# THE HIGH COURT OF SINDH, KARACHI

Suit No. 360 of 2013
[Ghulamali P. Allana versus Louis Dreyfus Commodities Suisse SA & others]

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| Plaintiff | : | Ghulamali P. Allana through M/s. Amel Khan Kansi and Khurram Ashfaq, Advocates. |
| Defendants 1-4 | : | Louis Dreyfus Commodities Suisse SA and 03 others through Mr. Salman Hamid, Advocate. |
| Dates of hearing | : | 29-03-2022, 12-04-2022, 18-04-2022 & re-hearing on 25-02-2023. |

## O R D E R

**Adnan Iqbal Chaudhry J. –** The suit is for recovery of money and damages arising from contracts for sale of rice between the Plaintiff (seller) and the Defendants 1 to 3 (buyers), the latter said to be foreign associated companies. The Defendant No.4 is their local agent. CMA No. 3351/2013 by the Plaintiff is for attachment before judgment under Order XXXVIII Rule 5 CPC. The other defendants had been deleted by order dated 13-05-2013 and therefore CMA No. 5245/2013 is wrongly listed.

2. The application prayed for attachment of goods then being loaded at Karachi Port aboard the vessel 'GMT PHEONIX'. It was contended by the Plaintiff that the goods belonged to the Defendants 1 to 3 who had no other asset in Pakistan, and that unless such goods were attached, the Plaintiff would not be able to execute any decree that may be passed. On such application, an interim order was passed on 28-03-2013 as follows:

> "Let notice be issued to the defendants for 01.04.2013. Till next date of hearing defendants No.5, 6 & 7 after confirming the ownership of the rice which is being loaded on '*GMT PHOENIX'* at berth No.21 & 22 of the West Wharf and if same is found in the name of defendants No.1 to 3 shall stop loading till next date of hearing. The plaintiff shall tentatively deposit a sum of Rs.1.000 (M) (Rupees One Million) with the Nazir of this Court to meet the claim, if any. Amount so deposited by the plaintiff shall be invested in government profit bearing scheme."

3. On 02-04-2013, the Defendants 1 to 4 entered appearance and moved CMA No. 3504/2013 to pray that since stoppage of goods at Port is causing losses, the order dated 28-03-2013 may be modified to substitute the goods with security. Therefore, on 03-04-2013 the following order was passed:

"By consent of learned Counsel for the parties present in Court, order passed on 28.03.2013 is modified to the following terms:-

1. That Defendant No.4 will furnish two bank guarantees, one amounting to US$ 215,004.21/- and second amounting to US$ 250,000/- with the Nazir of this Court. Both guarantees will be retained by the Nazir till further order of this Court.

2. After furnishing the bank guarantees to the satisfaction of the Nazir of this Court restriction of loading of cargo of "GMT PHEONIX" docked at Berth No.21 and 22 of West Wharf stand lifted.

Adjourned to 18.04.2013 at 12:00 Noon."

The above bank guarantees were submitted on behalf of the Defendants 1 to 3 on 06-04-2013.

4. The thrust of submissions of learned counsel for the Plaintiff was that for all intents and purposes the attachment application had been allowed by consent of parties by the order dated 03-04-2013 where under the Defendants 1 to 3 had deposited security to secure the Plaintiff's claim, and thus no further hearing or order is required thereon. He submitted that once the Defendants 1 to 3 had obtained release of goods in lieu of security, they were estopped from seeking its release until final judgment otherwise there will be nothing left with the Plaintiff for enforcing the decree, should one be passed, as the Defendants 1 to 3 are foreign companies with no other asset in Pakistan.

On the other hand, learned counsel for the Defendants 1 to 4 submitted that the order dated 03-04-2013 manifests that was only an interim arrangement till the attachment application was decided; that even if the Defendants 1 to 3 were foreign companies with no other asset in Pakistan, the Plaintiff failed to meet the test of Order XXXVIII Rule 5 CPC to show that they were shipping the goods with the 'intent' to defeat the Plaintiff's claim.

5. Heard the learned counsel and perused the record.

6. From CMA No. 3504/2013 moved by the Defendants 1 to 4 it is apparent that the subsequent order dated 03-04-2013 was proposed by said Defendants to '*modify*' the interim order dated 28-03-2013 "*till the hearing of CMA No. 3351/2013*" in circumstances where their goods had been stopped from shipment, and to avoid a greater loss by delay in shipment said Defendants offered to substitute the attached goods with security. That is

why the order dated 03-04-2013 did not dispose of the attachment application, rather recorded that it is only to 'modify' the order dated 28-03-2013 "till further order of this Court", which remains an interim order. In fact, from the order sheet it appears that the attachment application was not even fixed for hearing on that day. It has been coming up for hearing ever since. The argument that the purpose of Order XXXVIII Rule 5 CPC was served once security was furnished for releasing attached goods, was rejected by a learned Division Bench of this Court in *D.H.L. International Ltd. v. N.T.C. Ltd.* (1982 CLC 1360) to hold that even where attached goods are subsequently substituted by security, the attachment application is nevertheless to be decided with reference to the averments made in the application, and not with reference to subsequent events. Therefore, Mr. Kansi's argument that the order dated 03-04-2013 had decided the attachment application has no force. I advert to the merits of the application.

7. Under the first two contracts with the Defendants 1 and 2, dated 17-02-2011 and 02-03-2011, the Plaintiff's claim is for outstanding "*dispatch charges*". As per para 6 of the plaint: "*The dispatch charges are payable by a buyer to the seller entrusted with the mandate of loading the consignment within the ideal time frame to cover lay time. In other words the dispatch charges are paid as an incentive to the seller for saving the time and money of the buyer during the loading operations.*" Under the third contract with the Defendant No.3, dated 02-09-2011, the Plaintiff's claim is for loss suffered on account of goods not lifted. Per the Plaintiff, the Defendant No.3 lifted only 3500 MT of the agreed 4500 MT. The Plaintiff therefore claims: (i) USD 18,229.40 as dispatch charges under the first two contracts; (ii) price difference of USD 7500 and carrying charges of USD 115,500 (as on March 2013) in respect of goods not lifted under the third contract; (iii) USD 6,274.71 as dispatch charges under the third contract (totaling USD 215,004.11); and (iv) general damages of USD 250,000/-

8. In their written statement, the Defendants 1 to 4 deny that the Plaintiff had ever earned the dispatch charges; they also dispute the rate at which he has computed such charges; they state that under the third contract the quantity to be delivered was agreed as 3500 MT, not 4500 MT as alleged; and therefore the entire claim is false. The Defendants 1 to 4 have also made a counter-claim for loss allegedly suffered due to

stoppage/delay in the loading of the goods caused by the Plaintiff in obtaining the order dated 28-03-2013.

9. The above discussion is to show that the Defendants 1 to 4 do not admit or acknowledge any part of the Plaintiff's claim and have set-up a plausible defense. The test for an attachment before judgment is far more stringent than the test of *prima facie* case, irreparable harm and balance of convenience gauged for the purposes a temporary injunction. Under Order XXXVIII Rule 5 CPC the plaintiff has to satisfy the Court "that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him," is about to dispose of his property or is about to remove it from the Court's limits.

10. The affidavit filed by the Plaintiff in support of the attachment application relies on averments made in the plaint, which in turn pleads that:

> *"32. It has come to the knowledge of the Plaintiff that the Buyer Party instead of carrying out the mandate of the Contracts has purchased rice from the Pakistani market. It has been confirmed from various sources that such purchased rice is being shipped by the Buyer Party to some international destination via vessel namely "GMT PHEONIX". The said vessel is presently docked at Berth No. 21 at Karachi port under the control and management of the Defendant Nos.5, 6 & 7 and the cargo of rice is being loaded on the vessel as of 20.03.2013. To the best of the Plaintiff's knowledge such loading shall be completed by 30.03.2013.*
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> *33. It is submitted that the Plaintiff strongly apprehends that in case said vessel sails with the cargo belonging to the Buyer Party on board, the Plaintiff shall be seriously prejudiced in so far as the recovery of his lawful dues against the Buyer Party. It may also affect the enforcement of the decree that may be passed against the Defendants by this Hon'ble Court in this case as the Buyer Party has no stake, asset or property in Pakistan/within the limits of this Hon'ble Court that may cover the claim of the Plaintiff."*

Therefore, the ground taken by the Plaintiff for attachment before judgment is that the Defendants 1 to 3 as foreigners have no other asset in Pakistan except the goods that were then being loaded aboard the vessel 'GMT PHEONIX' (subsequently substituted with bank guarantees); and unless attachment is ordered, the Plaintiff will not be able to recover any amount that may be decreed in the suit.

11. In both the cases cited before me, *Muhammad Hanif v. ECKHARD & CO. MARINE GMBH* (PLD 1983 Karachi 609) by Mr. Aimel Kansi, and *Muhammad Ather Hafeez Khan v. SSANGYONG & USMANI JV* (PLD 2011 Karachi 605) by Mr. Salman Hamid, it had been held that the mere fact that

the defendant was a foreign entity having no other asset in Pakistan was not of itself sufficient to attract Order XXXVIII Rule 5 CPC. That much has been consistently held by superior courts. If that were not so, then every like foreign entity sued in Pakistan for recovery would be automatically exposed to an attachment before judgment.

12. The ratio of both the cases cited above is that the test under Order XXXVIII Rule 5 CPC is to see *prima facie* whether the disposal or removal of assets is with the **'intent'** to defeat a decree that may be passed. In the former case, this Court held that the plaintiff had been able to demonstrate that the vessel brought into Pakistan by the defendant for sale to the plaintiff for scrapping, but then reneged, was being sold off hurriedly to defeat the plaintiff's suit; hence the attachment. In the latter case, this Court held that the fact that the foreign entity was about to remit proceeds abroad of a project undertaken in Pakistan was a transaction in the normal course of business, and did not show intent to defeat the plaintiff's claim; hence no attachment. In the latter case of *SSANGYONG & USMANI JV*, Justice Munib Ahktar then speaking for the Sindh High Court held that:

> "9. …….. An order of attachment before judgment obviously curtails the undoubted right of a person to deal with his property as he deems appropriate. The object of such an order is preventive and not punitive. The plaintiff must therefore make out a clear case that the ingredients of Rule 5 are applicable. If there is a doubt or ambiguity, then the benefit must go to the defendant. Thus, unless the necessary "intent" can be made out with reasonable clarity from the relevant facts objectively considered, an order of attachment ought ordinarily to be regarded as inappropriate.
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> 10. ..… The purpose behind Order XXXVIII is not to guarantee to a plaintiff that there will always be an asset available in the jurisdiction to satisfy his claim, should he ultimately succeed in his action. That is not the function or duty of a court of law. The purpose behind Order XXXVIII is to ensure that a defendant does not abuse the process of the court, in the sense that he is able, pending adjudication of the claim against him, to make himself judgment-proof. That his acts, undertaken in the normal course, may for all practical purposes have such an effect is also not sufficient; it must be shown that he acted with intent to bring about such an effect. ….."

It was also held by a learned Division Bench of this Court in *D.H.L. International Ltd. v. N.T.C. Ltd.* (1982 CLC 1360) that where the foreign defendant was re-exporting certain articles from Pakistan after the dispute had arisen, it would not *per se* prove any intention on its part to defeat or obstruct execution of the decree that may be passed in favour of the plaintiff.

13. As highlighted in para 10 above, neither the attachment application nor the plaint alleges that goods being shipped by the Defendants 1 to 4 aboard 'GMT PHEONIX' was with the intent to obstruct or delay the execution of a decree that may be passed in the suit. In fact, it would have been difficult to attribute such intent when the suit was being instituted at that very time and notice had yet to issue to the Defendants 1 to 4. It was then also acknowledged by the Plaintiff in para 32 of the plaint that the goods sought to be attached had been purchased by the Defendants from the Pakistani market for shipment abroad. Thus, it was accepted that the goods were being shipped by the Defendants 1 to 3 in the normal course of their business and not by way of removing an asset held in Pakistan. In the circumstances, there was no question of any intent to obstruct or delay the execution of a decree that may be passed in the suit. CMA No. 3351/2013 under Order XXXVIII Rule 5 CPC is wholly misconceived and is dismissed. The Nazir shall release the bank guarantees to the Defendants 1 to 4 or to a person authorized by them.

**JUDGE**
signed: 04-03-2023

Announced by & on: