

2015 Y L R 2436

[Sindh]

Before Muhammad Shaft Siddiqui, J

WATERLINK PAKISTAN (PVT.) LTD. through General Counsel---Plaintiff

Versus

FARRELL LINES and 4 others---Defendants

Suit No.50 of 2015, decided on 2nd June., 2015.

Civil Procedure Code (V of 1908).--

---O. XXXVIII, R. 5---Attachment before judgment---Transportation of goods from one country to another---Breach of obligation---Attachment of container-- Word "intent"---Scope---Plaintiff had sought attachment of containers which were belonged to Shipping None of the containers sought to be attached could be deemed to be in Pakistan as ultimate destination of such goods was Afghanistan---Said goods were only available at Port in Pakistan for the purpose of clearance and transshipment i.e. for transit period only---Plaintiff had no claim with regard to the containers-- Detention charges must have been accrued for shipping line---Goods did not belong to the consignor rather same belonged to the consignee in Afghanistan-Goods were neither deemed to have arrived or existed in Pakistan nor it would belong to consignor for the purpose of attachment- Plaintiff had no privity of contract with the consignee---Present suit had not been filed against the consignee of the attached goods but against contractor of the consignee against whom plaintiff had a claim of recovery---Neither containers nor the goods therein were liable to be attached for the purpose of claim of plaintiff---Goods were meant to be transshipped to Afghanistan which were in Pakistan only in transit---Goods were not removed with "intention" to frustrate the decree which might be passed-- Application for attachment of goods was dismissed in circumstances.

Muhammad Ather Hafeez Khan v. Messrs Ssangyong and Usmani JV PLD 2011 Kar. 605 ref.

PLD 1980 Kar. 1; PLD 1983 Kar. 303 and PLD 2011 Kar. 605 distinguished. Abdur Rahman for Plaintiff.

Arshad Tayyabali for Defendant No.1.

Hassan Akbar for Defendant No.4.

Date of hearing: 15th May, 2015.

ORDER

MUHAMMAD SHAFI SIDDIQUI, J.---This is a suit for recovery of amount on account of breach of obligation. Brief facts of the case are that the plaintiff is a company incorporated under the law in Pakistan and is conducting business of freight forwarding within and outside-Pakistan whereas the defendant No.1 is shipping contractor and contracted with United States Military to provide transportation of its goods through Pakistan to Afghanistan.

Learned counsel for the plaintiff contended that the defendant No.1 is a main contractor of North Atlantic Treaty Organization/ International Security Assistance Force which is operating in Afghanistan. It is the case of the plaintiff that the defendant No.1 approached them to act as freight forwarder in respect of transportation of goods from Karachi to North Atlantic Treaty Organization/ International Security Assistance Force at Afghanistan. It is contended that no written agreement was ever executed between them however the terms were mutually agreed through correspondence and discussions. The amount which is the subject matter of the suit is in fact claimed to be money with regard to the services of plaintiff for transportation of containers arrived at Karachi Sea Port and transported by the plaintiff to its final destination in Afghanistan. Learned counsel submitted that during this transit shipment the plaintiff has also been given letter by defendant No.1 authorizing them to transport such goods from Pakistan to Afghanistan for its disclosure to the Federation of Pakistan. It is contended that in pursuit of such various agreements between them the plaintiff until 2010 continued to act on behalf of defendant No.1 leaving an amount of US Dollars 2,874,222.83 owing by defendant No.1 to plaintiff. The plaintiff claimed to have attempted to resolve the controversy but all in vain. It is contended that having no option the plaintiff has' filed the suit for recovery. In pursuit of such claim it is contended that since the defendant No.1. has no assets in Pakistan except the containers which are currently attached and hence prayed that such containers shall remain attached till the decision of the suit as there is every likelihood that they would succeed in getting a decree of the amount prayed for. It is contended that in absence of such attachment the plaintiff would be unable to realize any decree that may be passed by this Court. Learned Counsel in support of his arguments has, relied upon the case of Mareva Companies Naviera, commonly known as Mareva Injunction. Learned counsel has further relied upon PLD 1980 Karachi 1, PLD 1983 Karachi 303 and PLD 2011 Karachi 605.

On the other hand learned counsel for the defendant submitted that the contract between defendant No.1 and the plaintiff is a service agreement for transportation. The defendants have vehemently denied the claim of the plaintiff under present suit under all heads sought to be recovered by the plaintiff, however for the purpose of present application they, have mainly challenged the applicability of the principle enshrined under Order XXXVIII Rule 5, C.P.C. or the principle of Mareva injunction. It is contended that the subject containers are not the property of the defendant No. 1. Hoegh Autoliners have provided time charter space in the vessel to enable defendant No.1 to establish cargo on behalf of United States Military. Learned counsel has referred to page 5007 which provides that only two consignments stands attached in pursuance of the order dated 12-1-2015. Rest of the consignments have already been released. It is contended that the defendant No.1 never had any assets in Pakistan as such there is no question of its removal outside the territory of Pakistan with intention to frustrate any decree that may be passed by this Court. Learned counsel has relied upon various internal emails one of which is available at page 3959 which establishes the future consignments for the US military through Pakistan. It is urged that the subject consignment is not the subject matter of the suit which suit is only for recovery of amount and hence since they do not have any right in the property hence neither injunction nor any attachment, order can be passed. it is urged that the requirement of Order XXXIX, Rules 1 and 2; C.P.C. and Order XXXVIII, Rule 5, C.P.C. have not been met by the plaintiff. It is contended that the plaintiff has resorted to mareva injunction where the Court came to the conclusion that there was risk of removal of assets (money) belonging to defendant from the Court granting such injunction whereas in the present proceedings the plaintiff has not discharged such burden of either intention to remove or the ownership of the defendant. It is urged that under English Civil Procedure Code no provisions relating to attachment/freezing of assets was available during trial for ensuring that the plaintiff's claim could be satisfied subsequently and as such there was need to preserve the same in case the defendant with intention to dissatisfy the decree remove their assets. He argued that since it was the requirement, the Neligh Courts through mareva judgment through the Supreme Court Act, 1981 Section 37(3) included such, Rule 25.1(1)(1) i.e. freezing injunction whereas the situation is not the same as compare to the Civil Procedure Code where the provision of attachment before judgment has always existed in Pakistan in the shape of Order XXXVIII, Rule 5, C.P.C. Learned counsel for the defendant has relied upon the case of Muhammad Ather Hafeez Khan v. Messrs Ssangyong and Usmani JV reported in PLD 2011 Kar. 605.

Heard the learned counsel and perused the record.

The case of the plaintiff, as put forwarded, is to be seen on the touchstone of (i) Order XXXVIII and (ii) in terms of inherent powers and/or Mareva injunction and/or powers in terms of Order XXXIX, Rule 1(b), C.P.C.

Insofar as the application of the principle, as laid down in Order XXXVIII, is concerned it relates to the attachment of the property of the defendant before judgment where the Court is satisfied that the defendant with intent to delay or to avoid any process of Court or to obstruct or delay the execution of any decree, that may be passed against him, is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court. In pursuance therefore, learned counsel for the plaintiff has contended that the goods attached are to be secured/ attached for the ultimate satisfaction of the decree that may be passed in this suit.

For the purposes of the present suit the important consideration while applying the principle of Order XXXVIII is as to whether the defendant has any property within the jurisdiction of this Court which he intends to remove or whether he is holding over somebody's property to the knowledge of the plaintiff. In this regard the contents of plaint are very important and relevant and so -also the correspondence, which is being referred in the plaint and relied upon by learned counsel for the plaintiff to establish as to a contract of freight forwarding.

In terms of Para 2 of the plaint it is pleaded by the plaintiff that defendant No.1 is a main contractor of International Security Assistance Force in Afghanistan and that the plaintiff entered into negotiations in respect of transportation of goods of the aforesaid force from time of their arrival in Pakistan to Afghanistan and from Afghanistan to Pakistan. In terms of Para 6 it is again pleaded by the plaintiff that the ' defendant No.1 approached plaintiff to act as freight forwarder for transportation of such goods from Karachi to Afghanistan and that in the process of transshipment the plaintiff was under instructions of defendant No.1 and that such instructions were to be forwarded to it for its disclosure to the Federation of Pakistan authorizing plaintiff to transport such goods from Pakistan to Afghanistan.

The goods stand attached, as shown and available at page 5007 of the file, which confirms that the destination of the goods is Afghanistan and the consignee is United States Military. In terms of the pleadings, as well as the documents filed in support thereof, it appears that none of the containers sought to be attached could be deemed to be in Pakistan as ultimate destination of such goods is/was Afghanistan and such goods were/are only available at Karachi Port for the purpose of clearance and transshipment i.e. for transit period only. It may also be pertinent to note that plaintiff has sought attachment of containers which admittedly belong to shipping line against which plaintiff has no claim, in fact detention charges must have been accruing for shipping line. Even if the goods are to be taken into consideration I may say that the same do not belong to defendant No.1 rather belongs to (consignee) International Security Assistance Force at Afghanistan who are carrying out their operation there. Hence applying simple principle, as laid

down in terms of Order XXXVIII, the goods are neither deemed to have arrived or exist in Pakistan nor it belong to defendant No.1 for the purposes of attachment.

Furthermore, it is also significant to mention that the plaintiff has no privity of contract either with US Military or with International Security Assistance Force. Needless to mention that this suit has not been filed against the consignee of the attached goods i.e. U.S. Military but in fact against a contractor of the consignee against whom the plaintiff has a claim of recovery. Hence, in my view for the purposes of the claim of the plaintiff neither containers nor goods therein are liable to be attached in terms of provisions of Order XXXVIII, Rule 5, C.P.C.

Another significant point that needs to be considered is that the defendant No.1, with intent to obstruct or delay the execution of the decree, that may be passed against him, is removing its assets. Perusal of the pleadings would show that these goods are meant to be transshipped to Afghanistan and these goods are here only in transit therefore from the pleadings of the plaintiff itself the "intent" is missing, as in the normal course these goods would have been transported to Afghanistan via Pakistan. Hence, under no stretch of imagination it can be presumed that the goods are being removed with such "intention" to frustrate the decree that may be passed.

I would now consider the other point as raised i.e. apart from the above principle of Order XXXVIII, Rule 5, considering the prima facie case of the plaintiff it would be appropriate to exercise the inherent jurisdiction by attaching the subject containers in terms of Mareva injunction which was in fact creation of English Court.

In the case of Muhammad Ather Hafeez Khan v. Ssangyong and Usmani JV reported in PLD 2011 Karachi 605 learned Single Judge of this Court has considered all the cited judgments and has reached to the conclusion that the case of Nazar Muhammad was perhaps the best which could reflect the views expressed by the Courts. In Nazar Muhammad's case following are the principles which were deduced in the referred judgment by the learned Single Judge:-

"(1) The inherent power of a Court is in addition to and complementary to the powers expressly conferred under the Code.

(2) But that power will not be exercised if its exercise is inconsistent with, or comes into conflict with, any of the powers expressly or by necessary implication conferred by the other provisions of the Code.

(3) If there are express provisions exhaustively covering a particular topic, they give rise to a necessary implication that no power shall be exercised in respect of the said topic otherwise than in the manner prescribed by the said provision.

(4) Whatever limitations are imposed by consideration on the provisions of section 151 of the Code, they do not control the undoubted power of the Court conferred under section 151 of the Code to make a suitable order to prevent the abuse of the process of the Court."

Insofar as the present proceedings are concerned at the very outset I may say that none of the judgments by plaintiff has any bearing since the assets and goods sought to be attached are not of the defendant No.1, as observed above, so even if the principles laid down in the Mareva Injunction and Balagamwala case are to be considered the same are not applicable. Learned Single Judge after examining the referred judgments has reached to the conclusion that:-

"(a) The decision of the learned Division Bench in the Balagamwala case establishes that a Mareva injunction may issue, if otherwise appropriate, in circumstances....., where the money sought to be enjoined belongs to the plaintiff, or there is no doubt that the admissibility of his claim.

(b) In a case such as the present, where the Mareva injunction would be substantially or practically equivalent to an attachment before judgment under Order XXXVIII, a Mareva injunction cannot (or at the very least ought not to) issue.

(c) The question whether in other situations, to which English law and/or other common law jurisdiction have extended the Mareva injunction, Pakistani courts (or to be more precise, the courts of the Province of Sindh) can or may issue such an injunction in the exercise of inherent jurisdiction, can only be decided on a case to case basis in light of the principles enunciated in the case-law. It would be inappropriate to make any sweeping generalization simply on the basis or for the reason, e.g., that the Mareva injunction now pervades the whole of English law."

Neither principles of Balagamwala case nor Mareva injunction could be made applicable since neither the intent of removing the goods is established nor the goods are of defendant No.1 or plaintiff, which are the main reasoning of Mareva Injunction. Here the plaintiff has sought attachment of containers which are neither of plaintiff nor of defendant No.1.

Insofar as the provisions of Order XXXIX, Rule 1(b) is concerned no doubt the burden is lighter than the one under Order XXXVIII, Rule 5 however prime test is the ownership of property which belongs to it/defendant, which is not the case here.

Hence, while concluding the applications I observe as under:--

- (i) The assets sought to be attached by the plaintiff are not the assets of defendant No.1;
- (ii) The assets so attached could not be considered to be in existence in Pakistan as they are here only in transit for its ultimate destination/ transportation to Afghanistan.
- (iii) Since from very inspection when the cargo was on board, it is meant for Afghanistan hence "intent of removal of goods from jurisdiction of this Court or frustrating the proceedings and the judgment and decree" is missing.

In view of above facts and circumstances, I do not see any merits in the applications at Sr. Nos.1 to 3 which are accordingly dismissed while application at Sr. No.4 filed by the defendant for modification of interim order has become infructuous in view of above order and is also dismissed as such.

ZC/W-4/Sindh

Applications dismissed.