

IN THE HIGH COURT OF SINDH AT KARACHI

HCA No. 146 of 2011

Present:-

Mr. Justice Aqeel Ahmed Abbasi.

Mr. Justice Muhammad Junaid Ghaffar.

Fatima Sugar Mills Ltd. ----- Appellant

Versus

Trustees of the Port of Karachi

& another ----- Respondents

Date of hearing: 15.1.2015

Date of Order: 15.1.2015

Appellant: Through Mr. Usman Hadi Advocate.

RespondentNo.1: Through M/s Qamar Abbas and Abdul Razzak Advocates.

J U D G M E N T

Muhammad Junaid Ghaffar, J. Through instant appeal the appellant has impugned order dated 25.5.2011, whereby, application bearing CMA No.4332 of 2008 filed by respondent No.1 (plaintiff) under Section 14(1) of the Limitation Act and CMA No.1291 of 2008 filed by the appellant (defendant No.1) under Section 151 CPC have been disposed of with the observations that the controversy as raised through both these applications require recording of evidence, whereas, the parties may suggest framing of specific issues on such controversy.

2. Precisely, the facts as stated are that the appellant is a company engaged in the business of import and exports and for clearance of its imported goods pursuant to some orders passed by the Lahore High

Court had submitted a Bank Guarantee issued by respondent No. 2 & 3 in respect of claim of respondent No. 1 which is a statutory organization functioning under the Karachi Port Trust Act, 1886. The Lahore High Court at the time of final hearing of the matter held that it had no territorial jurisdiction to decide the petition which was returned to the appellant. Thereafter, the respondent No.1 through its letter dated 19.2.2004 sought enforcement of the guarantee which was challenged by the appellant, by filing a Constitutional Petition No. D-373 of 2004 before this Court and obtained restraining orders. Such petition was thereafter dismissed vide order dated 18.2.2005 which was further impugned before the Hon'ble Supreme Court, whereafter, the matter was remanded to this Court. On remand vide order dated 27.9.2006 this Court was pleased to set aside the amount claimed on account of liquidated damages by observing that KPT / respondent No.1 may file a Suit for recovery of such liquidated damages as stated in the Bank Guarantee within three months, however, the claim in respect of the amount of storage charges and demurrage was left intact. The Court also extended the period of Bank Guarantee as well. It further appears that respondent No.1 filed a Suit for Recovery in the Baking Court pursuant to the aforesaid order which was thereafter withdrawn, and presented before this Court on 24.2.2007. Subsequently, the appellant had filed CMA No.1291 of 2008 in the Suit and contended that pursuant to order dated 27.9.2006 as aforesaid, the Suit for recovery of liquidated damages was required to be filed within three months from the date of the order, whereas, it was further observed that if no Suit is filed within such period, then the order for extension of the Bank Guarantee in respect of liquidated damages shall stand vacated automatically, hence, the Suit was time barred and the guarantee stood discharged.

3. On the other hand the respondent No.1 also filed an application bearing CMA No. 4332 of 2008 under Section 14(1) of the Limitation Act, wherein, it was prayed that the time spent before the Banking Court may be excluded for the purpose of calculating the limitation period, and, delay if any, be condoned as the respondent No.1 was pursuing its remedy before a wrong forum. The impugned order has been passed in respect of both the aforesaid applications.

4. Counsel for the appellant contends that the order passed by the learned Division Bench in C.P. NO. D-373 of 2004 on 27.9.2006 is very clear and specific, whereby; the Bank Guarantee was extended with the observations, that if a Suit is not filed within three months, then the order for extension of the bank guarantee in respect of liquidated damages shall stand vacated automatically. It has been further contended that admittedly the Suit was required to be filed on or before 26.12.2006, whereas, the same was though filed on 21.12.2006, but before the Banking Court, and, thereafter on an application under Order VII Rule 10 CPC, filed on behalf of the respondent No.1, the same was requested to be returned for its presentation before this Court and the same was thereafter filed before this Court on 24.2.2007. Per Counsel, since the same was not filed within a period of three months, the bank guarantee furnished by the appellant stood discharged. Counsel has further contended that the learned Single Judge has no jurisdiction to extend the limitation, whereas, the appellant is simply seeking enforcement of order passed by the Division Bench in the aforesaid petition.

5. Conversely Mr. Qamar Abbas learned Counsel for respondent No.1 has contended that the learned Single Judge has passed a well reasoned order, whereby, it has been observed that the matter requires evidence

and cannot be decided on the basis of applications, whereas, evidence is already being recorded in the instant matter as no stay has been granted to appellant by this Court, therefore, the appeal has otherwise become infructuous. Learned Counsel has further contended that the Suit was filed before the Banking Court within the period of three months, however, in order to examine as to whether, the same was done bonafidely due to mistake or otherwise, is a matter of evidence, and cannot be resolved in a cursory manner as pleaded on behalf of the appellant, therefore, it would be appropriate that the parties be allowed to lead evidence, and the Suit may be decided on its own merits, including the question of limitation, if any.

6. We have heard both the learned Counsel and have also perused the record with their assistance. By consent of both the learned Counsel instant appeal is being finally decided at Katcha peshi stage.

7. Perusal of the record reflects that insofar as the facts involved in the instant matter are concerned, they are not in dispute as after return of the petition by the Lahore High Court, and filing of the same before this Court a learned Division Bench vide judgment dated 27.9.2006 decided the issue regarding recovery of demurrage and the demand of liquidated damages by respondent No.1 in the following manner:-

“This brings us to the question of liquidated damages. Mr. Malik Muhammad Rafiq Rajwana without prejudice to his contention that the liquated damages cannot be recovered and without conceding on the point, has stated that any person claiming liquidated damages is required to establish the loss through evidence and therefore, the KPT may file Suit for recovery of the damages if so desired, but cannot enforce the liability without establishing the incurring of actual loss.

Mr. Arif Khan after arguing at some length on the point of liquated damages that the liability can be enforced in pursuance of the finally stated that KPT may be allowed to file guarantee may be extended till final disposal of the Suit.

We are persuaded to agree with the statement made by Mr. Arif Khan and, therefore, we hold that the KPT cannot on its own enforce recovery of liquated damages inspite of such stipulation in

bank guarantee. The KPT may file a Suit for recovery of the liquated damages. The notice dated 19.2.2004 to the extent of payment of liquated damages is hereby struck down. As a matter of abundant caution we would once again clarify that this striking down of the notice for recovery of liquated damages shall not affect the right of KPT to file the Suit for the recovery of liquated damages as observed earlier. The bank guarantee shall remain in force, the validity whereof is extend till final outcome of the Suit filed by the KPT. If any Suit is not filed within three months, then the order for extension of bank guarantee in respect of liquated damages shall stand vacated automatically. (Emphasis supplied)

The petition stands disposed of on the point of demurrages and liquated damages in the above terms.”

8. Perusal of the operating Para reflects that while rejecting claim of KPT/respondent No.1, to the effect that it cannot enforce, on its own, the recovery of liquated damages, notwithstanding such stipulation in the Bank Guarantee, was allowed to file a Suit for recovery of liquated damages, and the notice issued by respondent No.1 dated 19.2.2004, was struck down. While doing so, the Court had further observed that the Bank Guarantee shall remain in force, the validity whereof stood extended till final outcome of the Suit filed by respondent No.1, with further observations, that if no Suit was filed within three months, then the order for extension of such bank guarantee in respect of the liquated damages shall stands vacated automatically. Therefore, on these directions by the Court, now the only controversy which remains in the instant matter is as to whether, the Suit was filed within the period of three months as per directions of the Court or not. The ground as urged by the appellant to the effect that since the Suit was wrongly filed before the Banking Court, therefore, the same when presented before this Court was time barred does not appear to be correct and is rather misconceived for the reason that Suit was filed within a period of three months, however, before the Banking Court, whereafter, with the permission of the Court, it was presented before this Court, moreover, such limitation, if any, in filling of the Suit before this Court has to be adjudicated by the

Court after examining the material as well as evidence, if any, adduced on behalf of the parties. The learned Division Bench never intended nor could have done so in law, to fix a limitation period for filing a Suit for recovery of liquidated damages, which in fact is required to be determined on the basis of applicable law in that regard. The learned Single Judge has come to a fair conclusion that it cannot be simplicitor decided on the basis of an application filed on behalf of the appellant for dismissal of Suit as being time barred. It may also be noted that the case itself has a chequered history, as the litigation started from filing of petition before Lahore High Court and then before this Court and the Hon'ble Supreme Court, and once again before this Court after remand of the matter. In the circumstances, we are of the view that the learned Single Judge has passed a well reasoned and fair order keeping in view the facts and circumstances of the case, whereby, the applications have been disposed of with the observations that the matter requires evidence, whereas, both the parties are at liberty to have an issue framed in this regard.

9. Accordingly, we are of the view that the appellant has failed to point out any factual or legal error in the impugned order passed by the learned Single Judge of this Court, therefore, instant appeal being misconceived in facts and law was dismissed vide a short order dated 15.1.2015 and above are the reasons thereof.

JUDGE

JUDGE