ordinance.

16. That in view of the aforesaid finding it is not necessary for me to consider the question, which was argued at length by both the learned counsel for the plaintiff and defendant No.1, as to whether the date of filing of the suit is the material date or the date of service of summon/notice or writ of arrest/attachment in terms of section 4(4)(A) of the Ordinance. I may however observe that the plaintiff had supplied a huge quantity of furnace oil on credit on August 24, 2011 at the request of defendant No.4 to the ship but without securing its interest. Whether the defendants Nos.2, 3 and 4 colluded with one another or entered into sham transactions with Sea Charm Shipping Inc. and Yalumba Inc. in depriving the plaintiff of their dues is not relevant for these proceedings as the beneficial interest in the ship was acquired by Salam's International. The beneficial ownership of the ship came to vest in Salam's International as it had paid valuable consideration for it, and no material has been produced to show that Salam's International either had knowledge of the plaintiff's claim or that it was a party to any sham transaction. Therefore, it would neither be just nor fair to affix the liability on the purchaser Salam's International (or on the ship purchased by him) if such purchaser had paid valuable consideration for the ship and had no knowledge about the claim.

17. For the aforesaid reasons C.M.A. No.115 of 2012 seeking arrest/attachment of the ship is dismissed. Consequently ad interim orders of arrest and orders restraining the breaking of the ship and removal and sale of scrap stand vacated.

SAK/74/Q

Application dismissed.