ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI

Admiralty Suit No.02 of 2021

Tenedos Denizcilik ve Tie. Ltd.
Versus
Makhambet & another

Date	Order with signature of Judge

1. For hearing of CMA 33/21
2. For hearing of CMA 43/21
3. For hearing of CMA 65/21

Date of hearing: 16.02.2022

Mr. Ishrat Zahid Alvi for plaintiff.
Mr. Aga Zafar Ahmed for defendants.

-.-.-

Muhammad Shafi Siddiqui, J.- Plaintiff[1] for a claim of Pak Rs.71,450,396/- has filed this suit for recovery under "admiralty jurisdiction" against defendants No.1[2] and 2[3] and through listed application it seeks arrest of the vessel.

2. Plaintiff claimed to be an Istanbul based shipping agency having expertise (as claimed) in ocean and maritime transportation whereas defendant No.1 is a vessel, being a foreign ship, carrying oil products and is registered and sailing under the flag of Saint Vincent and the Grenadines. At the time of filing of this suit the Vessel was within the territorial waters of Pakistan and was berthed at Karachi Port. Defendant No.2 is a registered owner of the vessel/ defendant No1.

3. It is the case of the plaintiff that defendant No.2, being owner of the vessel, entered into an agency agreement with the plaintiff on 17.01.2011 for a year which ended on 31.12.2011. In terms of the agreement plaintiff claimed to have been appointed as an agent to act

---

[1] Tenedos Denizcilik ve Tie. Ltd.
[2] Makhambet
[3] MBX Shipping Limited

on behalf of defendant No.2 to perform services, which include repair of defendant No.1 vessel at the Turkish ports. The plaintiff claimed that after expiry of the agreement it (plaintiff) was again authorized by defendant No.2, through mutual understanding between them, as being an agent for the repair works of the defendant No.1. As pleaded in the memo of the plaint, plaintiff and defendant No.2 agreed that repair work of defendant No.1 would be carried out by third party NARP DENIZCILIK SAN. VE TIC. LTD (hereinafter referred as "NARP") at Tuzla Hidro Dinamik Shipyard. For clarity, (as submitted) defendant No.2 and NARP entered into a written repair agreement in 2012 which was numbered as 032012.

4. It is case of the plaintiff that for the repair works of defendant No.1 for an amount of US $.703,330 plaintiff, while acting as an agent for defendant No.2, paid an amount of US S.374,000 to NARP against two invoices of 09.03.2012 and 13.03.2012. The plaintiff then claimed to have issued invoice of the said amount i.e. US $.374,000/- to defendant No.2 on 30.03.2012 however defendant No.2 refused its payment. Being aggrieved of it, plaintiff filed a case against defendant No.2 in the Commercial Court of First Instance in Turkey (hereinafter called "Turkish Court") on 16.06.2014. The said Turkish Court then pronounced judgment for US $.371,666.90 and additional 20% as debt enforcement denial indemnification along with other claims. In pursuance of such pronouncement of judgment plaintiff only claimed to have received US $.54,654/- from the amount that was secured by defendant No.2 as security before the Turkish Court. It is now in this suit that plaintiff under admiralty jurisdiction pleads that the claim is covered in terms of Section 3(2)(m) of Admiralty Jurisdiction of High Court Ordinance, 1980 and plaintiff is entitled to file this suit independently under Admiralty

jurisdiction, notwithstanding judgment from Turkish Court for the same claim.

5. It is argued by Mr. Ishrat Zahid Alvi, learned counsel appearing for the plaintiff that the instant suit is for recovery of dues which claim is also covered under admiralty jurisdiction. Learned counsel has categorically stated that this suit is not for enforcement of a foreign judgment/decree of Turkish Court, as referred above, but an independent suit for recovery of amount under admiralty jurisdiction as the cause survived on account of non-payment, despite judgment of same claim from Turkish Court. Learned counsel submitted that on the basis of such claim the vessel was ordered to be arrested on 16.08.2021 by this Court, subject to furnishing security in the sum of Pak Rs.71,450,396/-.

6. The defendants contested the suit and the arrest application without being surrendered to the jurisdiction of this Court, as stated in the counter-affidavit. As security was not furnished, the vessel is still anchored within the territorial limits of this Court under arrest. Mr. Aga Zafar Ahmed, learned counsel submitted that claim of the plaintiff as instituted in the Turkish Court, despite their defence, is concluded however matter is sub judice before Supreme Court of Turkey in Appeal No.712 of 2020.

7. Mr. Aga has also objected to the maintainability of the suit on the aforesaid counts as well as on the count that the claim is barred by time even under admiralty jurisdiction, if this suit is not for enforcement of a foreign judgment/decree. He submitted that plaintiff's claim is of alleged repair work carried out by NARP to the defendant No.1 who also issued invoices of 09.03.2012 and 13.03.2012 in respect thereof. As against payment to NARP by the plaintiff, the invoices generated to defendant No.2 on 30.03.2012 which payment of US $.374,000/- was

denied and hence this suit is hopelessly barred by time in terms of Section 56 of the First Schedule of the Limitation Act which provides period of three years.

8. Learned counsel for defendants further argued that decree of foreign Court does not fall within the admiralty jurisdiction of this Court. Without prejudice, learned counsel further clarified facts, as deposed in the counter-affidavit, that after expiry of the agreement with the plaintiff, defendant No.2 and its offshore company namely TOBIAS Enterprises Limited (hereinafter referred as "TOBIAS") entered into a repair agreement with each other as well as NARP for carrying out maintenance, repair and paint of the vessel. The claim of NARP through Tobias was then set at rest by payment to Capella Shipping Company (hereinafter referred as "Capella"), as instructed by NARP hence not only the amount being claimed but additional amount in response to some other maintenance, repair and paint work to the tune of a total amount of US $.873,000 was paid by TOBIAS to Capella under instruction of NARP. It is further highlighted by Mr. Aga that one Mr. Kamil Serkan Denizer owns 100% shares both in Capella as well as plaintiff.

9. Thus, without prejudice to the defence, defendant No.2 claimed to have paid through its offshore company a sum of US $.1,230,000 to its contractual party i.e. NARP, as instructed, and there are no outstanding dues of whatsoever nature. Defendant No.2 however denied that the plaintiff has settled any amount with NARP and any such payment to NARP by plaintiff is without any authorization and confirmation and it was done at its own risk and cost.

10. Learned counsel has further assisted this Court by disclosing facts of institution of a case in Turkish Court for Recovery of US $.371,666.90. Defendant No.2, without prejudice to its above rights, secured the said claim for lifting the attachment order of Turkish Court. The amount was

deposited in Turkish Lira in terms of the prevailing Rules of the said country. The defendant No.2 claimed that the amount of security was paid to the plaintiff and no cause of action survived as far as repair invoices or cost for filing this suit is concerned. Presently the matter is pending before Supreme Court of Turkey. It is claimed that on account of attachment order of this Court the defendant No.1 vessel is incurring daily losses.

11. I have heard the learned counsel and perused material available on record.

12. Plaintiff has attempted to exhaust admiralty jurisdiction of this Court after exhausting their remedy for recovery of their alleged outstanding dues, in the Commercial Court of First Instance Gebze i.e. Turkish Court. The "claim" of this suit is common though under different jurisdiction. The Turkish Court passed the following judgment in favour of plaintiffs which includes the claim as prayed in the instant suit:-

> *"1-ACCEPTACE OF THE CASE and for dismissal of the objection filed by the debtor, the defendant, against the file of the Third Debt Enforcement Office in Gebze with Merits No 2013/2931 and for continuance of the proceeding for the main receivable of USD 371.666,90 by applying the highest rate of interest applied by the public banks for the deposits with a term of one year in the same foreign currency (USD) starting from the date, when the proceedings were initiated,*
>
> *2-for ordering the defendant to pay debt enforcement denial indemnification of 20% of TRY 787.838,49, being the equivalent of the main receivable of USD 371.666,90 in Turkish Lira, as the defendant is acting unfairly and in bad faith in their objection,*
>
> *3-for collecting TRY 44.273,08, being the balance found by setting of the fee collected in advance, TRY 9.545,60, from the order fee due, TRY 53.818,68, and for entering the same in treasury,*
>
> *4-for receiving the application fee of TRY 22,50 and the fee in advance TRY 9.545,60 already paid by the plaintiff from the defendant and for delivering the same to the plaintiff,*
>
> *5-for collecting TRY 146,00 representing the service and mail expenses, and TRY 350,00 representing the expert charges, totaling TRY 496,00, all of which expenses were covered by the advance payment made by the plaintiff*

during trial, from the defendant and for delivering the same to the plaintiff,

6-for collecting the attorney's fee of TRY 70.64,37, calculated and assessed based on the recognized rate as given in the Minimum Attorney's Fees Tariff, from the defendant and delivering the same to the plaintiff as the plaintiff had themselves represented by an attorney,

7-for returning the balance advance payment for expenses deposited by the plaintiff to the plaintiff after setting off the expenses covered during the trial as well as the expenses to be covered until the order is finalized,

8-for returning the balance advance payment for evidence deposited by the defendant to the defendant after setting off the expenses covered during the trial and the expenses to be covered until the order is finalized,

9-for leaving the legal expenses covered by the defendant payable by the defendant themselves,

With order was made unanimously with means of recourse for appeal being available by submitting a petition to our Court to be referred to the Relevant Civil Chamber of the Istanbul Regional Court of Justice within weeks, was clearly pronounced and explained according to the applicable procedures in the presence of the attorney to the plaintiff and the attorney to the defendant. 16/03/2017."

13. Admittedly, this suit is not for the enforcement of any foreign judgment/decree rather Mr. Alvi made a clear statement that it is an independent suit for the same claim but under admiralty jurisdiction of this Court as the cause to file this suit survived and thus this is not a suit under foreign judgment. Before I could discuss other points of defendants, as raised, the main issue, which to my understanding requires prior indulgence is of maintainability of the suit for which parties were put on notice. Perusal of claim of plaintiff before Turkish Court reveals that it was same as in this suit. It is not even objected by Mr. Alvi on the count that the cause to file this suit still survive. Question before me is whether a judgment of foreign Court, which is not being asked to be enforced, could apply as res judicata and whether it is a conclusive judgment that concerns with all claims and issues. The claim of plaintiff before Turkish Court was thus decided favourably. Now whether it is conclusive judgment for the purposes of applying doctrine

of Section 11 CPC, I have attempted to adjudge its conclusiveness by applying exceptions to Section 13 CPC as well as 11 CPC. If the judgment is not conclusive within exceptions to Section 13 read with Section 11 CPC, then it may not be conclusive for applying Section 11 CPC as well as structured component are common. Undoubtedly, plaintiff itself invoked Turkish jurisdiction and succeeded in obtaining judgment which include all claims including claims of this suit, therefore, he cannot even plead that Turkish Court had no jurisdiction[4]. As far as defence of plaintiff that it is admiralty jurisdiction which is being exercised is also immaterial. It is the "claim" within a particular jurisdiction that counts and not jurisdiction itself. Claims are adjudicated under a particular jurisdiction be it general, original, constitutional or admiralty. If claim is common and adjudicated under any jurisdiction it counts for applying principle of res-judicata, if the local laws do not contradict.

14. Section 13 CPC determines the conclusiveness of a judgment subject to conditions as structured therein whereas its executability is under section 44A CPC. However, what is imperative from such conclusion is that if it is conclusive for its implementation and execution, then it is conclusive for giving effect to the doctrine of res judicata, provided it crosses the prerequisites of Section 11 CPC also. It is plaintiff's choice not to enforce the foreign judgment in terms of Section 13 and 44A CPC as he opted to initiate fresh proceeding for recovery of same claim.

15. Section 11 CPC is universal doctrine so it does not matter if the judgment is of a foreign Court or of a Court beyond the territorial limits of this Court. The subject claim is a tried and adjudicated issue (within competent jurisdiction) and hence it is being applied for enforcing res

[4] AIR 1935 Rangoon 284 (K.B. Walker v. Mrs. Gladys)

judicata. There is no legislation enacted contrary to the acceptance of such rule except as provided in Section 11 CPC.

16. Section 11 provides that no Court shall try any suit or issue in which the matter directly or substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim, litigating under the same title, in a competent Court of law to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such Court. For case of reference Sections 11 and 13 CPC are reproduced as under:-

> ***11. Res Judicata.*** *-- No Court shall try suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.*
>
> ***Explanation I.*** *__ The expression "former suit" shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.*
>
> ***Explanation II.*** *__ For the purposes of this section, the competence of a Court shall be determined irrespective of any provisions as to a right of appeal from the decision of such Court.*
>
> ***Explanation III.*** *__ The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.*
>
> ***Explanation IV.*** *__ The matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.*
>
> ***Explanation V.*** *__ Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused.*
>
> ***Explanation VI.*** *__ Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.*
>
> *12. ….*
>
> ***13. When foreign judgment not conclusive.*** *A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or*

between parties under whom they or any of them claim litigating under the same title except--

(a) Where it has not been pronounced by a Court of competent Jurisdiction;

(b) Where it has not been given on the merits of the case;

(c) Where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognize the law of Pakistan in cases in which such law is applicable;

(d) Where the proceedings in which the Judgment was obtained are opposed to natural justice;

(e) Where it has been obtained by fraud;

(f) Where it sustains a claim founded on a breach of any law in force in Pakistan."

17. The explanation provides that a former suit is one which has been decided prior, irrespective of its filing date. Explanation II provides that for the purpose of Section 11 competence of Court shall be determined irrespective of any provision as to right of appeal from the decision of such Court[5]. Explanation III provides that matter referred to must in the former suit have been alleged by one party and either denied or admitted expressly or impliedly by the other. Explanation IV provides that any matter which might or ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly or substantially in issue in such suit and under Explanation V any relief claimed in the plaint, which is not expressly granted by the decree, shall for the purposes of this section be deemed to have been refused. The remaining explanation VI is not relevant for the purposes of issue in hand.

18. Section 13 incorporates a branch of principle of resjudicata and extends it within certain limits to judgments of foreign Courts if competent in an international sense to decide dispute between the parties. The rules of resjudicata applies to all adjudication in a "former suit" which expression explanation I to Section 11 of the Code of Civil

[5] AIR 1927 Lahore 200 (Hari Singh v. Muhammad Said)

Procedure denotes a suit which was decided prior to a suit in question whether or not it was instituted prior thereto.

19. Section 13 couched negatively when a foreign judgment is not conclusive. Plaintiff has not made out a case within exceptions of Section 11 and 13 CPC and is thus conclusive for the purposes of Section 11 CPC.

20. Defendant No.2 had already deposited a claim under the judgment of Turkish Court after converting US Dollars into Turkish Lira and during pendency of appeal, plaintiff applied for release of security amount which was paid to it and prima facie if any balance amount is payable, it is only the Turkish Court or Court of Appeal, including Supreme Court of Turkey, which may take into account all such considerations of parties, however such claim, which is already materialized as judgment and decree, cannot be extended for re-trial independently, within the admiralty jurisdiction of this Court for recovery as an independent suit except for enforcement of said judgment/decree. Insufficiency of amount as pleaded cannot be a ground to invoke jurisdiction of this Court when all issues were adjudicated. Why rest of the amount was not paid, out of the amount secured by defendant No.2 is a matter which is to be decided by Turkish Courts. For the purposes of the identical claim, as raised in this plaint, this Court cannot sit in appeal against the order/ judgment whereby only a part of the security provided by defendant No.2 was ordered to be released to the plaintiff[6].

21. The doctrine of res judicata is conceived unanimously in the general interest or public policy which requires that all litigation must come to an end at a point of time and the parties must live in peace.

[6] PLD 2014 Sindh 209 (Syed Jaffer Abbas v. Habib Bank Ltd.)

22. Thus, the old Latin maxim ‘res judicata pro veritate accipitur’ is actively enforceable under the circumstances of the case as a decision which has already been rendered by a Court of competent jurisdiction on a matter in issue in this suit between the same parties and decided on merit, and it should not be allowed to be agitated again before the Courts of law as the aforesaid rule would prevent any party to such suit/ proceedings which has been agitated upon by the competent Court, from disputing or questioning decision on merit in subsequent litigation[7].

23. Section 11 recognizes the sanctity of judgments including foreign judgments competently rendered i.e. recognized on the touchstone of Section 11 and 13 CPC. In order that a foreign judgment may operate as res judicata it must have been given on the merits of the case[8]. Only if a judgment is opposed to natural justice will not be recognized to operate as res judicata and is impeachable within certain frame recognized universally. Foreign judgment in this case is a complete recognition of facts involved as it was a contested case and decision was given after taking into account pleadings and evidence of parties[9].

24. In the case of R. Vishwanathan[10] a three Member Bench of Supreme Court of India set up the conclusiveness of a foreign judgment as a bar even at a situation where it was delivered after the institution of a subsequent suit. A foreign judgment is conclusive between parties in the matter directly adjudicated and it is not predicated of the judgment that it must be delivered before the suit in which it is set up was instituted.

25. Private international laws at times differ from law governing relations of countries. While such governing law may differ, but by the comity of nations certain rules are recognized as common to civilized

---

[7] 2021 SCMR 1433 (Secretary Local Government v. Muhammad Tariq Khan).
[8] Sawta Singh v. Ralla Sugar (1919) PR 14 - AIR 1973 Madras 141 : (1972 2 MLJ 468
[9] International Woolen Mills v. M/s Standard Wool (UK) Ltd. (AIR 2001 SC 2134)
[10] AIR 1963 SC 01 (R. Vishwanathan v. Rukn-ul-Mulk Syed Abdul Wajid)

nations which may also be recognized through judicial system of such countries and these governing laws are to recognize the judicial systems of civilized nations and consequently to resolve disputes involving a foreign decision to effectuate and recognize foreign Courts and their judgments in certain cases as a result of internationally recognized principles.

26. In view of above facts and circumstances, not only that prima facie case is not made out but the suit itself suffers under the doctrine of resjudicata, as discussed, hence in view of above discussion the suit along with pending applications are dismissed being not maintainable with no orders as to costs.

Dated: 04.03.2022 **Judge**