

IN THE HIGH COURT OF SINDH AT KARACHI

ADM. APPEAL NO. 5 /2006

Present:

Mr. Justice Sajjad Ali Shah.

Mr. Justice Muhammad Junaid Ghaffar.

Bourbon Maritime (Pvt) Limited ----- Appellant

Versus

M.V. Salaj & others ----- Respondents

Date of hearing: 17.09.2015

Date of judgment: 17.09.2015

Appellant: Through Mr. Agha Zafar Advocate.

Respondent Through Mr. Abdul Razzak Advocate.

J U D G M E N T

Muhammad Junaid Ghaffar, J. Through instant appeal, the appellant has impugned judgment dated 16.10.2006 passed by a learned Single Judge of this Court under the Admiralty Jurisdiction, whereby, in addition to decreeing the Suit of appellant (bearing Admiralty Suit No. 14 of 1998) has also decreed the Suit of respondent No.2 bearing Admiralty Suit No. 7 of 2000 whereby, it has been held that the claim of respondent No.2 will have preference over the claim of other decree holders including appellant.

2. Briefly the facts as stated in the Memo of Appeal are that the appellant had filed Suit No. 14 of 1998 under Section 3 of the Admiralty Jurisdiction of High Courts Ordinance, 1980 against respondent No. 1 / Vessel as according to the appellant there were certain dues and expenses incurred by the appellant on behalf of respondent No.1 including payment of dues to respondent No.2. It further appears that

prior to this, another Suit bearing No. 1254 of 1997 was filed by respondent No.4 against respondent No.1 and vide order dated 3.10.1997 the Vessel was arrested. Thereafter some other Suits were also filed under the Admiralty Jurisdiction against the same Vessel; however, those are not relevant to the present controversy. In short, the Vessel which was arrested in Suit No. 1254 of 1997 was put to auction by the Court through the Official Assignee on 24.8.1999, and on 12.1.2000 the sale in the sum of Rs. 17,700,786/- was confirmed. It also appears that respondent No.2 had also filed a Suit No. 07 of 2000 under the Admiralty Jurisdiction against respondent No.1 and through impugned judgment all these Suits have been decided including the Suit of the appellant which has been decreed in the sum of Rs. 9,065,871/- as against its claim of Rs. 14,694,821/-. Similarly, the Suit of respondent No.2 has been decreed in the sum of Rs. 18,159,873/- and it has been held that since the decretal amount is more than the sum realized from the sale of respondent No.1 amounting to Rs. 17,700,786/- and since the claim of respondent No.2 enjoys priority over other claims made in the connected Suits, the Official Assignee was directed to release the entire amount of Rs. 17,700,786/- along with accrued profit earned thereof in favour of respondent No.2. The appellant being aggrieved with grant of lessor amount through the decree, as well as the amount of decree in favour of respondent No. 2 including the claim of priority has impugned the same through instant appeal.

3. Counsel for the appellant has contended that the dues of the Port Authority i.e. respondent No.2 does not fall within the Admiralty Jurisdiction of this Court under Section 3 of the Ordinance, 1980 therefore, the Suit filed by respondent No.2 against respondent No.1 was not maintainable. Counsel has further contended that the claim of respondent No.2 cannot have any priority as against the claim of other plaintiffs as well as the appellant before this Court. It has been further contended by the Counsel that at the most, respondent No.2 could have been paid the principal amount realized from the sale of respondent No.1, whereas, the profit earned on such amount should have been distributed amongst other claimants and the appellant on Pro Rata basis. Learned Counsel has further contended that respondent No.2 should have invoked the provisions of Port Qasim Authority Act, 1973, for detaining or

attaching the vessel and cannot exercise or seek recovery of their dues under the Admiralty Jurisdiction of this Court. On merits, the learned Counsel has contended that the learned Single Judge has failed to properly examine the claim of the appellant, especially in respect of necessary supplies provided to respondent No.1. In support of his contention Counsel has relied upon the case of *Hong Kong Finance Limited Vs. m.v. Asian Queen through Nazir High Court (PLD 1991 SC 1021)*, *Muhammad Bashir Butt V. M.V. Taheri (PLD 1980 KARACHI 458)*, *Twaha Vs. The Master m. v. Asian Queen and 2 others (PLD 1982 KARACHI 749)*, and *British Transport Docks Board V. Owners of the Proceeds of Sale of the Steamships or Vessels Charger, Probe, Vigia, Dideki, Surveyor, Constellation, Errol and Regency and owners of the Steamships or Vessels Vaseran and Pursuit [1968] 1 W.L.R.*

4. Conversely, Counsel for respondent No.2 has raised a preliminary objection with regard to maintainability of instant appeal and has contended that the appellant has no right to challenge the Judgment and Decree passed in favour of respondent No.2 by the learned Single Judge as the appellant is neither, nor could have been aggrieved by such order. Counsel has further contended that without prejudice to this legal objection, even otherwise the claim of respondent No.2 being a Port Authority falls within the Admiralty Jurisdiction of this Court under the Ordinance, 1980 whereas, the claim of respondent No.2 has a priority as against other claimants. In support of his contention Counsel has relied upon the cases of *Q.E.B. Insurance Limited Vs. The Trustees of the Port of Karachi (through Chairman and others) (1992 CLC 904)*, *ICICI Limited V. Board of Trustees, Port of Calcutta (2005) 10 Supreme Court Cases 284*, *M/s Maratos & Co. Vs. Rice Trader and 2 others (PLD 1989 Karachi 94)* and *SEMCO Salvage PTE. Ltd. Vs. m.v. Kaptan Yusuf Kalka Van through Person Incharge and another (PLD 1994 Quetta 51)*.

5. We have heard the Counsel and perused the record including R&P. By consent instant appeal is being finally disposed of at Katcha Peshi stage. Insofar as facts are concerned, they need not be repeated, except that Suit of various parties/claimants against Respondent No.1 (M.V. SALAJ), including that of the appellant as well as Respondent No.2 have been decreed, whereas, claim of Respondent No.2 has been given priority as against other claimants. The Suit of the appellant has been decreed

for a lesser amount than as claimed, and present appeal has been filed against such decretal of Suit for a lesser amount, as well as challenge to the judgment and decree in favor of Respondent No.2, and additionally, according priority to the claim of Respondent No.2 as against over other claimants. Further and importantly too, no other decree holder or for that matter judgment debtor has impugned the order in question.

6. In order to dilate upon the first objection with regard to the question that whether the claim of respondent No.2, falls within the Admiralty Jurisdiction of this Court under the Ordinance, 1980 or not, it would be advantageous to refer to Section 3(2)(m) which reads as under:-

3. Admiralty jurisdiction of the High Court. (1) The Sind High Court and the High Court of Baluchistan shall have and exercise, within their respective territorial jurisdiction, Admiralty jurisdiction as is in this Ordinance provided and the Lahore High Court and the Peshawar High Court shall, within their respective territorial jurisdiction, have and exercise the said jurisdiction in cases in which any claim relating to aircraft is to be determined.

(2) The Admiralty jurisdiction of the High Court shall be as follows, that is to say, jurisdiction to hear and determine any of the following causes, questions or claims---

“(m) any claim in respect of the construction, repair or equipment of a ship or **dock charges** or **dues;**” (emphasis supplied)

7. The case of the appellant appears to be that the claim of Respondent No.2 could not have been adjudicated / entertained by this Court, under its Admiralty jurisdiction but could have been decided only under its original civil jurisdiction. From perusal of the aforesaid provision, it reflects that this Court shall have and exercise within its territorial jurisdiction, Admiralty jurisdiction, that is to say, jurisdiction to hear and determine any of the causes, questions, or claim mentioned in subsection (2) of Section 3 of the Ordinance, 1980 whereas, clause (m) refers to any claim in respect of the construction, repair or equipment of a ship or dock charges or dues. Counsel for the appellant contended that firstly clause (m) does not cover the Port charges and it is only in respect of dock charges, and, further that should also be only in respect of any equipment which has been brought for construction or repair of a ship and not in respect of ships which are normally birthed or anchored within the port area. However, on a plain reading of the aforesaid provision we are not inclined to agree with such contention, as in our view clause (m) covers the claim of the Port Authority accrued in respect

of the birthing of ship and provision of other facilities. Here the word “or” in between *ship* and *dock charges* is to be read disjunctively (i.e. “*any claim in respect of dock charges or dues*”) and not conjunctively, as suggested on behalf of the appellant. Any other conclusion by treating the word “or” as “and” does not appeal to our minds. The clause as we read starts with “*any claim.....*” and that is in respect of either “*construction of a ship*”, “*repair of a ship*” and “*equipment of a ship*” and then “***any claim in respect of dock charges or dues***”. This is how we see and read it.

8. Insofar as the use of the words dock charges is concerned, we may refer to the definition clause under the 1980 Ordinance which provides in Section 2(i) that “*Port*” means *any port, harbor, river, estuary, haven, dock etc* whereas, the definition of “charges” provided in Section 2(b) includes *all charges including light dues, local light dues or any other charges in respect of lighthouses, buoys, beacons or pilot-age*. Therefore, in our opinion the claim of respondent No.2 in respect of the port dues falls within the Admiralty Jurisdiction as provided in Section 3(2)(m) of the 1980 Ordinance as rightly held by the learned Single Judge and such objection of the appellant in this regard being misconceived is hereby repelled.

9. Insofar as the other contention of the Counsel for the appellant with regard to the priority of claim of respondent No.2, acknowledged by the learned Single Judge is concerned, though we are of the opinion that the appellant in the instant matter cannot agitate a decree issued in favour of respondent No.2, whereby, firstly the claim of respondent No.2 has been accepted under the Admiralty Jurisdiction of this Court, and, secondly, such claim of respondent No.2 has been accorded priority over the claims of other decree holders, as in fact, the appellant itself is in possession of a decree in its favour and could have only agitated the rejection or reduction of its entire claim by the learned Single Judge, and, not with regard to what has been allowed to others. Notwithstanding such observations, we have examined the other objections so raised on behalf of the appellant and are of the view that none of them is sustainable. Insofar as the objection with regard to invoking the provision of Section 23 of the Port Qasim Act, 1973, is concerned, we may observe that in fact under Section 21 of the Act, 1973, the respondent No.2, to

recover its lawful dues and demands, can arrest the Vessel on its own, and such arrested vessel can be sold and proceeds of such sales may be utilized for specified claim of respondent No.2. Such Authority and power is in fact a statutory lien under the Port Qasim Act 1973, and the provision of Section 21 appears to be independent and in addition, to Section-23 which is an alternative to such powers exercisable under Section 21 *ibid*. It would be advantageous to refer to these two sections which read as under:

21. Power to distrain vessels for non-payment of rates, etc.- (1) If the master of any vessel in respect of which any tolls, dues, rates, charges or penalties shall be payable under this Act, or any bye-laws made there under, refuses or neglects to pay the same or any part thereof on demand, it shall be lawful for the Board to distrain or arrest of its own authority such vessels, and the tackle, apparel or furniture belonging thereto, or any part thereof and detain the same until the amount so due shall be paid.

(2) In case any part of the said rates or penalties, or of the costs of the distress or arrest or of the keeping of the same, shall remain unpaid for a period of fifteen days next after any such distress or arrest shall have been so made the Board may cause the vessel, or other thing so distrained or arrested, to be sold, and with the proceeds of such sale may satisfy such tolls, dues, rates, charges or penalties and cost of sale remaining unpaid, rendering the surplus, if any, to the master of such vessel on demand.

23. Alternative remedy by suit.- Notwithstanding anything contained in sections 15, 16, 17, 18, 19, 20, 21 and 22, the Board may recover by suit any tolls, dues, rates, charges, damages, expenses, costs, or in case of sale the balance thereof, when the proceeds of sale are insufficient or any penalties or fines payable to or recoverable by the Board under this Act or under any bye-laws made there under.

Perusal of the aforesaid provision reflects that it is a paramount right of respondent No.2 conferred by the statute and in our view, overrides the claim of all other creditors or decree holder(s) including secured creditors, whereas, though the vessel in question has been sold by the Official Assignee of this Court, however, such sale and release of the vessel cannot have been executed without consent of respondent No.2. It would suffice to observe that since the vessel in question was already under arrest by orders of this Court dated 03.10.1997 passed in Suit No. 1254 of 1997 filed by respondent No.4, there was no need for respondent No.2 to invoke any of such provisions of the Port Qasim Act 1973, for recovery of its dues and port charges. Such authority can be exercised by respondent No.2 in situations, wherein a vessel arrives at the port and does not pay its charges, whereas, in the instant matter the vessel was already under arrest by the orders of this Court, therefore, there was no need for respondent No.2 to exercise any such powers as conferred either by Section 21 or 23 of the Port Qasim Act, 1973, as contended by the Counsel for the appellant. Perusal of the record further

reflects that when the order for sale of confirmation was passed on 12.1.2000, at the request of Official Assignee, it was observed that the Official Assignee shall intimate Port Qasim Authority (Respondent No.2) to submit their claims whatsoever in the Court for settlement according to law. It is also a matter of record that after the Vessel was sold, the Respondent No.2 had not allowed release of the same, pending settlement of its dues, whereafter a show cause notice was also issued to the Chairman of the Port Authority, and subsequently the Vessel was allowed sailing. In these circumstances it cannot be said that Respondent No.2 had not exercised its right in terms of the Port Qasim Act, 1973, and thus was not entitled for settlement of its claim under the Admiralty jurisdiction. In fact the Vessel could not have been sold or delivered to the auction purchaser, without first settling the dues of Respondent No.2, hence it appears to be an absurd proposition that on the one hand the Respondent No.2 allows sailing of the Vessel on the orders of Court/ Official Assignee, and on the other, is deprived from recovery of its dues for not having exercised its lien or authority in terms of Port Qasim Act, 1973, but under Admiralty jurisdiction. In our view once the Vessel was already under arrest, the Respondent No.2 was neither required nor it would have been appropriate for it to detain any such Vessel or by invoking the ordinary civil jurisdiction of this Court under Section 9 CPC as contended by the Counsel for the appellant. Reliance in this regard may be placed on a judgment of a learned Single Judge of this Court in the case of **Muhammad Bashir Butt V. M.V. Taheri (PLD 1980 KARACHI 458)** who while dealing with Section 52 of the Karachi Port Trust Act, which is pari materia to Section 21 of the Port Qasim Act, 1973, has been pleased to hold that the Karachi Port Trust is entitled to have its claim satisfied before other claims are considered. The relevant finding is as under:-

“It will therefore, be seen that the Karachi Port Trust has more than a statutory right of lien. It has also the right to distrain or arrest a vessel for nonpayment of tolls, dues, etc. and to sell the same and out of the sale proceeds thereof adjust its dues.

The exercise of statutory power of sale by the Karachi Port Trust for reimbursement of tolls dues, in view of the above quoted provisions is, therefore not within the ambit of priorities. I am fortified in my view by the following statement, contained in paragraph 1573 of the British Shipping Laws, Volume I, and 1964 Edition:

- “(l) The exercise of a statutory power of sale for the reimbursement of a harbor or dock authority, e.g., under the Harbours, Docks and Fiers Clauses Act, 1847, or the authority’s own Act if it contains suitable provisions, is not within the ambit of priorities.”

This right was fully recognized by the Courts in England where more or the less a similar provision existed in Sections 248 and 253 of the Mersey Dock Acts Consolidation Act, 1858.”

10. Reference may also be made to the case of **Ashoke Arya V. M.V. “Kapitan Mitos” (AIR 1988 Bombay 329)**, wherein a notice of motion was taken out by the plaintiff seeking declaration that he has priority for his decretal claim against sale of Vessel, and in the alternative, his claim ranks pari passu with the claim of the Trustee of the Port of Bombay (B.P.T) for anchorage fees in respect of the such Vessel. A learned Single Judge of the Bombay High Court ruled as under;

20. The B.P.T. was honour bound not to contend with the Sheriff but to surrender the said vessel to him as the representative of the Court and to let him sell her under the Court’s directions. It was then the duty of the Court to protect the interests of the B.P.T. and to put in the same position as if it had sold the said vessel itself under its powers under the Act. In permitting the said vessel to be sold by the Sheriff, the B.P.T. did not forgo its lien thereon or its right to have the sale proceeds applied towards the satisfaction of its dues in priority to all other claims thereon.
21. The B.P.T., in acting as it did, followed an established Admiralty practice which is of immense advantage to all those who have claims upon a vessel, for it ensures a sale thereof, at a fair price, by and under the direction of the Admiralty Court.
22. The B.P.T. is entitled to be paid the amount of its claim, being Rs.9,10,031.25, out of the sale proceeds of the said vessel lying in Court in priority to any other claim thereto. If the sale proceeds have been invested, the B.P.T is entitled to the payment of the proportionate accrued interest.

11. The aforesaid judgment was cited with approval by the Indian Supreme Court in the case of **Board of Trustees, Port of Mumbai V. Indian Oil Corporation and another (AIR 1998 SC 1878)** in the following manner:

10. The statutory right under Section 64 embodies this overriding right of the harbor authority over the vessel for the recovery of its dues. This right stands above the rights of secured and unsecured creditors of a company in winding up---in the present case, the shipping company which owns the vessel. The harbor authorities allow ships---national or foreign to anchor and avail of the services provided by them. For payment they look to the vessel. The owner may be foreign or even unknown to the harbor authority. The latter’s right to recover its dues is not affected by any pending proceedings against the owner in any Court-whether in winding up or otherwise. The harbor authority can arrest the vessel while it is anchored in the harbor and recover it dues in respect of that vessel by sale of the vessel if the dues are not paid. This lien of the harbor authority over the vessel is paramount. The lien cannot be extinguished or the vessel sold by any authority under the directions of the Court or otherwise, unless the harbor authority consents to such sale. Thus, in the case of *Ashok Arya v. M.V. Kapitan Mitsos, AIR 1988 Bom 329*, the

Bombay High Court relied upon the decision in *The Emilie Millon (infra)* [1905 (2) KB 817] and held that the lien given by statute to a dock or harbor authority cannot be extinguished by Court unless it be done with the authority's express or implied consent.

12. In the instant matter it has come on record that Respondent No.2 had initially refused to allow the Vessel to leave the port, and it was only after a show cause notice was issued on a reference by the Official Assignee that it was allowed sailing. In "***The Tergeste***" case reported as **(1903) P.D.26 / 19 TLR 63** the issue which came before the Court was that a ship was sold in a wages action and as the proceeds were insufficient to meet the total claims, the question had arisen between the master and crew on the one side and the ship-repairers on the other, as to which should have priority and Phillimore. J. noted that the view which the Admiralty Court took with regard to conflicting claims by shipwrights having a possessory common law lien and claims which had been sustained by process in the Admiralty Court, had been well-established and had been accepted by the Probate Division of the High Court of Justice. The view was that "*it is the duty of the material man not to contend with the Admiralty marshal; to surrender the ship to the officer of the Court, and let the officer of the Court, under the order of the Court, remove and sell her; but when he has done that, the Court undertakes that he shall be protected, and that he shall be put exactly in the same position as if he had not surrendered the ship to the marshal.*"

13. In this connection we would also like to refer to the case of ***ICICI Limited V. Board of Trustees, Port of Calcutta (2005) 10 Supreme Court Cases 284*** wherein the Supreme Court of India while dealing with the question, that whether the Port authority had any claim / lien on the proceeds realized by sale of a vessel under the Admiralty Jurisdiction has been pleased to hold that such claim has to be accorded priority. The case of the appellant before the Supreme Court was that under Section 64 of the Major Port Trusts Act, the authority had a right of arrest and sale and if such right was not exercised, then they lost their right to claim any priority. It was further argued on behalf of the appellant that the right of lien which the Port Trust had against the vessel does not get attached to the sale proceeds of the vessel. The relevant observation of the Indian Supreme Court is as under:-

14. The Calcutta High Court has based the impugned judgment on this authority. We are in agreement with the view that by virtue of this authority the Port Trust would have priority over the appellant.

15. It was, however, submitted that both, in the case before the Bombay High Court as well as in the abovementioned authority, the right of the Port Trust was upheld because they had already arrested the ship. It was submitted that if the ship had not been arrested and/or if the Port Trust allows the ship to be sold then on the principle laid down in Charger case the Port Trust would have lost its remedy and rights under Section 64.

16. We are unable to accept this submission. On facts of this case it cannot be said that the Port Trust had given up their right under Section 64. As has been pointed out hereinabove, the Port Trust had intervened in the admiralty suit in Calcutta and had sought leave to exercise their rights under Section 64(2) of the Major Port Trusts Act. This showed that the Port Trust had not given up their rights and were insisting on their rights. They had merely permitted sale and delivery of vessel in pursuance of the established admiralty practice. Merely because they did not enter into a conflict with the Court and surrendered the vessel to the representative of the Court did not mean that they lost their right. It then becomes duty of the Court to protect the interest of the Port Trust and to put it in the same position as if they had sold the vehicle themselves under their powers.”

14. In view of hereinabove discussion as well as facts and circumstances of the instant case, we are of the opinion that the appellant has failed to point out any illegality in the impugned order which in our view is unexceptionable and does not warrant any interference by this Court. In such circumstances we had dismissed instant appeal through a short order on 17.09.2015 and above are the reasons for such dismissal.

JUDGE

JUDGE