

IN THE HIGH COURT OF SINDH, KARACHI

Admiralty Appeal No. 2 of 2013

Present

Mr. Justice Aqeel Ahmed Abbasi

Mr. Justice Muhammad Junaid Ghaffar

M/s Agility Logistics (Private) Limited.....Appellant

Versus

M/s B. K. Shipping Co. Limited & Others.....Respondent

Date of Hearing: 23.10.2013

Date of Order: 23.12.2013

Mr. Khawaja Shamsul Islam	Advocate for the Appellant.
Mr. Syed Ali Haider	Advocate for Respondent No 1
Capt. Irfan Hassan Farooqi	Managing Director of M/s Ship Shape (Private) Limited, local shipping agent for Respondent No 1

J U D G E M E N T

Muhammad Junaid Ghaffar, J:- Instant admiralty appeal arises out of an order dated 30.9.2013 passed by a learned Single Judge of this court in Admiralty Suit No.10 of 2013 whereby application filed by the respondent No.1 under Rules 731 & 759 of Sindh Chief Court Rules (O.S) bearing CMA No.60 of 2013 has been allowed.

2. Briefly, the facts as per the memo of appeal are, that the respondent No.1, filed Admiralty Suit No.10 of 2013 under the admiralty jurisdiction of this court for recovery of an amount of US\$ 6,70,665.43 in lieu of freight, demurrage and other charges against the appellant and others; along

with this suit an application under Rules 731 & 759 of SCCR (O.S) was also filed whereby it was prayed that the Nazir of this court be appointed to auction the cargo loaded on the vessel MV "Beacon SW" as according to the respondent No.1 the appellant had failed to make payment of freight and other charges, and/or in the alternative the appellant be directed to furnish a bank guarantee before the Nazir of this Court, of the equivalent amount before the clearance of the goods. It is the case of the respondent No.1 that they are the owners of the vessel MV "Beacon SW," a General Cargo Ship registered in Panama under demise charter of the respondent No.1. As per the contents of the memo of appeal, on or about 08.07.2013, respondent No.1 had entered into a charter party agreement with the respondent No.2 for the carriage of the goods to be loaded on board the vessel above named and subsequently for its discharge at Port Qasim on the agreed freight of US\$ 14.65 per metric ton. It has been further stated that the respondent No.3 is the sub-charterer who fixed the vessel and appointed its local agent at Karachi namely M/s. Ship Shape Pvt. Ltd. through its Managing Director Captain Irfan Hussasin Farooqui, who was responsible to facilitate the formalities before the customs and other authorities and to issue delivery order for the cargo. As per the Shipping documents, including mate's receipt, the appellant is a notified party in Pakistan in respect of the goods in question. It is further stated that under the terms of sub charterer party and instructions on behalf of the Charterer, the subject vessel called at the Port of Kandla India, where cargo of 24,000 Metric Tons (M.T) of wheat in 50 Kgs. bags each (total 4, 80,000 bags) was loaded on behalf of the shipper i.e. Ministry of External Affairs, Government of India and the said cargo was consigned to Ministry of Commerce &

Industry, Kabul, Afghanistan. After loading of the said cargo at Kandla, India and completion of all formalities relating thereto, the said vessel sailed out on or about 22.7.2013 and arrived at the outer anchorage of Port Qasim on or about 23.7.2013. It is further stated that the Bill of Lading in respect of the subject cargo was not issued due to non-fulfillment of pre-requisites for the issuance of the original Bill of Lading i.e. failure in payment of dues and earned ocean freight or producing the evidence of making such payment as per terms and conditions of the charter party agreement. It is further averred that the respondent No.1 was prepared to consign a bill of lading under the relevant applicable law incorporating Hague/Hague-Visby Rules as appropriate, but neither the formalities of bill of lading were fulfilled nor it was demanded from the respondent No.1, although various drafts of the relevant bills of lading were exchanged but all such efforts proved futile. It is further stated that after exhaustive efforts the respondent No.1 was constrained to serve a legal notice on the appellant who was a notified party in the mate's receipt, on 12.8.2013 but till the filing of the suit by the respondent No.1 no reply was received and having left with no other option, respondent No.1 had to exercise its right of lien on cargo for recovery of freight and other charges as well as extra port dues and penalties.

3. The application filed along with the plaint in Admiralty Suit No 10 of 2013 under Rules 731 & 759 of the SCCR (OS) bearing CMA No.630 of 2013 has been allowed by the learned Single Judge of this court in the following terms:-

“From the tentative assessment of material available on the record, I am of the considered view that the plaintiffs have made out a prima

facie case. Resultantly, listed application is allowed to the extent that plaintiffs are permitted to discharge the cargo in the custody of statutory custodian i.e. Port Qasim Authority, who are directed to detain the same under plaintiffs lien on the cargo for the amount due in lieu of freight, demurrage and other charges. The Port Authorities are also directed to release the cargo/property subject to production of the documents including bill of lading and furnishing bank guarantee to the suit amount with the Nazir of this Court”.

4. Mr. Khawaja Shamsul Islam, learned counsel for the appellant contended that the learned Single Judge, instead of giving consideration to the relevant documents and pleadings, has allowed the application of the respondent No.1 which is not sustainable under the law. It is further contended that the learned Single Judge failed to take notice of the fact that the appellant at the very outset had stated, without prejudice to its legal right, before the Court that the application under Rules 731 & 759 of SCCR (OS) may be allowed subject to all just exceptions for the time being as the appellant was agreeable to deposit the bank guarantee equivalent to the amount being claimed by the respondent No.1 as its due charges before the Nazir of this Court. However, per learned counsel, such request of the appellant was not acceded by the learned Single Judge and the matter was unnecessarily lingered on, was adjourned to several dates and finally the impugned order was passed. Per learned counsel although the respondent No.1 had served a legal notice dated 12.08.2013 on the appellant and had admitted that the appellant was an appropriate party for the purposes of release of the subject consignment, but despite this admission on the part of respondent No.1, the learned Single Judge did not pass an appropriate order for the release of the cargo which is being un-necessarily withheld for clearance since July 2013. It is further contended that the learned Single Judge also failed to consider the documents filed along with the counter

affidavit of the appellant as well as by the agent of respondent No.1, and more particularly, the correspondence made through e-mails between the parties. The learned counsel further contended that the appellant was acting as an agent on behalf of the consignee which is based in Kabul, Afghanistan and as per mate's receipt as well as the bill of lading issued in respect of the subject cargo, the appellant was the notified party and since the appellant is a company engaged in providing logistic services to the consignee in Afghanistan, and, is therefore authorized to take the delivery of the cargo and thereafter to transit it to Afghanistan under the Afghan Transit Rules of Pakistan. It is further contended that subsequent to filing of this appeal the respondent No.1 has already received the amount of freight charges and is withholding the issuance of original bill of lading and is also not issuing release instructions to its local agent in Karachi for the delivery of cargo to the appellant. The learned counsel further contended that the conduct of respondent No.1 is an attempt to recover over and above the agreed freight amount which already stands paid to the respondent No.1 and as such under the cover of the impugned order, the respondent No.1 is refusing the delivery of the consignment to the appellant, although all formalities for the delivery of the same and its onward transit to Afghanistan have already been fulfilled, including the payment of disputed amount of freight charges. An objection was also raised by the learned counsel that in fact the suit filed by the respondent No.1 was not maintainable as it was filed by the junior counsel of the advocate appearing on behalf of respondent No.1 and no proper power of attorney was available with such junior counsel. It was further contended that since the cargo is in transit to Afghanistan, it could not be directed to be offloaded

from the vessel and to be handed over to Port Qasim Authority as ordered by the learned Single Judge in the impugned order, as in terms of Rule 58 of the Custom Rules 2001, the transit goods could not be auctioned as well. Per learned counsel the appellant has already filed a Good Declaration which has been registered and manifested by the Customs Department, and the appellant is ready in all respect, after fulfillment of all codal formalities for the delivery of the cargo except the delivery order or the release instructions to be issued by M/s. Ship Shape Pvt. Ltd, by the local agent of the respondent No.1. The learned counsel also raised an objection that this Court has no Jurisdiction under the Admiralty Ordinance of 1980, as the respondent No.1 was neither the owner nor the consignee of the goods in question. It was further contended, without prejudice, that initially there might have been dispute between the respondent No.1 and respondent No.2 regarding the freight charges, but since subsequently the entire freight has been paid and duly received and acknowledged, as such the cargo ought to have been released to the appellant. In view of the above, the learned counsel prayed that the impugned order be set aside and consequently the application bearing CMA No.60 of 2013 be dismissed and cargo withheld by respondent No.1 be allowed to be released to the appellant.

5. Conversely, the learned counsel for the respondent No.1 Mr. Syed Ali Haider has supported the impugned order which according to the learned counsel does not require any interference by this Court. It is further contended that although the amount of freight has been received by the respondent No.1 during the pendency of the appeal before this Court; but even then, the goods cannot be delivered to the appellant as it was merely a notified party in the mate's receipt. It is further contended that as of today,

the respondent No.1 has not issued any bill of lading in respect of the subject consignment; as such the question of delivery of the same to the appellant does not arise. Per learned counsel if the appellant surrenders the original bill of lading, the respondent No.1 would have no objection in issuing the delivery order to the appellant. The learned counsel prayed for the dismissal of the instant appeal. Similar submissions have been made by Captain Irfan Hassan Farooqui, the Managing Director of M/s. Shipshape (Pvt) Ltd., the local shipping agents, of the respondent No.1

6. After conclusion of the hearing, we allowed the learned counsel for the parties to file brief written synopsis of the arguments along with relevant case law, if any, in support of verbal submissions, however, we have noted that instead of filing brief synopsis of the arguments and the case law both the learned counsels have filed voluminous arguments, treatise and documents and have referred to various laws and Acts as well as case law, which were never argued or cited before us at the time of hearing. We are of the view that if we may consider all such material which was neither produced, argued or considered at the time of hearing this appeal, both the parties would be prejudiced, therefore, we would decide instant appeal on the basis of the material available on record and by considering the submissions made by the learned counsel, keeping in view the pleadings, reply and relevant law and case law on the subject controversy.

7. It appears that admittedly the goods in question have been shipped by the Ministry of Economic Affairs, Government of India as a donation, out of charity and affection for the poor and needy people of Afghanistan

through the Ministry of Commerce & Industry, Kabul, Afghanistan. It is also an admitted position that since Afghanistan is a land locked country, therefore owing to this; the goods have been shipped from India and are to be discharged at Port Qasim, Karachi and thereafter, sent to Afghanistan by Road under transit from Pakistan. It is also an admitted position that the consignee based in Afghanistan cannot come personally to Pakistan to seek clearance of such transit goods. It is also a matter of record that transit goods are handled by logistic companies, transport companies, shipping and customs agents based in Pakistan and the Government of Pakistan and Afghanistan had entered into a Transit Trade Agreement way back in 1965 for regulating the transit trade. Therefore, in the instant case as well, the appellant has entered into an agreement with the Government of Afghanistan through the Ministry of Commerce & Industry, Kabul, for handling and transportation and delivery of the goods in question i.e. wheat donated by the Government of India of an approximate quantity of 100,000 metric tons subsequently enhanced to 1,50,000 metric tons. The appellant has filed copy of agreement as Annexure C/6 which is available at page 183 of the Court file. According to this agreement between the Islamic Republic of Afghanistan through the Ministry of Commerce & Industry and the appellant, the transportation of goods in question is required to be handled by the appellant from Kandala/Mundara Port (India) to Kabul Afghanistan. The appellant for this purposes arranged for the shipment of the said goods through the respondent No.3 who in turn arranged the vessel of the respondent No.1 through respondent No.2. For this purpose, the respondent No.3 has entered into a Charter Party Agreement with the respondent No.2 and the respondent No.2 as disponent owner, arranged for

the vessel MV "Beacon SW". It appears that the goods after loading from the said port of Kandala have arrived at Port Qasim Karachi on or about 23.7.2013 and since the freight as agreed, apparently was not credited to respondent No.2, as such the respondent No.1 withheld the issuance of bill of lading of the subject goods. However, as an acknowledgement of shipment of goods, a mate's receipt was issued which has not been denied. It however appears that freight was paid by the appellant to the respondent No.3, who had entered into a Charter Party Agreement with the respondent No 2, and perhaps, for the reasons that a dispute had arisen between the respondents, the amount of freight was not paid to the respondent No.1 as may have been agreed amongst them. However, it has come on record that during pendency of instant appeal the freight has been paid to the respondent No.1 and such position has not been controverted or disputed by the learned counsel for the respondent No.1, therefore the only question, now left in the instant appeal is, as to whether the respondent No.1 even after having received its freight charges can still refuse delivery of the subject consignment to the appellant, who claims to have acted on behalf of the actual consignee based in Afghanistan but has not surrendered the original bill of lading. The argument of the learned counsel for the Respondent No 1 that since the appellant is not in possession of the original bill of lading, therefore the goods cannot be delivered to the appellant, is on the face of it is contradictory and fallacious. It is even outside the scope and ambit of the pleadings and claim in the suit filed by the respondent No 1 before this court. In fact, at the time of filing of the suit, the only grievance of the respondent No 1 was that since freight charges are still unpaid, therefore, the owner of the vessel i.e. the respondent No 1 had a lien on the

cargo, and no more. Now, once they acknowledge receipt of freight charges, the demand for surrendering the original bill of lading, which admittedly has not been issued till date, is an attempt to compel the consignee and the appellant to pay extra charges over and above the freight as agreed which amounts to an act of extortion on the part of the respondent No 1. It will be relevant to examine the prayer made in the suit filed by the respondent No.1 which reads as follows:

- A. Pass judgment and decree in favor of the Plaintiff in the sum of US\$ 6, 70,665.43/= against the property/cargo and the defendants with 15% interest per annum from the date of this suit.
- B. Direct that the cargo on board the vessel be arrested/detained under lien of the Plaintiff till a suitable security/Bank Guarantee for an equivalent amount is furnished by the Defendants with the Nazir of this Hon'ble Court.
- C. Grant permission to the Plaintiff to discharge the cargo on board and warehouse it at the expense, cost and risk of the defendants/cargo Court.
- D. Upon failure of the defendants to furnish security, direct the subject cargo of 24,000 Metric Tons of wheat in bags of 50 kgs. Each, (480,000 bags in total as per tally) to be sold and claim of the Plaintiff be satisfied against the sale proceeds of the said cargo.
- E. Grant cost of the suit.
- F. Grant any further and better relief(s) as may be deemed appropriate by this Hon'ble Court in the interest of justice.

From perusal of the pleadings in the Suit and the claim of the respondent No 1 as replicated in the above prayer clauses, the contention of the learned counsel for the respondent No 1 that until and unless original bill of lading issued by the ship-owner is not surrendered, delivery of the cargo cannot be handed over to the appellant as the mate's receipt is not a title document besides being beyond its own pleadings, is equally unjustified and illogical, hence hereby repelled.

8. We are not oblivious of the fact that the mates receipt is not a document of title to the goods shipped and it is in fact the Bill of lading which proves and justifies the title to such goods. However, in a situation, like the one in hand, if the Bill of Lading is not issued or presented or it is withheld, and it is only the mate's receipt, which is in field. Naturally in such a situation, the holder of mate's receipt in the absence of any other claimant or holder of Bill of Lading in respect of consignment, will have some right to such goods, coupled with the fact that he is the notified person as per Customs documents and authorized to receive delivery. In such a situation, we believe, it's only the holder of mate's receipt, who can claim any right on the goods and consequently demand delivery of the same on behalf of consignee of the goods. Further, it is a settled law, (at least in the English Jurisdiction) that mate's receipt is a prima facie evidence of the quantity and condition of goods as it is a receipt of goods by the carrier or ship owner and while taking goods alongside the ship, the Ship-owner acknowledges receipt of the same through mate's receipt. Further the recipient or possessor of the mate's receipt is entitled to have the bill of lading issued to him. In so far as the instant matter is concerned, the shipper or anybody else has not lodged any claim so far with the ship owner, whereas, in the instant case there cannot possibly be any such claim, as there is no issue of payment to be made to the shipper, either on surrender of the mate's receipt or of the bill of lading, if so issued, thereafter. It is not denied anywhere by the respondent No.1, that the mate's receipt was not issued by them, or the shipper or anybody else has lodged any claim in respect of the goods in question. Similarly, it has not been disputed that name of the appellant mentioned in mate's receipt is not

a notified party. Further, there is no intimation or notice served by the shipper upon the respondent No 1 to withhold delivery of the goods, and being a donor of the goods has not undertaken to pay the freight, which as of today, admittedly has been received by respondent No.1 and such acknowledgement is on record. It therefore, leaves no ground of whatsoever manner, to withhold delivery of the subject goods, on the pretext that no bill of lading has been produced, (in fact none has been issued), as the same is admittedly withheld by the Respondent No 1.

9. It is a common practice, world over in the trade, that bill of lading are issued with surrender of mate's receipt. In the instant matter, since the respondent No.1 wanted to have its payment of freight secured, rightly did not issue the bill of lading at the time when it ought to have issued it in the normal course of business, as the shipper/consignor of goods, being a donor was least bothered about issuance of the same. Therefore, as observed earlier, the respondent No.1, withheld the issuance of bill of lading and rightly so, to secure its freight, but subsequently, when it has received the freight, the withholding of the bill of lading or in the alternative refusing delivery of the goods to the appellant, is highly unjustified and amounts to exert pressure upon the appellant to extract more amount, benefit and charges, over and above what was legally due as freight. In fact this act of the respondent No.1 has put the appellant in a no win situation as even after payment of freight, the appellant is unable to perform its part of the contract with the consignee of the goods, i.e. Ministry of Commerce & Industry, Kabul, Afghanistan, who is the recipient of the goods. It is also a common practice all over the world, as well as in Pakistan, that delivery of imported cargo is given to consignee even without surrender of original duly

endorsed bill of lading, against a letter of guarantee or indemnity. Such indemnity is obtained in cases where the bill of lading is issued to the order of the corresponding Bank in Pakistan. This happens in cases where, the carrier or ship owner or Master, as the case may be, has issued the original bill of lading to the order of the Bank, and for some reason, the original bill of lading is withheld somewhere in transit, or is not available for any other reason (though issued) a letter of guarantee or Indemnity duly stamped and thereafter verified by the Bank, is submitted to the local agent of the ship owner with an undertaking to the effect that original bill of lading would be surrendered in due course of time, as soon as the same is received, and on such assurance, the delivery of the goods is handed over by the local agent.

10. Keeping in view the peculiar facts and circumstances of this case, we may observe that the Respondent No 1, having found itself in an advantageous position particularly after having received the entire freight charges, is trying to en-cash it, by withholding issuance of the bill of lading on technicalities, and in turn, forcing the appellant to agree for payment of demurrage and other charges which might accrue, without going through the process of adjudication of the same before an appropriate forum. It appears that the respondent No 1, in fact wants to have the cake and eat it too, whereas the appellant has been deprived of his right and obligation to perform his part of agreement. This court has to maintain equity and to do substantial justice, keeping in view the peculiar facts and circumstances of the instant case and to break a deadlock created by the respondent No 1. We cannot allow sheer technicalities to obstruct dispensation of justice. If this is allowed, then it would lead to an absurd conclusion, and the appellant would be thrown at the mercy of respondent No 1, who after having

received the freight charges ceases to have any lien over the subject goods. The contention of the learned counsel for the Respondent No 1, that since mate's receipt is not a title document, as such the delivery of goods cannot be handed over to the appellant without surrender of the bill of lading, is totally misconceived and untenable under the facts and circumstances of this case, as this rule is not absolute and needs to be relaxed in peculiar facts and circumstances, like the one in hand and delivery of goods can be allowed on the basis of the mate's receipt, especially when other formalities have been completed and merely the bill of lading has not been issued and is being withheld purposely. It is also not possible that in relation to one consignment, there is a mate's receipt as well as a bill of lading, simultaneously in field. This would be unrealistic and unreasonable and would also create uncertainty. In the instant matter, the mate's receipts available at pages 95 to 103 very clearly states at the bottom that it must be exchanged immediately for the company's bill of lading duly signed. However, due to the facts as already stated and discussed above, no such exchange of mate's receipt with the bill of lading has taken place, and consequently it is only the mate's receipt which is in field at the moment. It is also an admitted fact that the bill of lading is only issued in exchange of the mate's receipt, and if it has not been done, then perhaps, the same has to be accepted as the only document issued by the ship owner (Respondent No 1), duly acknowledging receipt of the goods and admitting some sort of liability at least in respect of the goods so shipped.

11. It will be relevant to refer to a judgment of the Privy Council reported as **[1971]1 Lloyd's Report [PC] 439** (*Kum and another V/s Wah*

Tat Bank Limited and Another), wherein the bill of lading and mate's receipt have been discussed thread bare, and based on a custom which was prevalent at the relevant time amongst the merchants of Singapore; the mate's receipt has been accepted as equal to and even as a replacement of a bill of lading. It was held by the Privy Council at pg. 444 as under;

“In their Lordships’ opinion the custom alleged is neither uncertain nor unreasonable. The form of mate’s receipt used is similar to a bill of lading and there is no difficulty about treating it as an equivalent. In this respect it may be contrasted with the form considered in Hathesing v. Laing which appears to have been a receipt and nothing more and not to have named a consignee. Their Lordships can see nothing unreasonable in using the mate’s receipt in this case as a document of title. The law knows that to require the physical delivery of goods whenever they change hands in trade would be unreasonable and recognizes the need of merchants for a document that will represent the goods. It was by the custom of merchants that the bill of lading became such a document. But no documentary form is immutable. It is quite a natural development, first for the mate’s receipt to become more elaborate and then for merchants to feel that in certain cases the bill of lading can be dispensed with. The function of the commercial law is to allow, so far as it can, commercial men to do business in the way in which they want to do it and not to require them to stick to forms that they may think to be out-moded. The common law is not bureaucratic.”

12. Since in the instant appeal, neither any Banking transaction is involved, as admittedly the shipment in question has been donated by one Government to another, nor the question of repatriation of funds is an issue, as is normally the case in case of imports/exports, therefore, what should

have been simply required in the instant matter, issuance of instructions or directions, to be issued by respondent No.1 to its local agent, M/s. Shipshape (Pvt) Ltd., to allow release of cargo by simply issuing a delivery order to the appellant. In fact no letter of guarantee or indemnity through any Bank is required in the instant case for the reasons as stated above, and at the most a personal undertaking or indemnity by the appellant through its authorized person would have sufficed. However, unfortunately this has not been done and the goods are withheld at the outer anchorage of the port since its arrival i.e. 23.7.2013, without giving any consideration to the fact that these goods belong to the poor and needy people of Afghanistan. In view of hereinabove we are of the view that the impugned order cannot be sustained and accordingly is hereby set aside and the instant appeal is allowed in the following terms;

- a. The delivery of the subject goods loaded on vessel MV “Beacon SW”, be allowed and handed over to the appellant immediately and without any further delay for onward transit to Afghanistan by the Port Qasim Authority or any other authority which is acting as the custodian of the goods in question, subject to fulfillment of formalities as are required for such transit with the Customs authorities.
- b. The local shipping agent of the Respondent No 1, M/s Shipshape (Pvt) Limited, is hereby directed to issue necessary delivery order or release instructions for compliance of the above;

- c. However, the appellant, shall, as an abundant precaution execute a personal bond before the Nazir of this court for the total invoice value of the goods i.e. USD 6, 70,665.43 to the effect that, if any claim is lodged either by the shipper or the consignee of the goods contrary to the case of the appellant, the appellant shall be liable for such claim or compensation which shall not exceed the value of the goods i.e. USD 6, 70,665.43. Such bond shall be valid for a period of 60 days from the date of this order and shall automatically stands discharged after expiry of the said period without notice, if no claim is lodged with the Nazir of this court;

13. The appeal stand disposed of as above. Order accordingly.

Dated: 23.12.2013

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