

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 09.08.2021

Pronounced on : 17.08.2021

Coram:

THE HONOURABLE DR. JUSTICE G.JAYACHANDRAN

A.No.35 of 2021
in C.S.No.669 of 2019

Shahi Exports Pvt Ltd.,
Sarjapur Main Road,
Bellandur Gate,
Bangalore, Karnataka – 560 102.

Rep. by its Managing Director

... Applicant/2nd Defendant.

/versus/

1. Gold Star Line Limited,
Registered Office at 6 F, Pioneer Place,
33, Hoi Yuen Road,
Kowloon, Hong Kong,
Rep. by its POA holder Mr.Gopakumar Chandrasekarn

2. Star Shipping Service (I) Pvt Ltd.,
Branch Office at Heavitree, Unit 3 C, Level 3,
47, Mayor Ramanathan Salai,
Chetpet, Chennai – 600 031.
Rep. by its Authorised Signatory,
Mr.Gopakumar Chandrasekaran.

3. R.P.Nexus Worldwide Pvt Ltd.,
884/8, Ramaswamy Salai,
Chennai – 600 078,
Rep. by its Managing Director,

4. Triway Forwarders Pvt. Ltd.,
14, Jaffer Street, Behind Customs House,
Chennai – 600 001.
Rep. by its Managing Director,

5. Triway Container Freight Station Pvt Ltd.,
No.148, Edayanchavadi Village,
Ponneri High Road, New Napalayam,
Chennai – 600 103.
Rep. by its Managing Director.

... Respondents

Prayer:- This application is filed under Order XIV and Rule 8 of Original Side Rules read with Order VII Rule 11 of C.P.C.

- a). Why the above application should not be treated as urgent?
- b). Why this Hon'ble Court should not be pleased to reject the plaint in the above suit.

For Applicant : Mrs.Hema Sampath, Senior Counsel
for Mrs.R.Meenal

For D1 & D2 : Mr.K.M.Anand

For D3 : Mr.K.Bijai Sundar

For D4 & D5 : Mr.P.Giridharan

ORDER

The suit is filed for recovery of money.

2. The brief facts of the case as stated in the plaint is that the 1st plaintiff is engaged in the business of Shipping Line/Carrier, Shipping containers/cargo around the world. It carries on business in India through the 2nd plaintiff as its Agent. The 2nd plaintiff is responsible for filing Import General Manifest (IGM) for the customs departments prior to arrival of the containers/cargo shipped by the 1st plaintiff into Chennai Port. In the course of their business, 1st plaintiff shipped 10 containers stuffed with cargo which were entrusted to them from the Port of Shanghai, China to Port of Chennai India, vide 8 Master Ocean Bills of Lading. The 1st defendant is the consignee for all the above Master Ocean Bills of Lading. In respect of the Master Ocean Bills of Lading, M/s.Link Fast Logistics Company Limited, a Freight Forwarding Company is the counterpart of the 1st defendant in China. House Bills of Lading (HBL) was issued by M/s.Fast logistics Company Limited and the plaintiff is not privy to this document. It is between the House Bills of Lading issuer and their customer. The Master Bill of Lading in this instant case issued by the 1st

plaintiff/carrier, wherein, the 1st defendant is the consignee/notify party of the consignment and therefore, as per the terms of the contract, the 1st defendant is liable to the carrier/plaintiff for all conditions of the Master Bills of Lading as Merchant of the Shipped consignment. The vessels carrying the 10 containers of goods arrived at Chennai Port on 27.06.2017, 04.07.2017 and 11.07.2017 and discharged the containers. Prior to the arrival of the containers in India, the 1st defendant being the consignee instructed the 2nd plaintiff through email to file the Import General Manifest (IGM) in the name of 2nd defendant on the HBL in 3 cases and for the rest in the name of the 1st defendant. The 1st defendant also nominated the 4th defendant as Container Freight Station (CFS). As per instruction of the 1st defendant, 2nd defendant filed Import General Manifest (IGM) on 25.06.2017, 04.07.2017 & 11.07.2017 in respect of the 10 containers manifesting the name of the 2nd defendant in respect of 3 MBL and in the name of the 1st defendant in respect of remaining 5 MBL. On discharge of the containers, the 3rd defendant as the C&F agent of the 2nd defendant arranged for the movement of the 10 containers to the 4th defendant (Container Freight Station). In case of House Bill of Lading is involved, the entity to whom the HBL is surrendered would issue delivery order in the name of the Carrier so that, the carrier could collect the

import charges from the consignee and issue delivery order to the consignee named in the House Bill of Lading. In the instant case, the 2nd defendant ought to have surrendered HBL to the 1st defendant and 1st defendant should have issued delivery order in the name of the plaintiff for the 3 HBL. This was not done by the defendants. The 4th defendant who is the custodian of the imported cargo is well aware that the containers cannot be released to the consignee named in the HBL i.e., the 2nd defendant unless the 2nd defendant obtains 'Delivery Order' from the 2nd plaintiff and surrenders the same before the 4th defendant. Floating the procedures, the 4th respondent was permitted to take delivery of the cargo by the 2nd respondent, without the delivery order issued by the 2nd plaintiff.

3. The plaintiff raised “Proforma Invoice” on the 1st defendant for the Container detention charges and terminal handling charges for total sum of Rs.2,96,471/-. On receipt of Proforma Invoice, the 1st defendant instructed the plaintiff to arrange the invoice in the name of the 3rd defendant. Accordingly, the plaintiff re-issued the Proforma Invoice in the name of the 3rd defendant and same was collected by the 1st defendant from the 2nd plaintiff's Office. The actual invoice are issued only at the time of making payment to the plaintiff and

thereafter, delivery order will be issued by the plaintiff.

4. The 1st defendant did not surrender the Original Master Bills of Lading and paid the container detention charges and handling charges. Hence, the 2nd plaintiff issued another notice to the 1st defendant on 26.12.2017 informing that the consignment has remained unclaimed and the demurrage/storage are accumulating. The 1st defendant did not respond to that. To the shock, the plaintiff received an e-mail dated 23.12.2017 issued by the 3rd defendant, in which, it is stated that the cargo was released to the 2nd defendant on receipt of the original House Bill of Lading duly endorsed by the 1st defendant to release the cargo to the 2nd defendant. Contending that release of the cargo to the 2nd defendant without the delivery order of the plaintiff and without the effective payment of the local charges and Container detention charges to the plaintiff, which is contrary to the circulation notice of the Central Board of Excise and Customs, Ministry of Finance, the suit is filed for recovery of Rs.1,78,80,401/-.

5. The 2nd defendant, who received the suit summons has filed this application to reject the plaint primarily on the ground that the suit is barred by

law for (a). No privity of contract. Non-disclosure of cause of action against the 2nd defendant. (b). Non-joinder of “Link Fast Logistics Company Ltd” which is necessary and proper party. (c). Non-compliance of the statutory requirement under Section 12-A of the Commercial Court Act, 2015.

6. The Learned Counsel for the plaintiff has filed counter refuting all the allegations made in the application to reject the plaint.

7. The Learned Senior Counsel appearing for the applicant would submit that nowhere in the plaint, the role of 2nd defendant being specifically mentioned. There is no privity of contract between the plaintiff and the 2nd defendant. The goods were taken delivery by the 2nd defendant pursuant to the delivery order given by the 1st defendant. When there is no privity of contract between the plaintiff and the 2nd defendant, the suit as against the 2nd defendant is not maintainable. Further, the Learned Senior Counsel would submit that the reading of the plaint does not indicate any cause against the 2nd defendant. The vague reference to the 2nd defendant is not based on any evidence. Just to harass the 2nd defendant, the plaintiff has filed the suit arraying 2nd defendant as one of

the party. Furthermore, the Leaned Senior Counsel would submitted that, the plaintiff specifically states that Link Fast Logistics Company Limited at China is the counterpart of the 1st defendant and as a freight forwarder Company, the said M/s.Link Fast Logistics Company Limited has issued House Bills of Lading. While so, the said Link Fast Logistics Company Limited is a necessary party to the proceedings. The suit has to be dismissed for non-joinder of necessary party.

8. Further, the Learned Senior Counsel submit there is no urgency in filing the suit. The plaintiff, without exhausting the pre-litigation Mediation and Settlement as contemplated under Section 12-A of Commercial Court Act had rushed to this Court. The said Section is mandatory and pre-requisite before filing the suit invoking the provisions of Commercial Courts Act, 2015. Having failed to exhaust the mediation process which is mandatory pre-condition, the present suit is to be dismissed on that ground.

9. In support of her submissions, the Learned Senior Counsel would rely upon the following judgments:-

(i). ***Ganga Taro Vazirani -vs- Deepak Raheja reported in 2021 SCC OnLine Bom 195.***

(ii). ***M.K.Foods -vs- Dabur India Ltd dated 21/02/2019 passed in C.R.P.No.3687 of 2018***

(iii). ***Sathyam Wood Industries -vs- Adoniss (P) Limited and another dated 10/06/2019 passed in C.R.P.(MD).No.804/2019***

(iv). ***GSD Constructions Private Limited -vs- Balaji Febtech Engineering Pvt. Ltd dated 07.08.2019 passed in M.A.No.4081 of 2019.***

(v). ***Terai Overseas Private Limited -vs- Kejriwal Sugar Agencies Private Limited and others reported in 2020 SCC Online Cal 1591.***

10. Per contra to the submissions made by the Learned Counsel for the applicant, the Learned Counsel for the respondent/plaintiff submitted that there is sufficient cause of action disclosed to maintain the suit against the 2nd defendant. The Import General Manifest (IGM) which is usually filed in the name of the consignee appearing on the MBL, on the instruction of the 1st defendant, the IGM was filed in the name of the 2nd defendant as consignee. 10 containers manifesting the name of the 2nd defendant were discharged from the respective

ships. The cargo were released to the 2nd defendant without effecting payment of charges to the plaintiff. The 2nd defendant being the actual consignee is liable to make good lose caused to the plaintiff on account of the illegal act done in collusion with the other defendants. The delivery order for the cargo ought to have been issued by the plaintiff. Whereas, the 2nd defendant has taken delivery from the 4th defendant through 3rd defendant without the delivery order issued by the plaintiff. Therefore, the 2nd defendant cannot claim that there is no privity of contract between the plaintiff and the defendant. By taking the delivery of the cargo in connivance with the 1st defendant with whom the plaintiff has direct contract, the 2nd defendant is necessary, proper and liable party to the suit and it cannot be claimed by the 2nd defendant that there is no cause of action against him.

11. Regarding non-joinder of Link Fast Logistics Company Limited is concerned, the respondent/plaintiff would contend that the role of the Link Fast Logistics Company Limited which is freight forwarder at the load point i.e, Port of Shanghai, China). On loading, the consignment at Shanghai Port their role in the transaction completed. The Link Fast Logistics Company Limited has no role at the discharge Port of Chennai. It is the 1st defendant who should have surrendered

the Original Master Bills of Lading and paid the charges due to the plaintiff.

12. The specific case of the plaintiff is that the defendants 1 to 4 had colluded with each other to enable the 2nd defendant to take delivery of the cargo at the discharge Port of Chennai without obtaining delivery order from the plaintiff thereby caused wrongful loss and damages to the plaintiff.

13. As far as the plea of non-compliance of statutory provisions, Section 12-A of the Commercial Courts Act, the respondent Counsel state that the suit was filed in the year 2019 and the Registry at Madras High Court had accepted the suit and numbered it without noting any defect. While so, 2nd defendant after entering appearance in the suit during the early month of 2020 and after filing the written statement, as an afterthought had file this application as if the plaintiff has failed to comply the procedure envisaged under Section 12-A of the Commercial Court Act. Order VII Rule 11 (d) of C.P.C envisage rejection of plaint only in case of non-compliance of substantive law and not the procedural law. Further, Rule 3(1) of Commercial Courts, (Pre-Institution Mediation and Settlement) Rule, 2019, has made pre-institution mediation an optional and not

mandatory.

14. Relying upon the judgment of the Hon'ble Supreme Court in *Sambhaji and others -vs- Gangabai and others* reported in (2008) 17 SCC 117, *Surinder Kumar and others -vs- Praveen Kumari* reported in 2017 SCC OnLine HP 1135 and *Salem Advocate Bar Association T.N -vs- Union of India* reported in (2005) 6 SCC 344. The Learned Counsel for the plaintiff would submit that the procedure are hand made of justice. Non-compliance of Section 12-A of Commercial Court Act, cannot be the ground to reject the plaint. If strict interpretation of Section 12-A of Commercial Court Act, is made, then it will lead to miscarriage of Justice. A defendant who genuinely desires to resolve the dispute through mediation, can always request the Court to refer the matter for mediation. Instead cannot seek dismissal of the suit. The Learned Counsel would submit that provisions of law should enable the citizens to have access to justice and not denial of access to justice. If the word 'shall' in Section 12-A of the Commercial Court Act, has to be construed as mandatory provision, then it will lead to denial of justice, punitive for not resorting to Mediation before approaching the Court.

12/20

16. Perused the plaint and the arguments submitted by the Learned Counsels.

17. The specific case of the plaintiff is that, the plaintiff who is engaged in Shipping Line, Carrier Business has not paid a total sum of Rs.2,34,35,476/- as under:-

<i>Sl.Nos.</i>	<i>Particulars</i>	<i>Amount in Rupees</i>
(i).	Terminal Handling Charges	Rs.2,97,446/-
(ii).	Container/Equipment Detention Charges	Rs.2,30,88,175/-
(iii).	Transportation Charges	Rs.41,300/-
(iv).	Any other Charges specify (Lift On/Lift Off-{LOLO} Charges)	Rs.8,555/-
	Total	Rs.2,34,35,476/-

18. It is specifically averred in the plaint that the 1st defendant requested to file Import General Manifest in the name of the 2nd defendant for 3 House Bills of Lading. Without original delivery advise, from the plaintiff, the 2nd defendant had taken delivery of the goods without paying the charges. Out of 8 Master Bills of Lading, MBL GOSUSNH3-3404731, 3404732 and 3404733. 10 containers of cargo covered under 3 Master Bills of Lading (MBL) been taken delivery by the 2nd defendant and Cargoes falling under 5 Master Bills of Lading

(MBL) were taken delivery by the 1st defendant. The 4th defendant which is the Containers Freight Station (CFS) and the 3rd defendant which is the C & F Agent has connived with the defendants 1 & 2 for removing the goods from the Containers Freight Station (CFS). It is trite law that for rejection of plaint, the averments made in the plaint alone has to be looked into for *prima facie* satisfaction whether there is any ground to reject the same as envisaged under Order VII Rule 11 of C.P.C.

19. As far as the instant case is concerned, the narration of facts as found in the plaint indicates that the plaintiff has filed Import General Manifest (IGM) in the name of the 2nd defendant on the request of the 1st defendant. Thus, privity of contract between the plaintiff and the 2nd defendant is disclosed in the plaint.

20. The Learned Senior Counsel appearing for the 2nd defendant would submit the copy of the email referred in the plaint are not filed. But it is not denied by the 2nd defendant that the cargo was taken delivery by them pursuant to the Import General Manifest (IGM) issued in their name as consignee. Therefore,

at this juncture, non-filing of e-mail may not be relevant to decide the maintainable of the suit particularly when the 2nd defendant had not denied the allegation of taking delivery without the original delivery order issued by the plaintiff. Therefore, this Court holds that the plaint discloses the privity of contract between the plaintiff and the 2nd defendant and also cause of action for instituting the suit against all the defendants including the 2nd defendant.

21. Regarding the non-compliance of Section 12-A of Commercial Court Act, it is to be noted that Section 12-A of Commercial Court Act, did not find place in the Act as originally enacted when passed by the Parliament in the year 2015. Section 12-A of the Commercial Court Act was introduced by way of an amendment to the Act through an ordinance promulgated by the “President of India” on 3rd May 2018. Later, in exercise of the power conferred under Section 21-A of the amended Act, in consultation with NALSA, Ministry of Law and Justice, drafted Rules for the Commercial Court (Pre-Institution Mediation and Settlement). This rule was notified of 03.07.2018. The present suit for recovery of money presented on 13th July 2019. On the date of filing the suit, Section 12-A as well as the Rules governing the pre-suit mediation were inforce.

22. Section 12-A of the Commercial Court Act, which reads as under:-

*“12-A. Pre-Institution Mediation and Settlement.— (1)
A suit, which does not contemplate any urgent interim relief under this Act, shall not be instituted unless the plaintiff exhausts the remedy of pre-institution mediation in accordance with such manner and procedure as may be prescribed by rules made by the Central Government.”
(Emphasis added).*

23. The Central Government by notification dated 03.07.2018, has framed Rule and the Rule 3(1) and 3(7) of the Commercial Courts Act, 2015 (Pre-Institution Mediation and Settlement) Rules, 2018, reads as under:-

3. Initiation of Mediation Process:-

(1). A party to a commercial dispute may make an application to the authority as per Form-1 specified in Schedule-I, either online or by post or by hand, for initiation of mediation process under the Act along with a fee or one thousand rupees payable to the Authority

either by way of demand draft or through online.

.....

.....

(7). Where both the parties to the commercial dispute appear before the Authority and give consent to participate in the mediation process, the Authority shall assign the commercial dispute to a Mediator and fix a date for their appearance before the said Mediator. (Emphasis added).

24. Though, the word '*shall*' in Section 12-A of the Act, sounds Pre-litigation mediation is mandatory on the part of the plaintiff to explore Settlement before filing suit under Commercial Court Act, the Rule framed use the word '*Shall*' and makes it an optional. Also even if one party go for pre-litigation mediation the other party may conveniently abstain from participating in the mediation and make it a non-starter. Even otherwise, mediator can proceed only if the both the parties appear and give consent to participate in the mediation process. Thus, it is very clear that on combined reading of the Commercial Courts Act and the Rules framed thereunder, pre-litigation mediation is subject to urgency for any interim relief and the consent of the sparing parties.

25. In such circumstances, the Harmonious Interpretation takes us to the irresistible conclusion that Section 12-A of the Commercial Courts Act, is not a mandatory provision. The right to access justice which is a Constitutional Right cannot be denied or deprived for not resorting to mediation. The Court is not substitute to Alternative Dispute Redressal, it is otherwise. The litigant cannot be denied the doors of justice for directly approaching the Court without exploring the possibility of mediation. There can be no prejudice to the defendant, if the defendant is ready for mediation, even after Institution of the suit. Also there is no impediment either for the party or for the Court to refer the pending matter to be resolved through mediation or any other Alternative Dispute Redressal mechanism. This provision is meant for the parties to work out an amicably settlement without involving in the adversary system of litigation. The intention of this Section is not to prevent access to justice or to aid anyone who refuse to subject himself to the judicial process. The intention is to avoid the procedural rigor and to arrive an amicable win-win settlement. Any other interpretation to Section 12-A of the Act contrary to the intention will amount to miscarriage of Justice. Therefore, this Court holds that there is no ground to entertain this Application seeking rejection of plaint. Hence, ***Application is dismissed*** with

costs of Rs.10,000/-.

17.08.2021

Index : Yes/No.

Internet : Yes/No.

Speaking order/Non-speaking order

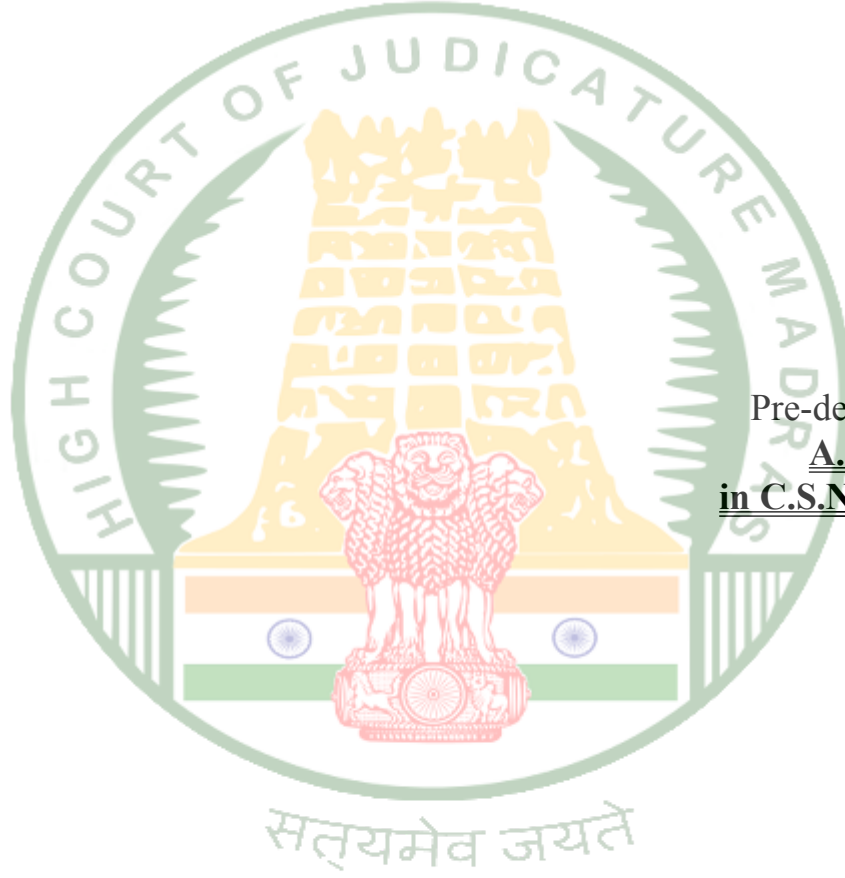


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Dr.G.Jayachandran,J.

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Pre-delivery order in
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