

IN THE HIGH COURT OF SINDH AT KARACHI

HCA No. 226 of 2014

Present:-

Mr. Justice Sajjad Ali Shah.

Mr. Justice Muhammad Junaid Ghaffar.

M/s United Way Shipping Ltd. ----- Appellant

Versus

M/s Alpine Marine Services

Private Ltd. ----- Respondents

Date of hearing: 4.11.2015.

Date of judgment: 4.11.2015.

Appellant: Through Mr. S. Ali Hyder Advocate.

Respondent: Through Mr. Naeem Ahmed Advocate.

J U D G M E N T

Muhammad Junaid Ghaffar, J. Through instant appeal the appellant has impugned order dated 8.7.2014, whereby, while disposing of CMA No. 8164 of 2014 filed by the appellant under Order 39 Rule 1 & 2 CPC, the appellant has been directed to furnish security in the sum of US\$ 600,000/-

2. Briefly, the facts as stated are that the appellant is the owner of vessel "M.T. ASIA GLORY", a foreign flag ship registered at Hong Kong which arrived at Port Muhammad Bin Qasim on or about 14.6.2014, for which the respondent was appointed as Port Agent to undertake completion of formalities with customs and the port authorities. The cargo weighing approximately 15300 metric tons was discharged by the vessel on 18.6.2014, whereafter the vessel arrived to the outer anchorage of the port, for which the respondent failed to obtain the port clearance and instead asked for surety / payment in respect of certain claims against Vessels namely "M.T. Doris", "M.T. Gold Star" and "M.T. Dolphina", which according to the respondent, were owned by the appellant

directly or indirectly and against which claims / cases were pending before various Civil Courts, in respect of short landing of cargo and consequential losses. The appellant being aggrieved by such act of the respondent filed a Suit before this Court for declaration, injunction and damages and had prayed for declaring the respondent's action of detaining the vessel as preposterous, malicious and without justification. Along with the Suit an application under Order 39 Rule 1 & 2 CPC bearing CMA No. 8164 of 2014 was also filed, whereby, the appellant had sought directions from this Court to the respondent to obtain port clearance and allow sailing of the Vessel in question on which the impugned order has been passed.

3. Counsel for the appellant has contended that insofar as the appellant is concerned, neither they are the owners of the Vessels as stated hereinabove, nor they have any concern with such Vessels; that without prejudice, even if the Vessels against whom there are certain claims pending as alleged, are owned by the appellant, the respondent had no jurisdiction and authority to detain the appellant's Vessel in question, whereas, at the most, the learned Single Judge could have dismissed the injunction application, rather than directing the appellant to furnish security in respect of the claims which have not yet been finalized; that the appellant is neither a party to those proceedings nor has any concern with such claims; that the learned Single Judge was not justified in passing the impugned order as Section 60 of Civil Procedure Code, is not applicable in the instant matter. With regard to delay in filing instant appeal Counsel has contended that since the short order was passed on 8.7.2014 and the reasons were recorded much later, therefore, the delay if any, in filing of the instant appeal may be condoned. In support of his contention the Counsel has relied upon the case of *Habib Shah Vs. The State (1997 SCMR 1351)* and *Hyderabad Development Authority Vs. Abdul Majeed (PLD 2002 SC 84)*.

4. Conversely, Counsel for the respondent has at the very outset raised a preliminary objection with regard to delay in filing of instant appeal which according to the Counsel is time barred by 8 days as the short order was passed on 8.7.2014 and the period of 20 days expired on 29.7.2014, whereas, instant appeal has been filed on 6.8.2014, therefore, the appeal is liable to be dismissed as being time barred. On merits of the case, the Counsel has contended that since they are facing various cases as claims have been lodged in respect of short landing of goods discharged by the Vessels owned by the appellant, therefore, to safeguard the interest of respondent a correct and just order has been passed by the learned Single Judge. In support of his contention the Counsel has relied upon the case of *Province of Sindh through Chief Secretary Sindh and 2 others Vs. Muhammad Sadiq and 5 others (2012 CLC 1409)*.

5. We have heard both the Counsel and perused the record. By consent instant appeal is being finally decided at Katcha Peshi stage.

6. Insofar as the objection with regard to delay in filing of instant appeal is concerned, it appears that the impugned order was passed on 8.7.2014 and the appellant had obtained the certified copy of the same on 9.7.2014. The reasons of such short order though do not reflect the date on which they were recorded, however, the certified copy annexed with instant Appeal, reflects that the appellant had applied for such copy on 6.8.2014, which was issued on the same day. In the application for condonation of delay filed under Section 5 of the Limitation Act, 1908, it has been contended on behalf of the appellant that the reasons were not available in the Court file till 5.8.2014 and therefore, precluded the appellant from filing appeal on the first opening day of the Court after summer vacations, i.e. 4.8.2014, and, therefore the appeal is within time. Insofar as filing of appeal against a short order and the limitation thereof is concerned, the same now stands settled that the period of limitation would be counted from the date of the short order and not from the date of reasons so recorded. This is now a consistent and a well settled proposition and therefore, does not require any further discussion. Reliance in this regard may be placed on the case of *Province of Sindh through Chief Secretary Sindh (Supra)*. Adverting to the facts of instant appeal there appears to no dispute that the short order was passed on 8.7.2014 and the period of limitation as provided under Article 156 of the Limitation Act for preferring an appeal against an interlocutory order is 20 days, and such period expired on 29.7.2014 whereas, instant appeal was filed on 6.8.2014 and therefore, the same appears to be time barred by 8 days. Notwithstanding such delay, an application under Section 5 of the Limitation Act has been filed along with the memo of appeal which we would consider and decide after discussion on the merits of the case.

7. As discussed hereinabove, instant Suit was filed by the plaintiff for having being aggrieved by the action of respondent, whereby, the Vessel in question was, for all practical purposes detained by them, by delay in obtaining the Port Clearance Certificate, for which they were appointed as agent by the appellant. Along with the Suit, the appellant had also filed an application under Order 39 Rule 1 & 2 CPC, as stated hereinabove, through which it was prayed to issue directions to the respondent to obtain such Port Clearance Certificate, enabling the Vessel to sail. The learned Single Judge while deciding the said application has issued directions to the plaintiff to furnish security of US\$ 600,000/- in respect of the alleged claims pending before the Civil Courts, purportedly against some other Vessels which according to the respondent are also owned by the appellant. While passing the impugned order the learned Single Judge has relied upon Section 60 CPC, which according to us, does not appear to be applicable in the facts and circumstances of the instant case, as it appears in Part II of the Civil Procedure Code

which relates to Execution (General) and it provides types and classes of the properties liable for attachment and its sale in Execution of a decree. In the instant matter, neither there is any judgment nor any decree as yet, whereas, even otherwise, the claims as alleged by the respondent in respect of Vessels as stated hereinabove, are admittedly pending before the Civil Court and have not been adjudicated so far. They are merely claims, in which the respondent is a defendant whereas; the appellant is not even a party in such proceedings. We have not been able to persuade ourselves to agree with the conclusion drawn by the learned Single Judge, whereby, while invoking the provision of Section 60 CPC, the appellant has been directed to furnish security of US\$ 600,000/- in respect of claims which are not subject matter of the Suit of which the learned Single Judge was seized at the relevant time. However, we may observe that at the most and without prejudice, the application filed on behalf of the appellant could have been dismissed on merits, whereby, the prayer sought against the respondent could have been declined, but under no circumstances, while deciding such application the appellant could have been directed to furnish any such security for the reason that neither the respondent had filed any specific application to this effect, nor the respondent had lodged any other claim or Suit against the appellant in this regard. Further, with respect, we also do not agree with the observation of the learned Single Judge that Section 60 is much wider than Section 4(4) of the Admiralty Jurisdiction of the High Court Ordinance 1980, as the attachment / powers of arrest under the said Ordinance may be exercised at the very initial stage i.e. on mere lodging / filing of Suit and before passing of any judgment / decree, (more or less similar to Order 38 Rule 5 CPC) whereas, insofar as Section 60 CPC is concerned, it only describes and explains the types of properties which can be attached in Execution proceedings. It neither confers any powers of attachment of property, nor can the same be exercised before passing of judgment and decree. It may further be added that the Suit before the learned Single Judge was not in respect of any claim by the respondent and naturally for that matter no proceedings under Order 38 Rule 5 CPC were initiated. Therefore, in our view the order impugned is not proper, which to us on the face of it, appears to be unsustainable in the eyes of law and is liable to be set aside, as the learned Single Judge has misdirected himself by placing reliance on a provision of law which has no relevance in the instant matter.

8. Since we have come to the conclusion that the impugned order is bad in law and void, hence cannot be sustained, we feel it appropriate to exercise discretion vested in this Court and condone delay in filing instant appeal by allowing the application bearing CMA No. 2303 of 2014 filed under Section 5 of the Limitation Act, 1908, as according to us the respondent has no case on merits and therefore, limitation should not be a hurdle in the way of the appellant for seeking justice on merits. We place reliance in this regard on

the case of *Hyderabad Development Authority (supra)* wherein, the Hon'ble Supreme Court has been pleased to hold as under:-

“Therefore, while condoning the delay it is held that the appeals were duly instituted. Even otherwise if on merits the respondents have no case then limitation would not be a hurdle in the way of appellant for getting justice and in such like situation the Courts should not feel reluctant in condoning the delay depending upon facts of the case under consideration.”

9. In view of hereinabove facts and circumstances of the instant case, we are of the view that the learned Single Judge while passing the impugned order has erred in fact and law, and therefore, in the earlier part of the day, we had allowed instant appeal by setting aside the impugned order by a short order, and above are the reasons for such order.

JUDGE

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