OCD-1

ORDER SHEET

IN THE HIGH COURT AT CALCUTTA
Admiralty Jurisdiction
ORIGINAL SIDE
(Commercial Division)

IA NO. GA-COM/2/2024
In
AS-COM/6/2024

PATANJALI FOODS LIMITED
VS
THE OWNERS AND PARTIES INTERESTED IN THE VESSEL
MT PHILIPPA GLADYS IMO NO 9500352

AND

IA NO. GA-COM/3/2024
In
AS-COM/6/2024

PATANJALI FOODS LIMITED
VS
THE OWNERS AND PARTIES INTERESTED IN THE VESSEL
MT PHILIPPA GLADYS IMO NO 9500352

BEFORE:
The Hon'ble JUSTICE SABYASACHI BHATTACHARYYA
Date : 3rd October, 2024.

Appearance:
Mr. Swatarup Banerjee, Adv.
Mr. Subhojit Roy, Adv.
Mr. Kuldip Mullick, Adv.
Mr. Rohit Mukherji, Adv.
Mr. Satyaki Mitra, Adv.
Ms. Swastika Sengupta, Adv.
...for the petitioner

Mr. Krishna Raj Thaker, Adv.
Mr. Souvik Kundu, Adv.
...for the defendant

In Re: IA NO. GA-COM 2 of 2024

The Court: The plaintiff/buyer has filed the present suit staking claims against the defendant/owners of the Vessel Mt Philippa Gladys (IMO No. 9500352). Initially, on the basis of the reliefs sought in the plaint, a limited interim order of arrest was passed on September 20, 2024 which was later extended till disposal of GA-COM 1 of 2024 on the terms and conditions as stipulated therein.

The present Affidavit of Arrest has been filed seeking further arrest of the Vessel on the premise of the additional claims sought to be incorporated in the plaint by way of amendment. The amendment application is still pending and the parties have been directed to exchange affidavits in connection therewith.

The plaintiff claims that upon discharge of the cargo on the Vessel an independent surveyor was appointed by the plaintiff, the report of which forms the premise of the additional claims. The report reflects considerable variance between the quantity of cargo reflected in the Bills of Lading and that discharged at the Discharge Port, that is, the Haldia Dock Complex and received in the Shore Tanks.

Whereas the Bill of Lading (B/L) quantity was 11540.767 MT, the quantity of cargo loaded at the Load Port that is Port Klang, Malaysia, as reflected in the Ullage Report authored by one C&P Company Limited, was 11519.554 MT. Thus, it is alleged that before the Vessel even set sail from the last Load Port, there was decrease in the B/L quantity, which can only be attributable to the defendant. Even subsequently, the quantity of cargo found at arrival was 11495.600 MT, which is lesser than the B/L quantity as well as the Load Port quantity.

Subsequently, when measurements were taken, the shore-received quantity further reduced to 11446.873 MT. Thus, it is contended that there were reductions in quantity at all stages, for which the owner is liable. Although the initial plaint claims were assessed on the premise of apprehensions based on the circumstances of the case, upon subsequent quantification of the arrival quantity and the shore-received quantity, the plaintiff has made additional claims on the basis of such quantities.

Whereas the difference between the Load Port departure quantity and the arrival quantity is 21.213 MT (0.18%), the difference between arrival quantity at Haldia and the B/L quantity was furthermore, to the tune of 45.167 MT (0.39% reduction). The difference between the measurements taken at the final point, that is the shore received quantity (11446.873 MT) and the initial B/L (11540.767 MT) comes to the tune of 93.894 MT, which is about 0.81% reduction. The additional claims have been made on the premise of the said reduction. The claim has been quantified at INR 75,85,618.

It is contended by the petitioner that C&P Company Limited, which prepared the Ullage Report dated July 12, 2024, is the Ship Manager working under the owners, which is borne out from the management detail of the C&P Company Limited and the Phillip Trading Company Limited, the owners of the Vessel, which disclose the address of the latter to be the same as C&P Company Limited. Learned counsel relies on the Ship Informations annexed at Pages 21 to 27 of the Affidavit of Arrest in that regard.

It is submitted that even as per the said Ullage Report, the ship's figure quantity was 11519.554 MT as opposed to the B/L quantity of 11540.767 MT.

Hence, it is an admitted position that the quantity of the Crude Palm Oil cargo was reduced from the admitted B/L quantity even before the Vessel set sail from its source port or Load Port at Port Klang, Malaysia.

Further reduction was detected when the cargo was examined by the surveyors and the quantity at arrival was found to be 11495.600 MT. It is submitted that since the cargo was onboard the Vessel during the voyage, which had several misadventures beyond the scheduled route over a prolonged period, the liability of such reduction lies entirely on the owners.

It is submitted that upon the cargo being received in the Shore Tanks at the destination port, further reduction was noticed, which is also attributable to the owners.

Learned counsel for the plaintiff argues that the plaintiff had obtained leave under Order II Rule 2 of the Code of Civil Procedure at the outset and, pursuant to the same, additional claims have been made by way of amendments. Rudiments of the amendments are found in the original plaint, where the apprehension of decrease in quantity and quality were both expressed. Thus, even during pendency of the amendment application, to prevent the subject-vessel from leaving the shores of India, thereby defeating the additional claims of the plaintiff even if the same is granted ultimately, a further arrest order is required to be issued immediately, putting the defendant to terms in respect of the additional claims as well.

Learned counsel for the plaintiff argues that the interim relief prayed for should be granted on the standard of the reasonably best arguable case having been made out by the plaintiff which justifies the reliefs.

Learned counsel appearing for the defendant controverts the plaintiff's submissions and argues that the difference in quantity between the B/L figure and the Load Port shipped cargo is entirely attributable to the seller which loaded the cargo on the vessel. The B/L quantity is based on the unilateral statement of the seller and, as such, the owners of the vessel cannot be held responsible for the same.

Learned counsel relies on the disclaimer in the B/Ls to the effect that the owner did not have knowledge of the quantity or quality of the cargo.

Learned counsel appearing for the petitioner cites an English Judgment of the Queen's Bench Division (Commercial Court) reported at *1996 Vol. 1 Lloyd's Law Reports 642 [Noble Resources Ltd. vs. Cavalier Shipping Corporation (The "Atlas")]* in support of the proposition that Bills of Lading cannot be treated to be *prima facie* evidence of the quantity of the cargo.

Learned counsel for the defendant next submits that despite the surveyors' Ullage Report dated July 4, 2024 having disclosed that the quantity loaded was 11519.554 MT, the plaintiff, thereafter, made payment of the entire price on July 19, 2024, without raising any objection. As such, the plaintiff cannot be permitted to resile from such position and urge as an afterthought that there was reduction in the cargo at that stage itself.

As to the destination port shortfall, it is argued that in terms of Clause 1 of the Additional Terms and Conditions in the Sales Contract between the parties, sellers and owners are not responsible for any loss/shortage of cargoes incurred outside the vessel's manifold. The Shore Tanks being situated much beyond the periphery of the vessel, the defendant/owners cannot be held responsible for any loss or shortage on such count.

It is further pointed out that the self-same clause provides that 0.5% tolerance loss is allowed in the trade as per the Charter Party. Since the Charter Party clause is incorporated in Clause 1 of the Additional Terms and Conditions of the Sales Contract, the same binds the plaintiff/buyer. As the maximum claim of shortage made by the plaintiff up to the arrival at the destination port, while the cargo was still onboard the vessel, falls under 0.5% deviation, the same should be counted to be within the tolerance level allowed by the Contract. As such, there cannot be any additional claim on such count.

It is further argued that in view of the amendment application having still not being allowed, there cannot be any justification for issuing an arrest order in respect of the Vessel on the basis of the additional claims sought to be incorporated by the proposed amendment at this stage.

Upon a careful perusal of the documents and upon hearing learned counsel for the parties, the first question which falls for consideration is whether before the amendment application is allowed, any further arrest can be granted on the basis of such prospective pleadings.

It appears from the averments made in Paragraph No.36 of the original plaint that the plaintiff apprehended that the cargo has been damaged or diminished and is no longer fit for use by the plaintiff to the extent it could have been utilized if it had been delivered in July, 2024.

Although the plinth of the averments were the diminution in quality and utility as well as worth of the cargo, it is averred in Paragraph No.31 of the original plaint that the plaintiff has no measure to assess the exact quantity or extent of financial loss due to degradation and deterioration of quality and nature of the cargo by reason of the Vessel's transgression during voyage and offences committed against the plaintiff's cargo. The plaintiff also sought appointment of surveyor to assess the cargo onboard the Vessel.

Thus, the rudiments of pleadings regarding apprehension of diminution of quantity of the cargo were there in the original plaint.

Furthermore, the very filing of the amendment application indicates that the plaintiff has expressed apprehension of reduction in the quantity of the cargo, apart from degradation of its quality.

Even irrespective of the amendment application, the further Affidavit of Arrest itself contains averments on oath expressing sufficient apprehension regarding reduction of cargo. Since leave under Order II Rule 2 of the Code of Civil Procedure was initially granted, the plaintiff can very well make additional claims. That apart, the plaintiff relies on a survey report prepared upon assessment of the cargo onboard after the arrival of the Vessel by an independent surveyor appointed by the plaintiff, subsequent to the filing of the suit and the previous order of arrest being passed.

Moreover, keeping in view the exigency involved, since if the Vessel leaves the territorial waters of India, any relief which may ultimately be obtained by the plaintiff in the suit will be rendered infructuous and toothless, the well-settled principle of reasonably best arguable case is to be taken as the standard.

Proceeding on such premise, the additional claims of the plaintiff are to be looked into.

Heavy reliance is placed by the plaintiff on the B/L quantities. In *Atlas*'s case, the Queen's Bench Division had held that the B/L were not even *prima facie* evidence of the weight or contents or value of the cargo. While doing so, the Queen's Bench Division followed *Attorney-General of Ceylon v. Scindia Steam Navigation Co. Ltd.*, reported at *[1961] 2 Lloyd's Rep. 173*. The court went on to observe that the cargo therein comprised of bags of steel billets in bundles and the Bills of Lading could be relied on at best as *prima facie* evidence of the number of bags, but not the weight and quality of the cargo. By placing reliance on such observations in *Attorney-General (supra)*, it was held that neither the Russian bills nor the switch bills constituted in the said case *prima facie* evidence of the number of bundles or quantity shipped and the underlying facts of shipment without the assistance of any evidentiary presumption should be looked into.

The B/Ls, in normal course of commercial transactions, are prepared on the representation given by the seller. In the present case, an Ullage Report was prepared on July 12, 2024 by the Shipping Manager, C&P Company Limited, apparently at the behest by the defendant/owners. The Ullage Report itself indicates that there was a difference between the quantity of cargo disclosed in the B/L, that is, 11540.767 MT and the Ship's figure quantity, which was 11519.554 MT. Hence, at the juncture when the

Vessel set sail from the last Load Port, the quantity was 11519.554 MT which was less than that depicted in the B/L.

In the B/Ls, there is a clear disclaimer that the quantity, measurement, weight, etc. of the cargo is unknown to the Vessel and the Master, to be delivered to the Port of Discharge.

However, in view of the quantity having been mentioned in the self-same B/L, it cannot be said that the said quantity was entirely unknown to the shipper. Be that as it may, the B/L also contained the condition that the shipment is covered by the Charter Party and all conditions, liberties and exceptions of the said Charter would apply to and govern the rights of the parties concerned in the shipment. The B/Ls also mentioned that the Vessel undertakes to deliver only that portion of the cargo actually loaded which is represented by the percentage that the total amount specified in the B/L bears to the total of the commingling shipment delivered as destination.

The *Atlas* judgment clearly observes that B/Ls cannot be construed as *prima facie* evidence of quantity. There is sufficient justification behind such ratio. Since the B/L quantity is depicted primarily on the basis of the representation given by the seller, the same cannot be taken as sacrosanct. Rather, the Ullage Report prepared onboard the ship after completion of loading at the Load Port is required to be taken as *prima facie* proof of the quantity loaded. Such report clearly indicates the difference between the B/L quantity and the ship's figure quantity (the latter being 11519.554 MT). The Plaintiff, despite being privy to such difference, made full payment of the price of the cargo, without any demur on such count, much thereafter, on or about July 19, 2024, thereby giving a go-bye to any objection that it might have had at the contemporaneous period regarding any purported reduction at that stage. Thus, the plaintiff cannot now resile from such position and urge that there was a decrease in the cargo even before the Vessel set sail from the Load Port.

Insofar as the surveyor's report dated July 4, 2024 is concerned, the same specifies the quantity of the cargo from the different Load Ports in Papua New Guinea and Malaysia. It is evident from the contents thereof that the last Load Port was Port Klang at Malaysia.

Although the plaintiff has sought to argue that the total shipped weight for the four Load Ports tallied with the B/L amount, a perusal of the surveyor's report, annexed to the Affidavit of Arrest, indicates that the said quantity was a sum-total of the quantities loaded at several Ports. Conspicuously, the calculations of the total amount relied on by the plaintiff were based on Shore Tank Calculations. It is obvious that the Shore Tank calculations at the Load Ports would be at the behest of the seller, who loaded the cargo. Thus, the quantity depicted at Page 45 of the Affidavit of Arrest to the tune of 11540.767 MT, which tallies with the B/L quantity, was entirely based on the Shore Tank calculations in the various Load Ports. The very next caption of the report dated July 4, 2024 relates to measurement taken onboard after loading the cargo at Port Klang, the last Load Port. The said measurement taken onboard the Vessel after loading, however, indicated the quantity to be 11519.554 MT. Thus, even if there was a difference of quantity between the B/L quantity (which were corroborated by the Shore Tank Calculations) at the Load Ports, the same could only be attributable to the seller and not the Vessel owners, the latter's liability commencing only from the point when the loading was complete and measurement was taken onboard. The Bills of Lading quantity and the Load Port shore tank calculations were both the versions of the seller and obviously tallied with each other.

Thus, the first limb of the argument of the plaintiff, regarding there being a discrepancy at the Load Port itself, cannot be accepted.

Another component of the plaintiff's additional claim is the alleged shore tank shortfall at the destination port. However, Clause 1 of the Additional Terms and Conditions of the Sales Contract between the parties clearly provides that sellers and owners are not responsible for any loss/shortage of cargoes incurred outside of the Vessel's manifold. The measurements taken in the Shore Tanks at the Destination Port, thus, being outside the Vessel's manifold, do not come within the responsibilities of the owners of the Vessel. Hence, any claim on such account has to fail *ab initio.*

The next crucial issue is the decrease in quantity of the cargo from the Load Port quantity of 11519.554 MT to 11495.600 MT, the latter being the total arrival quantity as measured by the plaintiff's surveyor. Even if the surveyor's report can be taken as a starting point to make out a *prima facie* case for such claim, the reasonably best arguable case of the plaintiff on its additional claims is restricted to the difference in cargo between the quantity measured upon the cargo being loaded on the Vessel at the Load Port and the total arrival quantity onboard the Vessel at the destination port. Even as per the claim of the plaintiff in its amendment application and the second

Affidavit of Arrest, the said difference comes to 23.954 MT, which is 0.21% of the total quantity.

The first Clause of the Additional Terms and Conditions of the Sales Contract between the parties stipulates in no uncertain terms that the tolerance loss allowed is up to 0.5%. Thus, the deviance, if at all correct, falls under the maximum permissible tolerance limit. As per Clause 1 of the Additional Terms and Conditions in the Sales Contract between the parties, such loss is allowed in the trade and the owners are not responsible for any such loss/shortage.

The plaintiff has argued that the said provision is a part of the Charter Party, to which the plaintiff is not a party. However, as discussed earlier, the B/Ls include a condition that all conditions, liberties and exceptions in the Charter apply to and govern the rights of the parties concerned in the shipment including the plaintiff.

Also, the Additional Terms and Conditions, in Clause 1, incorporates the relevant provision of the Charter Party as a part of the Sales Contract, which is binding on the plaintiff/buyer. Thus, the plaintiff cannot wriggle out of the tolerance loss allowed to the tune of 0.5% by pleading that it is not a party to the Charter Party, since the Sales Contract, where the plaintiff is very much a party, incorporates the said provision as well. As such, even if the reasonably best arguable case of the plaintiff is taken, there is no basis to the additional claims sought to be made by the plaintiff at this juncture.

Thus, in view of the plaintiff having failed on the standard of reasonably best arguable case, no interim relief by way of additional/further arrest of the Vessel can be granted.

However, a word of caution here: the findings above are all tentative and *prima facie*, arrived at only for the purpose of adjudicating GA-COM 2 of 2024, and shall not be construed to be final or binding at the hearing and/or any further stage of the suit.

Thus, in view of the above considerations, GA-COM 2 of 2024 is dismissed on contest without any order as to costs.

The further order dated October 1, 2024 restraining the subject-vessel from leaving the Haldia Dock Complex and/or the territorial waters of India till October 4, 2024 is, hereby, vacated. However, it is made clear that the order dated September 20, 2024, as extended by the order dated September 30, 2024, shall remain in force till disposal of GA-COM 1 of 2024 as directed earlier.

The matter will next appear on the pre-scheduled returnable date.

(SABYASACHI BHATTACHARYYA, J.)