Eco Maritime Ventures Ltd vs Ing Bank Nv on 27 June, 2016

Author: R.M.Chhaya

Bench: R.M.Chhaya

O/OJCA/234/2016 ORDER

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL APPLICATION (OJ) NO. 234 of 2016

In ADMIRALITY SUIT NO. 27 of 2016

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ECO MARITIME VENTURES LTD....Applicant(s)

Versus

ING BANK NV....Respondent(s)

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Appearance:
MR MANAV A MEHTA, ADVOCATE for the Applicant(s) No. 1
MR. TIRTHRAJ PANDYA, ADVOCATE for the Applicant(s) No. 1
MS PAURAMI B SHETH, ADVOCATE for the Respondent(s) No. 1

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CORAM: HONOURABLE MR.JUSTICE R.M.CHHAYA

Date : 27/06/2016

ORAL ORDER

1. By this application, the applicant□original defendant has prayed for the following reliefs □ "(a) Order and direct that the present suit be referred to arbitration under section 45.

(b) Order and direct that the present suit be dismissed and/or that the Plaintiff pleadings be stuck off from the records;

(c) Order and direct that the ship arrest and/or alternate security furnished be vacated;

(d) Order and direct that the Plaintiff make payment of US Dollars 12,695.05 per day w.e.f. 18.05.2016 until the ship gets released from arrest;

(e) That pending the hearing and final disposal of the application, the Hon'ble Court order and/or direct the plaintiff to provide counter security in the amount of US HC-NIC Page 1 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER Dollars12,695.05 per day w.e.f. 18.05.2016 until the arrest gets vacated.

(f) Ad interim reliefs in terms of prayer clause (b) and (d) above;

(g) Such further and other reliefs as this Hon'ble Court may deem fit and proper."

2. The parties are hereinafter described as per their position in the original suit.

3. The plaintiff herein filed Admiralty Suit No.27/16 in this Court on 18.05.2016. By an order dated 18.05.2016, this Court (Coram : A.J. Shastri, J.) passed an order of notice and arrest of the defendant and has observed thus □"6. Notice to the Defendant returnable on 23.05.2016. It is made clear that it will be open for the defendant to approach this Court even prior to the returnable date with adequate notice to the plaintiff.

7. Office is directed to serve the warrant of arrest on the Master of the Vessel MV ECO or through the agent of the vessel and send copy thereof to Port and Customs Authorities at HAZIRA.

8. Looking to the fact that the Vessel is likely to leave by evening the registry is directed to inform telephonically to Port and Customs at HAZIRA about arrest of the Defendant Vessel and to take the Defendant Vessel MV ECO under arrest at the cost of Plaintiff immediately.

9. The plaintiff is permitted to produce Omnibus Security Agreement dated 19th December 2013 with the registry. In addition HC-NIC Page 2 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER thereto, the undertaking, which has been prepared and filed on 18th May 2016, is also taken on record. Direct service is permitted today.

10. The Registry is directed to communicate this order to the concerned authority by fax, as well as, electronic device."

4. Heard Mr.Ashwin Shankar, learned advocate with Ms.Riddhi Niyati, learned advocate with Mr. Manav Mehta, learned advocate for the applicant□original defendant and Mr.Saurabh Soparkar, learned senior advocate with Ms.Paurami Sheth, learned advocate for the respondent□original plaintiff.

5. The learned counsels for the parties were heard in extenso on this application and they were also permitted to submit their written submissions.

6. The learned counsel for the defendant has raised the following contentions -

1) That the plaintiff has come to this Court with unclean hands on four counts and therefore, the arrest must be vacated.

2) It was contended by the learned counsel for the plaintiff that the plaintiff has not disclosed that they had correctly considered Copenship as

their contractual counterpart from the inception.

3) It was contended by the learned counsel appearing for the defendant that all the time, the plaintiff has addressed communication to HC-NIC Page 3 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER Copenship and the defendant was informed only two days before the order of arrest.

4) The learned counsel for the defendant further contended that the plaintiff is guilty of suppression of material facts inasmuch as it has not disclosed before this Court that the full payment has been received against the suit invoice.

5) It was also contended that the plaintiff has made a false averment to the Court that the defendant vessel is likely to sail immediately and is likely to leave within few hours after completing her cargo operations.

6) It was contended that the plaintiff was aware that the Copenship had taken the vessel on Time Charter from the defendant.

7) The learned counsel for the defendant further contended that all correspondences at all material times was addressed by the plaintiff only to Copenship and nothing has been disclosed in the plaint and it is the defendant who has brought on record of this application.

8) It was contended that only two days prior thereto, for the first time the plaintiff attempted to introduce a feeble case to suggest that Copenship has acted as agents on behalf of the disclosed principals, i.e., owners of the HC-NIC Page 4 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER defendant vessel.

9) It was also contended that there is nothing expressly or impliedly done by the owners of the defendant vessel to suggest that the Copenship has authority to use the ship as security.

10) It was also contended that the plaintiff has not disclosed before this Court that it has raised exact claims with Copenship's liquidators, which has gone in liquidation.

11) Relying upon the correspondences which are brought on record by the defendant, it was contended that various invoices which were outstanding and owed to the plaintiff or O.W. Bunkers, have not been disclosed.

12) Relying upon the averments made in paras 4 and 20 of the plaint, it was contended that in order to obtain ex parte order, false averments have been made in the plaint.

13) The learned counsel pointed out that the vessel arrived at Hazira Port on 14.05.2016 and in fact completed discharge operation on 28.05.2016 and hence, there was no reason for the plaintiff to suggest that the vessel was likely to sail out when they knew that the vessel had cargo to unload. Relying upon the judgment of the Apex Court in the case of Kishore Samrite vs. State of U.P. and Ors. Reported in AIR 2012 SC HC-NIC Page 5 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER (Supp) 699, it was contended that the plaintiff is obliged to disclose its source and it cannot be claimed that it got the information from unnamed reliable source. It was contended that since 2014, the plaintiff was aware that the defendant vessel was on time charter and it was not legally entitled to proceed against the vessel/applicant, i.e., owners of the defendant vessel.

14) Relying upon the judgment of this Court dated 12.01.2010 in Admiralty Suit No.20 of 2009 in the case of Link Oil Trading Ltd. vs. M.V. ST. Peter (Coram: D.A. Mehta, J.) as well as the judgment of the Division Bench (Coram: Jayant Patel & J.C. Upadhyaya, J.J.) dated 09.02.2011 in OJ Appeal No.2 of 2010, it was contended that there is suppression of material fact, which disentitles the plaintiff for any relief and therefore, the order of arrest must be vacated immediately.

15) Relying upon the documents at Exhibit S and Exhibit S1, it was contended that the principal amount of USD 174,450 with further accrued interest, administrative cost and cost of litigation, resulting in an inflated claim of USD 334,339.65 has been fully paid. Relying upon Exhibit S1, it was contended by the learned counsel for the defendant that as per the said arrangement, part payment of USD 100,000 per week HC-NIC Page 6 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER had been applied by the plaintiff towards satisfaction of the oldest outstanding principal invoices. Considering the date of the invoices, it was contended that all the first four invoices chronologically stands fully paid with the first USD 1.1 million payment from Copenship to the plaintiff and such fact is not disclosed by the plaintiff.

16) It was contended that the plaintiff even did not admit that it has received USD 1.1 million and contended that as alleged by the learned counsel for the plaintiff, only a dodgy vague averment is made in para 9 of the plaint. It was contended on the basis of the contents of the document at Exhibit S that considering the aforesaid arrangement between the Copenship and the plaintiff, the claim of the outstanding of the suit invoice is reduced to USD 83,830.82 from USD 174,450 and even this fact is not disclosed and hidden from the Court at the time of making ex parte application for arrest. Relying upon the document at Exhibit E dated 15.05.2016, it was contended that the plaintiff itself had claimed USD 83,830.82, which is quite evident from the email correspondences sent to O.W. Bunker.

17) Further relying upon the document at Exhibit S1, it was contended that bare study of the emails at Exhibit S1 would make it clear that full payment has been made by Copenship to the O.W. Bunkers.

It was further contended that it is evident from the correspondence which is brought on record by the defendant that at the time when the 11th installment of USD 100,000 was yet not been accounted for, the invoice in chronological order stood fully paid up and it was further contended that thus the fourth invoice, i.e., the suit invoice, has been reduced to USD 83,830.82. On the aforesaid basis, it was further contended by the learned counsel for the defendant that thus a further sum of USD 100,000 having been received, even covers the 5th oldest invoice partly.

18) The learned counsel for the defendant, further relying upon the document at Exhibit G, contended that the Copenship has also confirmed that the full payment has been paid.

19) It was contended by the learned counsel for the defendant that under both Danish law as well as under clause 1.6 of the IMG terms of supply, without admitting the same, the amount received on account payments was required to be adjusted against the oldest outstanding invoices.

20) The learned counsel for the defendant further contended that on the basis of the record, there is no underlying debt owed by the owners of the defendant vessel. It was contended that the time charter imposes the sole liability upon Copenship to purchase the bunkers. It was further contended that the plaintiff had always HC-NIC Page 8 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER corresponded and considered Copenship alone as their debtor and as a time charter; Copenship did not and could not pledge the credit of the defendant vessel.

21) It was also contended that underlying debt owed by ship owner is a prerequisite to obtain or sustain an arrest as in the present case, the underlying debt is owed by the Copenship and there is no underlying debt owed by the owners of the defendant vessel.

22) Relying upon section 21(4) of the Supreme Court's Act, 1981, it has been contended that the person who would be liable for the claim action in personam would be Copenship. It was also contended that as per Article 3 of the International Convention on Arrest of Ships, 1999, arrest is permissible of any ship in respect of which a maritime claim is asserted if the person who owned the ship at the time when the maritime claim arose is liable for the claim and is owner of the ship when the arrest is effected.

23) The learned counsel for the defendant has also relied upon the opinion of the English Law Firm M/s. Hill Dickinson and has contended that plaintiff does not have a maritime lien over the defendant vessel and that there is no contractual relationship between the plaintiff and the defendant and the defendant is not liable to the HC-NIC Page 9 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER plaintiff and therefore, it was contended that the arrest was malicious.

24) The learned counsel for the defendant has relied upon the following judgments to buttress his arguments on the aforesaid aspects -

1) Yuta Bondarovskaya - [1998] 2 Lloyd's Rep.

2) Raj Shipping Agencies vs. M.V. Bunga Mas Tiga□AIR 2001 Bombay 451

3) Fujairah National Shipping Agency vs. M.V. Sagar Shakti□AIR 2003 Bombay 470

4) M/s. Joanes P. Company vs. M.V. Kamal XXXXI

- Admiralty Suit No.67 of 2014 decided on 07.04.2015

5) Gulf Petrochem Energy Pvt. Ltd. Vs. M.T. Valor - Notice of Motion (L) No.581/15 in AS No.94/15 decided on 15.04.2015

6) Kishore Samrite vs. State of U.P. and Ors. □AIR 2012 SC (Supp) 699

7) Link Oil Trading Ltd. vs. M.V. ST. Peter □ Decided on 12.01.2010 in Admiralty Suit No.20 of 2009

8) Link Oil Trading Ltd. vs. M.V. ST. Peter □ Decided on 09.02.2011 in OJ Appeal No.2.

25) It was further contended that as provided under section 34 of the Gujarat Stamp Act, an instrument which is not duly stamped is inadmissible in evidence. Relying upon the provisions of Gujarat Stamp Act and the HC-NIC Page 10 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER notification dated 31.01.2002, it was contended that the stamp duty on the agreement in question, i.e., English Security Omnibus Agreement, is insufficient and contended that stamp duty payable for every instrument of securitization of loans or the assignment of debt with underlined securities is 0.75 paise for every 1000 rupees.

26) It was further contended that the plaintiff has raised only defence by way of their reply that the said agreement is adequately stamped and that the proceedings have been filed previously using the same agreement in this High Court as well as Hon'ble High Courts of Bombay, Karnataka and Andhra Pradesh. It was contended that merely

because some courts may not have had the occasion to consider the evidentiary value of the agreement, the insufficiency of the stamp duty payable cannot be deemed to have been ratified. On the aforesaid therefore, it was contended that the plaintiff is not entitled to rely upon the English Security Omnibus Agreement dated 19.12.2013.

27) It was also contended that the plaintiff does not have any title to sue as the plaintiff has not admittedly paid for these bunkers themselves and therefore, the plaintiff has filed a frivolous suit and is trying to make an illegal profit. Relying upon section 55 of the Indian Sale of Goods Act, 1930, it was contended that HC-NIC Page 11 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER its right to sue starts only if it has passed on valid title.

28) The learned counsel for the defendant has also further contended that the plaintiff is required to make a prima facie case to show that it has a direct privity of contract with the owners of the defendant vessel.

29) It was contended by the learned counsel for the defendant that the test is the same as provided under Order 38 of the Code of Civil Procedure. It was contended that the plaintiff is required to make out a prima facie case to show that -

a) They had a direct privity of contract with the applicant owners of the defendant vessel;

b) That the owner of the defendant vessel had impliedly or expressly confirmed that the credit of the ship was available as security;

c) That the entire invoice remains unpaid;

d) That the English Security Omnibus Agreement is admissible in evidence and has been adequately stamped;

e) That there was no willful concealment from this Hon'ble Court of various material facts dealt with above;

f) Copenship had the authority to pledge the credit of the vessel as security;

g) The owners of the defendant vessel agreed to be bound by the terms of the bunker supply contract.

30) It was thus contended that mere unsupported allegations in the plaint are insufficient to sustain an arrest. It was also contended that it is the duty of the plaintiff to verify the authority of Copenship. The learned counsel for the defendant also contended that as per the time charter, it is charterers liability to purchase and pay for the bunkers. The learned counsel for the defendant has relied upon the following judgments in support of his contention-

1. M/s. Kimberly□Clark Lever Pvt. Ltd. V. m.v. Eagle Excellence [Bom High Court, Appeal No.240 of 2007 decided on 13.08.2008].

2. Siva Bulk Ltd. V. m.v. AODABAO [Bom HC, Appeal (L) Siva Bulk Ltd. [Bombay High Court in Notice of Motion (L) No.843 of 2016 decided on 06.06.2016)]

3. Siva Bulk Ltd v. m.v. AODABAO [Bom High Court, Appeal (L) No. 4 of 2016 decided on 13.06.2016]

4. Gulf Petrochem Energy v. M.T. VALOR, [Bom HC, decided on 15.04.2015]

31) The learned counsel for the defendant also contended that as per the provisions of section HC-NIC Page 13 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER 45 of the Arbitration and Conciliation Act, the disputes have to be resolved by way of arbitration in London. Relying upon the terms and conditions of Sale of Marine Bunkers □Edition, it was contended that dispute is to be resolved by way of arbitration. The learned counsel for the defendant however contended that these terms in fact do not bind the defendant in any manner. It was also contended that in case if this Hon'ble Court is to base the arrest on plaintiff's arguments that these are to apply, prima facie, the arbitration clause takes away the jurisdiction of this Court.

7. On the aforesaid contentions, it was submitted by the learned counsel for the defendant that the application deserves to be allowed as prayed for.

8. Per contra, Mr. Soparkar, learned senior advocate appearing for the plaintiff has opposed the application. The learned counsel for the plaintiff has taken this Court through the averments made in the plaint and has submitted that the plaintiff is entitled to receive the amount as stated in para 3 of the plaint. Relying upon the averments made in para 3 of the plaint, it was contended that the plaintiff has not been paid in respect to the bunkers supplied to the defendant vessel. It was contended that the defendant vessel has not only received the bunkers, but has used and/or consumed and/or benefitted from the said bunkers, which is used for prosecuting her HC-NIC Page 14 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER

voyages.

9. The learned counsel for the plaintiff has also drawn attention of this Court to the averments made in para 9 of the plaint and has contended that the plaintiff has disclosed that a payment of USD 1.1 million is received, however, the same is under challenge before the Danish Bankruptcy Courts until date and hence, the plaintiff has not realized any amount towards the outstanding invoices including this suit invoice.

10. The learned counsel for the plaintiff has also taken this Court through the averments made in pars 13, 14, 16, 21 and 22 of the plaint. It was contended that as per the terms of the Sales Order Confirmation dated 20.08.2014, account for "Master and/or Owner and/or Charterers and/or M.V. Copenship Eco and/or Copenship Bulkers A/S" is referred to and as per the said Sales Order Confirmation, the payment terms provided is "within 30 days from date of delivery upon presentation of invoice". The learned counsel for the plaintiff has also relied upon the Bunker Delivery Note dated 27.08.2014 and has submitted that the same is duly acknowledged by the Master/Chief Engineer on behalf of the owners of the vessel. It was contended that even the defendant did not dispute the Delivery Note and in fact has accepted the Bunker Delivery Note as genuine document. It was contended that the said Bunker Delivery Note had the rubber stamp, signature, etc. of the Master/Chief Engineer and there is HC-NIC Page 15 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER acknowledgement of receipt of the supply for the vessel without raising any demur or protest.

11. Relying upon the terms and conditions of the sale of marine fuel, it was contended by the learned counsel for the plaintiff that the same is available in public domain and online and it is a matter of fact that goods have been received and consumed by the defendant vessel and therefore, the plaintiff has contract and direct claim with defendant vessel. The learned counsel for the plaintiff has contended that there is no suppression of fact much less material fact and all necessary disclosure is made in the plaint for the amount received from Copenship and pendency of bankruptcy proceedings.

12. The learned counsel for the plaintiff after enumerating the contentions raised by the learned counsel for the defendant in this application has contended as under:

1) It was contended that as such, the defendant has prayed for contradictory reliefs in the present application.

2) It was contended by the learned counsel for the plaintiff that private arrangement between owner and charterer cannot deprive the plaintiff/OW Bunker from taking action in rem for supply of goods which were received and consumed by the vessel for its operation which constitute maritime claim. It was reiterated by the learned HC-NIC Page 16 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER counsel for the plaintiff that supply to defendant vessel has been acknowledged by the Master/Chief Engineer and the same has not been disputed by the owners of the defendant vessel.

3) The learned counsel for the plaintiff has relied upon the following judgments -

1. M.V. Sea Renown vs. Energy Net Ltd. decided on 01.01.2003 (Coram: K.A.Puj, J.)

2. M.V. Sea Renown vs. Energy Net Ltd. decided on 15.03.2003 (Coram : J.M.Panchal & S.D.Dave, J.J.)

3. M.V. Lucky Field vs. Universal Oil Ltd. decided on 05.12.2008 (Coram : K.A. Puj,J.)

4. GM Shipping Co. Ltd. Vs. Glander International Bunkering Pvt. Ltd. decided on 04.11.2015 (Coram: Vipul M. Pancholi, J.) It was contended that the facts of these cases and the facts of the case on hand are identical.

4) The learned counsel for the plaintiff on the aforesaid basis contended that it is a matter of fact that goods were supplied to defendant vessel which have been supplied at the credit and faith of the vessel and the same has been received and consumed and accepted by the Master/Chief engineer of the defendant vessel and Bunker Delivery Note has been issued without any protest. It is contended that the Master of the vessel has right to bind the owner. The learned counsel for the plaintiff contended that as per HC-NIC Page 17 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER the ratio laid down by the aforesaid judgments, no privity of contract is required to be in existence with the owner of the vessel and action of rem is maintainable when vessel has received and consumed the bunkers irrespective of the fact whether there was knowledge about time charterer or payment was made or not to physical supplier. It was therefore contended that the knowledge of Time Charter does not change the situation.

5) The learned counsel for the plaintiff submitted that the Division Bench judgment of this Court in the case of M.V. Sea Renown (supra) is therefore having binding effect and hence, the decisions relied upon by the learned counsel for the defendant vessel, of the Bombay High Court cannot be made applicable to the facts of the present case.

6) The learned counsel for the plaintiff submitted that the plaintiff has not received the payment of the suit invoice. It was pointed out by the learned counsel for the plaintiff that both the ends have gone into liquidation and as such, it is a proxy fight. Referring to the notice dated 14.11.2015, it was pointed out by the learned counsel for the plaintiff that PWC informed to pay to ING NV only. The learned counsel for the plaintiff has also relied upon the correspondence produced by the defendant with rejoinder in this application. Reading the correspondences in HC-NIC Page 18 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER chronological manner, learned counsel for the plaintiff submitted that from the correspondences, which is forming part of the record, it clearly appears that there is no confirmation to the full payment as alleged nor there is any confirmation to its receipt. It was also contended that there is no admission by Copenship Trustee of having received the full payment.

7) The learned counsel for the plaintiff, referring to the correspondence dated 14.09.2015, submitted that it is clearly spelt out that original claim value USD 2,859,910 took accounts of 10 payments amounting to USD 1,000,000.00 and that prior to the payments received, the ledger indicates balance in excess of E3M from Copenship which indicates that even part payment is not received. The learned counsel further submitted that this fact and amount corroborates with the amount claim lodged by OW in Copenship bankruptcy case. On the aforesaid therefore, it was submitted that no payment much less part payment with respect to suit invoice no.14595 has been made as alleged. It was contended that the defendant has not produced any evidence confirming payment made towards suit invoice.

8) The learned counsel for the plaintiff asserted that in view of the Danish Court proceedings amount of USD 1.1 million has not been HC-NIC Page 19 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER appropriated. The learned counsel contended that even if assuming that part payment is made, then also it cannot be considered and the suit invoice is termed to be unpaid.

9) The learned counsel for the plaintiff submitted that defendant has relied upon email dated 14.09.2015 and one mail of Trustees of Copenship and has discarded other mails. It was contended that even on reading the said mail, the same does not confirm specifically about payment made towards suit invoice. The learned counsel for the plaintiff submitted that the same is based on assumption of Trustees of Copenship and such statement made that the amount has been paid in full or the statement that the OW Bunker stated in court proceedings about appropriation of amount towards oldest invoices in fact is not supported by any document or court proceedings and no document or court proceedings are produced by the defendant.

10) It was contended that in none of the correspondences, there is any confirmation about the payment towards the suit invoice either by Copenship or its trustees. The learned counsel for the plaintiff submitted that only on assumption it has been asserted that the amount of USD 1.1 million has been paid and appropriated against the oldest invoices including the suit invoice for which there is no documentary evidence to support that.

11) The learned counsel further submitted that the litigation which is pending before the Danish Court relates to challenge to monies paid to OW Copenship Bulkers A/S in bankruptcy vs. O.W. Bunker & Trading A/S in bankruptcy case. It was also submitted that the proceedings are also pending before the Danish Court for Copenship Bulkers A/S in bankruptcy vs. ING Bank.

12) The learned counsel for the plaintiff further submitted that even as per the letter of the law firm Bech□Brunn (a Danish law firm) is circular listing about the details of assets and liabilities of Copenship which shows that Copenship is claiming that the payment of USD 1.1 million is a voidable transaction and has initiated avoidance proceedings against OW Bunkers in bankruptcy. The learned counsel further relying upon the said letter submitted that the avoidance proceedings have been listed under 'Assets' of Copenship's estate. On the aforesaid basis, it was therefore contended by the learned counsel for the plaintiff that in view of the aforesaid therefore, the payments made to O.W. have been shown as assets as they believe that their avoidance proceedings will be allowed by the Danish Courts. It was further contended that as the matter is subjudice before the Danish Court, they cannot claim part payment and further it was also submitted that ING has HC-NIC Page 21 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER not realized the part payment made as it is under challenge.

13) The learned counsel for the plaintiff therefore submitted that even if condition no.1.6 of OW Bunkers general terms and conditions as relied upon by the defendant and stated in email dated 20.05.2016 is applied then also, it cannot be said that the amount has been appropriated towards principal of oldest invoice as it has to be at last.

14) Relying upon the judgment of the Apex Court in the case of Superintendent Technical Central Excise vs. Prataprai reported in (1978) 3 SCC 113, it was also contended by the learned counsel for the plaintiff that the correspondence made "without prejudice" basis to show for part payment cannot be relied upon.

15) The learned counsel for the plaintiff submitted that in any case whether part payment or full payment is received or USD 1.1 million is appropriated towards oldest invoices including the suit invoice or intention or understanding of the parties for appropriation can be decided only upon leading evidence at trial and not at hearing of the interim order.

16) The learned counsel for the plaintiff submitted that the allegation as regards suppression of facts and false statement as HC-NIC Page 22 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER alleged by the applicant is without any basis.

17) The learned counsel relying upon the averment made in para 9 of the plaint submitted that there is no suppression much less material suppression. The learned counsel for the plaintiff has relied upon the judgment of the Apex Court in the case of Mayar (H.K.) Ltd. & Ors vs Owners & Parties, Vessel M.V. reported in (2006) 3 SCC 100 as well as the judgment of M.V. Sea Renown (supra).

18) The learned counsel for the plaintiff submitted that the judgment of Link Oil Trading Ltd. (supra), would not apply to the present case and the same is on different facts and circumstances. Whereas in the present case, there is disclosure in para 9 and there is no suppression which would have impact on the grant of arrest order.

19) Similarly, it was contended by the learned counsel for the plaintiff that the aspect of urgency wrongly claimed under the plaint has no relevance. It was contended that it was nowhere mentioned about the completion of cargo operation or sailing of the vessel after 7/10 days and as such there is no pleading to the said effect. Relying upon the judgment of the Apex Court in the case of M.V.Elisabeth & Ors. Vs. Harwan Investment & Trading Pvt. Ltd. the learned counsel for the plaintiff contended that this Court would have to arrest the vessel to assume HC-NIC Page 23 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER jurisdiction and notice to other side could not have been given at pre□arrest stage since the same would be without jurisdiction.

20) The learned counsel for the plaintiff submitted that the contention raised by the defendant that the suit is not maintainable in view of the fact that the plaintiff has not shown to have made payment of bunkers supplied, i.e., S.K. Energy International P. Ltd. is not a relevant factor. It was submitted that a payment of USD 1.1 million was received; however, the same is under challenge before the Danish Bankruptcy Courts and till date OW/Pwd/Plaintiff has not realized any amount towards the outstanding invoices including the present claim amount.

21) It was contended that the plaintiff is not required to show about payment made by it to physical supplier. Referring to section 19 of the Sales of Goods Act, it was contended that title is passed over when party intended to pass title and therefore, the test is whether the goods are received by vessel and the consumed the same or not. The learned counsel for the plaintiff submitted that in commercial word, goods are sometimes bought on credit and getting title has nothing to do with sale of goods on payment only.

22) The learned counsel for the plaintiff also

submitted that therefore the proposition raised by the learned counsel for the defendant is unheard in law and the defendant has to show under Danish law if the title passes only when the payment is made and not otherwise. Relying upon the judgment of this Court in the case of M.V. Sea Renown (supra), it was submitted that it has been held by this Court that payment made to physical supplier is not required to be shown nor is it a relevant factor.

23) The learned counsel for the plaintiff submitted that the contention as regards applicability of arbitration clause and reliance upon section 45 of the Arbitration Act is in fact contrary stand taken by the defendant. The learned counsel for the plaintiff submitted that on one hand defendant says that it is not party to the contract then there is no contract and nothing is required to be referred to arbitration as arbitration is always under agreement and the defendant cannot rely upon said clause alleging not being party to the same. The learned counsel for the plaintiff also submitted that the plaintiff has right to sue the vessel for supply of goods received and consumed by the vessel for its operation which constitutes maritime claim as per 1952 Arrest Convention for which the plaintiff is entitled to initiate action in rem. It was submitted that the said right has not arisen out of contract with Copenship but also an HC-NIC Page 25 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER independent right under the law for unpaid invoice. The learned counsel further submitted that the plaintiff is therefore entitled to get the vessel arrested for securing its dues as vessel is considered as juridical person and that right is not dependent upon any contract with Copenship or otherwise. The learned counsel for the plaintiff submitted that as such, the plaintiff has contract with vessel for supply of goods received and consumed by her. The learned counsel for the plaintiff has relied upon the judgment of the Bombay High Court in the case of

Mehrab reported in AIR 2002 Bom 517 and 2007 (2) BCR 1 as well as the judgment of this Court in Admiralty Suit No.10/10 and OJ Application No.6/11 in support of his aforesaid contention.

24) The learned counsel for the plaintiff further submitted that as held by the Apex Court in the case of Booze Allen and Hamilton reported in 2011(5) SCC 532, submitted that action in rem is not required to be referred to arbitration clause or arbitration.

25) The learned counsel for the plaintiff submitted that English Security Omnibus Agreement creates security assignment in relation to debt with security outside India. Referring to sections 3 and 18 of the Gujarat Stamp Act, it was contended that even if the document is to be stamped, it has to be done within 3 months and HC-NIC Page 26 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER the plaintiff has time to pay duty till 01.09.2016 and till that time, it cannot be argued that the said document is inadequately stamped. The learned counsel for the plaintiff submitted that non□payment of stamp duty cannot be the relevant consideration for hearing of the interim order. Learned counsel for the plaintiff submitted that only debar is that such an inadequately stamped document cannot be read or admitted in evidence at the stage of trial and not at the interim order hearing stage. The learned counsel for the plaintiff submitted that it can remove the deficiency, if any, at future date and submitted that whether the document is stamped or not is irrelevant now.

26) The learned counsel for the plaintiff submitted that the judgment relied upon by the learned counsel for the defendant in the case of Malaysian Airlines Systems Bhd vs. Stic Travels (P) Ltd. reported in (2001) 1 SCC 451, is totally on different fact situation and not applicable in the instant case.

On the aforesaid grounds, it was therefore submitted that the issues raised by the defendant in the application are triable issues, which can be only resolved at trial stage and not at interim stage. It was submitted by the learned counsel for the plaintiff that until the arrest is declared wrongful and the amount of damages or loss are adjudicated and HC-NIC Page 27 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER quantified, the question of granting counter security does not arise and as such, the undertaking tendered by the plaintiff sufficiently safeguards the interest of the plaintiff. Relying upon the judgment of the Apex Court in the case of VSNL 1996(7) SCC 127, the learned counsel for the plaintiff submitted that as plaintiff has reasonably arguable case, therefore, the present application deserves to be dismissed.

13. The learned counsel for the defendant in further submission submitted that the contentions raised by the learned counsel for the plaintiff that the suppression was not material factor and that the Hon'ble Court ought to place reliance on the fact that arrest had been allowed in M.V. Sea Renown (supra), despite suppression, it was submitted that the

said case has not dealt with the Link Oil Trading Ltd. (supra). It was further submitted that the case of M.V. Sea Renown (supra) was of a minor effect. It was further submitted that in the case of M.V. Sea Renown (supra), the documents suppressed were not crucial to the case and on facts of that case. Therefore, it was held that the suppression was not a material suppression. Apart from the fact that in the said case, the Master of the defendant vessel had specifically confirmed the liability to pay for the bunkers on behalf of the owners and the arrest made was even upheld on other grounds. It was therefore submitted that the case of M.V. Sea Renown (supra) as relied upon by the plaintiff is not applicable to the facts of the present case.

14. It was also further contended by the learned counsel for the defendant that the plaintiff cannot say that the payment to the tune of USD 1.1 million received might have to be returned back in clawback proceedings to Copenship. It was contended that there is a prima facie finding that the funds of ING's are not subject to clawback refund to Copenship's liquidator and therefore, the plaintiff cannot get double payment from the owners of the defendant vessel on feeble basis and in fact the suit is premature.

15. The learned counsel for the defendant has also relied upon the provisions of section 55 of the Sale of Goods Act. It was also contended that the contention that in Admiralty Suit, in order to get the jurisdiction, the arrest order has to be passed is also incorrect. The learned counsel for the defendant contended that the plaintiff has to prove prima facie case and urgency and there cannot be any different standard for the foreigners. It was contended that the material which is suppressed are important material facts and therefore, the order of arrest deserves to be vacated.

16. The learned counsel for the defendant also contended that the plaintiff cannot be permitted to approbate and reprobate and blow hot and cold on material issues. It was contended that the contract which is relied upon by the plaintiff is not a guarantee contract as far as the defendant vessel and/or the owners of the defendant vessel is concerned HC-NIC Page 29 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER and on that basis, it is therefore prayed that there

is no privity of contract. On the aforesaid grounds, it prayed by the learned counsel for the defendant that the application deserves to be allowed as prayed for.

17. No other or further submissions are made by the learned counsel appearing for the parties.

18. Upon hearing the learned counsel appearing for the parties and perusal of the record of the suit as well as the application, it would be appropriate to refer to the case pleaded by the plaintiff in the plaint. Following facts are culled out from the plaint □

1) It is the case of the plaintiff that the plaintiff has entered into an English Security Omnibus Agreement dated 19.12.2013, whereby the plaintiff has a charge on the receivables of OW Bunker & Trading A/S.

2) It was contended that as per the provisions of the aforesaid agreement, the plaintiff has stepped into the shoes of OW and is authorized to take action for recovery of any receivables.

3) In para 3 of the plaint, the plaintiff has claimed USD 174,450 as principal amount plus interest and administrative cost total amounting to USD 139,889.65 from the due date of invoice till date and USD 20,000 towards cost of litigation in India aggregating to USD 334,339,65 with further HC-NIC Page 30 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER interest at the rate of 3% p.m. from the date of the suit till its realization as per the particulars of the claim.

4) In para 4 of the suit, the plaintiff has averred that the present suit is filed in extreme haste and within few hours, the defendant vessel is likely to leave after completing her cargo operations. It is also contended in the said paragraph that the plaint contains short narration of the relevant facts and documents which are presently available at short notice.

5) Paras 5 and 6 recites the bunkers provided to the defendant vessel at Singapore and more particularly the Bunker Delivery Note no.17189 dated 27.08.2014. It is specifically averred in para 6 that the said bunkers were accepted without raising any protest and/or demur and the Master/Chief Engineer of the defendant vessel acknowledged the receipt of Bunkers by endorsing upon the Bunker Delivery Receipt.

6) Para 7 speaks of the suit invoice no.14595 issued on 01.09.2014 for a total amount of USD 174,450.

7) In para 8 of the plaint, it is mentioned that a notice of appointment of receivers and assignment was issued on 14.11.2014 and the plaintiff and the

Pricewaterhouse Coopers (PWC) are joint receivers under the English Security Omnibus Agreement on behalf of OW.

8) In para 9 of the plaint, it is described that the Copenship Bulkers A/s has placed several orders with OW on behalf of and/or owners and/or charterers and/or operators of various vessels. It is further mentioned as under -

> "A payment of USD 1.1 million was received; however, the same is under challenge before Danish bankruptcy courts and till date OW/PWC/Plaintiff has not realized any amount towards the outstanding invoices including the present claim amount."

9) In para 10 of the plaint, the plaintiff has averred that on 15.05.2016, the plaintiff has called upon the owners of the defendant vessel to make payment of the outstanding amount. It is also further averred that the plaintiff also informed (on without prejudice basis) that to avoid arrest of the defendant vessel, the owners may consider securing claim of the plaintiff by an acceptable form of security and provided format for the same. It was further contended in the said paragraph that on 16.05.2016, the owners of the defendant vessel informed the plaintiff that they cannot at this stage provide any further comments on the plaintiff's claim unless they receive the documents/clarifications on plaintiff's claim. It is the case of the plaintiff that all the documents were provided to the owners of the defendant vessel. However, the outstanding payment was not made.

10) In para 12 of the plaint, the plaintiff has placed reliance upon the terms and conditions of OW Bunker General Terms and Conditions, 2013.

11) In paras 13 and 14 of the plaint, it is averred as under:

> "13. Copenship Bulkers A/S (on behalf of Defendant Vessel and/or master and/or owners and/or charterers and/or Operators and/or managers) have failed and neglected to make payment of the outstanding invoice.
>
> 14. Supply of bunkers to the Defendant Vessel is governed by OW's general terms and conditions. The Defendant Vessel and/or persons interested in her are liable to make payment for such bunkers which are admittedly received and consumed by the Defendant Vessel. Such liability of the Defendant Vessel cannot be linked to performance of OW's obligations under its contract, if any, with its vendors/suppliers."

12) It is also further contended in the suit in paras 16 and 17 that the plaintiff's claim arises by reason of bunkers supplied by OW to the defendant vessel and that the bunkers are essential for operation of the defendant vessel. It is also averred that the supply of bunkers was supply of goods or materials supplied to a ship for her operation and maintenance and also constitutes "necessaries" and the same would therefore constitute a maritime claim. It is also specifically averred that as per the terms and HC-NIC Page 33 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER conditions, the OW has lien on the vessel for the bunkers supplied and therefore, even a change in ownership of the vessel cannot defeat the claim of OW. It is also specifically averred that OW had supplied bunkers on faith and credit of the vessel and bunkers were supplied for a price consideration and not gratuitously. It is also therefore averred that the plaintiff is entitled to look to the defendant vessel for security. It is also further averred that thus the plaintiff/OW's claim is a recognized maritime claim/lien within the Admiralty Courts Act, 1861 and the various International Maritime Conventions.

13) In para 18 of the plaint, the plaintiff has averred that the plaintiff is entitled to proceed against the Defendant Vessel in rem as the plaintiff has a maritime claim and maritime lien against the defendant vessel and is entitled for the arrest, condemnation and sale of the defendant vessel for the satisfaction of its claim.

14) It is therefore contended by the plaintiff in para 19 that the plaintiff is entitled to maintain an action in rem against the defendant vessel under the provisions of law and generally under the admiralty jurisdiction of this Court as the defendant vessel is presently lying in port and harbor at Hazira within the territorial waters of India and within the admiralty jurisdiction of HC-NIC Page 34 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER this Court.

15) In paras 20 and 22 of the plaint, the urgency is mentioned.

16) In para 23, the balance of convenience is pleaded. The plaintiff has also filed an undertaking through their duly constituted attorney one Mr. Rohit Dhulabhai Parmar.

19. On the basis of the aforesaid averments, the order of arrest dated 18.05.2016 came to be passed by this (Coram A.J. Shastri, J.).

20. The present application is filed by the defendant with the aforementioned prayers.

21. The first contention which deserves consideration at the outset is whether there is any suppression of material fact by the plaintiff or not. From the plaint and more particularly the averments of the plaint which are noted hereinabove, it is disclosed by the plaintiff that the plaintiff has stepped into the shoes of OW bunkers on the basis of the English Security Omnibus Agreement dated 19.12.2013 and that they have a charge on the receivables of OW Bunkers. It is an admitted position that the Copenship Bulkers A/S were charterers of the defendant vessel. From the suit invoice at Exhibit□ D, the bill is in the name of M/V Copenship Eco and in the name of Copenship Bulkers A/S. The said invoice dated 01.09.2014 clearly discloses the following facts -

Date of supply - 27th August 2014
Due date – 26th September 2014
Port – Singapore
Invoice No. – 188-14595

It is also mentioned in the invoice bill as under:

> "All O.W. BUNKER & TRADING A/S's right under this invoice and the supply contract between us (the Supply Contract) have been assigned in favour of ING Bank N.V. pursuant to a security agreement dated 19th December 2013. You are authorized and instructed without further obligation to O.W. BUNKER & TRADING A/S to pay all amounts payable under this invoice to the following account with ING Bank N.V."

The copy of the Sales Order Confirmation at Exhibit□B to the suit dated 20.08.2014 is issued by O.W. BUNKER & TRADING A/S to Copenship Bulkers A/S, which relates to the supply to defendant vessel at Singapore in the said delivery date of 26.08.2014. The same also indicates that the seller is O.W. Bunker & Trading A/S and the supplier is S.K. Energy. The sale confirmation order also contains the following terms-

> "The sale and delivery of the marine fuels described above are subject to OW Bunker Group's Terms and Conditions of sale(s) for Marine Bunkers. The acceptance of the marine bunkers by the vessel named above shall be deemed to constitute acceptance of the said general terms applicable to you as 'Buyer' and to O.W. BUNKER & TRADING A/S as 'Seller'.
>
> The fixed terms and conditions are well known to you and remain in your possession. If this is not the case, the terms can be found under the web address:
>
> HC-NIC Page 36 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER http://owbunker.com/wp□content/uploads/ 2013/12OWB□GRC□ValidFrom01092013.pdf"

The Bunker Delivery Note at Exhibit□C is signed by the Master/Chief Engineer of the defendant vessel without any remarks and/or any demur or objection.

The aforesaid facts therefore constitute that the plaintiff has disclosed its relation with the O.W. Bunker and has also disclosed the conditions on which bunkers were supplied and the rate at which the bunkers were supplied including the fact that the bunkers were received and consumed by defendant vessel which is quite evident from the Bunker Receipt duly signed by the Master/Chief Engineer of the defendant vessel. As per the conditions of the supply relied upon and contended by the plaintiff, the Copenship Bulkers A/S, as charterer inter alia provides that the acceptance of marine bunkers by the defendant vessel shall be deemed to constitute acceptance to general terms applicable.

22. In para 9 of the plaint, the plaintiff has disclosed the fact that payment of USD 1.1 million has been received. But the same is under challenge before the Danish Bankruptcy Courts and till date, the plaintiff has not realized any amount towards the outstanding invoices including this suit invoice. The said preposition is the case of the plaintiff and therefore, it cannot be said that the receipt of USD 1.1 million is suppressed by

the plaintiff. As rightly contended by the learned counsel for the HC-NIC Page 37 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER plaintiff, admittedly, the bunkers were supplied to the defendant vessel which has been accepted by the competent person of the defendant vessel, i.e., Master/Chief Engineer and the bunkers have been consumed by the defendant vessel. The documents clearly show that the order of bunker was placed by Copenship and was for defendant vessel, may be as a charterer. However, the fact remains that the bunkers were supplied to the defendant vessel.

23. At this juncture, it would be appropriate to refer to the judgments relied upon by the learned counsel for the defendant.

1) Peacock Plywood Pvt. Ltd. Vs Oriental Insurance Co. Ltd. (para 42) "42. Only because the expression "without prejudice" was mentioned, the same, in our opinion, by itself was not sufficient and would not curtail the right of the insured to which it was otherwise entitled to. The expression "without prejudice" may have to be construed in the context in which it is used. If the purpose for which it is used is accomplished, no legitimate claim can be allowed to be defeated thereby. (See Cutts v. Head and Another and Rush & Tompkins Ltd v. Greater London Council)"

2) Link Oil Trading Ltd. vs. M.V. ST. Peter □ Order dated 12.01.2010 in Admiralty Suit No.20 of 2009 (Coram: D.A. Mehta, J.,) (paras 13 to

16) "13. The contention on behalf of plaintiff that granting of the amendment application permitting the plaintiff to amend the plaint would indicate that the Court had accepted the explanation tendered by the plaintiff is a submission which is too facile and cannot be countenanced. The Court is not expected to be naive enough to equate the permission to amend HC-NIC Page 38 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER with the statement to be made, after hearing the parties, that the explanation for the omission of material fact is required to be accepted. A procedural permission does not mean acceptance of an explanation in relation to substantive rights of litigating parties.

14. The explanation tendered by the plaintiff does not merit acceptance. The extracted portion reproduced hereinbefore indicates that the explanation is only in relation to why the plaintiff did not mention the correct amount.

There is no explanation as to why the factum of instituting proceedings for the very same cause of action, viz., recovery of the very same principal amount, as stated in Annexure A originally filed was not forming part of the plaint. The explanation is only as regards losing sight of the fact that partial payment had been received against the Invoice raised by the plaintiff. In this context one cannot lose sight of the fact that the proceedings instituted in New York Southern District Court were admittedly only against Belarussian Shipping and not either the defendant vessel or the owners of the defendant□vessel. This distinction has to be appreciated in the context of the dispute raised on behalf of defendant as to the ownership of the defendant vessel at the relevant point of time when the transaction of supplying bunkers had been entered into by the plaintiff with Belarussian Shipping, the case of the plaintiff being that Belarussian Shipping was the agent of the defendant owners, acting for and behalf of the defendant vessel and the said aspect being seriously disputed by the defendant Peter Maritime Company who has put in appearance and disputed the ownership of the vessel at the relevant point of time.

15. Hence the factum of instituting proceedings for recovery of the same amount against different entity before a different forum, viz, New York Southern District Court was suppressed by the plaintiff and no explanation is forthcoming as regards the said omission. The omission is, at the cost of repetition, only in relation to the amount of the outstanding dues and there is no HC-NIC Page 39 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER explanation as to why the plaintiff has not narrated the fact of having instituted proceedings for the same cause of action on September 4, 2008. This fact has come on record for the first time only alongwith affidavit filed by the defendant.

16. The plaintiff would therefore not be entitled to any equitable consideration. However, a further submission on behalf of plaintiff was that the correct test to be applied by the Court was as to whether the plaintiff would be entitled to an order of arrest even if the said fact had been originally incorporated in the plaint. One may not join any issue as regards the legal proposition as to the test to be applied but simultaneously the Court also has to consider whether even in a case where a plaintiff establishes a prima□facie case an ex□parte injunction must necessarily follow. In such an eventuality the Court has to further pose a question and examine as to whether the plaintiff would suffer irreparable loss if ex□parte ad□interim relief is not granted to the plaintiff at the point of time when the suit is taken up for hearing in the first instance. In the present case the answer has to be an emphatic 'NO'. The plaintiff had already instituted proceedings for recovery of the very same amount (as amended) in the New York Southern District Court and had failed by the process of withdrawal of those proceedings, as accepted by the plaintiff. It is not necessary to go into the reasons for withdrawal. At this stage the Court is only considering whether even if the aforesaid fact had formed part of the plaint as originally presented whether the plaintiff was, or was not entitled to an ex□ parte order of arrest of vessel. If the plaintiff had not suffered any irreparable damage for a period of more than one year there is no question of stating that in absence of any order of arrest of the vessel the plaintiff would suffer an irreparable loss which could

not be compensated in terms of money. In fact the claim itself makes it clear that in such a case all that happens is the amount of interest continues to go up, bearing in mind the fact that the suit is primarily only for recovery of HC-NIC Page 40 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER outstanding dues."

3) Link Oil Trading Ltd. vs. M.V. ST. Peter Judgment of the Division Bench (Coram: Jayant Patel & J.C. Upadhyaya, J.J.) dated 09.02.2011 in OJ Appeal No.2 of 2010 (paras 11 to 15) "11. In the background of the principle established by Hon'ble the Apex Court if the instant case is examined, in the first instance, it becomes clear that about claiming higher amount initially in the plaint and subsequently when the defendant in the reply affidavit brought to the notice of the court about payment, the plaintiff by way of amendment reduced its claim, but about the said mistake a vague and general explanation came to be tendered by the plaintiff stating that on account of several transactions, it has been skipped from its mind while giving urgent instructions to Solicitors and Advocates. It has been tried to explain that in a rush to file proceedings before this Court and to obtain order of arrest, the plaintiff could not point out part payment in the plaint. About the suppression of factum regarding previously instituted suit at New York is concerned, except the fact that the proceedings at New York had already been withdrawn, no explanation was tendered as to why said facts were not initially pleaded in the plaint. There is no dispute that only after the defendant filed its reply affidavit and brought to the notice of the Court regarding the suppression of these facts, the plaintiff carried out necessary amendment in the plaint. In the impugned order, the Ld. Single Judge elaborately dealt with this aspect of the matter and according to us, has rightly observed that there is no explanation as to why the factum of instituting proceedings for the very same cause of action viz. recovery of the very same principal amount, was not forming part of the plaint before the amendment. The Ld. Single Judge has also taken into consideration the fact that the previous suit filed at New York came to be withdrawn on 14/11/2008 and the present Admiralty Suit came to be instituted in this Court on 10/12/2009. However, there is no HC-NIC Page 41 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER dispute that the previous suit instituted at New York was pertaining to the very same cause of action, but the said suit was filed against BSC and not either against the defendant vessel or against the owners of the defendant vessel. It is further pertinent to note that this distinction is most relevant in the context of the dispute raised on behalf of the defendant about acquisition of ownership of the defendant vessel on 22/12/2008; whereas the cause of action of the suit transaction occurred much prior to that. In the impugned order, therefore, the Ld. Single Judge has in the above background, rightly emphasized the fact that the previous suit instituted at New York was only against BSC and not either against the defendant vessel or the present owners of the defendant vessel. If the cause of action, in fact, was qua the defendant vessel or its present owners, then they would have been the defendants in said suit.

12. About the withdrawal of the previously instituted suit, however, in the impugned order, the Ld. Single Judge observed that it is not necessary to go into the reasons for withdrawal as at this stage the Court is considering whether even if the aforesaid fact regarding institution of previous suit and the withdrawal of the same, had formed part of the plaint as originally presented, whether the plaintiff was or was not entitled to ex□parte order of arrest of vessel. Apart from the fact as to whether the previously instituted suit was withdrawn reserving the liberty to file fresh suit on the same cause of action or subject matter or not and if no such liberty was reserved, whether the plaintiff is precluded from instituting any fresh suit in respect of such subject matter or not, the relevant aspect of the matter is that only after the defendant pointed out about the suppression, the plaintiff amended its plaint. Moreover, it is pertinent to note that neither the defendant vessel nor the present owners of the defendant vessel were made party to that suit.

13. In the impugned order, the Ld. Single Judge has examined this aspect of the matter from one more angle as well. It has been HC-NIC Page 42 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER observed that in such an eventuality the Court has to further pose a question and examine as to whether the plaintiff would suffer irreparable loss if ex□parte ad□nterim relief is not granted to the plaintiff at the point of time when the suit was taken up for hearing in the first instance. The Ld. Single Judge, replying this question in negative, observed that if the plaintiff had not suffered any irreparable damage for a period of more than one year, there is no question of stating that in absence of any order of arrest of the vessel, the plaintiff would suffer an irreparable loss, which could not be compensated in terms of money. It is pertinent to note that the previous suit instituted at New York Court came to be withdrawn on 14/11/2008 and after about more than one year on 10/12/2009 the instant Admiralty Suit came to be instituted in this Court and in that context, in the impugned order it has been observed that if at all the plaintiff was going to sustain irreparable loss, he would not have waited for more than one year. It has been submitted on behalf of the appellant □plaintiff that the cause of action for this suit arose only when the defendant vessel came to be bearthed at Kandla Port within the Indian territorial water. This submission would have definitely carried effect if the previously instituted suit at New York was filed either against the defendant vessel or against the present owners of the defendant vessel. In above view of the matter, we do not find any infirmity in the impugned order when the Ld. Single Judge examined the suppression of material fact from the view point of irreparable injury.

14. Reliance was placed upon the case of Videsh Sanchar Nigam Ltd. [supra], wherein in Admiralty matter, considering peculiar facts and circumstances emerged in said case, the Apex Court allowed appeal and set aside the order of Bombay High Court directing release of a commercial ship M/s. M.V. Kapitan Kud. However, on the basis of materials available on the record, Hon'ble the Apex Court came to the conclusion that the damage to the cable wire of Videsh Sanchar Nigam Ltd., laid under the

sea HC-NIC Page 43 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER water of Indian territory came to be caused by said vessel. There was no such defence regarding suppression of material fact in that case. Furthermore, the learned Senior Counsel for the appellant placed reliance upon the above referred decisions of Hon'ble the Apex Court in the cases of S.J.S. Business Enterprises (P) Ltd., Arunima Baruah, and Mayar (H.K.) Ltd. to substantiate the submission that the suppression per se would not disentitle a litigant in claiming equitable relief of interim order, is ill founded in the facts and circumstances of the instant case as, in the instant case, the suppression was pertaining to material facts. If the appellant□plaintiff had pleaded in the plaint at the time of very inception of the Admirality Suit the material facts regarding filing of the previous suit at New York on the same cause of action, non□joinder of the Suit vessel and its present owners in said suit, withdrawal of said suit before about more than one year to the institution of the instant Admiralty Suit in this Court etc., the Court might not have passed ad interim order of arrest of the Suit Vessel. These are such material facts which the Court would have gone into before the grant of ad□interim order. At the same time, while considering the factors of urgency on the part of the appellant□plaintiff in obtaining ad interim order as well as sustaining irreparable loss in case immediate measures are not taken, if the appellant□plaintiff had brought to the notice of this Court about filing of the instant Admiralty Suit after about more than one year from the withdrawal of the previous suit, the Court would have declined to pass ad interim order against the respondent□ defendant. Besides, the power of the High Court under Article 226 of the Constitution in case when alternative remedy is resorted to before other forum would not stand at par with jurisdiction in Admiralty Suit like Civil Suit, when earlier, for the same cause of action a suit was already filed and was withdrawn. Under such circumstances, as found by the learned Single Judge and as find by us, the suppression was so serious that it should disentitle the appellant□plaintiff for equitable relief of interim order. Thus the facts of the present HC-NIC Page 44 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER case are totally different than the facts and circumstances in the cases before Hon'ble the Apex Court and consequently the decisions cited at bar would be of no help to the appellant□plaintiff.

15. In the impugned order, therefore, the Ld. Single Judge came to the conclusion that there was suppression of material facts. It has been further observed that applying the test as to whether the plaintiff would be entitled to an order of arrest even if the said fact had been originally incorporated in the plaint, the result would be that the plaintiff was not entitled to any equitable consideration. We, therefore, do not find that the Ld. Single Judge has exercised discretionary powers either arbitrarily, capriciously, perversely or against the settled principle of law. It is clear that in an appeal against discretionary order, appellate Court shall not interfere even if other view is possible, but considering the facts and circumstances of the instant case, so also considering the impugned order passed by the Ld. Single Judge, we are of the considered opinion that no other view is possible than the one taken by the Ld. Single Judge."

4) Raj Shipping Agencies vs. M.V. Bunga Mas Tiga□AIR 2001 Bombay 451 (Paras 7 & 8) "7. Now, if in the light of these rival submissions, if these plaint is perused it becomes clear that order for buying oil was placed by M/s. North End Oil with the Plaintiffs. The price at which the oil was to be supplied was also stated in that contract. The oil, however, was to be delivered to the first Defendant vessel. In the plaint. I do not find any averment made that the M/s. North End Oil Pvt. Ltd. was acting as an agent of the first Defendant or its owner for purchase of oil from the Plaintiffs. On the contrary, the documents which have been placed on record by the Plaintiffs namely purchase order, invoices etc. show that so far as the Plaintiffs are concerned, M/s. North End Oil Pvt. Ltd. was buyer of the oil from the Plaintiffs. The oil was merely to be delivered to the first HC-NIC Page 45 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER Defendant vessel. It is, thus, clear that so far as the substantive law is concerned, there is no privity of contract between the Plaintiffs and the first Defendant vessel or its owner. It is, however, contended on behalf of the Plaintiffs that though there was no direct contract between the Plaintiffs and the owner of the first Defendant vessel, the Plaintiffs have maritime lien over the vessel. Because, the oil was supplied to the first Defendant vessel. It is further to be seen that the present suit is the action in rem. The Supreme Court has considered this aspect of the matter in its judgment in M. V. Elisabeth's csae. The observations of the Supreme Court in paragraphs 65 and 66 are pertinent and they read as under :□"65. Where statutes are silent and remedy has to be sought by recourse to basic principles, it is the duty of the Court to devise procedural rules analogy and expediency, actions in rem, as seen above, were resorted to by Courts as a devise to overcome the difficulty of personal service on the defendant by compelling him to enter appearance and accept service of summons with a view to furnishing security for the release of the res; or, in his absence, proceed against the res itself, by attributing to it a personality for the purpose of entertaing a decree and executing the same by sale of the res. This is a practical procedural device developed by the Courts with a view to rendering justice in accordance with substantive law not only in cases of collision and salvage, but also in cases of other maritime liens and claims arising by reason of breach of contract for the hire of vessels or the carriage of goods or other maritime transactions, or tortious acts, such as conversion or negligence occurring in connection with the carriage of goods. Where substantive law demands justice for the party aggrieved, and the status has not provided the remedy, it is the duty of the Court to devise procedure by drawing analogy from HC-NIC Page 46 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER other systems of law and practice. To the Courts of the "Civil Law Countries" in Europe and other places, like problems seldom arise, for all persons and things within their territories (including their waters) fall within their competence to deal with. They do not have to draw any distinction between an action in rem and an action in personam.

66. It is likewise within the competence of the appropriate Indian Courts to deal. In accordance with the general principles of maritime law and the applicable provisions of

statutory law, with all persons and things found within their jurisdiction. The power of the Court is plenary and unlimited unless it is expressly or by necessary implication curtailed. Absent such curtailment of jurisdiction, all remedies which are available to the Courts to administer justice are available to a claimant against a foreign ship and its owner found within the jurisdiction of the concerned High Court. This power of the Court to render justice must necessarily include the power to make interlocutory orders for arrest and attachment before judgment."

8. It is clear from the observations quoted above that an action in rem is devised by the Court to overcome a difficulty of personal service on the owner of the vessel. For that purpose, the vessel itself is treated as a person, so that the liability of the owner of the vessel can be enforced against the vessal itself. It is thus clear that even for maritime lien there has to be an enforceable rights in the plaintiffs against the owner of the vessel. That right is enforceable against the vessel. But existence of aright in the Plaintiffs against the owner of the vessel. Is a must. Insofar as the present case is concerned, averments in the plaint do not disclose any existing right in the Plaintiffs against the owner of the vessel. In the present case, it is clear that there were two independent contracts HC-NIC Page 47 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER in relation to purchase of oil. There was one contract between the owner of the Defendant No. 1/ vessel and M/s. North End Oil Pvt. Ltd. whereby the owner of the Defendant No. 1/ vessel agreed to purchase oil at the stated price from M/s. North End Oil Ltd., and the second contract was between M/s. North End Oil Pvt. Ltd. and the Plaintffs, whereby M/s. North End Oil Pvt. Ltd. agreed to purchase oil from the Plaintiffs at a stated price. The price of oil in both these contracts is different. Insofar as, the purchase of oil by the owner of the Defendant No. 1/ vessel is concerned, there is no privity of contract between the Plaintiffs and the owner of the Defendant No. 1/ vessel. Not only that but even a demand of the price was made by the Plaintiffs from M/s. North End Oil Pvt. Ltd. and the Plaintiffs have also lodged their claim with M/s. North End Oil Pvt. Ltd. The first Defendant has produced on record receipts which show that the owner of the first defendant vessel has already made payment of price of oil to M/s. North End Oil Pvt. Ltd.. It is further to be seen here that in case the Plaintiffs claim against the Defendant No. 1/ vessel and its owner is held to be maintainable then, the owner of the Defendant No. 1/ vessel would be liable to pay price of the oil to two parties, namely M/s. North End Oil Pvt. Ltd. as also the Plaintiffs. In my opinion, adopting such course of action would not amount to advancing justice. Insofar as the Judgment of the learned Single Judge in the case of Trans Gulf Oil & Shipping Inc. relied on by the learned Counsel for the Plaintiffs is concerned, it is clear from the observations in paragraph 10 of that judgment that in that case there was a specific averments made in the plaint that the master of the vessel himself had requested supply of bunkers from the Plaintiff. Thus the case disclosed in the plaint of that case was adirect contract between the owner of the vessel and the Plaintiff. In my opinion, that is the distinguishing feature between that case and the present case. In my opinion, supply of necessity would not make the owner of the vessel liable to pay the price of the supply, unless the Plaintiffs prove that the supplies were made at the instance of either the owner

HC-NIC Page 48 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER of the vessel or at the instance of the person authorised by the owner of the vessel.

5) Fujairah National Shipping Agency vs. M.V. Sagar Shakti□AIR 2003 Bombay 470 (para 14) "14.....In order to enable the Plaintiff to succeed in a claim based on the supply of necessaries, it is necessary to aver that the supply of necessaries was effected at the request of the owners, or, that in the alternative, the supply was effected for and at the behest of an agent of the owners who was duly authorised to place an order for the supply of necessaries."

6) M/s. Joanes P. Company vs. M.V. Kamal XXXXI - Admiralty Suit No.67 of 2014 decided on 07.04.2015 (paras 11 to 16) "11. Once this is acknowledged, it is easier to see why there must be a link between the person liable in personam (i.e. one who would be liable if the action succeeded) and the ship concerned in the claim at two critical times. Once when the cause of action arose (at which juncture he must be the owner or charterer, as the case may be) and again when the action is brought (at which time he must be in possession or control of the ship either as the beneficial owner or the charterer under a charter of demise). The links (owner, charterer or in possession or control) not only apply to the ship in regard to which the claim is brought (the particular ship) but even to "any other ship".

12. Now let us interpret Articles 3(1) and (4) of the 1952 convention. It is submitted by the Plaintiff that the particular ship, in respect of which the maritime claim has arisen, can be arrested anytime without reference to its ownership, possession or control at the time of arrest. If that were so, all maritime claims would be placed on par with claims involving maritime lien. For it is only for enforcement of a maritime lien that the condition that the claim has arisen in respect of the ship to be arrested is by itself, without anything more, sufficient. As we have seen above, all other claims require HC-NIC Page 49 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER the critical link between the person liable and the vessel on both the occasions, i.e. at the time of accrual of cause of action and at the time of arrest. The question is whether the requirement, therefore, that the owner must be the person liable (save when the claim is secured by a maritime lien) is implied by Article 3(1). That it is so implied is clear from the reading of Article 3 as a whole, firstly, because otherwise there is no reason why a ship other than that in respect of which the maritime claim has arisen can be arrested on the basis that it is owned by the owner of the particular ship (i.e. that ship in respect of which the maritime claim has arisen). Secondly, the opening words of Article 3(1), "subject to the provisions of paragraph 4", also make it clear that paragraph 4 constitutes an exception to the general rule laid down in paragraph 1. Since the exception consists in the right of arrest of a ship when the charterer by demise and not the owner is liable in respect of the maritime claim, in all other cases the general rule must apply, namely, that the arrest is only permissible when the owner of the ship is liable. This implication is also clear when we read Article 9 of the 1952 Convention in conjunction with Article 3(1).

Article 9 is in the following words:

> ARTICLE 9 Nothing in this Convention shall be construed as creating a right of action, which, apart from the provisions of this Convention, would not arise under the law applied by the Court which was seized of the case, nor as creating any maritime liens which do not exist under such law or under the Convention on maritime mortgages and liens, if the latter is applicable.

This Article makes it clear that by Article 3(1) no new right of action or maritime lien was created which did not exist under the law or under the convention of maritime mortgages and liens (if applicable). An interesting discussion is to be found in Berlingieri on Arrest of Ships, A Commentary on 1952 and 1999 Arrest Conventions, in connection with this subject, and particularly referring to the way HC-NIC Page 50 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER the particular provisions of Article 3 and Article 9 (Article 11 of the original draft) evolved. Berlingieri has put it thus:

> "I.396 If in fact the claimant had the right to arrest the ship in the hands of a bona fide purchaser, the maritime claims would acquire one of the special features of the maritime liens, viz. The so called droit de suite, which is set out in Article 7(2) of the 1967 Convention on Maritime Liens and Mortgages and now in Article 8 of 1993 International Convention on Maritime Liens and Mortgages. This problem was raised during the Naples Conference by the British delegation, which drew the attention of the Conference to the fact that only four out of the maritime claims listed in Article 1(1) were maritime liens followed the ship into the hands of a bona fide purchaser, while that was not the case for the other maritime claims. The view was then expressed that Article 3(1) as then drafted might be construed to extend to all maritime claims the peculiar characteristics of maritime liens and it was suggested that the matter might be taken care by the Drafting Committee.
>
> I.397 The Drafting Committee thought that this question could be clarified by amending Article 11(now Article 9), which at the time was drafted as follows:
>
> Nothing in this Convention shall be construed as a creating a right of action, which, apart from the provisions of this Convention, would not arise under the law applied by the Court which had seisin of the case by adding the words:
>
> nor as creating any maritime liens which do not exist under such law or under the Convention on Maritime Mortgages and Liens.

I.398 Probably because the British delegation had raised the question whether maritime claims not secured by maritime liens would follow the ship, in the French HC-NIC Page 51 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER text reference was expressly made to the droit de suite. The addition was contained in a separate paragraph, while in the English text it was a continuation of the same paragraph, and was drafted as follows:

La presente Convention ne confere aux demandeurs aucn droit de suite autre que celui accorde par la loi du lieu de la saisie ou par la Convention internationale sur les privileges et hypotheques martimes. (This Convention does not grant to claimants any droit de suite other than that granted by the law of the place of arrest or by the International Convention on Maritime Liens and Mortgages).

I.399 As is known, at the Diplomatic Conference the words "if the latter is applicable" ("si celleci est applicable") were added at the end of the sentence.

I.400 A further clarification of this question was suggested by the Finnish delegate at he Diplomatic Conference. He suggested that in order to avoid Article 3(1) being construed so as to give the claimant the right to follow the ship into the hands of a bona fide purchaser, there should be added in that paragraph a reference to Article 11.

I401 Although no comments were made on the amendment proposed by the Finnish Delegage, it appears that it was inserted in the text prepared by the Drafting Committee. Article 3(1), as submitted to the Plenary Conference and approved by it, read as follows :

1. Subject to the provisions of paragraph 4 of this Article and of Article 10, a claimant may arrest either the particular ship in respect of which the maritime claim arose, or any other ship which is owned by the person who was, at the time when the maritime claim arose, the owner of the particular ship, even though the HC-NIC Page 52 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER ship arrested be ready to sail but no ship, other than the particular ship in respect of which the maritime claim arose, may be arrested in respect of any of the maritime claims enumerated in Article (1) (1)(o), (p) or (q).

I.402 Article 10, reference to which was made in Article 3(1), was at that time Article 11, the numbering of the Articles having changed after the incorporation of Article 9 of the draft approved at Naples into Article 2. Article 9 provided :

This Convention shall not apply to claims made by Governments or other Public Authority in respect of taxes, dues or penalties under any Statute or Regulation, and the Convention shall not affect any rights of Dock or Harbour Authorities under their existing domestic law against vessels or their owners.

I.403 Article 10 was approved by the plenary session of the Conference. But after the second paragraph of Article 6 had been deleted, President Lilar, when submitting Article 7(which provided that the rules of procedure shall be governed by the law of the State in which the arrest is made or applied for) to the vote, stated that the text of Article 7 could be inserted into Article 6.

I.404 Even if no express decision appears to have been taken on this suggestion of the President, Articles 6 and 7 were actually merged, and consequently Article 8 dealing with jurisdiction became Article 7, Article 9 dealing with the scope of application of the Convention became Article 8 and Article 10, which is that presently considered, became Article 9.

Unfortunately, it was not realised that as a consequence of this change in the numbering of the Articles from 7 onwards, the reference in Article 3(1) to Article HC-NIC Page 53 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER 10 should be changed to a reference to Article 9.

I.405 The conclusion is that the first part of Article 3(1) should be read:

"Subject to the provisions of paragraph 4 of this article and of article 9, a claimant may arrest either the particular ship", etc. I.406 There can be no doubt, therefore, that, unless the claim is secured by a maritime lien, the right of arrest of a ship in respect of a maritime claim exists only if that ship, at the time of the arrest, is still owned by the person who owned her when the maritime claim arose.

I.407 This view is accepted in a number of Contracting States, including Belgium, Croatia, Denmark, Finland, France, Germany, Greece, Haiti, Ireland, Italy, the Netherlands, Nigeria, Norway, Portugal, Slovenia, Spain, Sweden and the United Kingdom."

13. Thus, if it is clear on the interpretation of paragraph 1 of Article 3 that unless the claim is secured by a maritime lien, the right of arrest of a ship in respect of a maritime claim exists only if that ship, at the time of the arrest, is still owned by the person who owned her when the maritime claim arose, there is absolutely no reason to interpret paragraph 4 differently. Paragraph 4 cannot possibly mean that the particular ship, in relation to which a maritime claims arose and which was with a charterer by demise against whom the

claim arose, can be arrested without the same charterer being in its possession or control.

14. That which was latent in Article 3 of the 1952 Convention is made patent in the corresponding Article 3 of the 1999 Convention. There is thus no material difference in this respect in the arrest provisions of Article 3 of 1952 Convention and Article 3 of 1999 Convention. But even if it were, the latter Article being contained in a later convention HC-NIC Page 54 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER and which applies in India, as held by the Supreme Court in the case of M. V. Sea Success (supra), we would rather go by the later Convention and apply Article 3 of 1999 Convention. Just as in the case of overlapping provisions of municipal laws or of international treaties between two nations, it is to be presumed that concerning the same subject matter a later convention, if it fully and exhaustively deals with the subject matter, must prevail over the earlier convention.

15. Let us now consider whether any difference is made to this position by the provisions of the Merchant Shipping Act, 1958 referred to by learned Counsel for the Plaintiff, namely, Sections 443 and 444 read with Section 3(15) of that Act, and the interpretation of these provisions by the Supreme Court in the case of M.V. Elisabeth. The submission is that under Section 3(15), a foreign ship falls within the jurisdiction of the High Court where the vessel happens to be at the relevant time or where the cause of action wholly or in part arises, and the detention is authorised in terms of Sections 443 and 444 since this vessel has caused 'damage', such damage not being necessarily confined to physical damage, but even extending to breach of contract, as held in Elisabeth case (supra). Section 443 is in the following terms :

> Section 443. Power to detain foreign ship that has occasioned damage.
> (1) Whenever any damage has in any part of the world been caused to property belonging to the Government or to any citizen of India or a company by a ship other than an Indian ship and at any time thereafter that ship is found within Indian jurisdiction, the High Court may, upon the application of any person who alleges that the damage was caused by the misconduct or want of skill of the master or any member of the crew of the ship, issue an order directed to any proper officer or other officer named in the order requiring him to detain the ship until such time as the owner, master or consignee thereof has satisfied any claim in respect of the damage or has given HC-NIC Page 55 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER security to the satisfaction of the High Court to pay all costs and damages that may be awarded in any legal proceedings that may be instituted in respect of the damage, and any officer to whom the order is directed shall detain the ship accordingly.

(2) Whenever it appears that before an application can be made under this section, the ship in respect of which the application is to be made will have departed from India or the territorial waters of India, any proper officer may detain the ship for such time as to allow the application to be made and the result thereof to be communicated to the officer detaining the ship, and that officer shall not be liable for any costs or damages in respect of the detention unless the same is proved to have been made without reasonable grounds.

(3) In any legal proceedings in relation to any such damage aforesaid, the person giving security shall be made a defendant and shall for the purpose of such proceedings be deemed to be the owner of the ship that has occasioned the damage.

The Supreme Court in Elisabeth case considered, what is meant by 'damage caused by a ship' within the meaning of Section 443. The Supreme Court held as follows :

79. The detention of a foreign ship is authorised in terms of sections 443 and

444. In view of their vital significance in the enforcement of maritime jurisdiction, we shall read these two sections in full. Section 443 defines the character and scope of the power of detention:

Section 443. Power to detain foreign ship that has occasioned damage. (1) Whenever any damage has in any part of the world been caused to property belonging to the Government or to any citizen of India or a company by a ship other than an Indian HC-NIC Page 56 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER ship and at any time thereafter that ship is found within Indian jurisdiction, the High Court may, upon the application of any person who alleges that the damage was caused by the misconduct or want of skill of the master or any member of the crew of the ship, issue an order directed to any proper officer or other officer named in the order requiring him to detain the ship until such time as the owner, master or consignee thereof has satisfied any claim in respect of the damage or has given security to the satisfaction of the High Court to pay all costs and damages that may be awarded in any legal proceedings that may be instituted in respect of the damage, and any officer to whom the order is directed shall detain the ship accordingly.

(2) Whenever it appears that before an application can be made under this section, the ship in respect of which the application is to be made will

have departed from India or the territorial waters of India, any proper officer may detain the ship for such time as to allow the application to be made and the result thereof to be communicated to the officer detaining the ship, and that officer shall not be liable for any costs or damages in respect of the detention unless the same is proved to have been made without reasonable grounds.

(3) In any legal proceedings in relation to any such damage aforesaid, the person giving security shall be made a defendant and shall for the purpose of such proceedings be deemed to be the owner of the ship that has occasioned the damage.

(emphasis supplied) The power of enforcement of an order of detention of a foreign ship is dealt with by Section 444.

Section 444. Power to enforce detention of ship. (1) Where under this Act a ship is authorised or ordered to be detained, HC-NIC Page 57 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER any commissioned officer of the Indian Navy or any port officer, pilot, harbour master, conservator of port or customs collector may detain the ship.

(2) If any ship after detention, of after service on the master of any notice of, or order for, such detention proceeds to sea before she is released by competent authority, the master of the ship shall be guilty of an offence under this sub□section.

(3) When a ship so proceeding to sea takes to sea, when on board thereof in the execution of his duty any person authorised under this Act to detain or survey the ship, the owner, master or agent of such ship shall each be liable to pay all expenses of, and incidental to, such person being so taken to sea and shall also be guilty of an offence under this sub section.

(4) When any owner, or master or agent is convicted of an offence under Subsection (3), the convicting magistrate may inquire into and determine the amount payable on account of expenses by such owner, master or agent under that subsection and may direct that the same shall be recovered from him in the manner provided for the recovery of fines.

These provisions relate to detention by reason of damage caused in any part of the world by a foreign ship to property belonging to the Government of India or to an Indian citizen or company. The sections are wide in terms and the expression 'damage' is not necessarily confined to physical damage. Ordinarily damage is caused by physical contact of the ship, such as in collision. But damage can also be caused to property by breach of contract or acts of commission or omission on the part of the carrier or his agents or servants by reason of the negligent operation and management of the

vessel, as, for example, when cargo is damaged by exposure to weather or by negligent stowage; or, by the misconduct of those in charge of the HC-NIC Page 58 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER ship, like when cargo is disposed of contrary to the instructions of the owner or by reason of theft and other misdeeds. In all these cases, damage arises by reason of loss caused by what is done by the snip or by the breach, negligence or misdeeds of those in charge of the ship. It must however be noticed that the expression 'damage done by any ship' has been construed by the English Courts as not to apply to claims against the carrying ship for damage done to cargo. In the Victoria 1887 12 PD 105, the Court so construed Section of the Admiralty Court Act, 1861 (24 Victorine c.10).14 It has been held to apply only to physical damage done by a ship by reason of its coming into contact with something. See The Vera Cruz,; Currie v . M. Knight and The Jade. In view of the specific provisions of the English statutes of 1920, 1925, 1956 and 1981, it was unnecessary for the English Courts to construe the expression broadly so as to include cargo claims and the like. The last two enactments contain an exhaustive list of maritime claims and questions in regard to which the High Court can exercise jurisdiction over any merchant ship by arresting it as it enters the waters of Britain. This power, as already noticed, is available, whatever be the nationality of the ship or its owner or the domicile or place of residence or business of the owner, or wherever the cause of action has arisen. About the words 'damage done by a ship' in Section of the Admiralty Court Act, 1861 and the decision in The Victoria to the effect that the section had no application to claims against the carrying ship for damage to cargo, the following observation significantly appears in Halsbury's Laws of England, 4th ed, Vol. 1(1), para 319 N.

12. ... but this question is academic in the light of the fact that jurisdiction in respect of claims for damage to cargo carried in a ship is now expressly given by the Supreme Court Act, 1981 Section 20(2)(g).

80. In the absence of any statute in India comparable to the English statutes on admiralty jurisdiction, there is no reason why the words 'damage caused by a ship" appearing in Section HC-NIC Page 59 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER 443 of the Merchant Shipping Act, 1958 should be so narrowly construe as to limit them to physical damage and exclude any other damage arising by reason of the operation of the vessel in connection with the carnage of goods. The expression is wide enough to include all maritime questions or claims. If goods or other property are lost or damaged, whether by physical contact or otherwise, by reason of unauthorised acts or negligent conduct on the part of the shipowner or his agents or servants, wherever the cause of action has arisen, or wherever the ship is registered, or wherever the owner has his residence or domicile or place of business, such a ship, at the request of the person aggrieved, is liable to be detained when found within Indian jurisdiction by recourse to sections 443 and 444 of the Merchant Shipping Act, 1958 read with the appropriate rules of practice and procedure of the High Court. These procedural provisions are but tools for enforcement of substantive rights which are rooted in general principles of law, apart from statutes, and for the enforcement of which a party aggrieved has a right to invoke the inherent jurisdiction of

a superior court.

Undoubtedly, as held by the Supreme Court, Section 443 is wide in terms and 'damage' is not necessarily confined to physical damage, but includes damage caused to the property by breach of contract or acts of commission or omission on the part of the carrier or his agents. Any damage arising by reason of the operation of the vessel in connection with the carriage of goods would be covered within the meaning of such "damage". But it must be remembered that (i) this damage is 'damage to property' and (ii) it must have been caused as a result of an unauthorized act or negligent conduct on the part of the ship owner or his agents or someone who is in charge of the ship. If goods or other property are lost or damaged, whether by physical contact or otherwise, by reason of unauthorised acts or negligent conduct of the carrier or his agents, the ship is liable to be arrested whenever found within Indian jurisdiction under Section 443. That is what the Supreme Court held in Elisabeth case.

The requirement of unauthorised or negligent conduct of carrier or agents brings the provision of Section 443 in line with the law of arrest discussed above. Except in a case where there is a maritime lien, where the 'damage' is seen as a damage by the ship itself, in every other case the damage must be something which is caused by the shipowner or his agents or someone in charge of the vessel (charterer by demise), which, in turn, brings in the element of link between the ownership or possession and control and the cause of action. If the shipowner or demise charterer at the time of arrest is not the owner or demise charterer when the damage occurred, it is not possible to arrest the vessel having regard to this requirement of Section 443. The Supreme Court in Elisabeth case was dealing with the claim of a consignor - cargo owner.

Notwithstanding the consignor cargo owner's direction not to deliver the goods by reason of the buyer's failure to pay the agreed price, the cargo consignment was delivered by the vessel. This unauthorized delivery was termed as giving rise to the damage to the Plaintiff cargo owner's property, namely, the cargo itself and this claim arose against the defendant - owner of the vessel who breached his duty owed to the Plaintiff. In this context, the Supreme Court discussed the term "damage" occurring in Section 443. Based on this discussion, it cannot possibly be suggested that for any and every maritime claim, the particular ship, namely, the ship in connection with whom such claim arises, can at any time be arrested under Section 443 without reference to her ownership or control at the time of arrest. It cannot be said that

every such claim is a claim for damage done to the property by the ship within the meaning of Section 443 or arising as a result of an unauthorised or negligent conduct of the carrier or agents. Section 443 does not either introduce any new maritime lien, which travels with the ship irrespective of ownership or control of the ship or alter the law of arrest applied by Indian Courts for enforcement of maritime claims. Particularly in our case non□payment of a claim of a supplier for necessaries supplied to the charterer by demise HC-NIC Page 61 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER cannot be termed as damage done by the ship to the property of such supplier. So also, it is not possible to say that the alleged damage was caused by the shipowner (Defendant No.4) or his agents who are in possession and control of the ship.

16. For all these reasons, the Plaintiff is not entitled to proceed against the newly added defendant vessel. There is no connection any longer between the person liable in personam, namely, M/s Jaisu Shipping, who was the charterer by demise of the particular vessel when the claim arose and the vessel when the arrest application is made. The vessel is now owned by and is in possession and control of newly added Defendant No. 4, who in turn owes no liability to the Plaintiff in connection with the maritime claim which is the subject matter of the present suit."

7) Yuta Bondarovskaya - [1998] 2 Lloyd's Rep. 357 "(2) it was the responsibility of the time charterer under a time charter to provide and pay for bunkers if the time charterer wished to use the vessel for his own purposes; far from being necessary to make the contract work, or to give business efficacy to it, the idea that an owner who time chartered his vessel to a time charterer was authorizing the time charterer to contract on his behalf, was contrary both to the express terms and to the underlying basis of a time charter; under the standard forms of time charter the owner was expressly not agreeing to pay for the bunkers; there was no reason why an owner or demise charterer should agree to pay the supplier for bunkers; and the suggestion that there was any such implied authority or that it was within the usual authority of a time charterer to buy bunkers on behalf of owners or demise charterers was not arguable (see p. 362, cols. l and 2; p. 365 cols. l and 2);

(3) in all the circumstances, even giving full weight to the evidence relied on by the plaintiffs, it was not arguable that any term of the kind suggested. could be implied into a HC-NIC Page 62 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER standard time charter or that it was part of the usual authority of a time charterer such as EMEL to buy bunkers on behalf of Scanarctic so as to commit Scanarctic personally to pay for the bunkers; the implication of such a term would be directly contrary to the underlying scheme of the time charter (see p. 365, cols. l and 2):

(4) it was not arguable that EMEL had Scanarctic's authority to make bunker contracts on its behalf. whether implied actual authority, apparent or ostensible authority or any other kind of authority: the plaintiffs claim was bound to fail and the vessel should be released from arrest (see p. 365, col. 2); (5) if the plaintiffs' case was arguable, Scanarctic's case was to be preferred; and under 0.14A it would be concluded if necessary that on the facts set out in. the affidavits EMEL did not have authority to. make those bunker contracts on ' behalf of Scanarctic;

Scanarctic was not liable to the plaintiffs and the action failed and would be dismissed (see p. 366, cols. l and 2);

(6) if a bunker supplier wished to ensure payment and was not willing to give the time charterer credit he should obtain the consent of the shipowner or demise charterer before the contract was made, or he should insist on payment in advance or upon security from the time charterer; there was however no warrant for holding a shipowner or demise charterer personally liable without his consent (see p. 366, col. 2)."

8) Gulf Petrochem Energy Pvt. Ltd. Vs. M.T. Valor

- Notice of Motion (L) No.581/15 in AS No.94/15 decided on 15.04.2015

9) M/s. Kimberly□Clark Lever Pvt. Ltd. V. m.v. Eagle Excellence [Bom High Court, Appeal No.240 of 2007 decided on 13.08.2008].(Paras 51 to 56) "51. It is true that in Moschanthy's case (supra), it was held that the defendant can plead and establish by motion that the HC-NIC Page 63 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER plaintiff's case is not reasonably arguable best case and that it is hopeless and bound to fail and on that ground, the defendant can obtain release of the security. However, the said test in Moschanthy's case (supra) cannot be understood to be different from the test of prima facie case in view of the abovereferred rulings of the Apex Court i.e. m.v.Elisabeth, M.V.Al.Quamar, and M.V.Kapitan Kud's cases (supra) wherein the test of reasonably arguable best case being equated with a prima facie case. While dealing with the motion of the defendant for release of the security, the principles applicable to a case under Order 39 Rule 1 read with Order 38 of the Code of Civil Procedure will have to be borne in mind. Rule 954(IV) leaves no scope to contend that any other procedure can be adopted in such case. It is also to be noted that the Rule 966 of the Original Side provides the matter of that the rules and practice of the Court suits and the proceedings on in the Original Side of the Court shall, if not inconsistent with the rules in this part, apply to suits and proceedings on the Admiralty Side of the Court. Further it is well settled by the practice of this Court that whenever the rules on the Original Side are silent, the principles behind the provisions of the Code of Civil Procedure are to be followed, and this view gets support from the decision of

the Apex Court in m.v.Elisabeth's case (supra).

52. It is, therefore, clear that while applying the test of reasonably arguable best case, the Court will have to ascertain whether the plaintiff has prima facie case or not, and in that regard the Court will have to analyse the materials on record. Though the provisions of Orders 38 and 39 of the Code of Civil Procedure would not be directly applicable, the principles thereunder could not be forgotten while dealing with the matter at the stage where the defendant having released the ship on furnishing the security applies for release of security on the ground that the plaintiff has no prima facie case or reasonably arguable best case.

53. Rule the 954(IV) Court of our High Court Rules which empowers the Court to release the HC-NIC Page 64 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER property Rules on which any ground other than those specified under Item IV provided that the Court may deem it just, clearly discloses the Court's power to release vessel even without insisting for security is clearly provided for. It is a clear provision which speaks of Court power to release the vessel without insisting for security as well as having released the vessel against the security to pass an appropriate order even thereafter which would include even release of the security; albeit, for valid and genuine reasons which are to be borne out from the record and a clear finding to that effect being arrived at by the Court. Being so, the contention that because the plaintiff is entitled to keep the ship under arrest pursuant to the warrant having been successfully obtained, the plaintiff would also be entitled for sufficient security to cover the amount of his claim till the disposal of the suit without establishing prima facie case, cannot be accepted. Even after the ship is released against the security being furnished, nothing would prevent the defendant from pointing out to the Court that the Plaintiff lacks prima facie case in the matter and, therefore, the security obtained should also be released. It would all depend upon the facts of each against case. But there is no general bar release of security even in cases as such where the plaintiff does not make out prima facie case or reasonably arguable best case.

54. Perusal of the impugned judgment discloses that the learned Single Judge on perusal of the materials placed on record has clearly arrived at a finding that inspite of the fact that the suit is essentially based on account of alleged damages caused to the goods, the plaintiff did not take any pain to have a joint survey of the goods before they were subjected to alleged repairs on account of their alleged damage. The learned Single Judge has further observed that though the relief asked for includes insurance claim, insurance expenses and survey expenses, no document in support thereof had been produced on record disclosing satisfactory material in respect of such claim. Whatever documents which have been produced on record undoubtedly disclose repairs having been caused HC-NIC Page 65 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER to the machine and having been put to use in October 2005, however, the claim is based on the quotations of the month of November, 2005 and onwards. At the same time, according to the plaintiffs themselves, the machine was in working condition in the month of October,

2005. Further the learned damages, Single Judge has held that in the amount of damages gets crystalised a suit for only after adjudication of the claim and, therefore, in order to get interim relief in such action requiring the defendant to furnish security or to continue the security already furnished for the satisfaction of the decree that may be passed in favour of the plaintiff, it is necessary for the plaintiff to make out a strong prima facie case. As already seen above, whether it is a prima facie case or a reasonably arguable best case, whatever expression that may be used, it is ultimately for the plaintiff who approaches the Court in a suit of such nature, once it ceases to be a suit in rem and proceeds as a suit in personam and the defendant takes out Notice of motion for release of the security on the ground that the plaintiff lacks any prima facie case to justify continuation of such security, it is absolutely necessary for the plaintiff to place on record sufficient materials in support of his claim.

55. The contention that the arrest of a ship in admiralty action is a mere procedure to obtain security to satisfy the judgment cannot be disputed, as has been ruled by the Apex Court in m.v.Elisabeth's case (supra). But, at the same time the Apex Court partakes has also held that once the security is furnished, the suit the nature of action in personam and, therefore, the procedure thereupon will have to be followed as the one prescribed for any other normal suit and the Rules framed in that regard do not rule out an occasion to entertain a motion taken out by the defendant for release of the security already granted and to allow such motion in case the plaintiff fails to establish prima facie case or a reasonably arguable best case in the matter. The arrest of a ship is with the sole intention that the suit may not be defeated at the stage of initiation of an action itself, as in case the ship leaves HC-NIC Page 66 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER the territorial waters of India, the Court may loose jurisdiction over it and, therefore, in that case, the suit could be rendered infructuous; however consequent to arrest of the ship, and appearance of the owner of the ship before the Court, the suit has to proceed as any other normal suit. Therefore, the contention that the Court cannot analyse materials on record to ascertain whether the plaintiff has reasonably arguable best case or a prima facie case in a Notice of Motion taken out by the Defendant calling for release of the security cannot be accepted.

56. The learned Single Judge, on the analysis of the is materials on record, has clearly held that no material to show that what was the cost of there the parts which were actually used in repairing the machines nor there is any material to show that the machines which were transported were in fact damaged and, if so, to what extent was the damage caused, nor there is any documentary proof about the actual damage to such machines requiring repairs to the extent it is alleged to have been made or even of the amount which is claimed as the expenses having been actually incurred by the plaintiff. Referring to Section 73 of the contract Act, it has also been observed by the learned Single Judge that in case of breach of contract, damages which will naturally arise in the usual course of things from such breach or which the parties knew when they made the contract to be likely to result from such breach, such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach and there is nothing on record to show that the defendant had any reason to know

about the amount which was necessary for carrying out repairs to the machines when the contract was entered into and, therefore, taking an overall view of the matter, there is no prima facie case to establish the claim for damages. The findings arrived at by the learned Single Judge are clearly borne out from the record."

10) Siva Bulk Ltd. v. m.v. AODABAO [Bombay High Court in Notice of Motion (L) No.843 of 2016 decided on 06.06.2016) (Para 26) HC-NIC Page 67 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER "26. I am therefore of the view that the Plaintiffs have miserably failed in establishing, even prima facie, that the Beneficial Owner of Defendant No. 1 Vessel and the Defendant No. 2 Vessel is COSCO. As against this, the Defendant No. 1 has produced direct primary evidence in regard to the ownership of the first Defendant Vessel and the shareholders of the registered owner of the first Defendant Vessel. The Judgment in the case of VSNL vs. MV Kapitan Kud (supra) does not assist the Plaintiffs who have miserably failed to rely upon any credible material to establish that the Defendant No.1 Vessel is beneficially owned by COSCO. The test laid down in the VSNL vs. M.V. Kapitan Kud (supra) case cannot be stretched by the Plaintiffs to the point of absurdity. In my view the material relied upon by the Plaintiffs does not even satisfy the test as set out in the said case. The Plaintiffs having failed to make out even a prima facie case to discharge the initial burden of proof that the Beneficial Owner of Defendant Nos. 1 and 2 Vessels is COSCO, cannot be heard to state/argue that the Defendant No. 1 Vessel should provide disclosures as sought by the Plaintiffs. The Plaintiffs cannot ask the Defendant No. 1 to prove their allegation/case without making out even a prima facie case as alleged by them in the Plaint. The Plaintiffs who have failed to even prima facie establish their case on the strength of which they have approached this Court and obtained an ex□parte order of arrest, cannot be allowed to press for confirmation of the same only by raising a pointer to the pleadings of the Defendant No. 1 or to their conduct. It is settled law that the Plaintiff who approaches the Court should succeed on the strength of its own case rather than the weakness of the Defendant's case. The Plaintiffs have failed to discharge the initial burden of proof that was upon it. The Plaintiffs cannot on the basis of the material produced by it (which is doubtful), require Defendant No. 1 to furnish security for the Plaintiffs' claim in the Suit. The Court cannot also maintain the arrest of the vessel on the basis of surmise, bald allegation, conflicting HC-NIC Page 68 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER evidence which compound the confusion. It would be vexatious and oppressive and an abuse of the process of the Court to maintain the arrest of Defendant No.1. No equity minded Court would countenance continuation of the order of arrest for a single day more in the facts and circumstances of the case. The order of arrest of Defendant No. 1 Vessel was thus wrongfully obtained. In my view the Plaintiffs have failed to satisfy the test for maintaining the order of arrest. The balance of convenience is overwhelmingly in favour of Defendant No.1. In view thereof, the order of arrest dated 7th March, 2016 is vacated unconditionally..."

11) Siva Bulk Ltd v. m.v. AODABAO [Bom High Court, Appeal (L) No. 4 of 2016 decided on 13.06.2016] (para 12) "12. After going through the said judgment, we are of the view that the learned Single Judge has given cogent reasons before vacating the interim arrest, which was granted. It is well settled that if this Court comes to the conclusion that the findings recorded by the learned Single Judge are not perverse, and it is borne out from the record , then the Court should not interfere with such findings. In our view, there is overwhelming evidence to show that Plaintiff has not made out even a prima facie case. Even contention of the learned counsel appearing on behalf of the Plaintiff that the Court should lift the corporate veil to find out whether Defendant No.2 is owner or not, also is of no assistance to the Plaintiff. The submissions which are now made across the bar are not borne out from the pleading. However, there is no material to support the said contention. We are not inclined to entertain this appeal"

24. It would also be appropriate to refer to the judgments relied upon by the plaintiff -

1) M.V. Sea Renown vs. Energy Net Ltd. decided on 15.03.2003 (Coram : J.M.Panchal & S.D.Dave, HC-NIC Page 69 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER J.J.) (Paras 14 to 18) "14. However, from the impugned judgment, it is evident that the learned Judge has considered the application from both the view points that it was an application under Order VII, Rule 11 of the CPC as well as on the basis that the application was for discharge of bank guarantee. The case of the appellants is that the purported receipt issued by the Master of the vessels is in favour of MISR Petroleum Company and not in favour of the respondent and, therefore, whatever mentioned in the said receipt could never constitute privity of contract between the respondent and the appellants and, therefore, no cause of action is available to the respondent against the appellants. It is true that the receipt is in favour of the MISR Petroleum Company and not in favour of the respondent. However, the case of the respondent□plaintiff as pleaded in paragraph 4 of the plaint is that in accordance with the order confirmation, bunkers were supplied to the said vessel at Port Said by the Plaintiff through local physical suppliers MISR Petroleum Company on 30th July 2000 and the supplies were duly acknowledged by the Master and the Chief Engineer of the said vessel who endorsed the bunker delivery receipts with their seal and signatures and that the receipts for bunkers, duly acknowledged and endorsed by the Master and the Chief Engineer of the Defendant vessel state that the bunkers delivered/received on board were for account of the Owners and/or Managing Owners and/or Managers of the vessel, etc. Thus, what is claimed by the respondent is that MISR Petroleum Company was local physical supplier through whom the respondent had supplied the

> bunkers to the vessel. It is also the case of the respondent that upon delivery of bunkers being made, the local physical supplier, i.e. MISR Petroleum Company, was duly paid by the respondent, and the respondent, in turn, had raised its invoice in respect of supplies on the Master and/or owner of the appellant No. 1□vessel. The case of the respondent that the respondent was the owner of the bunkers, and had supplied the same through MISR Petroleum HC-NIC Page 70 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER Company, does not get destroyed merely because the receipt is raised on account of MISR Petroleum Company and, therefore, it is not correct to say that the respondent has no cause available and that only MISR Petroleum Company would be entitled to sue and not the respondent. Similarly, case of the appellants that Geepee Shipping & Trading Inc., Singapore, is liable for the price of bunkers supplied to the appellant No. 1□vessel and not the appellants, cannot be accepted at this stage.

The documents produced by the appellants along with application indicates that the vessel was chartered by Geepee Shipping & Trading Inc. under an agreement. Bunkers Stem Confirmation dated July 24, 2002 shows that buyer was Geepee Shipping & Trading Inc. It is an admitted position that Geepee Shipping & Trading Inc. was never the owner of the vessel, but charterer. The receipts issued by the Master of the vessel produced by the respondent along with the plaint would furnish a clear cause of action to the respondent to proceed against the appellants because it is not the case of the appellants that the Master was not authorised to state in the receipts that deliveries of marine bunkers against the receipt, delivered/received on board for use as bunkers were for account of owners and/or Managing owners etc. What is pleaded by the appellants is that the Master of M.V. Sea Renown had signed the receipt which was in prescribed form. However, this question can be gone into only at the trial. In Videsh Sanchar Nigam Limited v. M.V. Kapitan Kud & Ors. , (1996) 7 SCC 127, the Supreme Court has approved the principles laid down in Moschanthy, and held in paragraph 14 of the reported decision as under:

> "14. In Moschanthy, The where the question was whether the admiralty action was vexatious, following the ratio of Willmer, J. in St. Elefterio, it was held that action could not be successful. It was held that courts should only stay the action on the ground when the hopelessness of the plaintiff's claim is beyond doubt. If it is not beyond doubt but on the contrary the plaintiff has an arguable, even though difficult, case even in law HC-NIC Page 71 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER the action would be allowed to proceed to trial. The application for stay was accordingly rejected."

If the principles laid down by the Supreme Court in above quoted decisions are applied to the facts of the present case, it is difficult to come to the conclusion that hopelessness of the respondent's claim is beyond doubt. On the contrary, the respondent has a reasonably good arguable case and even if the case is difficult one, action should be allowed to proceed to trial. In view of the documents produced by the respondent along with the plaint and the appellants along with application, serious triable issues would arise for consideration of the Court, namely, whether the appellant No. 2 is liable for the price of bunkers sold and/or Geepee Shipping & Trading Inc., Singapore, is liable for the same. These are highly contested issues and cannot be determined at this stage and, therefore, the matter must proceed to trial. Further, the relief claimed in the application that the bank guarantee should be discharged, can be granted only if the Courts comes to a conclusion that the arrest of the appellant No. 1□vessel was not justified. Once such a finding in favour of the appellants is recorded, the Court would lose the jurisdiction to try the suit, which may have far reaching consequences. Under the circumstances, this Court is of the opinion that the plea that cause of action is not available to the respondent and, therefore, the bank guarantee should be discharged, cannot be accepted at this stage. For all these reasons, it cannot be said that the respondent had effected detention of the vessel without any basis or that the appellants are entitled to relief of discharge of guarantee.

15. The contention that there was no privity of contract between the appellants and the respondent and, therefore, the action in rem commenced against the vessel was not well founded, has no substance. It is conceded by the learned Counsel for the respondent that HC-NIC Page 72 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER supply of the bunkers gives rise to maritime claim, but not a maritime lien. It is expressly stated in paragraph 7 of the plaint that supply of bunkers to a vessel constitutes necessaries within the meaning of Section V. of the Act, and the respondent has a maritime claim against the appellant No. 1□vessel for the bunkers. Section XXXV of the Act provides that jurisdiction conferred by the Act on High Courts of admiralty may be exercised either by proceedings in rem or by proceedings in personam.

16. In Epoch Enterrepots (supra), the Supreme Court in paragraph 15 has, inter alia, explained that a ship may be arrested (i) to acquire jurisdiction; or (ii) to obtain security for satisfaction of the claim when decreed; or (iii) in execution of decree whereas in paragraph 21 has listed five heads of maritime liens. This decision of the Supreme Court may not affect the claim advanced by the respondent as it remains a maritime claim actionable under Section V. of the Act. However, at this stage, it would be instructive to refer to the decision of the Supreme Court in M.V. Elisabeth & Ors. (supra). Therein, the plaintiff□respondent had instituted a suit against the defendant No. 1□appellant which was a vessel of foreign nationality owned by a foreign company, i.e. the defendant No. 2 in Andhra Pradesh High Court invoking its admiralty jurisdiction by means of an action in rem. The case of the plaintiff was that the defendants had acted in `breach of duty' by

leaving the port of Marmagao on February 8, 1984 and delivering goods to the consignee in breach of plaintiff's direction to the contrary, thereby committing conversion of the goods entrusted with them. The vessel was arrested when it entered the Port of Vishakhapatnam on April 13, 1984 after returning from foreign ports. On the owner of the vessel entering appearance and providing security by a bank guarantee under protest, the vessel was released from detention. A preliminary objection was raised by the defendants that the plaintiff's suit against the foreign ship owned by a foreign company not having a place of residence or business in HC-NIC Page 73 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER India, was not liable to be proceeded against on the admiralty side of the High Court by an action in rem in respect of a cause of action alleged to have arisen by reason of a tort or a breach of obligation arising from the carriage of goods from a port in India to a foreign port. It was contended that no High Court in India was invested with admiralty jurisdiction to order the arrest of the vessel in respect of a cause of action relating to outward cargo because Section 6 of the Act conferring admiralty jurisdiction on Indian High Courts confined it to `claims for damages to cargo imported'. The preliminary objection raised by the defendants was overruled by the High Court. Before the Supreme Court, the crucial question was about the jurisdiction of the High Court. While dismissing the appeal, the Supreme Court has made following pertinent observations in paragraph 92 of the reported judgment.

> "92. Once a foreign ship is arrested in Indian waters by an order of the High Court in exercise of the admiralty jurisdiction vested in it by statute, or inherent in it as a court of record, in respect of any maritime claim against its owner, wherever the cause of action may have arisen, and whether or not the ship is subsequently released by the owner furnishing security, proceedings must continue against the owner as in any other suit. The arrest of the vessel while in Indian waters by an order of the concerned High Court, as defined under the Merchant Shipping Act, 1958 (Section 3(15)) attracts the jurisdiction of the competent court to proceed with the trial as in the case of any other suit, as an action against the owner, and any decree obtained by the plaintiff is executable against any property of the owner available within jurisdiction, including the security furnished by him for release of the vessel."

The facts in M.V. Elisabeth makes it evident that the suit was based on tort, but it was an action against the vessel, i.e. suit, was in rem. However, the Supreme Court has held that arrest of the vessel, while in Indian Waters by HC-NIC Page 74 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER an order of concerned High Court attracts jurisdiction of the competent Court to proceed with the trial as in case of any other suit as an action against the owner. Applying the principle laid down in the said decision to the facts of the present case, this Court is of the opinion that the suit can now certainly proceed against the appellant No. 2 also.

17. The plea that there is suppression of material facts by the respondent-plaintiff and, therefore, the reliefs claimed in the application should have been granted, is devoid of merits. What is claimed by the appellants is that the Bunker Stem Confirmation dated July 24, 2000 was not produced before the Court at the time of filing of the plaint nor anything was produced to indicate that the appellant No. 2, who is owner of the appellant No. 1-vessel, did not make payment of the amount due despite repeated telephonic requests and reminders from time to time although repeated promises of payments were received. According to the learned Counsel for the appellants, if the Bunker Stem Confirmation had been produced, the Court would have at once realised that buyer of the bunker being Geepee Shipping & Trading Inc., Singapore, no cause of action against the appellants was available to the respondent. On consideration of this, the Court finds that the Bunker Stem Confirmation dated July 24, 2000 cannot be read in isolation and has to be taken into consideration along with other documents on record. The case of the appellants is that the ship was chartered to Geepee Shipping & Trading Inc., Singapore, meaning thereby, that Geepee Shipping & Trading Inc. Singapore, was never the owner of the vessel. Further, as per the case of the respondent, the Master of the vessel has issued two receipts fastening liability on the owner of the vessel also. Therefore, though the Bunker Stem Confirmation is a relevant document, this Court is of the opinion that it would not have tilted the balance necessarily in favour of the appellants. Further, before passing the impugned order, all the documents were taken into consideration by the learned Single Judge. The learned Single Judge has not felt that by suppressing material facts, the order of the HC-NIC Page 75 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER arrest of the appellant No. 1-vessel was obtained by the respondent, and this Court also concurs with the same. Fax dated July 24, 2000 from LQM Petroleum Services as well as terms and conditions of supply were subsequently produced on record of the case. Moreover, the case of the respondent is that supply was made by it on the basis of Order Confirmation and the said confirmation read with the receipts signed by the Master acknowledges owner's liability to pay and the invoice is sufficient to enable it to claim reliefs mentioned in the plaint. The learned Judge has considered the Fax dated July 24, 2000 as well as the submissions advanced on behalf of the appellants. Under the circumstances, this Court is of the view that the appellants would not be entitled to reliefs claimed in the application on the ground that material facts were suppressed by the respondent more particularly when the matter is at interim stage, and no written statement has been filed by the appellants."

2) M.V. Lucky Field vs. Universal Oil Ltd. decided on 05.12.2008 (Coram : K.A. Puj,J.) (Paras 5, 9 and 17) "5. He has further submitted that the decision of this Court in the case of m. v. Sea Renown & Anr. Vs. Energy Net Ltd., dated 15.7.2003, relied upon by the plaintiff is not applicable to the facts of the present case. In the case of m. v. Sea Renown although the bunkers were supplied at the instance of the Time Charterers, Geepee Shipping & Trading Inc. the Master expressly acknowledged liability to pay for the bunkers supplied by issuing a receipt bearing his signature. There was an express acknowledgment of liability by the Master on behalf of the owners of the vessel for payment

of the bunkers supplied to the vessel. On these facts, this Court has held that this signified the acceptance of liability by the Master on behalf of the owners and consequently it was open to the bunkers supplier to sue the owners of the vessel for recovery and file an action in rem for arrest of their vessel. He has further submitted that in the present case, HC-NIC Page 76 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER there is no such acknowledgment / acceptance of liability by the Master on behalf of the vessel to pay for the bunkers supplied. The buyer is IMC Maritime Group Inc. who have acknowledged their liability to pay. The said buyer is not the owner of the vessel. The plaintiff has sent an invoice to the said buyer. The plaintiff has granted extension of time to the said buyer to make payment on the buyer's request and on payment of interest. He has, therefore, submitted that there is no privity of contract between the plaintiff and the owner of the defendant vessel and no in personam liability of the owners of the vessel to pay for the bunkers which were supplied at the request of the IMC Maritime Group Inc. who are liable to pay for the same."

> "9. Mr.Pratap has, therefore, made three broad submissions.
>
> (A) There is no privity of contract with the owner of the vessel and consequently no action for arrest of the vessel can lie. To make good this submission, he urged following points;
>
> (i) The essence of an Admiralty action in rem is to obtain security in respect of a maritime claim against the owner of the vessel, by arrest of the vessel. If there is no claim against the owner, then his property, namely, the vessel is not liable to be arrested. This is akin to any proceedings for attachment before judgment under Order 38 Rule 5 of the Code of Civil Procedure. One cannot attach a person's property unless one will have a claim against that person. The same analogy applies when it comes to enforcing a maritime claim.

That this has always been the legal position in India will be demonstrated by the following.

(ii) A foreign ship can be arrested in respect of any maritime claim against its owner (See (1993) Supp. (2) S.C.C. 433 M.V.Elisabeth pra

92). The foundation of an action in rem arises from a maritime lien or claim imposing a personal liability upon the owner of the vessel (See M.V. Elisabeth para 46). What was basic was the existence of cause of action arising HC-NIC Page 77 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER out of tort or contract in relation to the Master or owner of the ship. There has to be existence of a right arising out of contract or agreement entered into with the Master or owner of the ship (See M.V. Elisabeth para 99).

(iii) In all cases where there is no maritime lien (admittedly there is no maritime lien in the case of a claim for supply of bunkers to a vessel), a right in personam exists for any claim that may arise out of a contract. If the contract is with the owner of the vessel then a right in rem is available against the vessel. Otherwise only a right in personam exists against the contracting party. (See (2003) 1 SCC 305 Epoch Enterrepots Vs. M.V. WON FU).

(iv) Thus as can be seen from the above, there can be no action in rem for a maritime claim unless there is privity of contract with the owner of the vessel. This has always been the legal position in India as declared by the Supreme Court in both the aforesaid judgments.

(v) The Brussels Convention 1952 does not alter the position in any manner. The interpretation sought to be put on Article 3 of the said Convention by the plaintiff is wrong. It is implied in Article 3 that the owner must be the person liable. This is made clear by the further provision in Article 3 allowing for arrest of any other vessel owned by the person who is the owner of the vessel in question. This is only possible if the owner is liable. For the owner to be liable there must be a cause of action against the owner arising out of contract or agreement. (see the commentary on Berlingieri on Arrest of Ships 2006 edition). In any event, whatever be the interpretation of the plaintiff as regards Article 3 of the said Convention, the aforesaid judgments of the Apex Court in m.v. Elisabeth and m.v. WON FU make it clear that there must be privity of contract and a cause of action against the owner in respect of a maritime claim for a right in rem to be available against the vessel of the owner.

(vi) The position is now made clear by the Arrest Convention, 1999 (which is applicable HC-NIC Page 78 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER as per m.v. Sea SUCCESS (2004) 9 S.C.C. 512) which provides in Article 3(1) that "Arrest is permissible of any ship in respect of which a maritime claim is asserted if the person who owned the ship at the time when the maritime claim arose is liable for the claim..." The Supreme Court was conscious of the fact that this Convention does not abridge or curtail any right in rem which was otherwise available to a claimant. This right was always available only in the event the maritime claim was against the owner of the vessel and not otherwise. This right remains.

(vii) Thus for an action in rem to lie against a vessel, it is essential that there must be a maritime claim against the owner of the vessel who must be liable in respect of the claim. In the event the claim arises under a contract, no action in rem is permissible unless the contract is with the owner of the vessel.

(viii) In the case of m.v. Bunga Mas Tiga reported in 2002 (1) All MR 145 (Raj Shipping Agencies vs. m.v. Bunga Mas Tiga & Anr.), the owner of the vessel contracted with M/s. North End Oil for supply of bunkers. North End Oil in turn contracted with Raj Shipping Agencies for supply of bunkers. Raj Shipping Services supplied the bunkers. Thereafter Raj Shipping

Agencies demanded payment from North End Oil. Since no payment was received, Raj Shipping Agencies filed a suit and obtained an arrest of the vessel. The arrest was set aside on the application of the vessel / owner. The court held that in the event the contract for purchase of bunkers is not entered into by the seller with the owner of the vessel, then no action in rem can lie against the vessel at the behest of the seller. There is no privity of contract between the plaintiff and the owner of the vessel. All demands for payment were made by the plaintiff against the contracting parties who were not the owners. It is clear that there has to be an enforceable right in the plaintiff against the owner of the vessel. The right is enforceable against the vessel. But existence of a right in the plaintiff against the owner of the vessel is a must.

(ix) In the case of m.v. CHOPOL 2 (unreported ☐ Bombay High Court), the bunkers were supplied to the vessel by Scandinavian Bunkering AS at the request of M/s. Eurasia Shipping Ltd., who were the charterers of the vessel through an order placed by M/s. Anderson Hughes Co. Ltd. There was no order placed by the owners of the vessel. The arrest was set aside on the application made by the vessel owner M/s.Korean Polish Shipping Ltd. The court held that no privity of contract with owners of the vessel is created by acceptance of bunkers by the Chief Engineer. The plaintiff has to show that the bunkers were supplied at the instance of the owners.

(x) The law was summed up in the case of m.v. NIIZURU (unreported ☐ Bombay High Court) where the Court held in para 13 "Now as a result of several judgments of this Court as also other courts it is clear that when the suit is instituted for recovery of a maritime claim there has to be privity of contract between the plaintiff and the owner of the defendant vessel."

(xi) Hence on a reading of the aforesaid judgments, the legal position is amply clear. Privity of contract with the owner is essential for an action in rem to lie against the vessel in respect of a maritime claim. One need not go into the interpretation of the convention☐ provisions at all. None of the three judgments are based upon a interpretation of the convention. They proceed on the basis of the law declared by the Apex Court in the case of m.v. Elisabeth and affirmed in the case of m. v. WON FU.

(xii) The position under English law is the same and made clear by the judgment in the case of the YUTA BONDAROVSKAYA reported in (1998) Vol.2 Lloyd's Rep. Page 357. In this case bunkers were supplied at the instance of the time charterer EMEL who did not pay. The supplier IMS filed an action in rem for arrest of the vessel. The owners applied for setting aside the arrest. The Court held :□ "(a) It was the responsibility of the time HC-NIC Page 80 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER charterer under a time charter to provide and pay for bunkers if the time charterer wished to use the vessel for his own purposes; the idea that an owner who time chartered his vessel to a time charterer was authorizing a time charterer to contract on his behalf was contrary both to the express terms and to the underlying basis of a time charter; Under the standard forms of time charter the owner was expressly not agreeing to pay for the bunkers;

(b) It was not even arguable that a time charterer had the owner's authority to make bunker contracts on its behalf, whether implied actual authority, apparent or ostensible authority or any other kind of authority;

(c) The claim was bound to fail and the vessel would be released from arrest;

(d) If a bunker supplier wished to ensure payment and was not willing to give the time charterer credit he should obtain the consent of the shipowner or demise charterer before the contract was made, or he should insist on payment in advance or upon security from the time charterer; there was however no warrant for holding a shipowner or demise charterer personally liable without his consent."

(xiii) It is thus clear from the authorities set out above that a bunker supplier can have no right to arrest the vessel for the price of bunkers supplied at the instance of any person other than the owner of the vessel. Only if the owners of the vessel contracted with the bunker supplier for supply of bunkers that the owner would be liable in contract and the supplier would have a maritime claim against the vessel. The plaintiffs assertion that notwithstanding the fact that the buyer is not the owner of the vessel, the vessel owner is liable since the bunkers were supplied to the vessel and received by the Master and this creates privity of contract between the plaintiff and the owners of the vessel, is incorrect and clearly wrong in law and contrary to the aforestated legal position which is known or ought to be known to bunker suppliers.

(xiv) In the present case, the admitted position is;

(a) The contract for supply of bunkers was between the plaintiff as sellers and IMC Maritime Group as buyers. The contract was not between the plaintiff and the owners of the vessel Lyckyfield Shipping Corp. S.A.

(b) The master of the vessel acknowledged receipt of the bunkers on board the vessel by signing the bunker delivery note as proof of delivery just like a delivery challan.

(c) Invoice dated 10.3.2006 bearing No.4295 for the price of bunkers is raised by the plaintiff to the account of IMC Maritime Group C/o LQM Petroleum Services and sent to LQM Petroleum Services.

(d) No demand on the owners of the vessel for payment.

(e) The Broker, LQM Petroleum Services requested time extension on behalf of IMC Maritime Group for payment. IMC Maritime Group also offers to pay interest.

(f) Plaintiff accepts offer and confirms time extension.

(g) The broker, LQM Petroleum Services, informs plaintiff that IMC Maritime Group will not be able to pay presently and suggests that the plaintiff contact the owners of the vessel for a "commercial settlement".

(h) Plaintiff requests the vessel's managers to make payment of their invoice No.4295 dated 10.3.2006 which is the invoice raised on IMC Maritime Group and sent to the said brokers LQM Petroleum Services.

(xv) The above clearly demonstrates that plaintiff was aware that the liability was of IMC alone and not the owners of the vessel.

(xvi) The plaintiff says in the plaint that they carry on business of supply of bunkers to ships all over the world by themselves or HC-NIC Page 82 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER through their agents. It is inconceivable that they are not aware that if their contracting counter party is not the owner of the vessel, they can have no claim against the vessel. It is further simply not believable that the plaintiff is not aware of the legal position and the consequences of supplying bunkers at the instance of time charterers.

(xvii) The case of m.v. "Sea Renown" relied upon by the plaintiff is completely distinguishable on facts because in that case the bunker delivery receipts (Exh. 1 to OJCA) contain an express stipulation that the bunkers

delivered are for the account of the owners of the vessel who are responsible for the payment of the bunkers supplied. This stipulation was acknowledged by the master of the vessel who put his signature below the same, thus accepting owners liability to pay for the bunkers. This created an obligation on the owners of the vessel to pay for the bunkers supplied and consequently the vessel was liable to be arrested. There is no such stipulation in the bunker delivery note (Exh. F to the Plaint) in the present case where the master has simply acknowledged receipt of the bunkers as evidence of delivery.

(xviii) The case of m.v. "Sea Renown" also does not consider the judgment of the Hon'ble Supreme Court in the case of m.v. WON FU, the provisions of the 1999 Arrest Convention and the judgment of the English Court in the case of m.v. "Yuta Bondarovskaya, all of which make it clear that for arrest of a vessel, the owners of the vessel must be liable in respect of the claim and that no arrest was permissible in respect of bunkers supplied at the instance of a time charterer.

(ixx) In fact, the English judgment in case of m.v. "Yuta Bondarovskaya deals with each and every contention raised by the plaintiff in the present suit and conclusively holds that in case of supply of bunkers at the request of a time charterer, neither the vessel nor the owner of the vessel is liable.

(B) Arrest is oppressive and contrary to just HC-NIC Page 83 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER and equitable principles.

(i) The IMC Maritime Group, as Time Charterer of the vessel, were required to provide and pay for the bunkers. The bunkers on board remained the property of IMC Maritime Group. When the charter came to an end, the owners of the vessel were required to take over the bunkers remaining on board the ship and pay the value thereof to IMC Maritime Group who are entitled to deduct the value thereof from the last hire payment. This is the case in all time charters without exception. Accordingly, when the charter came to an end on 22.3.2006, the owners, as per the Final Hire Statement, gave credit to the charterers in the sum of US$ 198,627.00 for 601.900 metric tonnes of IFO and US$ 35,200.00 towards 64 metric tonnes of MDO. Thus the owners have already paid the charterers, IMC Maritime Group a sum of US$ 2,33,827.00 for the bunkers. This is reflected in the Final Hire statement at Ex.3 of OJCA and the averments will be found in para 6 of the OJCA. Hence this makes it demonstrably clear that the owners have paid for the bunkers to the Time Charterers and it is the latter who have failed to pay the plaintiff for which the remedy of the plaintiff is against the Charterers alone who are also the buyers of the bunkers under the contract with the plaintiffs.

(C) Damages for wrongful arrest;

(i) As a result of the order of arrest dated 14.8.2006, the vessel was detained for period of 4.0833 days. The vessel which was under time charter to STX Pan Ocean, Korea, at a charter rate of US$ 19,000.00 per day (charter party at Ex.2 to the OJCA) was treated as off hire for this period as evidenced by the off hire calculations and debit note issued by STC Pan Ocean (ex. 9 to OJCA). Thus the direct loss suffered by the defendant on account of the arrest of the vessel is the loss of charter hire for 4.0833 days aggregating to US$ 82,238.33.

(ii) The plaintiff's conduct is wrongful and malicious. They knew that there is contracting counter party, IMC Maritime Group and their HC-NIC Page 84 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER claim is against IMC Maritime Group alone. Yet, they instituted the action against the defendant vessel and against the owners of the defendant vessel.

(iii) The plaintiff deliberately and maliciously did not serve the order of arrest obtained on 14.8.2006 till 22.8.2006 and that too only on the port authorities at Kandla. Had they served the order of arrest immediately, as they were bound to, the detention would have reduced as the defendant would have had sufficient time to put up security before the vessel completed discharge. However, the plaintiff waited until the vessel completed discharge on 22.8.2006 and was ready to sail out, before they served the order of arrest on the port authorities. This was done with ulterior motives to cause losses to the owner of the vessel.

(iv) Apart from the above, the plaintiff wrongfully opposed deposit of Indian Rupees in this Court by the defendants as security on 24.8.2006 despite knowing fully that Indian Rupees are legal tender and they cannot insist on a foreign currency deposit. This caused further delay in release of the defendant vessel.

(v) This is a fit and proper case where not only damages for wrongful arrest should be awarded in the sum of US$ 82,238.33 but also exemplary costs.

(vi) The plaintiff is a foreign company with no assets. They have appointed an individual in India as their constituted attorney. The undertaking in damages given by the said individual is of no value. This must therefore be fortified by a bank guarantee or cash deposit in the amount of damages claimed."

"17.

....In the facts of the present case, the following similarities to the Sea Renown case (Supra) may be noted:

(i) The applicant has also not filed its written statement.

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(ii) The applicant has categorically stated that "the suit is not maintainable against the vessel in rem" and "the Court has no jurisdiction to entertain the suit".

(iii) The applicant has claimed damages from the respondent."

3) GM Shipping Co. Ltd. Vs. Glander International Bunkering Pvt. Ltd. decided on 04.11.2015 (Coram: Vipul M. Pancholi, J.) (Paras 6 to 17)
"6. I have considered the submissions canvassed on behalf of learned counsels appearing for the parties. I have also gone through the material produced on record and the decisions relied upon by learned counsel appearing for the parties. From the record, the following broad facts have emerged:

(a) As per the case of the applicant intervenor, the applicant is a demise charterer of the defendant vessel. Shinhan Capital Company Limited are the registered owners of the defendant vessel.

(b) By Vessel Lease Agreement dated 27.5.2011, the owners leased/bareboat chartered the defendant vessel to the applicant. The applicant operated the defendant vessel in the capacity of the bareboat charterer and man the said vessel.

(c) By time charter party, the applicant time chartered the defendant vessel to Daebo for a period of six months from 24.1.2014. The defendant vessel was duly delivered to Daebo on 14.3.2014. Thereafter, the said period was extended. The defendant vessel was withdrawn from Daebo and fixture note was terminated on 17.2.2015.

(d) The plaintiff had supplied the bunkers to the defendant vessel on 22.1.2015. Two Bunker Delivery Receipts were issued for the said HC-NIC Page 86 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER supply. The bunkers were accepted by the master/chief engineer of the defendant vessel and acknowledged the receipt of bunkers by endorsing upon both the bunker delivery receipts.

(e) On 6.2.2015, the plaintiff issued invoices for account of defendant vessel and/or master and/or owners and/or charterers and/or managers and/or operators and/or daebo for an amount of Rs.USD 1,67,554.81.

(f) The plaintiff issued legal notice on 11.2.2015 to Daebo and demanded the payment and withdrawal of the credit facility. Similarly on 13.2.2015, the plaintiff raised demand of outstanding amount from the owners of the defendant vessel in relation with the bunkers supplied to the defendant vessel. On 25.6.2015, notice was also given to the

manager of the defendant vessel. However, outstanding amount is not paid and, therefore, the plaintiff has filed the Admiralty Suit.

7. In view of the aforesaid broad facts of the present case, for deciding the controversy involved in the present application, clause `k of Article 1(1) and Article 3 of 1952 convention are required to be considered which read as under:

> Maritime Claim means a claim arising out of one or more of the following:
>
> (a) to (j) xxxxx
>
> (k) goods or materials wherever supplied to a ship for her operation or maintenance;
>
> (l) to (q) xxxx Article 3:
>
> Subject to the provisions of para (4) of this article and of article 10, a claimant may arrest either the particular ship in respect of which the maritime claim arose, or any other HC-NIC Page 87 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER ship which is owned by the person who was, at the time when the maritime claim arose, the owner of the particular ship, even though the ship arrested be ready to sail; but no ship, other than the particular ship in respect of which the claim arose, may be arrested in respect of any of the maritime claims enumerated in article 1, (o), (p) or (q).
>
> (2) Ships shall be deemed to be in the same ownership when all the shares therein are owned by the same person or persons.
>
> (3) A ship shall not be arrested, nor shall bail or other security be given more than once in any one or more of the jurisdictions of any of the Contracting States in respect of the same maritime claim by the same claimant: and, if a ship has been arrested in any of such jurisdictions, or bail or other security has been given in such jurisdiction either to release the ship or to avoid a threatened arrest, any subsequent arrest of the ship or of any ship in the same ownership by the same claimant for the maritime claim shall be set aside, and the ship released by the Court or other appropriate judicial authority of that State, unless the claimant can satisfy the Court or other appropriate judicial authority that the bail or other security had been finally released before the subsequent arrest or that there is other good cause for maintaining that arrest.

(4) When in the case of a charter by demise of a ship the charterer and not the registered owner is liable in respect of a maritime claim relating to that ship, the claimant may arrest such ship or any other ship in the ownership of the charterer by demise, subject to the provisions of this Convention, but no other ship in the ownership of the registered owner shall be liable to arrest in respect of such maritime claim. The provisions of this paragraph shall apply to any case in which a person other than the registered owner of a ship is liable in respect of a maritime claim relating to that ship.

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9. Further, the observation made by Honble Supreme court in the case of M.V.Elisabeth (supra) is required to be kept in mind, wherein the Honble Supreme Court has held in paragraph 48 as under :

"48. A ship may be arrested (i) to acquire jurisdiction; or (ii) to obtain security for satisfaction of the claim when decreed; or

(iii) in execution of a decree. In the first two cases, the court has the discretion to insist upon security being furnished by the plaintiff to compensate the defendant in the event of it being found that the arrest was wrongful and was sought and obtained maliciously or in bad faith. The claimant is liable in damages for wrongful arrest. This practice of insisting upon security being furnished by the party seeking arrest of the ship is followed in the United States, Japan and other countries. The reason for the rule is that a wrongful arrest can cause irreparable loss and damages to the shipowner; and he should in that event be compensated by the arresting party."

10. By way of this application, the applicant has indirectly prayed for the rejection of the plaint. Learned counsel appearing for the applicant, in fact, has submitted that this Court is having no jurisdiction to entertain the present Admiralty Suit and, therefore, the suit itself is liable to be dismissed and, therefore, while considering the submissions canvassed by the learned counsel appearing for the applicant, this Court has to keep in mind the provision contained in Order VII Rule 11 of Civil Procedure Code, 1908 which reads as under:

11. Rejection of plaint The plaint shall be rejected in the following cases:□

(a) where it does not disclose a cause of action;

(b) where the relief claimed is undervalued, and the plaintiff, on being required by the HC-NIC Page 89 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER

Court to correct the valuation within a time to be fixed by the Court, fails to do so;

(c) where the relief claimed is properly valued but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp□paper within a time to be fixed by the Court, fails to do so;

(d) where the suit appears from the statement in the plaint to be barred by any law;

(e) where it is not filed in duplicate;

(f) where the plaintiff fails to comply with the provisions of rule 9] [Provided that the time fixed by the Court for the correction of the valuation or supplying of the requisite stamp□paper shall not be extended unless the Court, for reasons to be recorded, is satisfied that the plaintiff was prevented by any cause of an exceptional nature for correcting the valuation or supplying the requisite stamp□paper, as the case may be, within the time fixed by the Court and that refusal to extend such time would cause grave injustice to the plaintiff.]

11. In the case of Mayar H.K.(Ltd.) and others (supra), the Honble Supreme Court in paragraph 12 has observed and held as under:

12. From the aforesaid, it is apparent that the plaint cannot be rejected on the basis of the allegations made by the defendant in his written statement or in an application for rejection of the plaint. The court has to read the entire plaint as a whole to find out whether it discloses a cause of action and if it does, then the plaint cannot be rejected by the court exercising the powers under Order 7 Rule 11 of the Code. Essentially, whether the plaint discloses a cause of action, is a question of fact which has to be gathered on the basis of the averments made in the plaint in its entirety taking those averments to be correct. A cause of action is a bundle of facts which are required to be proved for obtaining relief and for the said purpose, the material facts are required to be stated but not the evidence except in certain cases where the pleadings relied on are in regard to the misrepresentation, fraud, wilful default, undue HC-NIC Page 90 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER influence or of the same nature. So long as the plaint discloses some cause of action which requires determination by the court, the mere fact that in the opinion of the Judge the plaintiff may not succeed cannot be a ground for rejection of the plaint. In the present case, the averments made in the plaint, as has been noticed by us, do disclose the cause of action and, therefore, the High Court has rightly said that the powers under Order 7 Rule 11 of the Code cannot be exercised for rejection of the suit filed by the plaintiff□ appellants.

12. Thus, in view of the aforesaid decision rendered by the Honble Supreme Court, it is clear that the plaint cannot be rejected on the basis of the allegation made by the defendant in the written statement or in an application for rejection of the

plaint. The Court has to read the entire plaint as a whole to find out whether it discloses a cause of action and if it does, then the plaint cannot be rejected by the Court exercising powers under the aforesaid provision. The cause of action is a bundle of facts which are required to be proved for obtaining relief and for the said purpose, the material facts are required to be stated but not the evidence except under certain circumstances. If the plaint discloses some cause of action which requires determination by the Court, the mere fact that in the opinion of the Judge, the plaintiff may not succeed cannot be a ground for rejection of the plaint.

13. In the present case, the plaintiff has pleaded the cause of action in paragraphs 4(a) to (e) of the plaint. The averments made in the plaint are also required to be considered while deciding the present application.

14. In the case of M.V.Sea Renown V/s Energy Net Limited being Civil Appeal No.257 of 2001 reported in 2003 JX (Guj) 278, the facts of the said case were almost similar to the facts of the present case and the learned Single Judge, after considering the facts of the said case, observed and held in paragraphs 18 to 22 as under:

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> 18. While considering the facts in the proper perspective and appreciating the documents produced before the Court, the Court is not prima facie inclined to accept the proposition put forward by the defendant that there is no privity of contract between the plaintiff who has supplied bunkers to the defendant vessel and the owners of the defendant vessel. As a matter of fact, while moving the present Civil Application, the defendant has proceeded on the premises that it is necessary for the owner of the defendant vessel to be liable in personam in respect of any claim against the defendant vessel. However, both these propositions are misconceived and unacceptable in law as the plaintiff has supplied bunkers to the defendant vessel which are necessaries for the operation of the said vessel. Consequently, the plaintiff has a maritime claim against the defendant vessel as well as the maritime lien in respect of the necessaries supplied to the said vessel.

It is an established position in law that in admiralty, the vessel is treated as a juridical entity with a corporate personality and is liable to be proceeded against in respect of a maritime claim, irrespective of the character or personality of its owners. The vessel is treated as a wrongdoer and liable to be proceeded against. The Court found substance in the submission of the plaintiff that there is nothing in the Admiralty Courts Act, 1861 which is

the applicable statute and the Brussels Convention, 1952 which has been applied by Courts in India for the purpose of enforcing maritime claims, that requires privity of contract with the owner of the vessel before an action in rem can be commenced against the vessel. On the contrary, it is held by the Hon'ble Supreme Court in the case of M.V. Elisabeth & Ors v. Harwan Investment & Trading Pvt.Ltd 1992 (1) SCALE 490 wherein it is held that the powers of the High Court are plenary and unlimited and in the absence of any fetters imposed by a statute, the Court is entitled to proceed against the vessel for the enforcement of the maritime claims.

19. The submission of the defendant to the effect that the defendant was not aware of the terms and conditions of the supply of the HC-NIC Page 92 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER bunkers and the same were not binding on the defendant, does not also seem to be convincing as it was made clear to the Master of the vessel at the time of supply of the bunkers that the delivery is for the account of the owner of the vessel and the owner is individually and jointly responsible for the payment of the bunkers supplied to the vessel without any protest. The clause which appears on the face of the Bunker Delivery Receipt and which is signed by the Master and/or Chief Engineer of the vessel binds the owner of the vessel and holds the owner liable for the payment of the bunkers supplied which were delivered expressly on the condition that they were for the account of the owner of the vessel.

20. The Court further found sufficient force in the contention of the plaintiff that the supply of bunkers was made by the plaintiff to the defendant vessel on the terms and conditions for the sale of marine bunker fuel and lubricants ☐ referred to as the "current applicable terms and conditions of the seller"

> in the order confirmation dated 24.7.2000. Cl. 10.3 of the said terms and conditions states that deliveries of marine fuel are not only on the credit of the buyer but also on the faith and credit of the vessel which uses the marine fuel and it is agreed and the buyer warrants that the seller will have and may assert a lien against the receiving vessel for the amount of the purchase price of the said marine fuel. On this basis, the plaintiff asserted that bunkers were supplied on the faith and credit of the vessel and it was open to the plaintiff to proceed against the vessel for recovery of the price of the bunkers supplied. It was also clear from the said cl. 10.3 that the plaintiff was entitled to assert a lien against the defendant vessel for the amount of the purchased price which was in enforcement of the maritime lien that the plaintiff was entitled to an order of arrest and detention of the defendant vessel to which the plaintiff looked for the purpose of satisfying its claim apart from any other contractual remedy that the plaintiff may have.

21. The Court is also not inclined to accept HC-NIC Page 93 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER the submission made by the defendant to the effect that at the time of supply of bunkers, the vessel was on the Charterer of Geepee Shipping and Trading Inc., and the order was placed by the Manager of the said vessel and that the Charterer or Manager of the vessel was liable and not the owner of the vessel. It appears from the record that the order was placed by a person who was duly authorised to act on behalf of the vessel and consequently bind the vessel and its owner. The plaintiff was not having any knowledge of the arrangement between the Charterer and/or Manager of the vessel or its owner. As far as the plaintiff is concerned, the bunkers were supplied to the vessel and on the faith and credit of the vessel and the vessel was liable to pay for the supply.

22. With regard to the other arguments canvassed by the defendant, the Court could not find any force therein so as to reject the plaint at the very threshold. Those arguments in any way, before their acceptance, require evidence and full□ fledged trial. At this stage, it cannot be said that the Master of the vessel has merely filled□ up quantity in various blanks and signed at the bottom as alleged by the defendant. It is also not possible to jump to the conclusion that the plaintiff has made false statements in the plaint. Whether G. Premjee Trading were acting as Managers to Charterers of the vessel or whether the Geepee Shipping & Trading Inc., has gone into liquidation do not assume much significance in view of the fact that the bunkers were received by the Master of the vessel on behalf of the vessel and the plaintiff was entitled to look to the defendant vessel for payment. On prima facie reading of the documents, it flows that the Master of the vessel has accepted the liability on behalf of the owner of the vessel. The plaintiff has emphatically stated that and it is weighed with the Court that it is customary in the shipping business that orders for supply of bunkers are also placed by the brokers who are called "Bunker Brokers". The broker has authority on behalf of the vessel to order supply. The bunkers are supplied by the seller on the faith and credit of the vessel.

The bunkers are expressly acknowledged by the Master as having been received on behalf of the Vessel and its owners who are responsible for the payment of the same. Thus, in any case, the vessel is liable to be proceeded against in event the price of the bunkers supplied is not received by the seller.

The aforesaid order was challenged before the Honble Division Bench by filing an appeal. The Honble Division Bench also dismissed the appeal after modification of the order passed by the learned Single Judge to some extent. The Honble Division Bench observed and held in paragraphs 9,13,14 and 15 as under:

> 9. After hearing the learned counsels of the parties at length, and considering the documents produced, the learned Single Judge held that the appellants have moved the application for return of the bank guarantee duly discharged and for raising an issue that since the plaint does not disclose any cause of action against the appellants□ defendants, the suit is not maintainable, and it is liable to be rejected. The learned Judge did not accept the proposition put forward by the appellants that there was no privity of contract between the respondent□plaintiff who had supplied bunkers to the defendant□vessel (appellant No.
>
> 1) and the owners of the defendant vessel, and held that the plaintiff having supplied bunkers to the defendant□vessel, which are necessary for the operation of said vessel, has a maritime claim against the defendant□vessel as well as maritime lien in respect of necessaries supplied to the said vessel. After referring to well□ established principle of law to the effect that the vessel is treated as a juridical entity with a corporate personality and is liable to be proceeded against in respect of a maritime claim, irrespective of the character or personality of its owners, the learned Judge held that there is nothing in the Act and the Brussels Convention, 1952, which has been applied by courts in India for the purpose of enforcing maritime claim, requiring privity of contract with the owner of the vessel before an HC-NIC Page 95 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER action in rem can be commenced against the vessel. The learned Judge did not accept submission that at the time of supply of bunkers, the vessel was on the charter of Geepee Shipping & Trading Inc. Singapore, and the order was placed by the Manager of the said vessel and that charterer or manager of the vessel was liable and not the owner of the vessel, and held that the order was placed by the person who was duly authorised to act on behalf of the owner and consequently was binding on the vessel and its owner. The learned Judge accepted the plea raised by the respondent that the respondent was not having any knowledge of arrangement between the Charterer and/or Manager of the vessel or its owner and that bunkers were supplied on the faith and credit of the vessel and the vessel was liable to pay for the supply. The learned Judge deduced that it was not possible to conclude that the respondent□plaintiff had made

false statement in the plaint and that bunkers having been received by the vessel, the respondent was entitled to look to the vessel for payment. On prima facie reading of the documents, the learned Judge expressed the view that it is customary in the shipping business that orders for supply of bunkers are placed by the brokers who are called "Bunker Brokers" and brokers have authority on behalf of the vessel to order supply and the bunkers having been expressly acknowledged by the Master, the vessel and its owner would be responsible for payment of the same. The learned Judge referred to the decisions cited at the Bar and held that the respondent is within its right to claim that necessaries/bunkers were supplied at the instance/authority of the vessel/owners and that it would not be possible to hold, at this stage, that contract had not been entered into on behalf of the owners of the vessel. Dealing with the claim of damages advanced by the appellants, the learned Judge held that the question of awarding damages as well as interest would arise only if the Court comes to a conclusion that the claim made by the respondent in the suit is not sustainable and even if such a finding is recorded by the Court at the conclusion of the trial, the Court may or may not award damages and interest depending HC-NIC Page 96 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER upon the facts found by the Court and, therefore, the claim for damages cannot be entertained. The learned Judge expressed the view that, at this stage, when the suit is still pending and evidence is yet to be adduced, the Court cannot accept the demand of appellants to get the bank guarantee duly discharged. In view of the abovereferred to conclusions, the learned Judge has rejected the application submitted by the appellants vide judgment dated 15.01.2003 giving rise to instant appeal.

13. The plea that the learned Single Judge has committed an error in treating the application filed by the appellants as an application filed under Order VII, Rule 11 of the CPC and, therefore, the impugned order should be set aside, cannot be accepted. Three circumstances, namely;

(a) that no written statement was filed till the date of filing application;

(b) that averments have been made in the application demanding dismissal of the suit on the ground that no cause of action is available to the respondent against the appellants; and

(c) damages have been claimed by the appellants in the application, may persuade a Court to treat the application as if filed under the provisions of Order VII, Rule 11 of the CPC. If the application is treated as one having been filed under the provisions of Order VII, Rule 11 of the CPC, then the Court will have to proceed on demurrer, and try to find out with

reference to the averments made in the plaint and documents produced therewith, whether a cause of action is available to the respondent against the appellants.

In paragraph 4 of the plaint, the respondent has made averments, inter alia, as under:

> "In accordance with the order confirmation, bunkers were supplied to the said vessel at Port Said by the Plaintiff through local physical suppliers MISR Petroleum Company on 30th July 2000. The supplies were duly HC-NIC Page 97 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER acknowledged by the Master and the Chief Engineer of the said vessel who endorsed the bunker delivery receipts with their seal and signature. The receipt for bunkers, duly acknowledged and endorsed by the Manager and the Chief Engineer of the Defendant vessel states that the bunkers delivered/received on board are for account of the Owners and/or Managing Owners and/or Managers of this vessel....."

In support of abovereferred to averments, the respondent has produced three documents, i.e.;

(i) Order Confirmation dated 24.07.2000; (ii) Bunker Delivery Receipts dated 30.07.2000, which are two in number; and (iii) Invoice dated 9.08.2000. The order confirmation, inter alia, states that the buyer of the bunkers is "M.V. Sea Renown and jointly and severally Owners / Managing Owners / Operators / Managers / Disponent Owners/ Charterers and vessel in rem and Geepee Shipping & Trading Inc.. Mere receipt of this confirmation signifies acceptance of responsibility for payment of the bunker invoices by each and all of them." Whereas Master of the vessel is said to have acknowledged that the bunkers were supplied on board for account of owners who are individually and jointly responsible for payment of bunkers supplied to the vessel without any protest and though the invoice dated 9.08.2000 is raised on account of Geepee Shipping, Master and/or Owners and/or Managing Owners and/or Operators of MISR Petroleum Company are also mentioned while mentioning that invoice is on account of Geepee Shipping, Singapore. On a fair reading of the three documents together with averments made in the plaint and more particularly paragraph 4 of the plaint, this Court is of the view that it is clearly made out by the respondent that cause of action is available to it against the vessel and the owners for payment of price of bunkers sold and delivered by the respondent. Therefore, the application, if treated as having been filed under Order VII, Rule 11 of the CPC, is liable to be dismissed.

14. However, from the impugned judgment, it is evident that the learned Judge has considered the application from both the view points that it was an application under Order VII, Rule 11 of the CPC as well as on the basis that the application was for discharge of bank guarantee. The case of the appellants is that the purported receipt issued by the Master of the vessels is in favour of MISR Petroleum Company and not in favour of the respondent and, therefore, whatever mentioned in the said receipt could never constitute privity of contract between the respondent and the appellants and, therefore, no cause of action is available to the respondent against the appellants. It is true that the receipt is in favour of the MISR Petroleum Company and not in favour of the respondent. However, the case of the respondent-plaintiff as pleaded in paragraph 4 of the plaint is that in accordance with the order confirmation, bunkers were supplied to the said vessel at Port Said by the Plaintiff through local physical suppliers MISR Petroleum Company on 30th July 2000 and the supplies were duly acknowledged by the Master and the Chief Engineer of the said vessel who endorsed the bunker delivery receipts with their seal and signatures and that the receipts for bunkers, duly acknowledged and endorsed by the Master and the Chief Engineer of the Defendant vessel state that the bunkers delivered/received on board were for account of the Owners and/or Managing Owners and/or Managers of the vessel, etc. Thus, what is claimed by the respondent is that MISR Petroleum Company was local physical supplier through whom the respondent had supplied the bunkers to the vessel. It is also the case of the respondent that upon delivery of bunkers being made, the local physical supplier, i.e. MISR Petroleum Company, was duly paid by the respondent, and the respondent, in turn, had raised its invoice in respect of supplies on the Master and/or owner of the appellant No. 1-vessel. The case of the respondent that the respondent was the owner of the bunkers, and had supplied the same through MISR Petroleum Company, does not get destroyed merely because the receipt is raised on account of MISR Petroleum Company and, therefore, it is not HC-NIC Page 99 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER correct to say that the respondent has no cause available and that only MISR Petroleum Company would be entitled to sue and not the respondent. Similarly, case of the appellants that Geepee Shipping & Trading Inc., Singapore, is liable for the price of bunkers supplied to the appellant No. 1-vessel and not the appellants, cannot be accepted at this stage. The documents produced by the appellants along with application indicates that the vessel was chartered by Geepee Shipping & Trading Inc. under an agreement. Bunkers Stem Confirmation dated July 24, 2002 shows that buyer was Geepee Shipping & Trading Inc. It is an admitted position that Geepee Shipping & Trading Inc. was never the owner of the vessel, but charterer. The receipts issued by the Master of the vessel produced by the

respondent along with the plaint would furnish a clear cause of action to the respondent to proceed against the appellants because it is not the case of the appellants that the Master was not authorised to state in the receipts that deliveries of marine bunkers against the receipt, delivered/received on board for use as bunkers were for account of owners and/or Managing owners etc. What is pleaded by the appellants is that the Master of M.V. Sea Renown had signed the receipt which was in prescribed form. However, this question can be gone into only at the trial. In Videsh Sanchar Nigam Limited v. M.V. Kapitan Kud & Ors. , (1996) 7 SCC 127, the Supreme Court has approved the principles laid down in Moschanthy, and held in paragraph 14 of the reported decision as under:

> "14. In Moschanthy, The where the question was whether the admiralty action was vexatious, following the ratio of Willmer, J. in St. Elefterio, it was held that action could not be successful. It was held that courts should only stay the action on the ground when the hopelessness of the plaintiff's claim is beyond doubt. If it is not beyond doubt but on the contrary the plaintiff has an arguable, even though difficult, case even in law the action would be allowed to proceed to trial. The application for stay was accordingly rejected."

HC-NIC Page 100 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER If the principles laid down by the Supreme Court in above quoted decisions are applied to the facts of the present case, it is difficult to come to the conclusion that hopelessness of the respondent's claim is beyond doubt. On the contrary, the respondent has a reasonably good arguable case and even if the case is difficult one, action should be allowed to proceed to trial. In view of the documents produced by the respondent along with the plaint and the appellants along with application, serious triable issues would arise for consideration of is liable for the price of bunkers sold and/or Geepee Shipping & Trading Inc., Singapore, is liable for the same. These are highly contested issues and cannot be determined at this stage and, therefore, the matter must proceed to trial. Further, the relief claimed in the application that the bank guarantee should be discharged, can be granted only if the Courts comes to a conclusion that the arrest of the appellant No. 1☐ vessel was not justified. Once such a finding in favour of the appellants is recorded, the Court would lose the jurisdiction to try the suit, which may have far reaching consequences. Under the circumstances, this Court is of the opinion that the plea that cause of action is not available to the respondent and, therefore, the bank guarantee should be discharged, cannot be accepted at this stage. For all these reasons, it cannot be said that the respondent had effected detention of the vessel without any basis or that the appellants are entitled to relief of discharge of guarantee.

15. The contention that there was no privity of contract between the appellants and the respondent and, therefore, the action in rem commenced against the vessel was not well founded, has no substance. It is conceded by the learned Counsel for the

respondent that supply of the bunkers gives rise to maritime claim, but not a maritime lien. It is expressly stated in paragraph 7 of the plaint that supply of bunkers to a vessel constitutes necessaries HC-NIC Page 101 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER within the meaning of Section V. of the Act, and the respondent has a maritime claim against the appellant No. 1□vessel for the bunkers. Section XXXV of the Act provides that jurisdiction conferred by the Act on High Courts of admiralty may be exercised either by proceedings in rem or by proceedings in personam.

15. In the case of M.V.Luckyfield (supra), learned Single Judge observed the contentions of learned advocate in paragraph 9 of the said order and thereafter discussed the contentions raised by the original plaintiff in paragraph 10 of the said order. Thereafter, learned Single Judge observed in paragraph 15, 19 to 21 as under:

> 15. Having heard the learned advocates appearing for the parties and having considered their pleadings and submissions made orally and in writing and having considered relevant provisions relating maritime laws and conventions as well as the decided case law on the subject, the Court does not find any substance or merits in this application and it is liable to be rejected. The applicant/defendant vessel's case in a nutshell is that;

(i) That the m.v. Lucky Field was at all relevant time of the supply of bunkers under a time charter dated 1.2.2006 to IMC Maritime Group who under the alleged time charter party dated 1.2.2006 was liable to pay for the bunkers.

(ii) That though the bunkers were supplied and delivered to the vessel m.v. Lucky Field by the plaintiff there was no privity of contract between the owners of the defendant vessel and the plaintiff.

(iii) That in absence of privity of contract, the vessel m.v.Lucky Field cannot be held liable or responsible to pay for the value of bunker and could therefore not be arrested in an action in rem.

(iv) That the Application of the owners of the defendant vessel is not for rejection of the plaint under Order VII Rule 11 for want of cause of action but is an application for setting aside an order of arrest and for damages.

(v) The owner of the defendant vessel has also prayed for losses and damages to be paid to them for the alleged wrongful arrest of the vessel.

19. The Court now proceeds to deal with each of the aforesaid submissions.

Submission (i) :The plaintiff relied upon two decisions in support of the first submission. In a decision reported in (1996) 7 SCC 127, it is held in para 15 that the claim was not vexatious, but the claim was triable and if there is a strong triable case, the security is required to be furnished. The only test for determining whether the case is triable or not is by finding out whether the claim is not vexatious. Therefore, it is established in an admiralty action that the claim is not vexatious and it is triable. The requirement of prima facie case as understood in the context of interim injunction under Order 39 of the Code of Civil Procedure, 1908 is not to be imported while exercising the admiralty jurisdiction. It is sufficient to establish that the claim is triable and not vexatious. In a decision reported in (1998) 2 Lloyd's Rep.357, it is held as follows :

> It is certainly open to a defendant to apply to the court at an early stage of an action for a stay on the ground that the action has no chance of success and is therefore, vexatious and the Court certainly has power in the exercise of its inherent jurisdiction to grant a stay on that ground..... Court however, should only stay an action on that ground when the hopelessness of the respondent's claim is beyond doubt. If it is beyond doubt but on the contrary, the respondent has an arguable even though difficult case in fact and law, the action should be allowed to proceed to trial ..... This last principle applies, in my view, as much to an action in rem as to an HC-NIC Page 103 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER action in personam, even though the former involves a defendant in providing security and maintaining it until the action is determined, while the later does not.

> Submission (ii) :
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> The Arrest Convention of 1999 is not yet ratified by 10 countries. A printout obtained from the website clearly provides that the international convention on arrest of ship, 1999 is not yet in force. Its statute indicates that there are only six signatories and seven parties to such convention. In the case reported in (2004) 9 SCC 512, there is a reference made by the Hon'ble Supreme Court to the Arrest Convention of 1999.

In particular, para 43 of the judgment states that the countries mentioned in the said para have ratified convention. This is factually not correct. The Arrest Convention, 1999 is not yet ratified by all the countries mentioned in the said para. The website clearly shows that such convention is not in force.

The Hon'ble Supreme Court was concerned with the Arrest Convention of 1999 in the context of the question whether the insurance premium paid for the ship constitutes 'necessaries' so as to give rise to a maritime lien. Such question is answered in the affirmative by referring to the Arrest Convention of 1999.

Arrest Convention of 1999 cannot be resorted to for the purpose of restricting or truncating the expanding jurisdiction of Indian Courts. The rights available under the Arrest Convention of 1952 cannot be taken away by the Arrest Convention of 1999. The decision reported in (1993) Sup.2 SCC 433 clearly provides that India has not adopted the Brussels' convention and yet the provisions of the convention are the result of international unification and development of the maritime laws of the world and can be regarded as international common law and which can be adopted and adapted by the Courts to supplement and compliment national statute on the subject, in absence of specific statutory provisions. Although this convention may not have been ratified by India, they embodied the principles of law recognized by the generally of maritime HC-NIC Page 104 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER states and can therefore, be regarded as part of our common law. In particular, it is held in para 64 that where statutes are silent and remedy is sought, it is the duty of the Court to devise procedural rules by analogy and expediency. Briefly stated, the Arrest Convention of 1952 read with the judgment of the Hon'ble Supreme Court in case of m.v.Elizabeth clearly establishes that the jurisdiction of the Indian Courts cannot be truncated or restricted except by national statutes. It is not proper to reject the claim of the plaintiff by putting 1999 Arrest Convention on the same footing as 1952 Convention. In the Sea Success case the Supreme Court of India applied the 1999 Arrest Convention because the 1952 Arrest Convention did not provide for P & I call money claims to be a maritime claim to enable the arrest of the vessel. It is in this context that the Supreme Court relied upon the 1999 Arrest Convention to expand the jurisdiction of the Court. By relying on the 1999 Arrest Convention which is wider is being sought

to be narrowed or whittled down. It would be an error to hold that 1999 Arrest Convention has the effect of superseding 1952 Arrest Convention.

Submission (iii) :Admiralty Court Act, 1861 provides that the bunkers supplied to the ship constitute 'necessaries' so as to give rise to maritime claim. In the instant case, the facts on record very clearly establish the following:

(i) The charter party between the owner and charterer was not known, or made known to the plaintiff at the time of supply of bunkers to the ship. The plaintiff did not and could not have known, that the ship was under a time charter (see para 18(vi) to (viii) to plaint).

Since master of the ship/chief engineer are the employees of the owner and since they have not disclosed to the plaintiff about the time charter at the time of supply of the bunkers, the plaintiff could not have known about such time charter at all.

(ii) The bunker confirmation, bunker nomination and revised bunker nomination clearly referred to the general terms and conditions subject to which the bunkers are supplied by the plaintiff. It clearly provides that the sale of HC-NIC Page 105 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER the bunkers is subject to such general terms and conditions and that the copy of the same is available on request. No such request was made by the Master of the ship/ Chief Engineer. Such terms and conditions are a part of the contract. In a decision reported in (1978) 1 All England Report page 18 it is held that the reference made in the purchase order of the plaintiff to the general conditions of the contract obtainable at request was sufficient to incorporate into the contract such conditions. In the instant case also, similar language is used, and therefore, such conditions are part of the contract. In particular Clauses 1.3, 2.6 and 3.3 are relevant. Clause 3.3 provides that the sale of the products is on the credit of the buyer, the receiving vessel and/or otherwise provided in Clause 1.3 and that the settler shall have a maritime line against the receiving vessels and that the buyer or its agents are authorized to encumber the receiving vessels.

(iii) The bunker delivery note is signed by the Master of the Ship/ Chief Engineer. Invoice is issued to the account of Owners/Charters/ Master/ Operator. The original invoice is handed over to the Master of the Ship/Chief Engineer.

20. Looking to the aforesaid facts on record, it is sufficiently triable/arguable that the Master of the Ship/Chief Engineer had actual or implied or ostensible authority and that by no stretch of imagination, such claim can be described as vexatious.

21. It is sufficiently triable/arguable that bunkers are supplied to the credit of vessels and this is sufficient to arrest the ship irrespective of the question whether the owner is liable in personam or not. In a well recognized classic by D.C. Jackson Enforcement of Maritime Claims (Second Edition), it is stated on page No.197 as under:

> The prerequisite that the person liable in personam should be beneficial owner at the time that the action was brought was clearly contrary to the Arrest Convention so far as the liability to arrest was concerned. In effect, HC-NIC Page 106 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER the convention provides simply that the ship in respect of which the claim arose may be arrested, whoever is liable in respect of the claim, and there is no reference to ownership or any other link at the time the action is brought
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> 15. Keeping in mind the aforesaid decisions rendered by this Court, if the facts of the present case are considered, it is clear that in the present case, the plaintiff supplied the bunkers at the request of Daebo to the defendant□vessel. The applicant time chartered the defendant□ vessel to Daebo for a period of six months from January 2014 to it was extended thereafter and ultimately the defendant□vessel was withdrawn from Daebo and fixture note dated 23.12.2014 on 17.2.2015. Thus, during the said period on 22.1.2015, the plaintiff supplied the bunkers to the defendant□ vessel. The plaintiff issued bunker delivery receipts for the said supply.

The bunkers were accepted without raising any protest and/or demur. The master/chief engineer of the defendant□vessel acknowledged receipt of bunker by endorsing upon both the bunker delivery receipts. Invoices were also issued by the plaintiff. Thus, it is not in dispute that bunkers were supplied to the defendant□vessel. If bunker delivery note produced at page nos.29 and 30 of the compilation of the Admiralty Suit is carefully seen, it is clear that in the said delivery note, it has been specifically stated that owner/borrower/owner or master. The master/chief engineer has affixed the rubber stamp and signed the said delivery note and accepted the bunkers. Invoice produced at page 31 is also helpful to the plaintiff. Thus, even if there is no privity of contract between the applicant and original plaintiff, the action in rem of the supplier of bunkers gives rise to maritime claim. When the plaintiff has supplied bunkers to the defendant□vessel which are necessaries for the operation of the said vessel, the plaintiff has a maritime claim against the defendant□ vessel in respect of the said supplies. It is well settled that the vessel is treated as a juridical entity with a corporate personality and therefore is liable to proceed against in respect of maritime claim irrespective of the character or personality of its owners. In the admiralty jurisdiction, the vessel is treated as a wrong doer and liable to be proceeded against. From HC-NIC Page 107 of 125 Created On Wed Jun

29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER the above facts on record, it is sufficiently triable/arguable that Master/Chief Engineer of vessel had actual or implied authority. Thus, in view of the aforesaid discussion, this Court is of the opinion that the plaintiff is having prima facie case and reasonably arguable case on merits.

16. The decisions relied upon by learned counsel appearing for the applicant-intervenor in the case of Gulf Petrochem (supra) decided by the Bombay High Court is not applicable to the facts of the present case. Even otherwise, in view of the binding decision of this court rendered by Honble Division Bench of this Court in case of M.V.Sea Renows (supra), the decision rendered by Bombay High Court relied upon by learned counsel for the applicant is not helpful to him. Similarly, reliance placed on the decision rendered by learned Single Judge of this Court rendered in the case of M.V.Leonis thro.Her Master, Prominent Shipping Pte.Ltd. (supra) is also misconceived. When the decision of Honble Division Bench of this Court, in identical facts of the present case, is in favour of the plaintiff, the decision rendered by Honble Division Bench is binding to this Court.

17. Similarly, the decision rendered by the Honble Supreme Court in the case of Epoch Enterrepots (supra) is also not applicable to the facts of the present case as the plaintiff has submitted that the claim of the plaintiff is maritime claim under 1952 convention."

4) Mayar (H.K.) Ltd. & Ors vs Owners & Parties, Vessel M.V. reported in (2006) 3 SCC 100 (paras 18, 19 and 20) "18. As per law of pleadings under Order VI Rule 2 of the Code, every pleading should contain, and contain only, a statement in a concise form of the material facts on which the party relies for his claim or defence, as the case may be. Thus, the facts on which the plaintiff relies to prove his case have to be pleaded by him. Similarly, it is for the defendant to plead the material facts on which his defence stands. The expression `material facts' has not been defined anywhere, but from HC-NIC Page 108 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER the wording of Order VI Rule 2 the material facts would be, upon which a party relies for his claim or defence. The material facts are facts upon which the plaintiff's cause of action or defendant's defence depends and the facts which must be proved in order to establish the plaintiff's right to the relief claimed in the plaint or the defendant's defence in the written statement. Which particular fact is a material fact and is required to be pleaded by a party, would depend on the facts and circumstances of each case. In A.B.C. Laminart Pvt. Ltd. Vs. A.P. Agencies, Salem, (1989) 2 SCC 163, this Court has considered the ambit of the exclusion clause whereby the jurisdiction of one court is excluded and conferred upon another court by agreement of the parties and said that in a suit for damages for breach of contract, the cause of action consists of making of the contract, and of its breach, so that the suit may be filed either at the place where the contract was made or at the pace where it should have been performed and the breach occurred.

When the court has to decide the question of jurisdiction pursuant to an ouster clause, it is necessary to construe the ousting expression or clause properly to see whether there is ouster of jurisdiction of other courts. When the clause is clear, unambiguous and specific accepted notions of contract would bind the parties and unless the absence of ad idem can be shown, the other courts should avoid exercising jurisdiction. As regards construction of the ouster clause when words like `alone', `only', `exclusive' and the like have been used, there may be no difficulty. Even without such words in appropriate cases, the maxim `expressio unius est exclusio alterius' expression of one is the exclusion of another may be applied. What is an appropriate case shall depend on the facts of the case. In such a case, mention of one thing may imply exclusion of another. When certain jurisdiction is specified in a contract, HC-NIC Page 109 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER an intention to exclude all others from its operation may in such cases be inferred. It has, therefore, to be properly construed (SCC pp.166 and 175, paras 21□22).

19.The allegations in the plaint are to the effect that the parties have entered into a contract on 7.1.2000 to carry on board the vessel M.V. Fortune Express under the six split bills of lading 642 logs from the port of Sarawak, Malaysia for discharge at the port of Calcutta, India. As per stowage plan, 578 logs were lying on the deck of the vessel. At the time of the discharge of the cargo lying on the deck of the vessel, it was found that 456 logs out of 578 logs were missing and had been short□landed. The plaintiffs claimed a decree for the proportionate value of 456 logs, port and other charges, custom duty and proportionate insurance payment. As per the plaintiffs' allegation, the logs, which were to be carried on the vessel owned by the defendants, had not been delivered at the port of destination. Thus, all the material facts on the basis of which the plaintiffs claimed the decree are alleged in the plaint. As the logs were not delivered at the port at Calcutta, the port of destination, the part of cause of action arose within the jurisdiction of the Calcutta Court and, thus, the suit filed by the plaintiffs at Calcutta was maintainable although it may be pleaded by the defendants in their written statement that the Calcutta High Court has no jurisdiction on account of Clause 3 of BOL. For the purpose of the cause of action, it was not necessary for the plaintiffs to plead the ouster of the jurisdiction of the Calcutta Court. In fact, it was for the defendants to plead and prove the ouster of the jurisdiction of the Calcutta Court and conferment of the jurisdiction in the Singapore Court alone. On a bare reading of Clause 3 of BOL, it is clear that any dispute arising under the BOL shall be decided in the country where the carrier has its principal place of business and the law of such country shall apply except as provided elsewhere in the BOL. Therefore, the exclusion clause refers to the jurisdiction of a court where the carrier has its principal HC-NIC Page 110 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER place of business. Unless and until it is established that the defendant□carrier has its principal place of business at Singapore, the exclusion clause has no application. Simply because in the cause title of the plaint, the plaintiffs have described defendant No. 2□ Trustrade Enterprises PTE Ltd. to be carrying on business at Singapore, would not ipso facto establish the fact that the principal place of

business of defendant No.2 (respondent herein) is/was at Singapore to exclude the jurisdiction of the Calcutta Court which admittedly has the jurisdiction to try the suit. Therefore, absence of reference of Clause 3 of BOL in the pleadings cannot be said to be suppression of the material fact as the question of jurisdiction would be required to be adjudicated and decided on the basis of the material placed on record at the trial.

20. In S.J.S. Business Enterprises (P) Ltd. vs. State of Bihar and Others, this Court has accepted the principle that the (SCC p.173, para 13) "suppression of a material fact by a litigant disqualifies such litigant from obtaining any relief. The rule has been evolved out of the need of the courts to deter a litigant from abusing the process of court by deceiving it. But the suppressed fact must be a material one in the sense that had it not been suppressed it would have had an effect on the merits of the case. It must be a matter which was material for the consideration of the court, whatever view the court may have taken."

25. In facts of this case, in the opinion of this Court, the case considered by the learned Company Judge in Link Oil Trading Ltd. (supra) and confirmed by the Hon'ble Division Bench of this Court in OJ Appeal No.2/10 are totally different than the present case. Similarly, the other judgments relied upon by the learned counsel for the defendant would not apply to the facts of this case. The reliance placed for by HC-NIC Page 111 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER the learned counsel for the defendant in the case of Malaysian Airlines Systems Bhd (supra) would not be applicable to this case at this stage because the time provided under section 18 is not yet over.

26. The contention of suppression raised by the learned counsel for the defendant that the plaintiff has not disclosed the fact that the payment has been received in full as far as suit invoice is concerned, relying upon the correspondences of the Copenship receiver and in addition to the fact that the plaintiff has clearly disclosed in para 9 of the plaint that an amount of USD 1.1 million is received, but the same is not realized because of the pendency of the bankruptcy proceedings in Danish Court, it cannot be said that there is no disclosure of the said fact, which would be fatal for the plaintiff. In prima facie opinion of this Court, in view of the claim raised by the plaintiff and contradicted by the defendant, such an issue is a triable and arguable issue and therefore, on that ground, it cannot be said that there was material suppression as held by this Court in the case of Link Oil Trading Ltd. supra). It is not the case that of the defendant that the bunkers were not supplied to the defendant vessel and that the Master/Chief Engineer has not accepted the supply. It is also not the case of the defendant that the bunkers supplied were not utilized by the defendant vessel. The material on record prima facie shows that the Copenship, as a charterer of the defendant vessel, had agreed to the terms and conditions, which also binds HC-NIC Page 112 of 125 Created On Wed Jun

29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER the charterer. The question whether the same was binding on defendant vessel cannot be decided at this stage.

27. The third limb of contention in relation to the alleged suppression of material facts and false averments made to obtain ex parte order out of the selling of the vessel does not take the case of the defendant any further. The plaintiff cannot have knowledge of the fact that as to when the vessel after completing her cargo operations is to leave the territory of Indian water. The plaintiff has based their case on the fact that the defendant vessel has arrived at Hazira Port on 14.05.2016, which gives admiralty jurisdiction to this Court and therefore, the ratio laid down by the Apex Court in the case of Kishor Samrite (supra) would not apply to the case on hand and it cannot be said that such statement made in the plaint are totally misconceived and/or the abuse of process of Court. The Hon'ble Apex Court in the case of M.V.Elisabeth (supra) has observed thus -

> "44. "The law of admiralty, or maritime law, ... (is the) corpus of rules, concepts, and legal practices governing ... the business of carrying goods and passengers by water." (Gilmore and Black, The Law of Admiralty, page (1). The vital significance and the distinguishing feature of an admiralty action in rem is that this jurisdiction can be assumed by the coastal authorities in respect of any maritime claim by arrest of the ship, irrespective of the nationality of the ship or that of its owners, or the place of business or domicile or residence of its owners or the place where the cause of action arose wholly or in part.
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> "..... In admiralty the vessel has a juridicial HC-NIC Page 113 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER personality, an almost corporate capacity, having not only rights but liabilities (sometimes distinct from those of the owner) which may be enforced by process and decree against the vessel, binding upon all interested in her and conclusive upon the world, for admiralty in appropriate cases administers remedies in rem, i.e., against the property, as well as remedies in personam, i.e., against the party personally...". Benedict, The Law of American Admiralty, 6th ed. Vol. I p.3.
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> 45. Admiralty Law confers upon the claimant a right in rem to proceed against the ship or cargo as distinguished from a right in personam to proceed against the owner. The arrest of the ship is regarded as a mere procedure to obtain security to satisfy judgment. A successful plaintiff in an action in rem has a right to recover damages against the property of the defendant. `The liability of the shipowner is not limited to the value of the res primarily proceeded against ... An action .... though originally commenced in rem, becomes a

personal action against a defendant upon appearance, and he becomes liable for the full amount of a judgment unless protected by the statutory provisions for the limitation of liability'. (Roscoe's Admiralty Practice, 5th ed. p.29)

46. The foundation of an action in rem, which is a peculiarity of the Anglo□ American law, arises from a maritime lien or claim imposing a personal liability upon the owner of the vessel. A defendant in an admiralty action in personam is liable for the full amount of the plaintiff's established claim. Likewise, a defendant acknowledging service in an action in rem is liable to be saddled with full liability even when the amount of the judgment exceeds the value of the res or of the bail provided. An action in rem lies in the English High Court in respect of matters regulated by the Supreme Court Act, 1981, and in relation to a number of claims the jurisdiction can be invoked not only against the offending ship in question but also against a `sistership' i.e., a ship in the same beneficial ownership as the ship in regard to which the claim arose.

"The vessel which commits the aggression is treated as the offender, as the guilty HC-NIC Page 114 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER instrument or thing to which the forfeiture attaches, without any reference whatsoever to the character or conduct of the owner...." Per Justice Story, The United States v. The Big Malek Adhel,

47. Merchant ships of different nationalities travel from port to port carrying goods or passengers. They incur liabilities in the course of their voyage and they subject themselves to the jurisdiction of foreign States when they enter the waters of those States. They are liable to be arrested for the enforcement of maritime claims, or seized in execution or satisfaction of judgments in legal actions arising out of collisions, salvage, loss of life or personal injury, loss of or damage to goods and the like. They are liable to be detained or confiscated by the authorities of foreign States for violating their customs regulations, safety measures, rules of the road, health regulations, and for other causes. The coastal State may exercise its criminal jurisdiction on board the vessel for the purpose of arrest or investigation in connection with certain serious crimes. In the course of an international voyage, a vessel thus subjects itself to the public and private laws of various countries. A ship travelling from port to port stays very briefly in any one port. A plaintiff seeking to enforce his maritime claim against a foreign ship has no effective remedy once it has sailed away and if the foreign owner has neither property nor residence within jurisdiction. The plaintiff may therefore

detain the ship by obtaining an order of attachment whenever it is feared that the ship is likely to slip out of jurisdiction, thus leaving the plaintiff without any security.

48. A ship may be arrested (i) to acquire jurisdiction; or (ii) to obtain security for satisfaction of the claim when decreed; or (iii) in execution of a decree. In the first two cases, the court has the discretion to insist upon security being furnished by the plaintiff to compensate the defendant in the event of it being found that the arrest was wrongful and was sought and obtained maliciously or in bad faith. The claimant is liable in damages for wrongful arrest. This practice of insisting upon security being furnished by the party seeking arrest of the ship is followed in the United HC-NIC Page 115 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER States, Japan and other countries. The reason for the rule is that a wrongful arrest can cause irreparable loss and damages to the shipowner; and he should in that event be compensated by the arresting party. (See Arrest of Ships by Hill, Soehring, Hosoi and Helmer, 1985). "

"55. An action in rem is directed against the ship itself to satisfy the claim of the plaintiff out of the res. The ship is for this purpose treated as a person. Such an action may constitute an inducement to the owner to submit to the jurisdiction of the court, thereby making himself liable to be proceeded against by the plaintiff in personam. It is, however, imperative in an action in rem that the ship should be within jurisdiction at the time the proceedings are started. A decree of the court in such an action binds not merely the parties to the writ but everybody in the world who might dispute the plaintiff's claim.

56. It is by means of an action in rem that the arrest of a particular ship is secured by the plaintiff. He does not sue the owner directly and by name; but the owner or any one interested in the proceedings may appear and defend. The writ is issued to "owners and parties interested in the property proceeded against." The proceedings can be started in England or in the United States in respect of a maritime lien, and in England in respect of a statutory right in rem. A maritime lien is a privileged claim against the ship or a right to a part of the property in the ship, and it "travels"

with the ship. Because the ship has to "pay for the wrong it has done", it can be compelled to do so by a forced sale. (See The Bold Buccleaugh). In addition to maritime liens, a ship is liable to be arrested in England in enforcement of statutory rights in rem (Supreme Court Act, 1981). If the

owner does not submit to the jurisdiction and appear before the court to put in bail and release the ship, it is liable to be condemned and sold to satisfy the claims against her. If, however, the owner submits to jurisdiction and obtains the release of the ship by depositing security, he becomes personally liable to be proceeded against in personam in execution of the judgment if the amount decreed exceeds the amount of the bail. The arrest of the foreign ship by means of an action in rem is thus a means of assuming jurisdiction by the HC-NIC Page 116 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER competent court.

57. The admiralty action in rem, as practised in England or in the United States, is unknown to the civil law. In countries following the civil law, all proceedings are initiated by actions in personam. The President of the Court having competence in the matter has the power to order an attachment of the ship if he is convinced that the plaintiff is likely to lose his security unless the ship is detained within jurisdiction. His hands are not fettered by the technicalities of an action in rem and the scope of the proceedings are not limited to maritime liens or claims. According to the French law, arrest of a ship is allowed even in respect of non□ maritime claims and whether or not the claimant is a secured or unsecured creditor. A vessel may be arrested either for the purpose of mobilising the vessel as security (Saisie conservatoire) or in execution of judgment (Saisie Execution) whether or not the claim has any relation to the vessel. Arrest of the vessel has the advantage of forcing the owner to furnish security to guarantee satisfaction of any decree that may be passed against him. On furnishing sufficient security with the Court, he is usually allowed to secure the release of the vessel. Maritime law is part of the general law of France and other `civil law countries' and is dealt with by the ordinary courts or tribunals. The presence of any property belonging to the defendant within the territorial jurisdiction confers jurisdiction on the French Court. (See the observation of Lord Diplock in The Jade).

58. The real purpose of arrest in both the English and the Civil Law systems is to obtain security as a guarantee for satisfaction of the decree, although arrest in England is the basis of assumption of jurisdiction, unless the owner has submitted to jurisdiction. In any event, once the arrest is made and the owner has entered appearance, the proceedings continue in personam. All actions in the civil law □ whether maritime or not □ are in personam, and arrest of a vessel is permitted even in respect of non□maritime claims, and the vessel is treated as any other property of the owner, and its very presence within jurisdiction is sufficient to clothe the competent tribunal with jurisdiction over the owner in respect of any claim. (See D.C.Jackson, Enforcement of Maritime Claims, (1985) Appendix 5).

Admiralty actions in England, on the other hand, whether in rem or in personam, are confined to well defined maritime liens or claims and directed against the res(ship, cargo and freight) which is the subject□ matter of the dispute or any other ship in the same beneficial ownership as the res in question.

59. Maritime law is as much a part of the general legal system as any other branch of the law. With the merger of the Admiralty and Common Law Courts in England in 1875 and the fusion of their legal precepts and concepts, this branch of the law, despite its peculiarities about actions in rem, is no longer treated as a separate and independent branch. It is not the exclusive preserve of the English High Court, for certain county courts in that country are specially authorised to exercise this jurisdiction. This is much more true of the civil law system where no distinction is drawn between maritime law and other branches of the law, and they are administered alike by the same courts or tribunals."

28. Prima facie therefore, the plaintiff on the basis of their case, has claimed that they have lien by virtue of English Security Omnibus Agreement as assignee of Copenship Bulkers A/S and therefore, following the ratio laid down by the Hon'ble Supreme Court in the case of M.V.Elisabeth (supra), the action taken against the defendant vessel is an action in rem and supply of bunkers would constitute a maritime claim.

29. In light of the aforesaid therefore, the contention that there was suppression of material fact in facts of this case, cannot be accepted and all such issues which are raised by the defendant and its counter by the plaintiff would constitute triable and arguable issues. Relying upon the ratio laid down by HC-NIC Page 118 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER this Court in the case of GM Shipping Co. Ltd. (supra) and M.V. Sea Renown (supra), both the Company Judge and the Hon'ble Division and the principles laid down, it cannot be said that there is suppression of material fact.

30. Having come to the conclusion that the plaintiff has not suppressed any material fact following the ratio laid down by this Court in M.V. Sea Renown (SJ) (supra), M.V. Sea Renown (DB) (supra), M.V. Lucky Field (supra), GM Shipping Co.(supra), the judgments in the case of Peacock Plywood Pvt. Ltd.(supra), Link Oil Trading Ltd. (supra) and Raj Shipping Agencies (supra) would not be applicable. Similarly, this Court

in the case of GM Shipping Co.(supra) has considered similar fact situation and therefore, the judgments cited by the learned counsel for the defendant would not apply to the facts of the present case.

31. It was rightly contended by the learned counsel for the plaintiff that a private arrangement between the owner and the charterer cannot deprive the plaintiff/OW Bunker from taking action in rem for supply of goods which were received and consumed by the vessel for its operation which constitute maritime claim and which was duly acknowledged by the Master/Chief Engineer. Therefore, the contention raised that the Master had not specifically confirmed the liability to pay for the bunkers on behalf of the owners would not take the case of the defendant any further.

32. Similarly, the contention raised that the plaintiff has not disclosed that the suit invoice is paid in full is highly disputable. Even if the correspondences which are relied upon by the defendant is considered, it is disputed and the manner of reconciliation which is contended by the defendant mainly to the effect that as per the due date of the suit bill, the same stands duly paid is highly disputed and the same is a triable and arguable issue. There is nothing to show that there is any confirmation of the payment made towards the suit invoice. Thus, it is disclosed by the plaintiff that they have received USD 1.1 million. It is also the case of the plaintiff that the same is not realized because of the pendency of the bankruptcy proceedings before the Danish Courts and therefore, the email dated 14.09.2015 and the mail of the Trustees of Copenship does not conclusively lead to the fact that the suit invoice is fully paid up. It may be a case by the defendant in defence. However, the same does not establish conclusively that the full payment of the invoice is received by the plaintiff and that such statement is not made.

33. The correspondences made without prejudice would not mean that the rights or privileges of the party are taken away or lost or that it is an acceptance in toto. Such an aspect cannot constitute of having received the full payment of the suit invoice and an offer of settlement made cannot be read as receipt of HC-NIC Page 120 of 125 Created On Wed Jun

29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER full payment of the invoice bill. It is pleaded by the plaintiff that because of the pendency of the bankruptcy proceedings before the Danish Court, the amount of USD 1.1 million which is received is contended before the Danish Court as a voidable transaction and as the same is subjudiced, the plaintiff has not realized even the part payment of the suit invoice. The aforesaid discussion therefore clearly reveals that there is no suppression of material fact. Though the defendant has claimed in this application that they are not liable for the underlying debt and there is no underlying debt owed by the owners of the defendant vessel, the fact remains that as per the condition of supply and the suit bill itself binds the defendant vessel for payment of bunkers supplied and consumed. As observed hereinabove therefore, the same would constitute a maritime claim and therefore, no reliance can be placed only on the opinion expressed by the law firm as tried to be contended by the defendant and it cannot be said that the claim of the plaintiff would be an action in personam against the Copenship and not an action in rem as tried to be canvassed by the defendant.

34. The other limb of contention raised by the learned counsel for the defendant to the effect that the document English Security Omnibus Agreement dated 19.12.2013 is not admissible in evidence would be governed by the provisions of the Gujarat Stamp Act and the stage at which this application is filed is at HC-NIC Page 121 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER the stage of considering the prima facie case and the issue whether it is sufficiently stamped or not and/or such documents are admissible in evidence can be considered at the stage of evidence of the suit. Apart from the fact that the plaintiff has relied upon the provisions of section 18 and the learned counsel for the defendant has relied upon section 35 of the Indian Stamp Act and section 34 of the Gujarat Stamp Act, the said issue has to be considered at an appropriate stage. Similarly, the contention that the plaintiff did not have title to sue more particularly because the plaintiff has not shown to have made payment of bunkers supplied, i.e., S.K. Energy International P. Ltd., and that the plaintiff has filed a frivolous suit and is trying to make an illegal profit and therefore, no valid title is passed, in the facts of the case is therefore, squarely covered by the ratio laid down by this Court in the case of M.V. Sea Renown (supra) and as rightly contended by the plaintiff, the test provided under section 19 of the Sales of Goods Act would govern the field.

35. The contention that the matter is required to be referred to arbitration of London is a contrary view taken by the defendant as the claim made by the plaintiff is an action in rem against the defendant vessel and the claim raised in the plaint is not a claim raised out of the contract with the Copenship and it is a claim in rem against the defendant vessel for the bunkers supplied and consumed by it. As per HC-NIC Page 122 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER the terms and conditions of sale for Marine Bunkers by

OW Bunkers, clearly provides as under :

> "Buyer : means the vessel supplied and jointly and severally her Master, Owners, Managers/Operators, Disponent Owners, Time Charterers, Bareboat Charterers and Charterers or any party requesting offers or quotations for or ordering Bunkers and/or Services and any party on whose behalf the said offers, quotations, orders and subsequent agreements or contracts have been made:"
>
> C. OFFERS, QUOTATIONS AND PRICES "C.5 If the party requesting Bunkers is not the Owner of the Vessel, the Seller shall have the right (but will not be obliged) to insist as a precondition of sale that a payment guarantee is provided by the Owner. The Seller shall have the right (but will not be obliged) to cancel any agreement with the Buyer at any time, if such payment guarantee is not received upon request thereof from the Seller to the Owner. The Seller's decision to forego obtaining a payment guarantee under this Clause C.5 shall have no effect on Seller's right to a lien on the Vessel for any Bunkers supplied under this Agreement.
>
> C.6 The Buyer warrants that it is authorized as agent to order Bunkers for the vessel, and that the Seller has a lien on the Vessel for any Bunkers supplied under this Agreement. If the party requesting Bunkers is not the owner of the Vessel, Buyer assumes the sole responsibility for communicating the terms and conditions of this Agreement to the Owner of the Vessel prior to the date of delivery."

I. PAYMENT MARITIME LIEN I.6 Payments made by the Buyer in respect of a HC-NIC Page 123 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER supply of Bunkers shall at all times be credited in the following order: (l) costs at any kind or nature, including but not limited to legal costs and attorneys' fees, (2) interest and administrational fee, and (3) invoices in their order of age, also if not yet due, or in Seller's sole discretion to specify a payment to any such invoice Seller considers relevant.

36. In light of the aforesaid conditions and facts on record of this case therefore, the plaintiff has made a prima facie case that it has a maritime lien over the defendant vessel and therefore, even if the test as provided in Order 38 as well as Order 39 of the Code of Civil Procedure is applied, the plaintiff has a prima facie case and the balance of convenience is also in favour of the plaintiff and therefore, there is no consideration for vacating of the order of arrest that too without any proper security is

made out by the defendant.

37. The counter claim raised by the defendant is as such covered in view of the undertaking given by the plaintiff and various triable and arguable issues have been pleaded in the present application, which can be considered at the final stage of the suit. The issues which are raised by the owners of the defendant vessel in this application are required to be gone into based upon the evidence that may be adduced and raises triable and arguable issues as observed hereinabove which has to be considered at an appropriate stage of the suit and not at the stage of interim order.

38. In view of the aforesaid therefore, plaintiff has HC-NIC Page 124 of 125 Created On Wed Jun 29 00:15:11 IST 2016 O/OJCA/234/2016 ORDER a reasonably arguable case on merits and therefore, the suit cannot be dismissed at the threshold. The defendant is therefore not entitled for the reliefs claimed for in the present application.

39. At the end of the arguments, the learned counsel for the defendant made an attempt to submit that considering the fact that part payment has been made, the defendant is ready and willing to undertake before this Court that it shall not dispose of or sell the defendant vessel during the pendency of this Suit before this Court and the same would amount to appropriate security, in the opinion of this Court, in facts of this case, such security is not sufficient and once the defendant vessel is permitted to sail out of the territory, the same would prejudice the case of the plaintiff as pleaded.

40. In light of the aforesaid therefore, the application deserves to be dismissed and is hereby dismissed.

(R.M.CHHAYA, J.) bjoy HC-NIC Page 125 of 125 Created On Wed Jun 29 00:15:11 IST 2016