

OCD-2

ORDER SHEET

IA No. GA/2/2023

In

AS/5/2023

IN THE HIGH COURT AT CALCUTTA

Admiralty Jurisdiction

ORIGINAL SIDE

(Commercial Division)

HINDUSTAN AEGIS LPG LTD.

Versus

THE OWNERS AND PARTIES INTERESTED IN THE VESSEL

MT TSM POLLUX (IMO NO. 9266889)

BEFORE:

The Hon'ble JUSTICE MOUSHUMI BHATTACHARYA

Date : 19th October, 2023.

Appearance:

Mr. K. R. Thaker, Adv.

Ms. Tannya Baranwal, Adv.

Mr. Prathamesh Kamat, Adv.

Mr. Dharmesh Singh Chauhan, Adv.

Mr. Ankit Pal, Adv.

..... for the plaintiff.

Mr. Tilak Kr. Bose, Sr. Adv.

Mr. Subhojit Roy, Adv.

Mr. Rohit Mukherji, Adv.

Mr. Ramanuj Ray Choudhuri, Adv.

..... for the defendant.

The Court:

1. The applicant is the registered owner of the vessel MT TSM Pollux and seeks vacating of an order dated 15th September, 2023 passed by a Co-ordinate Bench. The applicant prays for reduction of the amount of security to be furnished by the applicant in the alternative. The order dated 15th September, 2023, directed arrest of the applicant's vessel and directed the applicant

(defendant in the Admiralty Suit) to deposit an amount of USD 506,161 and Rs. 84,00,67,559/- as security with Registrar, Original Side of this Court. The arrest was made conditional on the applicant depositing this amount. The amount of security, translates approximately to Rs. 88 crores.

2. The complaint of the applicant relates to the quantum of security directed to be furnished. Learned counsel appearing for the applicant, seeks modification of the order of arrest to the extent of the quantum, and urges that the amount of security was fixed on the material shown to the Court by the plaintiff upon the suppression of several relevant facts. Counsel has taken the Court through the pleadings in the plaint and the documents relied on by the plaintiff to arrive at the sum of Rs. 88 crores. Counsel for the applicant owner, is most aggrieved by the “economic loss” component in the adjudicated quantum. It is submitted that for asserting a claim for damages, the plaintiff must not only show that there has been negligence on the part of the owner but also that the applicant owner owed a duty of care to the plaintiff. It is thus submitted that the damages claimed and the security directed to be put in, which includes a claim for damages, do not match up to any claim in contract or in tort which the plaintiff may have against the owner of the vessel. The submission put forward on behalf of the owner is essentially that the plaintiff’s claim is imaginary and inflated.

3. Learned counsel appearing for the plaintiff puts emphasis on the damage caused by the vessel to the twin loading/unloading arm of the plaintiff. Counsel submits that the plaintiff has put forth a reasonable estimate of the

loss of income which the plaintiff would suffer for one year in the absence of the damaged arm and that the owner does not defend the fact of breakage of the loading arm. Counsel submits that the sum of Rs. 88 crores computed on the basis of the economic loss is consequential to the material damage which the plaintiff has suffered and which may take a better part of an order to replace and recover.

4. The factual context to the present application first needs to be briefly stated. The order of arrest dated 15.9.2023 was passed in the background of a damage caused to the Twin Marine Loading /Unloading Arms of the plaintiff installed at Haldia Oil Jetty Port I (HOJ-I) by the crane of the applicant's vessel being MT TSM Pollux on 14th September, 2023. The plaintiff accordingly claimed arrest of the vessel and security from the defendant of USD 506,161/- and Rs. 84,00,67,559/- amounting to Rs. 88 crores. The plaintiff pleaded negligence and contributory negligence on the part of the vessel and loss of business income for one year.

5. The Court accepted the claim for compensation and damages and directed security of Rs. 88 crores. The basis of the computation can be found in paragraph 13 of the Affidavit-of-Arrest. The particulars include Rs. 4.77 crores on account of transportation and installation charges, Rs. 83.43 crores for loss of business income and Rs. 15 lakhs on account of legal costs. Approximate figures have been mentioned.

6. The statements in the plaint show that the entire cause of action of the plaintiff against the defendant owner is based on the tort of negligence. The applicant says that the Port authorities are liable for negligence and the damage caused to the property belonging to the plaintiff. The Port authorities are not parties to the present suit.

7. The Court must proceed on the statements made in the plaint which alleges negligence on the part of the defendant owner. The pleadings in the plaint and the documents referred to therein would hence form the basis of a claim for compensation and damages and the order for security should strictly be based on and commensurate to the pleading in the plaint.

8. The applicant owner has pointed to several facts to discredit the quantum of security demanded by the plaintiff and granted by the Court. The facts are summarised below :

i) Admittedly, the plaintiff purchased 2 twin arms, one each for HOJ-I and HOJ-II. While the twin arm for HOJ-I was damaged, the twin arm at HOJ-II is fully operational. The twin arms are essential for loading and unloading cargo to and from vessels at HOJ-I.

ii) The plaintiff has claimed economic loss on account of losing business income for one year amounting to Rs. 834,374,457/-. The plaint however does not disclose any pleadings, particulars or documents to substantiate this figure. The only documents disclosed are invoices raised by Hindustan Aegis Limited of HPCL on account of bottling and throughput charges. The plaintiff has not disclosed any agreement with

HPCL and the invoices disclosed do not refer to any particular berth for example HOJ-I or HOJ-II.

iii) The non-disclosure of a particular berth is important since the plaintiff has many facilities in other berths including in HOJ-I, II and III. The accident / damage took place in HOJ-I and hence the suit must only be concerned with HOJ-I.

iv) The plaintiff has disclosed a document in its opposition to the vacating application showing that the plaintiff's business of discharge of propane and butane is in full swing at the HOJ-II where the plaintiff also has two sets of loading and unloading arms.

v) The plaintiff's affidavit-in-reply to the affidavit of arrest (GA 1 of 2023) disclosed a Storage and Operating Agreement dated 29.12.2017 between the plaintiff and HPCL. The Agreement is not restricted to HOJ-I but pertains to overall infrastructure facilities of the plaintiff in the Port area consisting of HOJ-I, II and III. Moreover, the Agreement also does not reflect the essential minimum guaranteed quantity which the HPCL could expect from the plaintiff from the overall facilities of the port area which would mean that the Agreement does not also specify the twin loading and unloading arms at HOJ-I. Hence, the entire projected loss of income for one year consequential to the damage of the loading / unloading arm at HOJ-I where the accident occurred is based on unsubstantiated figures.

vi) The plaint also does not plead duty of care owed by the applicant owner to the plaintiff. As stated above, the pleadings in the plaint suggest that the defendant was discharging cargo for HPCL which is incorrect. The

defendant was actually discharging liquid cargo for Haldia Petrochemicals Ltd. and hence did not owe any duty of care to the plaintiff. That duty, if any, was that of the Port authority which was responsible for steering the defendant's vessel to the berth. The accident was also caused within the premises of the Port.

9. The above facts cast a shadow of doubt on the correctness of the case made by the plaintiff for claiming damages of Rs. 88 crores against the defendant owner. Section 73 of the Indian Contract Act, 1872 gives a statutory seal to a claim of compensation for loss or damage caused by breach of contract. There was no privity of contract between the plaintiff and defendant in the present case and the pleadings in the plaint further reflect that the loss caused to the plaintiff was remote and not foreseeable. Even in a case of breach of contract, a claim of special damages can only be entertained where there is evidence of special knowledge of the wrongdoer at the time entering into the contract. Since there is no contractual relationship between the plaintiff and the defendant in the present case, the question of special damages cannot and will not arise.

10. A claim for compensation or damages would have to meet the standard test of a reasonably best arguable case at the interim stage. The quantum which the plaintiff has claimed for loss of business income for one year amounting to Rs. 83.43 crores along with legal costs of Rs. 15 lacs, apart from being excessive, is also not borne out from the pleadings in the plaint.

11. This Court is therefore inclined to accept the submission made on behalf of the applicant owner that the quantum of security directed to be paid is harsh and unreasonable.

12. The above view is reinforced by the fact that the plaintiff has refused the defendant's request for a joint survey for assessing the costs for repair of the damaged loading / unloading arm. The only document which sheds any light on this aspect is a site visit report of 26th and 27th September, 2023 by Kanon Loading Equipment B.V. This report cannot be considered to be an objective and independent report since Kanon is the manufacturer of the equipment/loading arm which was purchased by the plaintiff. Hence, the defendant's request for a joint survey by a neutral/independent party appears to be just and reasonable. This is all the more so since the defendant has been directed to pay security of an excessive amount without the opportunity to rebut the quantum. A joint inspection also is required to prevent a unilateral assessment of the loss.

13. The law on compensation and damages for economic loss turns more on logic and rational thinking than a sympathy for the sufferer of loss. The consensus is that a claim for security on account of loss suffered must be reasonable to a man of ordinary prudence who will be able to draw a causal link between the damage → accountability of the wrongdoer → loss suffered → consequences of the loss → and lastly, whether the claim for compensation translates to a reasonable and foreseeable quantum which can be recovered from the wrongdoer.

14. The estimate of the loss complained of must be reasonable as not being disproportionate to the estimated loss of opportunity / business income which the person at the receiving end could have earned if he/she had not suffered the loss. The difficulty in computing economic loss for a period which is projected for future months is that several variables may intervene in that period. It is therefore impossible for the projected future loss to take into account such variable intervening circumstances which the sufferer cannot have any means of predicting at a given date. From a purely logical premise, the loss suffered cannot be uniform and consistent on a day to day basis unless the complainant is able to show evidence that there is an arrangement or a contract which guarantees such consistent and unvarying income on a daily basis from the damaged equipment and that the complainant would have earned a reasonable proximation of that amount if the damage had not occurred. A claim for loss / compensation must be proximate to the occurrence as well as to the consequences of the loss and must not be unreasonable.

15. The need for evidence to substantiate economic loss or at least a reasonable pre-estimate of economic loss hence assumes utmost importance. *Spartan Steels & Alloys Ltd. vs. Martin & Co. (Contractors) Ltd.*; (1972) 1 QB 27 dwelt on this uncertainty with unparalleled felicity. The Court of Appeal held that pure economic loss is recoverable where there is a breach of duty provided the economic loss is foreseeable. It was also held that economic loss must truly be consequential to the material damage. A Single Bench decision of the Bombay High Court in *Shree LTC Agro Sales Ltd. vs. Mediterranean Shipping*

Company; 2013 SCC OnLine Bom 852 placed emphasis on the unreasonableness of an excessive demand for security and proceeded to hold that the security furnished for release of the vessel should be reduced in the absence of evidence to corroborate the claim.

16. Indeed, the power to exact security under duress; and duress it certainly would be when a vessel remains arrested. The Court must hence not use the power oppressively and must see whether the plaintiff who claims security has the evidence to support the claim. An exorbitant claim can never be an automatic fallout to invocation of admiralty jurisdiction. In *Bachhqj Nahar vs. Nilima Mandal*; (2008) 17 SCC 491, the Supreme Court reinforced the well-settled principle that without pleadings and issues, evidence cannot be considered to make out a new case which is not pleaded. In the present case, apart from the loopholes in the pleadings, the plaintiff's claim for security of Rs. 88 crores is not buttressed by documentary evidence.

17. *SCM (United Kingdom) Ltd. vs. W.J. Whittall and Son Ltd.*; [1971] 1 QB 337 was considered in *Spartan Steels* where the tortious liability of duty of care was also considered. *M.V. "Baltic Confidence" vs. The State Trading Corporation of India Ltd*; AIR 2000 Cal 91 was a case where a part of the judgment of the learned Single Judge was set aside at the instance of the defendant owner and not by the plaintiff. The Commissioner was in fact appointed at the instance of the plaintiff and not the defendant.

18. The above considerations persuade this Court to hold that the reasonably best arguable case put forward by the plaintiff should be fixed at Rs. 4,77,70,265.93/- on account of a claim in tort for negligence. This would include Rs. 56,93,102/- as transportation and installation cost. In the Court's view this would be the total amount which the plaintiff can claim as security for the damage caused by the vessel to the twin loading/unloading arms at HOJ-I. The Court disagrees with any further claims for security under the heads of economic loss and legal costs.

19. GA 2 of 2023 is allowed and disposed of for the reasons as stated above. The plaintiff and the defendant shall undertake a joint survey by engaging an independent surveyor for the purpose of assessment of damage caused to the twin marine loading/unloading arms of the plaintiff. The independent surveyor will file a report upon concluding such survey. The joint survey shall be conducted within 2 weeks from today and the report be filed on the reopening day i.e 16th November, 2023.

20. The Court will consider revision of the security after considering the contents of the report. The plaintiff will consider accepting the defendant's suggestion of the Singapore entity as the independent surveyor for undertaking the exercise.

21. The defendant will therefore deposit Rs. 4,77,70,265.93/- as security with the Registrar, Original Side of this Court. The order of arrest shall automatically be vacated when this is done.

22. List this matter on 16th November, 2023.

Later:

23. The defendant's prayer for depositing this amount in the form of cash security by way of banker's draft is allowed.

24. The defendant will follow the directions as given in the foregoing paragraphs of this order.

25. Learned counsel appearing for the plaintiff seeks a limited stay on the operation of this order.

26. Considering the fact that the Court has not vacated the order of arrest and is only limited to reduction of the quantum of security, the prayer for stay is considered and refused.

(MOUSHUMI BHATTACHARYA, J.)