

2011 (0) GLHEL-HC 224644

GUJARAT HIGH COURT

Hon'ble Judges: Anant S. Dave, J.

Unique Trading Co Versus M.T. Johar Ex-vukovar (And Her Owner And All Other Persons)

ADMIRALTY SUIT No. 2 of 2011 ;

O.J. CIVIL APPLICATION No. 78 of 2011 ; *J. Date :- FEBRUARY 23, 2011

- [ARBITRATION AND CONCILIATION ACT, 1996](#)
- GENEVA CONVENTION OF 1999 Article - 1(v)

Arbitration and Conciliation Act, 1996 - Geneva Convention of 1999 - Art. 1(v) - invocation of admiralty jurisdiction - sought for order that pending commencement, conclusion and disposal of arbitration proceedings, defendant no. 1 vessel be arrested - and that same ordered to be sold along with her machinery and same be condemned in respect of claim in said arbitration proceeding pending between parties - however, dispute arose out of contract/agreement/MOA dated 11-12-2010 entered into between plaintiff and defendant No. 2, but the same was not in realm of public law character - as a consequence of suit filed on the basis of maritime claim in terms of Art. 1(v) of Convention of 1999, was merit-less since suit was not maintainable - held, said finding is consistent and in conformity with decision of this Court dated 24-1-2011 rendered in Admiralty Suit and confirmed by Division Bench in appeal - therefore, arguments of plaintiff on basis of merit of dispute of contract are not to be gone into by this Court in exercise of admiralty jurisdiction - suit dismissed - application disposed of.

Imp. Para: [[8](#)] [[9](#)] [[10](#)]

Cases Referred to :

1. [Dudhia Forest Cooperative Society V/s. Mohamed & Co., 1980 0 GLR 272 : 1979 GLHEL HC 203273](#)
2. Liverpool And London S.P. & I Association Limited V/s. M.V. Sea Success I And Another, 2004 9 SCC 512

Equivalent Citation(s):

2011 JX(Guj) 211 : 2011 GLHEL_HC 224644

JUDGMENT :-

1 Plaintiff has invoked admiralty jurisdiction of this Court with a prayer to order that, pending the commencement, conclusion and disposal of arbitration proceedings, defendant No.1-vessel M.T Johar Ex-Vukovar be arrested. It is further prayed that defendant No.1-vessel M.T Johar Ex-Vukovar be ordered to be sold along with her hull, engines, gears, tackles, bunkers, machinery, apparel, plant, furnitures, fixtures, appurtenances and

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paraphernalia and the same be condemned in respect of the claim in the arbitration proceeding pending between the parties.

2 Initially, the plaintiff as well as the defendants filed Civil Application No.96 of 2011 and Civil Application No.88 of 2011 and both the applications came to be disposed of by this Court by order dated 9th February 2011 considering the statement of Mr. Mihir Thakore, learned Senior Advocate, that the inter-se claims made by the parties, viz. the plaintiff as well as the defendants shall be referred to arbitrator as per clause 8 of the Memorandum of Agreement [MOA] dated 11.12.2010 and the plaintiff was permitted to amend the prayer clause.

3 Along with the plaint, the plaintiff has annexed list of documents containing MOA dated 11.12.2010, Letter of Credit opened on 14.12.2010, compilation of e-mails exchanged between the plaintiff and defendant No.2, Notice of Readiness dated 21.12.2010 issued by defendant No.2, the plaintiffs letter dated 21.12.2010 to defendant No.2, MOA dated 11.12.2010 entered into by the plaintiff for purchase of new vessel.

4 It is the say of the plaintiff that defendant No.1-vessel M.T Johar Ex-Vukovar is registered under the Zanzibar flag until deletion and, later on, the MOA in respect of the vessel dated 11.12.2010 was amended and it was registered under the Pakistan flag. Pursuant to negotiation between the plaintiff and defendant No.2 for sale of defendant No.1-vessel M.T Johar Ex-Vukovar by defendant No.2 in favour of the plaintiff, the parties entered into MOA dated 11.12.2010 for the sale of defendant No.1-vessel M.T Johar Ex-Vukovar to the plaintiff at the rate of USD 486 per LT. It is the further case of the plaintiff that, as per the terms of MOA dated 11.12.2010, the light displacement tonnage (LDT) of the vessel was agreed to be 15,636 MT and the vessel was to be delivered at Karachi/Gadani Anchorage in Pakistan between 15.12.2010 and 24.12.2010. Defendant No.2 was required to tender Notice of Readiness (NOR) to the plaintiff as and when the vessel was ready for delivery and, along with the vessel, defendant No.2-seller was required to provide amongst other documents an original Trim and Stability Booklet (TSB). Accordingly, the plaintiff opened Letter of Credit on 14.12.2010 and requested the agent of defendant No.2 to provide Trim and Stability Booklet (TSB) when the said booklet, purporting to be the original Trim and Stability Booklet (TSB), provided weight of defendant No.1-vessel M.T Johar Ex-Vukovar only 15,463 MT instead of 15,636 MT as agreed upon under MOA dated 11.12.2010 and the plaintiff, who examined Trim and Stability Booklet (TSB), found that a few pages were not numbered and found to be tampered with. In the meanwhile, exchange of communication in the form of e-mail between the parties took place. On 21.12.2010, defendant No.2 issued a notice of readiness along with only one page of Trim and Stability Booklet (TSB) showing the weight to be 15,636 MT and, therefore, the plaintiff on the very day i.e. 21.12.2010 informed defendant No.2 that NOR was not as per the MOA and that there were deficiencies and LTD was not as per MOA dated 11.12.2010 and the plaintiff requested defendant No.2 and the Chairman of Pakistan Ship-breakers Association to resolve the disputes amicably. The plaintiff suffered losses owing to the default committed by defendant No.2 in delivering defendant No.1-vessel M.T Johar Ex-Vukovar in accordance with the terms and conditions of MOA dated 11.12.2010 and, therefore, a claim is made in this plaint to award USD 3,78,614 with interest @ 18% per annum from the date of filing the suit till the date of realization against the defendants.

5 Mr. Mihir Thakore, learned Senior Advocate appearing for the plaintiff, has taken this Court to various factual aspects as recorded in the foregoing paragraphs and submitted that

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the plaintiff was justified in not taking delivery of defendant No.1-vessel in as much as LTD of defendant No.1-vessel was not as per MOA dated 11.12.2010 and no original documents including Trim and Stability Booklet (TSB) was placed for the perusal of the plaintiff. It is further stated that prior to NOR, various correspondence took place and, in no uncertain terms, the plaintiff had pointed out shortfall/deficiency and non-compliance of MOA dated 11.12.2010. Therefore, it cannot be said that the plaintiff has repudiated the contract and only it is a case of refusal to take delivery since defendant No.1-vessel was not as per the description mentioned in MOA dated 11.12.2010.

5.1 The learned Senior Advocate appearing for the plaintiff has placed reliance on the provisions of Section 15 of the Sale of Goods Act, 1930 and submitted that the sale of the vessel was by description and, therefore, the action taken by the plaintiff against the seller was for breach of warranty in diminution or extinction of the price as per remedy for breach of warranty provided under Section 59 of the said Act. As regards pending proceeding of arbitration, it is submitted that there is no bar for this Court to exercise admiralty jurisdiction with regard to maritime claim in spite of the fact that the arbitration proceedings are pending. It is submitted that the claim made in this suit cannot be realized or even if any award that may be passed in the arbitral proceeding cannot be enforced against defendant No.2 which has weak financial infrastructure and assets as shown in the certificate which referred to cash transaction only.

6 At the outset, Mr. K.S. Nanavati, learned Senior Counsel appearing for the defendants has raised a preliminary contention as to maintainability of the suit in its present form under the Admiralty jurisdiction of this Court and relied upon the decision dated 24.1.2011 of this Court in Admiralty Suit No.10 of 2010, confirmed by a Division Bench of this Court in O.J. Appeal No.6 of 2011, vide CAV Judgment dated 17th February 2011, and submitted that there is no maritime claim and International Convention on the arrest of Ships, Geneva, dated March 12, 1999, which mentions about a dispute arising out of contract and sale of a ship, is a Convention not ratified by the countries which participated in the Convention and, in any case, such Convention is not binding to this country since India was not a signatory. Even no domestic law is enacted by the Parliament to carry out effect and consequence of the Convention and, in absence thereof, the maritime claim as raised does not require any adjudication by this Court. Without admitting anything to the contrary, alternatively, it is submitted that, in the case of Liverpool and London S.P. & I Association Limited vs. M.V. Sea Success I and another, reported in (2004) 9 SCC 512, the Apex Court, while considering the factual aspects of Geneva Convention of 1999, ultimately, in paragraph 60, held that application of 1999 Convention in process of interpretative changes would be subject to [i] domestic law which may be enacted by the Parliament and [ii] it should be applied only for enforcement of a contract involving public law character. In this suit, the pleadings, subject matter and nature of prayer do not satisfy either of the above conditions and the suit deserves to be rejected on this preliminary ground alone.

6.1 On merits also, Mr. K.S. Nanavaty, learned Senior Advocate for the defendants has resisted the suit on the ground that, since, in view of clause 8 of MOA dated 11.12.2010 with regard to arbitration, the defendants have filed an application under Section 45 of the Arbitration & Conciliation Act, 1996 for reference of disputes to arbitration, no relief, as claimed, can be granted to the plaintiff. The learned Senior Advocate for the defendants has also pointed out the fact that defendant No.1-vessel M.T Johar Ex-Vukovar was sold by Pakistan National Shipping Corporation, an undertaking of Pakistan Government, which mentioned LDT of the vessel as 15636

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MT and the said weight was shown in MOA dated 11.12.2010 executed with the plaintiff by defendant No.2. The plaintiff accepted the vessel without inspection and the sale of the vessel was definite and outright. The Notice of Readiness (NOR) was served along with Trim and Stability Booklet (TSB) and, according to defendant No.2, on account of refusal to take delivery on the part of the plaintiff, no loss can be attributed to the defendants. The learned Senior Advocate for the defendants has relied upon certain documents including minutes of meeting dated 18.12.2010 held between the agent of defendant No.2 where it was unanimously agreed that the weight of the vessel was 15650 MT, Certificate issued by ships classification society Bureau Veritas dated 18.12.2010 certifying that the lightweight of the vessel is 15650 MT, and certificate issued by American Bureau of Shipping dated 17.12.2010 certifying the LDT to be 15636 MT, dead-weight calculation by the builders of the vessel dated 21.6.1982 and e-mail dated 20.12.2010 all relating to weight of the vessel as 15636 Mt. Since the plaintiff refused to take delivery, defendant No.1-vessel sailed to Alang and at present lying at Alang Anchorage.

6.2 The learned Senior Advocate for the defendants has vehemently urged that, for the difference in the LDT to the extent of mere 173 MT, the plaintiff is not justified in repudiating the contract and the conduct of the plaintiff disentitles it from claiming any relief from this Court. It is further submitted that defendant No.2 has several assets and it is registered in the State of Texas, USA, and having good business reputation and the certificate issued by State of New Jersey, Department of Treasury, certifying good standing of defendant No.2 and, therefore, any claim in the nature of present one can be realized of a decree or award being passed and, therefore also, the admiralty jurisdiction of this Court is not to be exercised. The learned Senior Advocate for the defendants has also disputed that the Letter of Credit was opened in accordance with MOA dated 11.12.2010 and clause 49 of the Letter of Credit did not contain such confirmation as required by authorized financial institution and it contains several discrepancies. Even after negotiation and entering into correspondence/communication, the dispute was sought to be resolved, but failed and, therefore, the plaintiff cannot be permitted to take advantage of its own wrong under the admiralty jurisdiction of this Court.

6.3 Mr. K.S. Nanavati, learned Senior Advocate appearing for the defendants has further contended that the plaintiff has invoked admiralty jurisdiction of this Court by placing its claim as maritime claim and the only dispute, if any, was about difference of LTD of the vessel around 173 MT and, as per the terms of MOA dated 11.12.2010, the plaintiff was duty bound and under obligation to accept delivery of the vessel and, for shortfall or lacuna, if any, as per MOA dated 11.12.2010, the plaintiff could have taken appropriate recourse in accordance with law. The action of the plaintiff is nothing, but a deliberate breach of contract and the conduct of the plaintiff has genesis in the international market about sale and purchase of the vessel which came down and, to take advantage of such situation, the plaintiff refused to take delivery of the vessel. The learned Senior Advocate appearing for the defendants has also relied upon requirement of issuance of NOR and the reply submitted by the plaintiff on the same day, i.e. 21.12.2010, and, while relying upon the provisions of Order 39 Rule 5 of the Code of Civil Procedure, it is submitted that no such eventuality arises and no arrest order is necessary. The learned Senior Advocate appearing for the defendants has also relied upon Section 37 of the Sale of Goods Act, 1930 with regard to delivery of wrong quantity and the decision of this Court reported in 1980 GLR 272 [Dudhia

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Forest Cooperative Society vs. Mohamed & Co.] in the context of Section 37 and submitted that the difference in quantity is not substantial difference and, therefore, the buyer is not justified in resorting to Section 37(1) of the said Act. It is next submitted that, in any case, the plaintiff has no maritime claim and, for a dispute arising out of contract of sale of the vessel, it is at the most a claim for which ordinary civil remedy may be available and taken recourse of, but, in no circumstances, it is in the realm of public law character as held in paragraph 60 of the judgment of the Apex Court in the case of Liverpool [supra]. It is, therefore, submitted that the present suit may be rejected with costs.

7 In rejoinder, Mr. Mihir Thakore, learned Senior Advocate appearing for the plaintiff, has emphasized and tried to distinguish the nature of public law contract and submitted that, since the remedy is taken under the Arbitration and Conciliation Act, 1996, subject of the plaintiff, the pleading of the suit and the prayer have nexus with the provisions of the Arbitration and Conciliation Act, 1996, and that the nature of the suit and the dispute arising out of the contract cannot be said to be a contract arising out of private law and the suit is maintainable in view of the judgment of the Apex Court in the case of Liverpool [supra]. It is further submitted that even International Convention of Brazil of 1952, to which India was not a signatory, was accepted and applied with regard to maritime claim vis-?-vis admiralty jurisdiction and, though various heads of maritime claim being no public law character, but still the Courts exercising admiralty jurisdiction have considered the Convention of 1952 and exercised admiralty jurisdiction.

7.1 Mr. Mihir Thakore, learned Senior Advocate, appearing for the plaintiff, has relied on Article 7 of 1952 Convention with regard to jurisdiction of the Courts of the country in which the arrest was made with regard to determining the case upon merits on certain conditions. Thus, it is submitted that even after the decision of the Apex Court in the case of Liverpool [supra] and this Court in Admiralty Suit No.10 of 2010, confirmed in O.J. Appeal No.6 of 2011, this Court has jurisdiction with regard to maritime claim raised in the plaint and the suit may be decided accordingly. It is further submitted by the learned Senior Advocate for the plaintiff that this Court can refer the issue to a Larger Bench for examining applicability of Geneva Convention of 1999 vis-a-vis the law laid down by the Apex Court in the case of Liverpool [supra] restricting only for the enforcement of contract involving public law character.

8 Having heard the learned counsel for both the parties and on perusal of the record and the judgments cited and referred by both the parties, it is necessary to consider the preliminary contention as to maintainability of the suit in its present form under the Admiralty jurisdiction of this Court in view of the judgment dated 17th February 2011 passed by a Division Bench of this Court in O.J. Appeal No.6 of 2011 confirming the decision dated 24.1.2011 of this Court in Admiralty Suit No.10 of 2010. In the above case, similar issue arose about maritime claim arising out of dispute of contract of sale of a vessel and applicability of Geneva Convention of 1999. After examining various aspects and the decision of the Apex Court in the case of Liverpool [supra] vis-a-vis Article 1(v), Article 2(3) and Article 3(2) of Geneva Convention of 1999, a Division Bench, in paragraphs 10, 11 and 12 in the above decision, held as under:

10. We may only record that in the case of Liverpool and London S.P. & I Association Limited V/s. M.V. Sea Success I and Another (supra), the Apex Court on the aspects of Convention has recorded at para 43 about the ratification of the

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Convention of 1999 by various countries and, therefore, it is not possible for us to entertain the contention that the Convention of 1999 is not in force or not ratified by the requisite number of countries as per Article 14 of the Convention of 1999. However, in the very decision, the Apex Court at paragraphs 59 and 60, has observed thus:-

59. M.V. Elisabeth is an authority for the proposition that the changing global scenario should be kept in mind having regard to the fact that there does not exist any primary act touching the subject and in absence of any domestic legislation to the contrary; if the 1952 Arrest Convention had been applied, although India was not a signatory thereto, there is obviously no reason as to why the 1999 Arrest Convention should not be applied.

60. Application of the 1999 Convention in the process of interpretive changes, however, would be subject to; (1) domestic law which may be enacted by Parliament; and (2) it should be applied only for enforcement of a contract involving public law character. (Emphasis supplied)

11. In view of the above, in the very decision, while observing that 1999 Convention may be applied, it is specifically also observed that the application of such Convention shall be subject to Domestic Law enacted by the Parliament and it should be applied only for the enforcement of contract involving public law character. This means that both the conditions are to be observed while applying the Convention of 1999.

12 The aforesaid leads us to examine the question as to whether the contract in question is involving public law character or not. The contract in question for sale of the particular ship is produced by the plaintiffs themselves with the plaint at Annexure-A and the same is entered into between the plaintiffs and defendant No.3 herein. It is purely a commercial transaction for sale of the ship and, in no way, connected with our nation directly or indirectly, nor is there any operation and/or involvement of the State or any instrumentality of the State as per Article 12 of the Constitution of India. The said contract dated 21.8.2008, upon which the reliance has been placed by the plaintiff, in our view would not attract any public law character, in any manner, whatsoever. In our view, the parameters of the contract involving public law character has to be read as per the legal provisions prevailing in our country. It is by now well settled that the contract may attract public law character, if the State or instrumentality of the State, is directly or indirectly connected therewith in enforcement of the contract or implementation thereof. Further, by virtue of the said contract, if there is any question arises for the sovereignty of the Nation, environment, pollution, dispute of sea water etc., where larger or huge or any public interest is involved, such contract may also attract public law character. We do not find any element of public law character in the present contract in question even if the terms and conditions of the contract agreement are considered as they were.

It is held by a Division Bench that, in the facts and circumstances of the case, since there is no element of public law character in the present contract in question, even if the terms and conditions of the contract are considered as they are, dismissal of the

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suit under Order 7 Rule 11 of the Code of Civil Procedure was held just and proper. A Division Bench also considered other aspects, as argued by the learned Senior Advocate for the plaintiff, on the strength of the decision of the Full Bench of the Bombay High Court in the case of J.C. Ocean Liner LLC V/s. M.V. Golden Progress & Another, reported in 2007 (2) Bombay C.R. 1, and observed in paragraphs 16, 17 and 18, as under:

16. In the decision of Bombay High Court in the case of O.J. Ocean Liner LLC V/s. M.V. Golden Progress & Anr. (supra), the Full Bench of High Court had no occasion to consider the restriction read by the Apex Court expressly at paragraph 60 of the aforesaid decision in the case of Liverpool and London S.P. & I Association Limited V/s. M.V. Sea Success I and Another (supra), nor the Full Bench of High Court had an occasion to consider the matter of limitation provided by Order 38 Rule 1 of CPC as per the law made by the Parliament for the purpose of passing the order of arrest of ship, which is akin to the power of the Civil Court under Order 38 Rule 5 of CPC. Hence, the decision of the Full Bench of the Bombay High Court in the case of O.J. Ocean Liner LLC V/s. M.V. Golden Progress & Anr.(supra), in our view would be of no help to the appellant.

17. Apart from the above, as observed earlier, the Apex Court read at paragraph 60, the limitation for applicability of Convention of 1999, if one of it is not satisfied, 1999 Convention cannot be applied. Even if it is considered for the sake of examination that one may invoke the admiralty jurisdiction for securing the arbitration as observed by the Full Bench of Bombay High Court in the case of O.J. Ocean Liner LLC V/s. M.V. Golden Progress & Anr. (supra), then also the requirement of contract involving public law character as per our Constitution and law prevailing in our country is not satisfied.

18. In view of the aforesaid, we find that as per the aforesaid decision of the Apex Court in the case of Liverpool and London S.P. & I Association Limited V/s. M.V. Sea Success I and Another (supra), as the conditions are not satisfied, no relief can be granted to the plaintiff based on 1999 Convention.

8.1 Thus, a Division Bench noticed that the Full Bench of the Bombay High Court had no occasion to consider the restrictions read by the Apex Court expressly in paragraph 60 of the decision in the case of Liverpool [supra] nor even an occasion to consider the matter of limitation provided by Order 38 Rule 5 of the Code of Civil Procedure.

9 Even the contention of the learned Senior Advocate for the plaintiff about the claim based on the arbitration proceeding and, considering the provisions of the Arbitration and Conciliation Act, 1996, the contract in the present suit is in the realm of public law character, is also meritless in as much as a Division Bench has considered the said issue in O.J. Appeal No.6 of 2011 arising out of Admiralty Suit No.10 of 2010 which was also based on securing a claim based on arbitration. Therefore, now it not open for this Court to again consider the said issue or to refer the case to a Larger Bench.

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10 Further, other issues were also examined by a Division Bench in the said decision in the context of submissions made with regard to arrest of 'sister ship', lifting of corporate veil and beneficial ownership, but, this Court is of the opinion that, in the facts of the present case, when the dispute arises out of a contract/agreement/MOA dated 11.12.2010 entered into between the plaintiff and defendant No.2 and the same is not in the realm of public law character, a suit filed on the basis of maritime claim, as defined in Article 1(v) of Geneva Convention of 1999, is merit-less since the suit is not maintainable. The said finding is consistent and in conformity with what this Court held in the decision dated 24.1.2011 rendered in Admiralty Suit No.10 of 2010, confirmed by a Division Bench vide judgment dated 17th February 2011 in O.J. Appeal No.6 of 2011. Therefore, the other arguments of the learned Senior Advocate for the plaintiff on the basis of the merit of the dispute of the contract are not to be gone into by this Court in exercise of admiralty jurisdiction.

11 In the result, this suit is dismissed with no order as to costs.. Civil Application also stands disposed of.