



IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 16.08.2021

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CORAM :

THE HONOURABLE MR.JUSTICE N.KIRUBAKARAN
AND
THE HONOURABLE MR.JUSTICE P.D.AUDIKESEVALU

O.S.A.No.423 of 2012

Archean Industries Private Limited,
Haveli 32-D,
North Crescent Road,
T.Nagar, Chennai - 600 017,
Presently having office at
5th Floor, Tower II,
TVH Beliciaa Towers,
94, MRC Nagar, Chennai - 600 028.

(Cause title amended vide order of the Court dated
25.03.2013 made in M.P.No.1 of 2013)

... Appellant/
1st Defendant

Vs

1.Goltens Dubai
Post Box 2811,
Dubai, UAE.

...1st Respondent/Plaintiff

2.Canara Bank Overseas Branch,
770A Anna Salai, Chennai - 600 002.

... 2nd Respondent/
2nd Defendant/Respondents

PRAYER : Original Side Appeal filed under Order XXXVI Rule 1 of
Original Side Rules read with Clause 15 of Letters Patent
praying to set aside the impugned Judgement and Decree in
C.S.No.933 Of 1998, dated 18.11.2010.

Prayer in C.S.No.933 of 1998:

Plaint filed under Order IV, Rule 1, C.P.C.read with
order 7 Rule 1 C.P.C. Of O.S.Rules seeking for a Judgment and
Decree against the defendants jointly and severaaly (a) for a
sum of Rs.48,26,750/-together with interest thereon at 21% per
annuym on Rs.43,00,000/- from date of plaint till date of
realisation; (b) for cost of the suit.



For Appellant : Mr.Ramakrishnan Viraraghavan
Senior Counsel
for Mr.G.Sivasankaran

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For Respondents : Mr.S.Sidharth Yadav
for Mr.S.R.Sundar for R1
Mr.M.Arunkumar
for Mr.Sampath Kumar for R2

JUDGMENT

(Judgment of the court was delivered by N.KIRUBAKARAN.J.,)

The matter was heard through "Video Conference".

2. The intra-Court Appeal arises out of the judgment and decree dated 18.11.2010 in C.S. No. 933 of 1998 passed by the Learned Judge on the Original Side of this Court.

3. The parties are hereinafter referred to as per their description in C.S. No. 933 of 1998 for the sake of clarity and convenience.

4. Originally, the Suit in C.S. No. 933 of 1998 was filed by the Plaintiff to pass a judgment and decree against the Defendants to pay jointly and severally a sum of Rs.48,26,750/- together with interest and for other reliefs. Both the defendants contested the suit. Considering both oral and documentary evidence, the suit was decreed in favour of the Plaintiff only as against the First Defendant with cost and the suit was dismissed in respect of the Second Defendant. Aggrieved thereby, the First Defendant has preferred this Appeal.

5. Heard Mr. Ramakrishnan Viraraghavan, Learned Senior Counsel appearing for the First Defendant, Mr. S.Sidharth Yadav, Learned Counsel appearing for the Plaintiff and Mr. M.Arunkumar, Learned Counsel appearing for the Second Defendant and perused the materials placed on record, apart from the pleadings of the parties.

6. The facts leading to the filing of the Civil Suit have been extensively captured in the judgment dated 18.11.2010 in C.S. No. 933 of 1998 and hence, the same are not repeated in this order except with regard to the material facts relevant for the purpose of disposal of this Appeal.



7. Goltens Dubai (Plaintiff), who is a ship repairer, carried out repair work of "Master Panos" at the request of Royal Swan and Pevson, being owners, who were liable to pay US\$ 477,562/- towards the ship repair charges. On 18.03.1998, as the payment for repair was not received, the Plaintiff initiated legal action for arrest of ship. After that, the owner of the vessel entered into a settlement with the Plaintiff, whereby, it was agreed to pay finally US\$ 377,562/- on or before 08.04.1998. On 09.03.1998, the Royal Swan Navigation Company Limited entered into a charter party agreement with the First Defendant for despatch of 25,000 metric tonnes of granites from Chennai to New York Port. It was agreed between the owners and the First Defendant that out of the total payments towards freight charges, US\$ 100,000/- shall be paid by the First Defendant directly to the Plaintiff, inspite of fee paid to the owners of the vessel. All the terms were reduced to a memorandum of agreement on 18.03.1998 between the owners of the vessel and the Plaintiff wherein, it was agreed that a sum of US\$ 100,000 would be paid directly by the First Defendant to the Plaintiff. In continuation of the said agreement, the owners of the vessel issued letter to the Plaintiff confirming that US\$ 100,000/- shall be paid directly by the First Defendant, which was followed by the instructions being issued by the owners to the First Defendant on 21.04.1998 to read "Clause 30-Freight" in such manner that the said charges of US\$ 100,000 would be payable directly to the Plaintiff instead of paying to the owners of the vessel.

8. In continuation of the agreement between the First Defendant and the Plaintiff, the First Defendant issued a Corporate Guarantee on 25.04.1998 in favour of the Plaintiff stating that they shall pay a sum of US\$ 100,000/- to the Plaintiff upon first written demand after the arrival of the vessel at New York. The First Defendant confirmed to the Plaintiff through fax dated 19.05.1998 that they would be processing the payment with the Reserve Bank of India for US\$ 100,000/- to be made to the Plaintiff by 21.05.1998. The First Defendant requested their bankers to remit US\$ 100,000/- in the account of Plaintiff for that it also submitted Form A2 to the Second Defendant/Bank giving written instructions to transfer the funds to the bank account of the Plaintiff. The Second Defendant, instead of transferring the amount to the account of the Plaintiff, mistakenly transferred the amount to the owners of the vessel. This fact was also admitted by the First Defendant. Thereafter, the First Defendant again wrote to the brokers informing them that they had inadvertently paid the



amount to the owners of the vessel, instead of paying the same to the Plaintiff. Altogether, no amount was paid by the owners of the vessel to the Plaintiff, as agreed. So the Plaintiff issued the notice and filed the suit.

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9. The First Defendant also filed the Written Statement and also made a claim under third party procedure under Order VIII-A of the Code of Civil Procedure, 1908, against its bankers/Second Defendant. The Second Defendant filed Written Statement denying their liability towards the Plaintiff.

10. Eight issues were framed in C.S. No. 933 of 1998, which are as follows:-

- (i) Whether the Plaintiff is entitled for decree and judgment as prayed for?
- (ii) Whether the Charter Party Agreement was amended enabling the First Defendant to pay the claim directly to the Plaintiff instead of paying to the ship owners?
- (iii) Whether the guarantee was valid till the entire amount of US\$ 100,000/- is settled to the Plaintiff account subject to Charter Party Agreement dated 09.03.1998?
- (iv) Whether the payment made by the Second Defendant in favour of the ship owners was justifiable in spite of the specific directions from the Plaintiff and the First Defendant?
- (v) Whether the suit is maintainable before this Court?
- (vi) Whether the First Defendant has discharged its obligation as guaranteed?
- (vii) Whether the First Defendant is entitled to get indemnify from the Second Defendant?
- (viii) Whether the First Defendant is entitled to claim contribution from the Second Defendant for the amount claimed in the plaint?

On the side of the Plaintiff, Exs.P1 to P27 were marked and on the side of the Defendants, DWs.1 and 2 were examined. On considering both evidence and documents, the Learned Single Judge granted a decree as prayed for in the plaint only as against the First Defendant and dismissed the suit against the Second Defendant.

11. At the time of arguments, the Learned Counsel for the First Defendant would submit that as per the memorandum of agreement viz., Ex.P6, which was entered into between the Plaintiff i.e., Ship repairers and the Royal Swan Navigation Company and Pevson shipping company (owners of the vessel) dated 18.03.1998, the owners of the vessel agreed to pay the repairing charges for a sum of US\$ 377,562/- to the Plaintiff on or



before 08.04.1998 as follows:-

- "(i) US \$ 2,10,000/- from Incheape
- (ii) US \$ 67,562/- from Skuld and
- (iii) US \$ 100,000/- from Royal Swan and Pevson under a letter of Guarantee."

All these facts are admitted by all the parties.

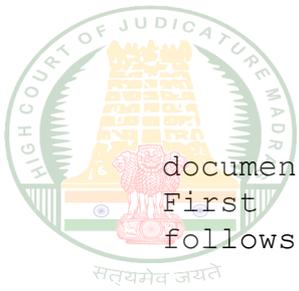
12. By this time, the owner of the Royal Swan Navigation entered into a charter party agreement with the First Defendant, wherein, it had to despatch 25,000 of metric tonnes of granites from Madras to New York Port with the following conditions:-

- "(i) Freight of US \$ 100,000/- to be paid to the plaintiff's Dubai Account with chartered bank, Deira Branch, Dubai in Account No.01-4537-424-01 and the balance is to be paid directly to the owner of the ship. After getting MOU duly signed by the owner of the ship and amending clause 30 of the chartered party agreement to pay US \$ 100,000/- directly to the plaintiff."

13. When the Plaintiff demanded the owners of the ship to pay US\$ 100,000/- directly to it, the owners asked the First Defendant to pay US\$ 100,000/- to the Plaintiff. However, the First Defendant informed the Plaintiff that they would pay only after the vessel reached New York. Since, there was a delay, the Plaintiff insisted the First Defendant to give a bank guarantee. Though it was refused, finally, the Plaintiff asked the First Defendant to provide a Corporate Guarantee for US\$ 100,000/- and the First Defendant provided the same through fax dated 25.04.1998 marked as Ex.P11. As per the guarantee, it was valid till the entire amount settled to the Plaintiff account subject to charter party agreement dated 09.03.1998.

14. The fact would reveal that according to the Plaintiff, the First Defendant had not paid US\$ 100,000/- as agreed. On the contrary, the contention of the First Defendant is that they entered into an agreement with the owner of the ship and not with the Plaintiff, thereby, it is not bound to pay any amount directly to the Plaintiff. However, the Learned Single Judge erroneously appreciated the evidence adduced on the side of the Plaintiff and wrongly fastened the liability upon the First Defendant without considering that there was no contract between the First Defendant and the Plaintiff.

15. The Learned Counsel for the Plaintiff argued relying upon the documents, viz., Exs.P10 and P11. On perusal of the



document Ex.P10, it is seen that it is a fax message from the First Defendant to the Plaintiff Company, which reads as follows:-

"Reference out telecon, we are pleased to advise that we have held back US \$ 100,000/- from freight on account of owners obligation to your goodselves towards repair cost.

We have therefore decided to hold back from freight US \$ 100,000/- to be disbursed to your goodselves on vessels arrival at New York and commencement of discharge..... We would like to assure you that the money is safe with us and by this fax we are advising you that we would remit this money directly to your goodselves and would only like to ensure that the vessel reaches destination and commences discharge.

Please feel free to contact us any time and as discussed, would advice you to keep owners out of this understanding between us otherwise through could insist on remittance of the money to them directly as it forms part of the freight.

On perusal of Ex.P11, it is named as Guarantee Payment of US\$ 100,000/- (U.S.Dollars One Hundred Thousand only). "

Therefore, it is clear that the First Defendant committed and undertook to pay the Plaintiff US\$ 100,000/-. That apart, during the cross examination, DW.1 (the Manager of the First Defendant Company) deposed as follows:-

"Ex.P11 is the conditional guarantee letter, I denied circumstances that Ex.P11 is the unconditional guarantee."

Hence, from the evidence of DW.1, he accepted Ex.P11, though he denied it was not an unconditional guarantee, but the covenants in Ex.P11 were totally denied by him. With the help of Ex.P11, the Plaintiff is able to establish that it is a Corporate Guarantee given by the First Defendant to the Plaintiff Company to pay US\$ 100,000/- on behalf of the owner and the manager of the ship (Master Panos)".

16. Based upon Ex.P11, the Plaintiff demanded the suit claim from the First Defendant through Ex.P18, dated 06.06.1998. Even, prior to that on 21.05.1998, the fax, Exhibit P14, sent by the First Defendant to the Plaintiff, is extracted as follows:-

"Dear Sir,
An amount of 100,000/- (US Dollars One Lakh) is to be paid to Goltens Dubai towards freight M.V.Master Panos.



Kindly remit through telegraphic transfer, the above amount to the following account and debit out account.

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Through Goltens Dubai
Account No.01-4537424-01
STANDARD CHARTERED BANK
DEIRA BRANCH
DUBAI U.A.E."

On perusal of Ex.P14, the First Defendant asked the Second Defendant/Bank to pay the money to the Plaintiff by providing the particulars of the Account Number of the Plaintiff. So, through fax viz., Ex.P14, the First Defendant impliedly agreed to pay the amount of freight charges to the Plaintiff as agreed through Corporate Guarantee viz., Ex.P11. Therefore, with the help of all these documents, the Plaintiff established that the First Defendant agreed to pay the suit claim to the Plaintiff. However subsequently, it failed. All these facts and documents were rightly appreciated by the Learned Single Judge, while deciding the issues between the parties and accordingly, the issues (i) and (ii) are answered.

17. By way of reply, the Learned Counsel for the First Defendant would submit that Ex.P11 was not a valid contract between the First Defendant and the Plaintiff and thereby, it was not bound to follow the terms, even assuming it is true. But as rightly pointed out by the Learned Counsel for the Plaintiff, the subsequent conduct of the First Defendant has to be taken into consideration. Considering the admitted fact that after the execution of Ex.P11 viz., Corporate Guarantee, the First Defendant had directed the Second Defendant/Bank to send the amount to the Plaintiff account by providing its bank details, is by itself sufficient to conclude that the First Defendant is bound to pay US\$ 100,000/- to the Plaintiff account as agreed in Ex.P11. Therefore, the First Defendant is estopped from denying the terms of Ex.P11.

18. The judgment of the Hon'ble Supreme Court held in Phoenix ARC Pvt. Ltd. -vs- Ketulbhai Ramubhai Patel reported in [LL 2021 SC 60] with regard to "Contract of Guarantee" does not support the case of the First Defendant for the reason that the facts in the instant case are totally different from the facts concerned in the referred case. On the other hand, the First Defendant is bound to remit the amount to the account of the Plaintiff and the same was rightly concluded by the Learned Single Judge while deciding issue (iii), which calls for no interference by this Court. Therefore, the objection raised by the First Defendant that the alleged Corporate Guarantee would



not bind him, is not a sustainable one. Accordingly, issue (iii) is answered.

19. Another contention raised by the First Defendant is that to remit the amount directly to the account of the Plaintiff would attract the violation of the Foreign Exchange as well as the Reserve Bank of India Rules. But as rightly pointed out by the Learned Counsel for the Plaintiff, the First Defendant had not raised that contention specifically at the time of execution of Exs.P11 and P14 nor specifically in the Written Statement. Therefore, the ratio laid down in 2012 (8) SCC page 148 relied on by the Plaintiff would squarely support the case of the Plaintiff. With the help of Exs.P17 and P18, the Plaintiff is able to establish that the First Defendant ought to have remitted the amount to the account of the Plaintiff on or before 21.05.1998 by getting necessary approval from the Reserve Bank of India, if necessary.

20. With regard to issue (iv), viz., whether the payment of US\$ 100,000 transferred by the Second Defendant in favour of the owner of the vessel was justifiable, in spite of the specific direction from the Plaintiff and the First Defendant, the Learned Single Judge held that as per the contract between the owner of the vessel and the First Defendant, the First Defendant remitted a sum of US\$ 100,000/- with the direction to the Second Defendant to transfer the same to the account of the Plaintiff. However, the said amount was transferred to the account of the owners of the vessel viz., "Master Panos" contrary to the instructions given by the First Defendant. However, it was held that the First Defendant had not proved that the First Defendant had not obtained permission and approval from the Reserve Bank of India to transfer a sum of US\$ 1,00,000/- to the account of the Plaintiff and the First Defendant has not acted in accordance with Exhibit P11, Corporate Guarantee dated 25.04.1998 issued by the First Defendant to the Plaintiff and the Second Defendant and there was no clause in the Charter Party Agreement, based on which the Learned Single Judge rightly held that the Second Defendant has not sought clarification in respect of transferring a sum of US\$ 100,000/- contrary to the instructions given by the First Defendant to the owners of the vessel. The said finding cannot be set aside.

21. As regards the maintainability of the suit, the Learned Single Judge held that there is no pleading raised by the First Defendant that the owner of the vessel is a necessary party. Hence, the Learned Single Judge held that in the absence of any



pleading in the Written Statement filed by the First Defendant to that effect, the suit is maintainable. The said finding is justified. It is well settled law that without pleading, no evidence could be adduced nor arguments could be advanced.

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22. With regard to the issue as to whether the First Defendant discharged its obligations as guaranteed, the Learned Single judge held that the First Defendant did not discharge its obligations as guaranteed.

23. A perusal of paragraph 9 of the Judgment would reveal that the Learned Single Judge appreciated the entire facts and found that as per the agreement between the owner of the vessel and the First Defendant, the First Defendant agreed to pay a sum of US\$ 100,000/- to the account of the Plaintiff with Standard Chartered Bank. Exhibit P10 - fax was sent by the First Defendant to the Plaintiff on 22.04.1998 and executed a Corporate Guarantee, Exhibit P11, in favour of the Plaintiff. Another fax dated 06.06.1998, Exhibit P17 was sent by the First Defendant to the Second Defendant/Bank stating that it held back US\$ 100,000/- towards freight on account of the owner's obligations. The Learned Single Judge rightly relying upon the Exhibit P11 - Corporate Guarantee and Exhibit P10 - fax message held that the Plaintiff is entitled to a sum of US\$ 100,000/- from the First Defendant as the amount was not paid to the Plaintiff and therefore, rightly held that the First Defendant had not discharged its liability as guarantor.

24. Taking note of the fact that no amount was paid by the First Defendant to the Plaintiff, the Learned Single Judge rightly held that the First Defendant has not discharged its obligations as guaranteed, as per Exhibit P11. In this regard, the Learned Single Judge rightly held against the First Defendant and the said finding does not call for any interference.

25. With regard to issue (vii) as to whether the First Defendant is entitled to get indemnified from the Second Defendant is concerned, the Learned Single Judge held against the First Defendant holding that the First Defendant is neither entitled to get indemnified from the Second Defendant/Bank nor entitled to claim under third party procedure. In this regard, no reasoning has been given by the Learned Single Judge as to



why the First Defendant is not entitled to the claim under third party procedure.

26. Learned Single Judge appreciated the fact and held that the owner of the vessel paid the said amount to the account of the First Defendant and the First Defendant had already given instructions to the Second Defendant/Bank to pay the said amount to the Plaintiff, and held in paragraph no. 8 sub para (vii) that there was no evidence to show that the Second Defendant/Bank has sought for any clarification with regard to the transfer of US\$ 100,000/- into the account of the Plaintiff, before it was transferred to the owner of the vessel, and held that the payment made by the Second Defendant/Bank in favour of the ship owners was not justifiable in spite of specific directions from the First Defendant through Exhibit P14. Having given such a finding, it is not understandable as to how the Learned Single Judge rejected the claim made by the First Defendant against the Second Defendant under third party procedure. Ex.P-14 dated 21.5.1998 is the fax sent by the First Defendant to the Second Defendant/Bank, which is extracted as follows:-

"An amount of 100000/- (USDollars One Lakh only) is to be paid to GOLTENS DUBAI towards freight - Mv MASTER PANOS.

Kindly remit through Telegraphic Transfer, the above amount to the following account and debit out account."

From the above, as stated by the Learned Single judge, it is clear that a clear instruction has been given by the First Defendant to the Second Defendant/Bank to pay the said amount to the account of the Plaintiff. In that event, the Second Defendant/Bank is bound to pay the said amount directly to the account of the Plaintiff, whereas admittedly the said amount was not paid as per the instructions of the First Defendant. The said amount was paid directly to the owner of the vessel.

27. Though it is stated by the Learned Single Judge that the approval of the Reserve Bank of India was not obtained by the First Defendant and charter party agreement was not amended, the Second Defendant/Bank should have atleast got instructions before crediting the amount directly to the owner of the vessel, as to whether the Charter Party Agreement was amended and



approval was obtained from the Reserve Bank of India for transferring the amount into the account of the Plaintiff. When no such steps were taken by the Second Defendant/Bank, the Second Defendant/Bank cannot plead that the amount was transferred in the absence of any approval from the Reserve Bank of India in the communication sent subsequent to the complaint made by the First Defendant to the Second Defendant/Bank that the amount was not transferred to the account of the Plaintiff as per its direction and was paid to the owners. The complaint dated 03.06.1998 was written by the First Defendant to the brokers, viz., M/s. Maersk Progress UK, complaining about the payment of US\$ 100,000/- to the accounts of the owners, instead of the account of the Plaintiff. Maersk Broker's fax dated 03.06.1998 written to the First Defendant would undoubtedly reveal that the amount was inadvertently remitted to the account of the owners Ex.P16. Further, Ex.P17, communication of the First Defendant to the Second Defendant/Bank dated 06.06.1998 with all enclosures making a complaint regarding the non crediting of US\$ 100,000/- by the Second Defendant/Bank to the Plaintiff in spite of directions given by the First Defendant. Ex.P-17, is extracted as follows:-

" Re: Remittance of US \$ 1,00,000/- favouring Goltens Dubai

Attached please find copy of letter from Archean Granites Ltd. (Remitter) instructing you to pay US \$ 1,00,000/- to our account with Standard Chartered Bank.

Due to oversight, one of your staff has wrongly teleremitted to the account of First National Bank of Maryland, Transportation Division, Mail Code 101-460, P.O.Box 1596, Baltimore MD 21203, U.S.A. Favouring Royal Swan Navigation Co.Ltd. Account No.192-0422-2.

In this connection, when we spoke to Mrs. Gloria Persaud of First National Bank of Maryland, we understand that till today there is neither instructions to freeze the amount nor recall the amount for this wrong transfer of funds either from Canara Bank or Union Bank of California. For your information, please note that US \$ 1,00,000/- is credited to the wrong beneficiary account on 22 May 1998 and this is confirmed by Mrs. Gloria Persaud of First National Bank of Maryland.

It is more than ten days from the time the wire transfer was done by your bank and till now there is no positive confirmation from your side to retrieve



the funds.

We therefore request you to look into this matter more seriously and to transfer US \$ 1,00,000/- plus interest and other costs incurred by us to our account within a weeks time.'

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"FURTHER TO MY TELEPHONE CONVERSTAION WITH YOU OF YESTERDAY. I AM WRITING IN AN EFFORT TO FIND A MUTUALLY ACCEPTABLE SOLUTION.

28. There was no reply to the complaint made by the First Defendant to the Second Defendant/Bank. The Second Defendant/Bank, in the absence of any amendment to the charter party agreement and in the absence of production of the approval obtained by the First Defendant from the Reserve Bank of India, could have stated the same and a reply could have been sent to the First Defendant. No such reply was given. That itself would prove that the Second Defendant failed to follow the instructions given by the First Defendant in crediting US\$ 100,000/- to the account of the Plaintiff and they wrongly credited the amount into the account of the owner of the vessel. Therefore, the Second Defendant/Bank cannot wriggle out of the said position. On the other hand, owner of the vessel, to whose account the amount was paid by the Second Defendant, sent a fax on 17.06.1998 to the First Defendant seeking to resolve the issue. Exhibit P21 is extracted as follows:-

"FIRSTLY, I WOULD ASK YOU TO REFRAIN FROM HARASSING MY BANK. THEY HAVE NO AUTHORITY TO DISCUSS THIS MATTER WITH YOU AND , THEREFORE, I WOULD ASK YOU TO REFER YOUR COMMUNICATION TO MY OFFICE. SECONDLY, FOR THE LAST FEW MONTHS WE HAVE ASKED YOUR OFFICE TO CONFIRM RECEIPT OF PAYMENT FROM THE CHARTERERS TO WHICH DESPITE OUR REPEATED ATTEMPTS WE RECEIVED NO RESPONSE FROM YOU OFFICE. IF YOU WISH I CAN SEND COPIES OF OUR COMMUNICATIONS WITH YOUR OFFICE. THIRDLY, THE CHARTERERS REMITTED THE FUNDS TO OUR ACCOUNT WITHOUT ANY INTERVENTION FROM US AND OF COURSE AFTER ABOUT TWO MONTHS TIME FROM OUT AGREEMENT.

WE APPRECIATE YOUR CO-OPERATION TO DATE AND WE WOULD ASK YOU TO SHOW A LITTLE PATIENCE AS THE PRESENT MARKET IS PUTTING STRAIN ON OUR CASH FLOWS. WE EXPECT TO BE IN A POSITION TO SETTLE THIS ISSUE WITHIN A COUPLE OF WEEKS WHEN WE WILL BE IN FUNDS."



Exhibit P21 would clearly demonstrate that the Second Defendant/Bank has not denied wrong crediting of the amount and the owner of the vessel has also accepted the payment of the amount to their account, without their efforts.

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29. It would assume significance here that the Written Statement dated 02.04.1999 filed by the First Defendant in the suit, contains the claim of the First Defendant against the Second Defendant under third party procedure under Order VIII-A of the Code of Civil Procedure, 1908, and D.W.-2, viz., P.E.Vazhuthy, who was the Assistant Manager of the Second Defendant, during his cross-examination by the Learned Counsel for the Plaintiff on 27.07.2010, has confirmed that he had gone through that Written Statement filed by the First Defendant. Though the said witness has stated that he was not aware whether the Second Defendant has filed any Reply Statement to the Written Statement filed by the First Defendant, the Second Defendant has filed its Written Statement dated 25.12.1999 after the receipt of the Written Statement of the First Defendant. The Second Defendant had contended that no approval has been obtained by the First Defendant from the Reserve Bank of India, but that reason was given only after the complaint was made by the First Defendant about non-crediting of the amount US\$ 100,000/- to the account of the Plaintiff and negligently crediting the amount to the account of the owner of the vessel. As rightly held by the Learned Single Judge, clarification could have been sought as to whether approval was obtained from the Reserve Bank of India and charter party agreement was amended. No such clarification was sought by the Second Defendant/Bank before crediting the amount to the account of the owner of the vessel. Having committed to pay the amount through the said documents, the First Defendant is not entitled to go against the recitals as contemplated under Section 70 of the Indian Evidence Act, 1872.

30. The First Defendant clearly proved through documents, especially, Exs.P10, P11, P14, P15, P16, P17, P21 that clear instructions were given by the First Defendant to the Second Defendant/Bank to credit the amount, which was not followed by the Second Defendant/Bank. On the other hand, the Second Defendant/Bank contrary to the instructions, paid the amount directly into the account of the owner of the vessel. Hence, there was a clear violation of the instructions given by the First Defendant and negligence in crediting the amount to the account of the owners of the vessel by the Second Defendant/Bank



instead of the Plaintiff. In such circumstances, though the Plaintiff has not preferred any appeal against the dismissal of the suit against the Second Defendant, the First Defendant has proved its claim against the Second Defendant under third party procedure and consequently, the Second Defendant would be liable to the First Defendant.

31. In view of the foregoing discussion, this Court arrives at the following conclusions:-

- (i) the owner of the vessel has unjustifiably been enriched by the wrong credit of US\$ 100,000/- amount of the First Defendant;
- (ii) for the failure on the part of the Second Defendant/Bank, the First Defendant suffered a decree for US\$ 100,000/- to be paid to the Plaintiff;
- (iii) therefore, the First Defendant would be losing double the amount,
- (iv) the First Defendant would suffer in both ways, i.e., losing the amount, he is entitled to and liability to pay the same amount to the Plaintiff.

As a consequence, it would follow on analysing the oral and documentary evidence that the decree granted in favour of the Plaintiff against the First Defendant calls for no interference. However, the First Defendant is entitled to reimbursement of that amount from the Second Defendant/Bank under third party procedure as sought in its Written Statement.

32. In the result, the Appeal is allowed to the limited extent of decreeing the claim of the First Defendant against the Second Defendant under third party procedure as prayed for, and the judgment and decree dated 18.11.2010 in C.S. No. 933 of 1998 passed by the Learned Single Judge is confirmed in all other respects. No costs.

Sd/-

Assistant Registrar(I)

// True Copy //

Sub Assistant Registrar



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The Sub-Assistant Registrar,
Original Side,
High Court of Madras.

+2cc to Mr.G.Sivasankaran, Advocate SR.No.40925
+1cc to Mr.Moorthy, Advocate SR.No.40930
+1cc to M/s.Sampath Kumar Associates, SR.No.40885

O.S.A.No.423 of 2012

MG(CO)
CB(07/12/2021)