

(2004) 11 CAL CK 0022

Calcutta High Court

Case No: T. No"s. 425, 430, 457 and 459 of 2004

Liberty Commodities Ltd.

APPELLANT

Vs

LMJ International Ltd. and

RESPONDENT

Another

Date of Decision: Nov. 19, 2004

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 9
- Specific Relief Act, 1963 - Section 41

Citation: (2005) 1 CHN 369 : (2004) 2 ILR (Cal) 492

Hon'ble Judges: Ajoy Nath Ray, Acting C.J.; Arun Kumar Mitra, J

Bench: Division Bench

Advocate: Pradip Kumar Ghosh, R. Bachwat and A. Roy, for the Appellant; Debal Banerjee, A.K. Gupta, Sanjib Banerjee, D.N. Mishra and Asit K. Dey for Respondent No. 1 and S.N. Mukherjee, T. Bose, S. Roy and A. Bose, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

1. This is an application for preferring an urgent appeal and obtaining an order of stay in respect of an impugned order dated the 10th of November, 2004.
2. The order was passed in two completely separate matters, one being an interlocutory application made for dismissal of an admiralty suit in which an order for arrest had been made earlier on the 26th of October, 2004, it was alternatively prayed for, that the order of arrest or the direction of furnishing of security to the extent of Rs. 3 crore be dispensed with.
3. The second matter was an application made u/s 9 of the Arbitration and Conciliation Act, 1996 in regard to a foreign arbitration which parties had agreed would commence and conclude in London under the Rules of the Grain and Feed Trade Association there, located at 6, Chapel Place, the rules of it being commonly

known as the GAFTA RULES.

4. The parties to the arbitration agreement were "Liberty" i.e., the appellant in the Section 9 matter and LMJ International, the respondent in that matter which is also plaintiff in the admiralty suit.

5. This ship in question is one "M.V. Ormos" lying arrested at the Kakinada Port in Andhra Pradesh pursuant to the orders of Court passed in Calcutta, which are referred to above.

6. The appellant has preferred another appeal in respect of the same impugned order, regarding the admiralty suit issues, where there are two respondents, the first being the plaintiff in the admiralty suit, and the second one being one Atlantis Maritime which has claimed to be the owner and party interested in the vessel "M. V. Ormos".

7. Cross-objections have also been filed by Atlantis, the shipowners.

8. The facts are basically these, sometime early this year, an agreement for sale of about 7,000 metric tonnes of Long Grain Parboiled Rice (plus minus 5%) was entered into between Liberty and LMJ whereby the goods would be delivered FOB, the nominated ship being made known in advance by seven days, the ship to be placed at the Kandla Port in Andhra Pradesh.

9. The placement of the goods on board was first scheduled to be made mid April this year but time was extended.

10. In spite of extensions, the contract never worked out. The allegation of LMJ is that because of fallen international prices Liberty, in breach of its contract, found it more convenient and profitable to buy the rice from ITC and, payment to ITC being complete, they have now loaded the rice on "M. V. Ormos".

11. Correspondence was placed before us and there is one letter from Liberty which states that they were surprised to learn that LMJ had sold the rice obtained by them for Liberty in the Indian market; Liberty further alleges that in spite of best efforts it could not arrange to have a ship placed at Kandla in time.

12. The case of LMJ is that all this is eye-wash and Liberty barefacedly committed a breach of contract only for the purpose of earning more profit. According to it "M.V. Ormos" should have contained the rice procured from LMJ and not the rice procured from ITC. Liberty raises a question on somewhat of a side issue alleging that the type of rice supplied by ITC is not exactly the type of rice which LMJ had agreed to supply.

13. LMJ has threatened to invoke arbitration in accordance with the Gafta 64 Contract Rules. This they have done in a letter dated the 16th of October 2004, Liberty, presumably because are London based, is quite ready and willing to go to arbitration and we are told that they have already nominated their arbitrator. We

are told today, although, we were not told so yesterday, that LMJ has also nominated its arbitrator.

14. The shipowners Atlantis say that they are deeply aggrieved. They are Greek owners of the ship flying a Korean flag and there is not even a whiff of an allegation that Atlantis or the ship "M. V. Ormos" has been guilty in any manner.

15. Atlantis has a charter party agreement with one Planet Navigation which is as absent from the array of parties before us as is the 1TC. Although the vessel has been chartered out, because of agreements or understandings which we need not enter into, it has fallen upon Atlantis, the basic shipowner to get orders for release of the vessel for proceeding to Nigeria.

16. In the impugned order, it has been recorded by the learned Judge that the plaintiff has not stated in the plaint that they have sold out that goods altogether in India. We were not told which portion, if any, of the goods have already been sold by LMJ. Mr. Banerjee appearing for the plaintiff submitted that damages would arise to the plaintiff not exactly as the difference between the sale price and the contract price but because of the inability of the plaintiff to take advantage of considerably lower prices of the Food Corporation of India at which the plaintiff would have been able to obtain the agreed quantity of rice to be exported provided the Food Corporation were satisfied that the goods in fact got exported out of India.

17. Particulars of the, damage are given in round sums, but many more particulars would be needed before a Court could be in a position to quantify the claim.

18. On the other hand, Liberty does not come forward with the price at which they have purchased the goods from 1TC. They have said clearly in their petition that they have erased the price deliberately from the annexures to protect the confidentiality of their trade.

19. In these circumstances, two basic points fell to be considered by us. First, whether there is an admiralty claim against the ship which has been put under arrest. Not every claim is an admiralty claim and if the arrest was ill founded the admiralty suit itself would have to be dismissed and the arrest order consequentially lifted.

20. The second point was whether in exercise of the Court's jurisdiction u/s 9 of the Arbitration and Conciliation Act, the learned Judge was right in ordering to this effect that unless security of Rs. 1 crore is furnished (His Lordship reduced the initial Rs. 3 crore to 1 crore after hearing parties) the ship would have to unload the entire cargo of Liberty at the cost of the plaintiff before sailing away.

21. The cargo, we are told, is of the order of 8,000 metric tonnes. The price, although erased by Liberty, would, roughly and according to the Indian market, be of the order of Rs. 1 crore per 1000 metric tonnes. Needless to mention the unloading of the entire cargo for a sum of Rs. 1 crore would not be right. But there is more to this

matter than mere arithmetic.

22. As regards the claim being an admiralty claim square and proper, Mr. Mukherjee appearing for the shipowners told us that it simply was not so. He gave us in time sequence the list of claims which can properly be classed as admiralty claim. First he gave us the Admiralty Court Act, 1861 and we quote therefrom Sections 4 to 13 for listing what are, or were, admiralty claims before Supreme Court decided the case of [M.V. Elisabeth and Others Vs. Harwan Investment and Trading Pvt. Ltd., Hanoekar House, Swatontapeth, Vasco-De-Gama, Goa, :](#)

"4. The High Court of Admiralty shall have jurisdiction over any claim for the binding, equipping or repairing of any ship, if at the time of the institution of the cause of ship or the proceeds thereof are under arrest of the Court.

5. The High Court of Admiralty shall have jurisdiction over any claim for necessaries supplied to any ship elsewhere than in the port to which the ship belongs, unless it is shown to the satisfaction of the Court that at the time of the institution of the cause any owner or part-owner of the ship is domiciled in England or Wales: provided always, that if in any such cause the plaintiff do not recover 201, he shall not be entitled to any costs, charges, or expenses incurred by him therein, unless the Judge shall certify that the cause was a fit one to be tried in the said Court.

6. The High Court of Admiralty shall have jurisdiction over any claim by the owner, or consignee, or assignee of any bill of lading of any goods carried into any port in England or Wales in any ship, for damage done to the goods or any part thereof by the negligence, or misconduct of or for any breach of duty or breach of contracts on the part of the owner, master, or crew of the ship, unless it is shown to the satisfaction of the Court that at the time of the institution of the cause any owner or part-owner of the ship is domiciled in England or Wales: provided always, that if in any such cause the plaintiff do not recover 201 he shall not be entitled to any costs, charges or expenses incurred by him therein, unless the Judge shall certify that the cause was a fit one to be tried in the said Court.

7. The High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship.

8. The High Court of Admiralty shall have jurisdiction to decide all questions arising between the co-owners, or any of them, touching the ownership, possession, employment, and earnings of any ship registered at any port in England or Wales, or any share thereof, and may settle all accounts outstanding and unsettled between the parties in relation thereto, and may direct the ship or any share thereof to be sold, and may make such order in the premises as to, it shall seem fit.

9. All the provisions of "The Merchant Shipping Act, 1854", in regard to salvage of life from any ship or boat within the limits of the United Kingdom shall be extended to the salvage of life from any British ship or boat, wheresoever the services may have

been rendered and from any foreign ship or boat, where the services have been rendered either wholly or in part in British waters.

10. The High Court of Admiralty shall have jurisdiction over any claim by a seaman of any ship for wages earned by him on board the ship, whether the same be due under a special contract or otherwise, and also over any claim by the master of any ship for wages earned by him on account of the ship: provided always, that if in any such cause the plaintiff do not recover 501, he shall not be entitled to any costs, charges, or expenses incurred by him therein, unless the Judge shall certify that the cause was a fit one to be tried in the said Court.

11. The High Court of Admiralty shall have jurisdiction over any claim in respect of any mortgage duly registered according to the provisions "The Merchant Shipping Act, 1854", whether the ship or the proceeds thereof be under arrest of the said Court or not.

12. The High Court of Admiralty shall have the same powers over any British ship, or any share therein, as are conferred upon the High Court of Chancery in England by the 62nd, 63rd, 64th and 65th sections of "The Merchant Shipping Act, 1854."

13. Whenever any ship or vessel, or the proceeds thereof are under arrest of the High Court of Admiralty, the said Court shall have the same powers as are conferred upon the High Court of Chancery in England by the 9th part of "The Merchant Shipping Act, 1854".

23. In the Elizabeth case, at paragraph 77, the Supreme Court said that International Conventions being themselves derived from the common law of Nations those are part of the common law in India and those are applicable for the enforcement of Maritime Claims against foreign ships.

24. With due respect and reverence, the case is a path-breaking case and with one stroke of pen brings the Indian law in this respect at par with the advanced maritime law of any other country, without our Legislature having to lift a pen or write a single line in that regard.

25. The Brussels Convention of 1952 lists in Article 1, maritime claims under letters (a) to (q) and those are set out below:

"(a) damage caused by any ship either in collision or otherwise;

(b) loss of life or personal injury caused by any ship or occurring in connection with the operation of any ship;

(c) salvage;

(d) agreement relating to the carriage of goods in any ship whether by charter party or otherwise;

(e) agreement relating to the carriage of goods in any ship whether ;

- (f) loss or damage to goods including baggage carried in any ship;
- (g) general average;
- (h) bottomry;
- (i) towage;
- (j) pilotage;
- (k) goods or materials wherever supplied to a ship for her operation or maintenance, construction, repair or equipment of any ship or dock charges and dues;
- (l) construction, repair or equipment of any ship or dock charges and dues;
- (m) wages of Master, officers or crew;
- (n) Master's disbursements including disbursements made by ship charterers or agents on behalf of a ship or her owner;
- (o) disputes as to the title to or ownership of any ship;
- (p) disputes between co-owners of any ship as to the ownership, possession, employment or earnings of that ship;
- (q) the mortgage or hypothecation of any ship."

26. There are clear indications in Articles 3 and 4 of the said Convention that without maritime claims ships are not to be arrested. It is too basic a proposition in admiralty matters for any Judge to say in his judgment, but we say so clearly so as to avoid any type of confusion in this matter.

27. The next International Convention on arrest of ships was in 1999 and by the Elizabeth case this is also a part of the Indian Common Law. In the Liverpool and London S.P. and I Asson. Ltd. Vs. M.V. Sea Success I and Another, Supreme Court has also specifically said that this Convention is also a part of Indian law. The definition of maritime claims in this last Convention is given in Article 1(1) under heads marked with letters (a) to (v) and those are set out below:

- "(a) loss or damage caused by the operation of the ship;
- (b) loss of life or personal injury occurring whether on land or on water in direct connection with the operation of the ship;
- (c) salvage operations or any salvage agreement including, if applicable, special compensation relating to salvage operations in respect of a ship which by itself or its cargo threatened damage to the environment;
- (d) damage or threat of damage caused by the ship to the environment coastline or related interest, measures taken to prevent, minimize or remove such damage,

compensation for such damage, costs of reasonable measures of reinstatement of the environment actually undertaken or to be undertaken, loss incurred or likely to be incurred by third parties in connection with such damage and damage costs, or loss of a similar nature to those identified in this sub-paragraph1 (d);

(e) costs of expenses relating to the raising, removal, recovery, destruction of the rendering harmless of a ship which is sunk, wrecked, standard or abandoned, including anything that is or has been on board such ship, and cost of expenses relating to the presentation of an abandoned ship and maintenance of its crew;

(f) any agreement relating to the use of hire of the ship, whether contained in a charter party or otherwise;

(g) any agreement relating to the carriage of goods or passengers on board the ship, whether contained in a charter party or otherwise;

(h) loss of/or damage to or in connection with goods including luggage carried on board the ship;

(i) general average;

(j) towage;

(k) pilotage;

(l) goods, materials, provisions, bunkers, equipment (including containers) supplied or services rendered to the ship for its operation, management, preservation or maintenance;

(m) construction, reconstruction, repair, converting or equipping of the

(n) port, canal, dock, harbour and other waterway dues and charges;

(o) wages and other sums due to the Master, officers and other members of the ship's complement in respect of their employment on the ship, including costs of repatriation and social insurance contributions payable on their behalf;

(p) disbursements incurred on behalf of the ship or its owners;

(q) insurance premiums (including mutual insurance calls) in respect of the ship, payable by or on behalf of the shipowner or demise charterer;

(r) any commissions, brokerages or agency fees payable in respect of the ship by or on behalf of the shipowner or demise charterer;

(s) any dispute between co-owners of the ship as to the employment or earnings of the ship;

(t) any dispute between co-owners of the ship as to the employment or earnings of the ship;

(u) a mortgage or a "hypotheque" or a charge of the same nature on the ship;

(v) any dispute arising out of a contract for the sale of the ship."

28. Here also in Article 2, sub-article (2), it is stated that a maritime claim is a must before arrest of a ship can be made. That sub-article is set out below.

"2. A ship may only be arrested in respect of a maritime claim but in respect of no other claim."

29. On simply going through these lists of maritime claims and on drawing upon whatever great or little experience one has in regard to admiralty matters, it should become manifestly clear to anybody that a claim for breach of contract of sale of goods cannot be a maritime claim in respect of the ship "M. V. Ormos", which had no connection with the contract of sale of rice itself. The ship was not named even in the contract. That the ship was to go to Nigeria was nowhere mentioned in the contract. The vessel had nothing to do with the agreement for purchase and sale of rice, or the quantity of rice itself, which LMJ has, if at all, acquired and disposed of all by itself.

30. On this basis there would be no alternative to dismissing the admiralty suit altogether.

31. We must point out that even according to the plaintiff, only certain goods on board "M. V. Ormos" were attempted to be taken possession of as security for the alleged damage suffered by the plaintiff. It is possible to proceed for arrest of cargo on board a ship just as it is possible to proceed for arrest of the ship itself. However, the arrest of the cargo would also have to be founded on a recognized maritime claim and a simple case for damage suffered on account of some goods agreed to be bought but not actually bought is not by itself a maritime claim.

32. The plaintiffs, therefore, made two clear mistakes in filing the admiralty suit, First it had no admiralty claim in respect of the ship at all and it could not have been arrested, Secondly they never even bothered to consider whether they had a recognizable maritime claim against the goods of Liberty along and never even framed their suit for arrest of the cargo; we say in passing that had there been a good maritime claim against the cargo, and had the cargo been arrested, it would be open to the ship to leave the arrested cargo behind and proceed on its voyage with the rest of the goods, if any on board her.

33. Mr. Ghosh submitted on the authority of the Mantovani case, reported in 1980 Lloyd's Law Reports page 375, a decision of the Court of Appeal of England, that under the particular arbitration clause which had been agreed upon by the parties an application for an interim order would not lie to Court pending the disposal of the arbitration case.

34. That was indeed held so by the Court of Appeal in that case and the clause considered there is identical to the clause which is present in the instant contract and that clause is set out below :

"(a) Any dispute arising out of/or under this contract shall be settled by arbitration in accordance with the GAFTA Arbitration Rules, No. 125, in the edition current at the date of this contract, such Rules forming part of this contract and of which both parties hereto shall be deemed to be cognizant. (b) Neither party hereto, nor any persons claiming under either of them shall bring any action or other legal proceedings against the other of them in respect of any such dispute until such dispute shall first have been heard and determined by the arbitrator(s) or a board of appeal, as the case may be, in accordance with the Arbitration Rules and it is expressly agreed and declared that the obtaining of an award from the arbitrator(s) or a board of appeal, as the case may be, shall be a condition precedent to the right of either party hereto or of any person claiming under either of them to bring any action or other legal proceedings against the other of them in respect of any such dispute."

35. The Court of Appeal held on a construction of this clause that it barred not merely a suit for recovery of substantive claims but also even ancillary proceedings in Court for obtaining orders of injunction and such like.

36. Mr. Banerjee has given us a later case of a learned Single High Court Judge in this regard. The case is *In Re: O's Estate*, reported in 1999 Lloyd's Law Reports page 931; at page 936, His Lordship has quoted a dictum of Lord Justice Phillips in a later Court of Appeal judgment where His Lordship said that they would, if permitted, construe the GAFTA Arbitration Clause as relating to disputes of substance rather than in relation also to ancillary reliefs.

37. In our opinion the GAFTA Rules do not rule out the possibility of an application u/s 9 of our Arbitration and Conciliation Act. Agreements in restraint of institution of legal proceedings altogether are bad and unenforceable in India; see Section 41(b) of the Specific Relief Act, 1963.

38. In the [Bhatia International Vs. Bulk Trading S.A. and Another](#), the Supreme Court stated at page 123 in paragraph 32 that it would be open to the parties to derogate from provisions of Part I of our Arbitration and Conciliation Act in case of foreign arbitrations. Section 9 is part of Part I. In the manner we respectfully read the judgment, Their Lordships were merely stating that it would be open to the parties to include the jurisdiction for obtaining interlocutory relief from Indian Courts, provided such reliefs were left open to be obtained by other appropriate Courts elsewhere in the World. In case of the GAFTA Rules however, the London Courts would be quite powerless because of the still binding and continuing Mantovani case to grant reliefs of any interlocutory nature. As it would be contrary to Indian Law to rule that Section 9 of the Indian Arbitration and Conciliation Act is

not invocable either, whereby that Section 9 application becomes maintainable in the present case.

39. Mr. Banerjee submitted that u/s 9 the grant of interim relief is purely a matter of discretion of Court to be exercised in the facts and circumstances of each different case. We are of the clear opinion that the matter is not that wide and the matter is not open. The grant of orders of injunction, security or attachment by the Arbitration Court would normally and ordinarily be governed by the same principles as govern the grant of such interlocutory orders in regular suits filed in Court. The only difference in a Section 9 matter is that instead of the suit, the substantive relief, if any, would be granted in the arbitration by the nominated arbitrator or arbitrators. We are of the view that only because the Forum is an Arbitral Forum, the interlocutory powers of the Court do not thereby become lese predictable or more at the discretion of the Judge.

40. In an interlocutory matter obtaining of security whether by attachment or otherwise in a suit for damages for breach of contract should ordinarily require one of two things. It would have to be shown that the defendant is trying to take out goods from within the jurisdiction with the motive of at least harassing the creditor, if not something worse. Or it would have to be shown that the defendant is threatening to dispose of property so that creditors do not have an easy time in having their decrees executed.

41. This type of allegation is hardly there, and proof, whether *prima facie* or not, of such allegation is less there before us. The goods are being exported by Liberty from India to Nigeria in the course of its watchful trade, where it keeps its eyes open as to where foodgrains are to be supplied and also, from where those might be obtained. In this case the two spots were found by Liberty to be Nigeria and India and they are making a profit on the basis of the information and the connection they have in these two countries.

42. This does not show that they are trying to take out 8,000 metric tonnes of goods outside the Indian territorial waters for the purpose of rendering a plaintiff helpless nor does it show that they are trying to dispose of the rice to Nigerian parties because they do not want a decree of LMJ to be executed against it.

43. These conclusions would be fantastic and absurd to draw. The clear view is that the rice is being exported by Liberty in the ordinary course of its trade. Unloading large quantities of such rice at the instance of LMJ interference of this normal and international trade would be thoroughly unjustified.

44. In these circumstances, we opine that no relief is merited u/s 9 of the Arbitration and Conciliation Act by the plaintiff respondents. There will be orders in terms of prayer (a) in T/459 of 2004 and prayer (b) in T/457 of 2004. The undertakings are discharged. The appeals are treated as on the day's list. The cross-objections of Mr. Mukherjee's clients, the shipowners, are similarly treated as on the day's list.

45. Affidavits to the stay applications are not invited. Allegations therein cannot be taken to be admitted. The appeals of the London Traders Liberty and of the shipowner, i.e., the cross-objectors, are allowed. The impugned order dated 10th November, 2004 in which the earlier order dated 26th October, 2004 had merged and by which the earlier order had been varied, is set aside. The application for reliefs made by LMJ u/s 9 is dismissed. We are aware that affidavits are pending before the Court below, but these affidavits would be pointless once the ship sail is away with the goods, and the ship must sail away with the goods because there is no admiralty claim against the ship and no admiralty claim has been even formulated as against the goods.

46. The application of the shipowner for the dismissal of the admiralty suit is allowed. The admiralty suit is hereby dismissed. There will be no further order of arrest in existence, whether with regard to the ship or with regard to the goods, which can both leave Indian territorial waters immediately. The appellant Liberty Commodities and the cross-objectors Atlantis Maritime would be entitled to all their costs both in the Court below and before us, to be paid by the first respondent LMJ International.

47. Parties and all others concerned to act on a signed copy of this Dictated Order on the usual undertakings.

48. Before the Dictated Order is available, all parties and the Marshall will act on Counsel's endorsements and on such basis fax messages might be sent to the Port at Andhra Pradesh and on that basis the Ship and the goods might also leave the territorial waters. The Customs Authorities will also act thereon.