

Pradeep And 5 Ors vs Mt Gp Asphalt 1(Imo No. 9120891) on 23 March, 2022

Bench: S.J. Kathawalla, Milind N. Jadhav

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
COMMERCIAL APPEAL NO. 108 OF 2021
IN
INTERIM APPLICATION NO. 2062 OF 2021

The Swedish Club ... Appellan
Versus
V8 Pool Inc. and other ... Responde

WITH
COMMERCIAL APPEAL NO. 111 OF 2021
IN
INTERIM APPLICATION NO. 1395 OF 2021

Pradeep and others ... Appellan
Versus
m.t. GP ASPHALT I ... Responde

.....

Mr. Rahul Narichania, Sr. Counsel along with Mr. Bimal Rajasekh
in Comm. Appeal No. 108 of 2021.
Mr. Shyam Kapadia along with Mrs. Apurva Mehta Pohonerkar for t
Comm. Appeal No. 111 of 2021.
Mr. Prathamesh Kamat, alongwith Mr. Jithin Jose, Ms. Archita Se
Ayya instructed by Mr. Harsh Pratap for Respondent No.1 in Comm
of 2021.

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Mr. Prashant S. Pratap, Senior Advocate, alongwith Mr. Nishaan Shetty, present.
Mr. Shubham alongwith Mr. Nishita Bhatia instructed by Anoma Law Group LLP for
the Plaintiffs.

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CORAM : S.J. KATHAWALLA AND
MILIND N. JADHAV, JJ.

DATED : MARCH 23, 2022

P.C. :-

1. These appeals raise the question of whether crew wages accrued on board a vessel after her arrest by the Admiralty Court would rank as Sheriff's expenses. Commercial Appeal No. 111 of 2021 has been filed against the order of the Ld. Single Judge dated 11 March 2021 where he has disallowed the Appellants' ("Crew Members") application for recovery of their wages accrued while the vessel m.t. GP ASPHALT 1 was under arrest as Sheriff's expenses. The further question involved is whether a party who has approached the Admiralty Court for leave to pay the crew their wages can stand in the shoes of the crew members and claim such amounts from the sale proceeds of the vessel as Sheriff's expenses and/or in priority as a maritime lien. Commercial Appeal No. 108 of 2021 has been filed against the order of the Ld. Single Judge dated 21 June 2021 where he has disallowed the Appellant's ("Swedish Club's") application for such leave.

2. Mr. Prashant S. Pratap, Sr. Counsel had appeared, instructed by Anoma Kanchan P Dhuri 3 / 37 COMAP-108-2021.odt Law Group LLP, before the Ld. Single Judge during the hearing that led to the order of 21 June 2021. He had represented the Plaintiffs in Commercial Admiralty Suit (L) No. 6607 of 2021 and 6008 of 2021 against the same vessel. However, despite service, they were not present before this Court on any of the occasions the present appeals (and interim applications) were listed. For the sake of good order, by an order dated 27 January 2022, we had directed Anoma Law Group LLP to remain present before us. Mr. Pratap appeared and informed us that though he has not been instructed by his clients to appear in the appeal, he had certain submissions in support of the Ld. Single Judge's order.

A. FACTUAL BACKGROUND

3. The vessel m.t. GP ASPHALT I was owned by one GP Asphalt Shipping Inc. Swedish Club was the Protection and Indemnity Club with which the vessel was entered.

4. The vessel was arrested on 22 December 2020 by the 1 st Respondent in Commercial Appeal No. 108 of 2021 ("V8 Pool Inc.").

5. On 22 December 2020, after receipt of emails from the crew informing that the vessel supplies were running low, FTI Consulting, the company undertaking restructuring of the owner of the Defendant vessel, arranged for enough supplies to last a month.

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6. On 7 January 2021, the crew addressed an email to Swedish Club informing them that the salaries for November and December were overdue and that arrangements would have to be made for food and water.

7. Swedish Club, on 21 January 2021, filed Interim Application No. 2062 of 2021, stating that the vessel had been abandoned and relying on the Maritime Labour Convention, 2006 ("MLC"), seeking leave of the Ld. Single Judge to make certain payments in respect of maintenance of the vessel and well-being of the crew. It sought the following reliefs:

"a. The Applicant be permitted to intervene in the present suit; b. That the Applicant be permitted to make arrangements for urgent disembarkation and repatriation of the Chief Officer of the Defendant vessel so as to enable him to visit his wife, who is unwell; c. The Applicant be permitted to make payment of USD 31,250 per month, calculated from 21 December 2020 till date of sale or till February 2021 (i.e. four months from November 2020, which is when owner discontinued payment of wages), whichever is earlier, either directly to the crew members or to the Sheriff of Mumbai for onward payment as wages to the crew members currently on board the vessel and who have not been paid their wages during the period of arrest.

d. The Applicant be permitted to make payment of USD 2,500 per month, calculated from 21 December 2020 till date of sale to the Sheriff of Mumbai for arranging provisions and water for the crew on board the vessel.

e. The Applicant be permitted to make such further payments under the above head as may be required in the circumstances and in the manner abovesaid.

f. All of the above said amounts which are paid by the Applicant
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treated as "Sheriff's expenses"/ expenses for maintenance of the vessel/ expenses in the course of sale and be paid out first in priority from the sale proceeds along with the other expenses in the course of sale. h. That, insofar as crew wages for November 2020 and till 21 December 2020 are concerned, the Hon'ble Court direct that the Applicant be permitted to get assigned to itself all such crew wage claims, maintaining intact the maritime lien nature of such claims and to make payment of such wages.

i. For ad-interim reliefs in terms of the relevant prayer clauses above."

8. The Ld. Judge disallowed the application and held that:

a) Swedish Club was obligated under the Maritime Labour Convention to make payment of 4 months' wages the Appellant and was not a volunteer.

b) If Swedish Club makes payment for the expenses post arrest (including wages), it will not be entitled to such amounts being treated as Sheriff's expenses. It would have to file a suit, prove the claim, determine priorities and then seek reimbursement from the sale proceeds.

c) It would have been a different matter if the crew themselves had filed such an application.

9. The Crew Members had, in fact, filed such application, being Interim Application No. 1395 of 2021, seeking that their wages accrued post-arrest be treated as Sheriff's expenses and paid out immediately from the sale proceeds. By an order dated 11 March 2021, the Ld. Single Judge had disallowed that application by stating Kanchan P Dhuri 6 / 37 COMAP-108-2021.odt that it was open to the crew to prove their entitlement to such amounts by way of a suit.

10. Both Swedish Club and the Crew Members appealed from the respective orders. It may merit mentioning here that Swedish Club had also borne the maintenance and repatriation expenses of the crew and vessel from 27 January 2021 till the vessel was sold on 30 March 2021- however, by consent of all parties, the Ld. Single Judge had permitted these expenses to be incurred by Swedish Club as Sheriff's expenses by orders dated 27 January 2021 and 11 March 2021. These amounts have been reimbursed to Swedish Club and this is not the subject matter of these appeals.

11. Swedish Club filed Interim Application (L) No. 16071 of 2021 in its appeal, seeking leave of this Court to make payment of 4 months' wages (from 1 November 2020 - 28 February 2021) to the crew members without prejudice to its stand that such payment was to be considered Sheriff's expenses/ maritime lien. By an order dated 18 August 2021, this came to be allowed. Swedish Club thereafter made such payments by 12 September 2021.

12. Both appellants now seek an order from this Court as to the priority of crew wages accrued post arrest. Since Swedish Club has paid their wages till 28 February 2021, the Crew Members' appeal is limited to recovery of the wages accrued between 1 March 2021 till 20 March 2021 (when the Crew was repatriated) as Sheriff's expenses. Swedish Club seeks an order that having made such payment of 4 Kanchan P Dhuri 7 / 37 COMAP-108-2021.odt months' wages to the crew member, it is today entitled to stand in the shoes of the crew and claim the amounts as Sheriff's expenses/ maritime lien.

B. SWEDISH CLUB'S SUBMISSIONS

13. Mr. Narichania, on behalf of Swedish Club, submits that the payment made to the crew by Swedish Club of the amount of USD 64,663 should be considered Sheriff's expenses, being payment for wages accrued from 22 December 2020 (the date of arrest) till 28 February 2021.

14. Mr. Narichania relies on Rule 1084 of the Bombay High Court (Original Side) Rules and states that Swedish Club had approached the Ld. Single Judge under this Rule for leave, as per established admiralty law, to make payment of the crew wages which had accrued during the period of arrest

through the Sheriff. Rule 1084 reads as follows, "1084. Sheriffs expenses --In the event any expenses are required to be incurred by the Sheriff during the period of the arrest for the safety and preservation of the ship and its crew, the Sheriff shall make a report to the court and the court, shall after hearing the parties direct payment of such sums as the court may deem fit by any party the Sheriff for incurring such expenses, which shall be treated as Sheriffs expenses. These expenses shall be paid in priority to the Sheriff from the sale proceeds of the ship or by the defendant or other party seeking release of the ship as the case may be, and the same shall be reimbursed to the parties who have paid the amounts to the Sheriff in the first instance."

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15. Mr. Narichania further relies on the provisions of the MLC (Standard A2.5.2) which read as under:

"1. In implementation of Regulation 2.5, paragraph 2, this Standard establishes requirements to ensure the provision of an expeditious and effective financial security system to assist seafarers in the event of their abandonment.

2. For the purposes of this Standard, a seafarer shall be deemed to have been abandoned where, in violation of the requirements of this Convention or the terms of the seafarers' employment agreement, the shipowner:

(a) fails to cover the cost of the seafarer's repatriation; or

(b) has left the seafarer without the necessary maintenance and support; or

(c) has otherwise unilaterally severed their ties with the seafarer including failure to pay contractual wages for a period of at least two months.

3. Each Member shall ensure that a financial security system meeting the requirements of this Standard is in place for ships flying its flag. The financial security system may be in the form of a social security scheme or insurance or a national fund or other similar arrangements. Its form shall be determined by the Member after consultation with the shipowners' and seafarers' organizations concerned.

4. The financial security system shall provide direct access, sufficient coverage and expedited financial assistance, in accordance with this Standard, to any abandoned seafarer on a ship flying the flag of the Member.

5. For the purposes of paragraph 2(b) of this Standard, necessary maintenance and support of seafarers shall include: adequate food, accommodation, drinking water supplies, essential fuel for survival on board the ship and necessary medical care.

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6. Each Member shall require that ships that fly its flag, and to which paragraph 1 or 2 of Regulation 5.1.3 applies, carry on board a certificate or other documentary evidence of financial security issued by the financial security provider. A copy shall be posted in a conspicuous place on board where it is available to the seafarers. Where more than one financial security provider provides cover, the document provided by each provider shall be carried on board.

7. The certificate or other documentary evidence of financial security shall contain the information required in Appendix A2-I. It shall be in English or accompanied by an English translation.

8. Assistance provided by the financial security system shall be granted promptly upon request made by the seafarer or the seafarer's nominated representative and supported by the necessary justification of entitlement in accordance with paragraph 2 above.

9. Having regard to Regulations 2.2 and 2.5, assistance provided by the financial security system shall be sufficient to cover the following:

(a) outstanding wages and other entitlements due from the shipowner to the seafarer under their employment agreement, the relevant collective bargaining agreement or the national law of the flag State, limited to four months of any such outstanding wages and four months of any such outstanding entitlements;

(b) all expenses reasonably incurred by the seafarer, including the cost of repatriation referred to in paragraph 10; and

(c) the essential needs of the seafarer including such items as:

adequate food, clothing where necessary, accommodation, drinking water supplies, essential fuel for survival on board the ship, necessary medical care and any other reasonable costs or charges from the act or omission constituting the abandonment until the seafarer's arrival at home.

10. The cost of repatriation shall cover travel by appropriate and expeditious means, normally by air, and include provision for food and accommodation of the seafarer from the time of leaving the ship until arrival at the seafarer's home, necessary medical care, passage and Kanchan P Dhuri 10 / 37 COMAP-108-2021.odt transport of personal effects and any other reasonable costs or charges arising from the abandonment.

11. The financial security shall not cease before the end of the period of validity of the financial security unless the financial security provider has given prior notification of at least 30 days to the competent authority of the flag State.

12. If the provider of insurance or other financial security has made any payment to any seafarer in accordance with this Standard, such provider shall, up to the amount it has paid and in accordance with the applicable law, acquire by subrogation, assignment or otherwise, the rights which the

seafarer would have enjoyed.

13. Nothing in this Standard shall prejudice any right of recourse of the insurer or provider of financial security against third parties.

14. The provisions in this Standard are not intended to be exclusive or to prejudice any other rights, claims or remedies that may also be available to compensate seafarers who are abandoned. National laws and regulations may provide that any amounts payable under this Standard can be offset against amounts received from other sources arising from any rights, claims or remedies that may be the subject of compensation under the present Standard."

16. Mr. Narichania submits that Swedish Club promptly approached the Ld. Single Judge to discharge its humanitarian obligations under the MLC. He submits that the Ld. Single Judge erred in considering that because Swedish Club was obliged to make such payments, it could not ask for these payments to be treated as Sheriff's expenses. He submits that the Ld. Single Judge has referred to the P&I Club's obligation to make payment but has not appreciated the significance of Regulation 12 of Standard A2.5.2 which specifically provides that the P&I Club is entitled to stand in Kanchan P Dhuri 11 / 37 COMAP-108-2021.odt the shoes of the crew once it has made payment to the crew. He submits that the Ld. Judge erred in disregarding this crucial provision. If the Maritime Labour Convention casts an obligation on the P&I Club to pay, it also concomitantly gives the P&I Club the right to subrogation viz, to step in the shoes of the crew and to enjoy the right which the crew enjoyed.

17. He further submits that Rule 1084 does not make any distinction between voluntary payments and payments made otherwise. Any party who incurs expenses to maintain a vessel under arrest or wages to the crew during the period of arrest is entitled to recover such expenses as Sheriff's expenses, irrespective of whether it is voluntary or not. Words cannot be read into a Rule which are contrary to its letter and spirit. What needs to be borne in mind is whether the expenses relate to the period when the vessel is under arrest. If the answer is in the affirmative, then these expenses ought to be categorized as Sheriff's expenses regardless of the identity of the person who has borne or is willing to bear it. The nature and category of the claim does not change merely because the crew have been paid by the P&I Club. The only relevant factor is whether the wages relate to the period of arrest - if it is so, then the crew or alternatively, any person who pays the crew with leave of the court can claim it under Rule 1084.

18. Mr. Narichania submits that Swedish Club acted correctly in approaching the Ld. Single Judge as soon as it got to know of the vessel's Kanchan P Dhuri 12 / 37 COMAP-108-2021.odt abandonment. He submits that it appears to be settled law that if a party wishes to make payment to the crew of its wages and stand in the shoes of the crew, leave has to be taken from the Admiralty Court before making any such payment. Without such leave, the crew's rights in its wages cannot be assigned/ subrogated. He relies on *The Leoborg*, [1964] 1 Lloyd's Rep 380, *The Vasilis*, [1972] 1 Lloyd's Rep 51 and *The Berostar*, [1970] 2 Lloyd's Rep 403. In *The Berostar*, it was held - "The authorities established that a volunteer who paid wages without sanction of the Court was not allowed "to stand in their shoes" by subrogation or otherwise."

19. Thus, in the present case, Swedish Club voluntarily came forward seeing the plight of the crew and in line with its humanitarian obligations under the Maritime Labour Convention, legitimately expecting that the Ld. Single Judge would follow the worldwide practice that permits P&I Clubs, once the vessel is sold, to recover such amounts standing in the shoes of the crew. The Ld. Judge has however laid down law which is contrary to worldwide accepted practice.

20. He submits that though conceivably Regulation 12 of A2.5.2 of the MLC does away with the requirement of leave of the Admiralty Court (since it seems to automatically subrogate/ assign all crews' rights to the P&I Club), Swedish Club was justified in approaching the Admiralty Court and seeking leave before making such payments. It apprehended that objections would be raised by other creditors if payment was made without seeking leave of the Admiralty Court.

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21. He further submits that the Ld. Single Judge failed to follow binding precedent of this Court in (a) coming to a conclusion that crew members were not entitled to recover post arrest wages as Sheriff's expenses and (b) finding that a P&I Club was not entitled to recover wages that it had paid to the crew members for the period of arrest as Sheriff's expenses. He submits that there are several judgments of this Court where the Court has considered post arrest wages as Sheriff's expenses:

o.a Axis Trustees Service Ltd v. MT Prem Mala (Order dated 7 August 2020 passed by Gupte J)

o.b Irwin Edmond Sequeira v mv Karnika (Order dated 5 November 2020 passed by Colabawalla J)

o.c DVB Group Merchant Bank (Asia) Ltd v mv Malaviya Twenty Three & Ors.

(Order dated 25 October 2016 passed by Kathawalla, J.)

22. He submitted that the Ld. Judge erred in distinguishing the binding precedent in the case of Irwin Edmond Sequeira v m.v. Karnika (Colabawalla, J.) on the ground that (a) The application for such payments to be treated as Sheriff's expenses in that case was filed by the crew and not the P&I Club - though the actual payment was made by the P&I club and (b) The MLC under which the P & I Club came forward to make such payment and to thereafter stand in the shoes of the crew was purportedly not brought to the attention of the Court in that case. He submits that the Kanchan P Dhuri 14 / 37 COMAP-108-2021.odt case is not distinguishable, and that the Ld. Single Judge was bound by it. The application in that case, though filed by the crew, in fact sought for payments made by the P&I club to be classified as Sheriff's expenses, as is clear from the prayer clauses, and this was granted. It was specifically argued by a creditor of the vessel in that case that it was the duty of the P&I club to bear such wages and expenses and this has been recorded in the order as well. Thus, the same argument was placed before the Hon'ble Court that the P&I club was obligated to make such payment and was not a volunteer. This argument did not find favour with the Hon'ble Court. In view of this, he submits that the Ld. Single Judge's attempt to distinguish the said binding precedent is ex

facie erroneous.

23. He also submits that worldwide practice is for post arrest wages to be considered as Sheriff's expenses, given that the crew were constrained to remain on board the vessel from its arrest until its sale and to take care of the vessel for no fault of theirs. Having thus kept the crew on board and availed of their services, no creditor could oppose the crew's claim for their wages to be treated as Sheriff's expenses. A P&I Club who paid the post arrest wages to the crew was also entitled to make such payment after taking leave of the admiralty court and claim it as Sheriff's expenses. He relied on:

- a. The Aquarius III, [2002] SGHC 138
 - b. Credit Suisse v. Brightoil Lion (Order of the Singapore High C
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24. In The Aquarius III, the Singapore High Court observed as under:

"49. In my view, the post-arrest wages and disbursements were in substance sheriff's expenses. It did not matter that there was no prior order allowing the same to be treated as sheriff's expenses or that the interveners were not engaged by the sheriff himself or his agents, Gulf Agency.

50. Gulf Agency knew the requirement of the relevant regulation, as must the sheriff. They were content to let the interveners stay on board to meet the requirement. As Mr Ong himself had said, the interveners had wanted to be repatriated even without payment of their pre-arrest wages and disbursements. Yet although two of the crew were repatriated, the rest were not. This must be because they were needed to meet the requirement. I was of the view that the interveners had effectively been adopted by Gulf Agency, as the agent of the sheriff, to meet the requirement, and it did not lie in the mouth of Gulf Agency to suggest otherwise. I also did not think that the sheriff's obligation was only to feed and maintain the interveners with supplies. It extended to paying their post-arrest wages and disbursements.

51. Therefore, the interveners did not have to rely on the equities of the case. However, even if they had to do so, I was of the view that the equities of the case were with them.

52. The sheriff had had the benefit of the interveners' presence and services to meet the regulatory requirement as a result of which the sheriff had saved on having to engage a replacement crew. If Gulf Agency had thought that it could have engaged a cheaper crew for the sheriff to replace the interveners, it should have done so. The fact that it did not speaks for itself."

25. In *Credit Suisse v. Brightoil Lion*, the Singapore High Court permitted Gard (a P&I Club) to incur the very same expenses as incurred by Swedish Club in the *Kanchan P Dhuri 16 / 37 COMAP-108-2021*.odt present case and to claim it as Sheriff's expenses.

26. Lastly, he submits that it is not necessary, as the Ld. Single Judge has held, to file a suit to prove these expenses through trial - there can be no serious doubt about crew wages and the scrutiny is done by a competent officer of the High Court, such as the Sheriff of Mumbai or the Commissioner for taking Accounts. All that needs to be verified are the contracts of employment of the crew and proof of payment. This recourse has been adopted in the following cases. a. *Axis Trustees Service Ltd v. MT Prem Mala* (Order dated 7 August 2020 passed by Gupte, J.) b. *Slovesnov Vadym v. OSV Beas Dolphin* (Order dated 10 December 2020 passed by Colabawalla, J.) c. *Aviat Chemicals Pvt Ltd v Jagmohansingh Arora* (2000) Bom Cr 90 (Nijjar, J.) d. *Navios Corporation v. mv Fu Jin*, (Order dated 27 August 2010 passed by Vazifdar, J.) e. *Det Norske Veritas v. m.t. PRATIBHA INDRAYANI* (Orders dated 18 June 2013, 9 July 2013, 13 September 2013 passed by Kathawalla, J.) f. *Indian Register of Shipping v. m.t. PRATIBHA TAPI* (Orders dated 18 June 2013, 13 September 2013, 24 December 2013 passed by Kathawalla, J., 20 January 2014 and 28 January 2014 passed by Shriram, J.) *Kanchan P Dhuri 17 / 37 COMAP-108-2021*.odt

27. He, thus, submits that the Ld. Judge's orders dated 21 June 2021 and 11 March 2021 set an incorrect precedent. Not only has he disallowed Swedish Club's application for reimbursement of post arrest expenses incurred by it for wages to be treated as Sheriff's expenses - he has also disallowed the crew's application in respect of this very same vessel for their wages post arrest to be treated as Sheriff's expenses. In other words, he has effectively rendered Rule 1084 nugatory insofar as crew wages are concerned.

28. Mr. Kapadia, appearing for the Crew Members, supported Mr. Narichania. He submitted that the Crew Members had been paid their wages till 28 February 2021 and this appeal was for reimbursement of wages incurred between 1 st March 2021 till 20th March 2021 (when the Crew was repatriated, being to the tune of USD 11,133.31. The Crew Members were retained on board as per the minimum safe manning requirements of the vessel as per the order dated 27 January 2021 of the Ld. Single Judge. He submitted that the Ld. Single Judge had, without assigning reasons, summarily rejected the Crew Members' application for their post arrest wages to be considered as Sheriff's expenses and paid out immediately. The Crew Members were constrained to stay on board the vessel during the period of arrest and they were entitled to their wages. They could not now be told to file a suit and prove their wages- which is what the Ld. Single Judge did. When a vessel is under arrest, the mere fact of the crew member being on board is sufficient to entitle him to his wages. Whether he is *Kanchan P Dhuri 18 / 37 COMAP-108-2021*.odt discharging his normal duties is irrelevant - on an arrested vessel, his duties may have altered. This does not mean that he is not entitled to wages. If the Sheriff / arresting party considers his presence unnecessary, they should take steps to disembark and repatriate him to stop the wages accruing. Not having done that, the arresting party could not now object to the wages being considered as Sheriff's expenses. Further, under Section 9(1)(a) r/w Section 10(1)(a) of the Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017, "crew wages" are accorded highest priority after "sheriff's expenses". Hence, no prejudice caused to any party, as there would be no alteration in the priorities for other

claims. Mr. Kapadia relies upon the following case laws (in addition to the case laws submitted by Swedish Club):

- a) Madison Pacific Trust Limited v MV Garv Prem (Order dated 25th April 2016) (Notice of Motion No. 993/2016 in Admiralty Suit No. 18/2016)
- b) Madison Pacific Trust Limited v MV Garv Prem (Order dated 9th May 2016) (Notice of Motion No. 993/2016 in Admiralty Suit No. 18/2016)
- c) Sarfuddin Davar v.M.V. Don Jose & Ors. (Order dated 4th December 2018) (Notice of Motion (L) No. 2664 of 2018 in Admiralty Suit 56 of 2018)
- d) Cil & Ors. Owners of Ship Turiddu & Anr U.K. - Queens Div. Bench [[1998] C.L.C. 1043]

29. Mr. Kamat, appearing for V8 Pool Inc. the Plaintiff who had arrested the vessel submitted as under:

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- a) He had no objection to Swedish Club's claim being granted the status of a maritime lien.
- b) He had no objection to the Crew Members' claim for the wages from 1 March

to 20 March 2021 being granted the status of Sheriff's expenses and being paid out immediately.

c) However, Swedish Club could not claim the post arrest expenses as Sheriff's expenses. This was because Swedish Club was obliged to make payment of wages to the crew members under the MLC. It was not a volunteer and it could not seek the same benefits as a volunteer would have under such circumstances.

30. Mr. Kamat further submits that Swedish Club in the present case had failed to discharge its obligations under the MLC promptly. It had no reason to file the interim application to seek leave of the Admiralty Court and should have made payment without any such leave. Even while seeking leave, it sought to impose a condition that the payment should be considered as Sheriff's expenses. The MLC does not contemplate obtaining leave of the Court by a P&I Club to comply with its obligations under the MLC. Therefore, the Ld. Single Judge was correct and justified in holding (a) that Swedish Club was in breach of its obligations to make prompt payment under the MLC and (b) no prior leave of the court was required for Swedish Club to comply with its obligation of payment of wages, supply of food/ provision and repatriation of crew.

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31. He submits that in the present case, the Sheriff has not filed any report seeking funds to pay the wages of crew members or for that matter, retaining either the full crew or the skeleton crew. The Sheriff has not sought any assistance from Swedish Club. The expenses incurred by Swedish Club cannot be understood as the Sheriff's requisition. Likewise, the interim application preferred by Swedish Club cannot be considered as a report of the Sheriff. He submits that the Ld. Judge was justified in distinguishing the contractual obligation of Swedish Club under the MLC from the requisition of the Sheriff.

32. He also submits that, as a matter of law, payment of wages and other employment entitlements of the crew after arrest is not the responsibility of the Sheriff unless the Sheriff considers it appropriate to employ or engage crew members. The obligation is that of the ship owner. Failure of such obligation entitles the crew members to initiate an action in rem against the vessel and enforce its maritime lien. Therefore, unless the Sheriff deems it fit to continue the crew members and accordingly presents such a report before the admiralty judge for consideration, crew wages ipso facto cannot be treated as Sheriff's expenses. This is clear on a bare reading of Rule 1084. However, in the present case, Mr. Kamat is agreeable to the crew members' appeal being allowed and their wages from 28 February 2021 till sale of the vessel being released to them as Sheriff's expenses.

33. Mr. Kamat relies on 3 authorities:

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- a) Coromandel International Ltd. v. m.v. GLORY I, 2014 SCC Online Bom 220
- b) Patrick Stevedores No. 2 Pty. Ltd. v. Tukarina, (1998) 154 ALR 514
- c) GAC Shipping (India) Pvt. Ltd. v. m.v. GOLDEN PRIDE (Order dated 17 February 2021 passed by Shriram, J.)

34. Mr. Pratap, supporting the Ld. Single Judge's impugned orders, submits that any and every expense required to be incurred for the safety and preservation of the vessel and its crew after the vessel is arrested can only be incurred by the Sheriff, who is the vessel's custodian. This obviates the requirement of any party being required to obtain leave of the court. No such leave is necessary as it is only the Sheriff who will incur such expenses after first obtaining directions from the Court to this effect. Any expense incurred by a third party even if it is for the safety and preservation of the vessel and its crew cannot be considered as Sheriff's expenses under Rule 1084 unless the Sheriff requires the third party to incur such expenses and makes a report to the court requiring such expenses to be incurred and the court makes an order to this effect.

35. He further submits that any expense incurred for the safety and preservation of the vessel and its crew pursuant to legal/ contractual obligations will not automatically qualify as Sheriff's expenses. A P&I Club which, under the MLC, makes payment of crew wages and/ or incurs expenses for the safety and preservation of the vessel and its crew is doing so pursuant to a legal/ contractual obligation and Kanchan P Dhuri 22 / 37 COMAP-108-2021.odt cannot claim these as Sheriff's expenses.

36. He further submits that such a P&I Club is not even entitled to the maritime lien status enjoyed by the crew, even if it makes payment of wages to the crew and the crew's rights are subrogated to it. A maritime lien is a personal privilege which enures to the sole benefit of the maritime lienor and cannot be transferred. He relies on *The Sparti*, [2000] Vol. 2 Lloyd's Rep 618 [H.K. Ct.].

37. He further submits, insofar as the crew's right to claim their post arrest wages as Sheriff's expenses is concerned, that there is no such right. The Master and crew may continue to remain on board pursuant to their contract of employment with the owners. All wages due to them would be under such contract and would not be Sheriff's expenses. The crew have a maritime lien in respect of these amounts but are not entitled to them being classified as Sheriff's expenses. If the Sheriff negotiates with the crew and directly employs the crew, then wages under that contract would be considered Sheriff's expenses.

38. Mr. Narichania, in rejoinder, states that the P&I Club, in the present case had discharged its obligations promptly. The crew, which is the party who should complain about promptness, had no grievances against the P&I Club. Mr. Kapadia supported Mr. Narichania and confirmed that the crew had no grievances. He states that if the crew had no grievances, a party who arrested a vessel and left the crew to their own devices for 4 months had no locus to complain about the P&I Club's alleged Kanchan P Dhuri 23 / 37 COMAP-108-2021.odt lack of promptness.

39. He distinguished the judgments relied on by Mr. Kamat and Mr. Pratap as follows:

a) *Coromandel International Ltd. v. m.v. GLORY I*, 2014 SCC Online Bom 220 - This was carried in appeal and the appeal court disposed of the appeal by holding that the Ld. Single Judge's observations that the expenses incurred by the Plaintiff (who, in that case, had paid crew wages and maintenance amounts for the period of arrest on a humanitarian basis) could never be Sheriff's expenses would not come in the way of the party claiming such amounts as Sheriff's expenses in the suit.

In other words, the Ld. Judge's findings were held to be not binding even in the same suit.

b) *Patrick Stevedores No. 2 Pty. Ltd. v. Tukarina*, (1998) 154 ALR 514- In this case, it was held that though work had been done on the vessel by the Master and the crew, such work could not have been said to be done for the Marshal's benefit and could not be termed Sheriff's expenses. This logic is flawed inasmuch as it proceeds on the basis that the work has to be for the Sheriff's benefit. In India, as Rule 1084 makes clear, the test is whether work has been done for the preservation and maintenance of the vessel and crew - the work need not be for the Sheriff's benefit. Once that

pre-requisite is satisfied, then everything else is a matter of procedure.

c) GAC Shipping (India) Pvt. Ltd. v. m.v. GOLDEN PRIDE (Order dated 17
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February 2021 passed by Shriram, J.)- The Ld. Single Judge in this matter had disallowed an application by a crew member who had served on board the vessel during the period of arrest for classifying his wages as Sheriff's expenses. The Ld. Judge holds, "If we entertain such applications, the problem will be (a) it will not be possible to ascertain whether applicant really worked on board the vessel,

(b) what was he doing on board the vessel, (c) what were the terms and conditions based on which he was on board the vessel and (d) if it was a huge vessel with 50 crew members, would the Court direct the Sheriff to pay the wages of all the crew members until the vessel is sold? Only such crew, who are required to remain on board as per the safe manning rules, are required to stay on board. There could be a situation where the vessel will not be sold for various reasons for months together. The reason could be that it was unable to fetch a proper price or some applications were taken out by various parties. Does that mean the Court should direct Sheriff to pay the wages of all the crew members for the entire duration of their stay on the vessel as Sheriff's expenses or treat it as Sheriff's expenses".

Mr. Narichania submits that this logic is flawed and that this order does not have any binding value since it ignores previous orders passed by this Court where crew members have been paid their post arrest wages as Sheriff's expenses. He further submits that, in any case, this order is contrary to the impugned order of 21 June 2021 where the Ld. Judge has himself said that if the crew members had filed the application for their post- arrest wages to be Sheriff's expenses, that would have been allowed.

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d) The Sparti, [2000] Vol. 2 Lloyd's Rep 618 [H.K. Ct.] - This does not l

down any absolute proposition that a lien cannot be transferred. The judgment was basis a statutory provision and itself records, "In my view, the true spirit and intention of s. 93(1) is not to prohibit absolutely all assignment of the right of wages lien". The vice being guarded against is an inequitable transfer of the lien to the detriment of the seafarer - which is why the law is that prior leave has to be taken in order for the lien to be transferred. This is supported by the English judgments of The Leoborg, The Vasilias and The Berostar. It may be noted that in The Sparti, the volunteer paid the amounts without seeking the leave of the court. Where prior leave is obtained there is no bar on a Court to order that the expenses are to be accorded the same priority as that enjoyed by the crew member.

40. Insofar as Mr. Pratap's submission that a maritime lien is not capable of being transferred is concerned, Mr. Narichania submits that a lien can be transferred, but subject to leave of the court. Any purported transfer without prior leave of the court is not valid. This is why Swedish Club approached the Admiralty Court for leave. He relies on *The Leoborg*, *The Vasilia* and *The Berostar* (*supra*).

41. He further submits that what Mr. Kamat and Mr. Pratap have not dealt with is clause 12 of Standard A2.5.2 of the MLC which specifically provides that the rights of the crew members will be subrogated/assigned or in other manner automatically transferred to the P&I Club on making such payment. In other words, if *Kanchan P Dhuri 26 / 37 COMAP-108-2021.odt* the crew members are entitled to claim their post arrest wages as Sheriff's expenses, so is the P&I Club who has paid them those wages. If the crew members are entitled to claim pre-arrest wages as a maritime lien, so is the P&I Club.

C. CONCLUSION

42. We have carefully considered the rival contentions.

43. Rule 1084 provides that if expenses are required to be incurred during the period of the arrest for the safety and preservation of the ship and its crew, the Sheriff should make a report to the Admiralty Court and the court shall pass appropriate orders after hearing all parties. A party putting the Sheriff in funds pursuant to such order will be entitled to recover those amounts as Sheriff's expenses. In our view, the paramount consideration is the well being of the crew members and the safety and/ or preservation of the vessel and the Rule has to be construed accordingly.

44. In the present case, the vessel was arrested on 22 December 2020. Owners made the last supply of provisions and fuel on 22 December 2020. Wages had not been paid since November 2020. The abandonment (which under the MLC is considered to be when the owner does not make provision for supplies or when the owner fails to pay two months' wages) was brought to the notice of Swedish Club by the crew's email of 7 January 2021. Swedish Club filed its interim application *Kanchan P Dhuri 27 / 37 COMAP-108-2021.odt* indicating its readiness to make payments for the crew's benefit and seeking leave for the same on 21 January 2021. It was moved without delay and an ad interim order was obtained on 27 January 2021 insofar as the food/water/supplies for the crew were concerned. In our view, and considering that the crew themselves have no grievance as stated by Mr. Kapadia, it cannot be said that the P&I Club did not act promptly.

45. It appears that the Sheriff may not have been not aware of the situation on board the vessel. Given that the Sheriff did not move any application for orders relating to the maintenance and preservation of the vessel and the crew, Mr. Pratap's and Mr. Kamat's submission that any such application under Rule 1084 has to come from the Sheriff is not well founded. That is taking too restrictive a view of Rule 1084. Though the Sheriff conceivably has to be involved in disbursement of any such amounts (this will enable the Admiralty Court to monitor the payments made and ascertain its bona fide nature), such an application to route the payments through the Sheriff can be filed by any party. In the present case, Swedish Club filed the interim application and was open to

making such payments through the Sheriff so that the court could keep a check on the payments. This is evident from the prayer clauses. A Sheriff's report will have to be prepared but this report can be pursuant to such an application filed by a party wishing to incur such expenses for the preservation and maintenance of the vessel. We have observed that there are several cases in which the owner abandons the vessel and the crew members are left to fend for themselves. It is Kanchan P Dhuri 28 / 37 COMAP-108-2021.odt unrealistic to expect the Sheriff to suo moto file reports in every such case. In many cases, the situation on board the vessel may not even be brought to the Sheriff's notice until several months have passed. The crew members in many cases are foreigners. Even otherwise, crew members who are on board a vessel, cannot be expected to expeditiously write to the Sheriff - they are more likely to air their grievances to the owner. Any party having knowledge of such situation and desiring to assist has the liberty to approach the Admiralty Court or the Sheriff. As stated, the paramount consideration is the well being of the crew members and the safety and/ or preservation of the vessel. This enures for the benefit of all creditors who have a maritime claim against the vessel and/ or her sale proceeds.

46. Rule 1084, thus, does not prescribe that only a Sheriff's report can be filed. It does not preclude an interim application in relation to such reliefs. A Sheriff's report can be filed pursuant to an interim application filed by a party seeking to make payments for the preservation of the vessel and the crew and orders passed in such application. Looked at in another manner, we do not think there would be any material difference in the fact situation if Swedish Club had first written to the Sheriff instead of filing an interim application and the Sheriff had prepared a report and filed it pursuant to such communication. All that has changed is that here, the Sheriff's report would have come after the interim application and orders passed therein. This is just a matter of form. Of course, in the present case, there is no Sheriff's report Kanchan P Dhuri 29 / 37 COMAP-108-2021.odt since the application was disallowed. However, Swedish Club cannot be faulted for approaching the Admiralty Court to take leave before making such payments. As Mr. Narichania pointed out, had leave not been taken, the club would have found itself in a position where it had made payments and been faced with other creditors' objections to recovery of such amounts on the basis that leave had not been taken. The Admiralty Court's ability to monitor the payments made so as to ensure its bona fide nature remains intact.

47. Insofar as the second contention of Mr. Kamat and Mr. Pratap that crew are not entitled to their post arrest wages being paid to them as Sheriff's expenses are concerned, we do not find much force in the submission. Mr. Kamat and Mr. Pratap are unable to point out any authority to buttress their position. The judgment in the case of Golden Pride appears to not have considered binding precedent. Further, the impugned order of 21 June 2021 itself states that if the crew themselves had filed an application, their wages would have been considered Sheriff's expenses (notwithstanding that by the impugned order of 11 March 2021, the Ld. Single Judge had disallowed such an application by the crew). This court has repeatedly permitted crew wages accrued post arrest to be recovered as Sheriff's expenses without putting the crew to the trouble of filing a suit, proving their claims, getting a decree, determining priorities and then seeking payment out - which will realistically take several years. If there is any doubt or objection on the quantum and validity of the Kanchan P Dhuri 30 / 37 COMAP-108-2021.odt crew claim, this court has, on several occasions, asked the Sheriff or the Commissioner for Taking Accounts to verify the same. The impugned order

dated 11 March 2021 whereby the Ld. Single Judge has disallowed the crew's application for their post arrest wages to be considered Sheriff's expenses cannot, thus, be sustained.

48. Insofar as Mr. Pratap's and Mr. Kamat's submission that Swedish Club is not entitled to the post arrest wages being considered as Sheriff's expenses on account of it being an obligation under the MLC is concerned, we are of the view that the MLC which imposes a humanitarian obligation on the P&I Club to make certain payments also gives the P&I Club the right to stand in the shoes of the crew by subrogation/ assignment/ other mode of transfer. In view of clause 12 of A2.5.2, it cannot be said that once the P&I Club has made payment, it has to file a suit and recover the amounts after proving it, obtaining a decree, determining priorities and then seeking payment out. If the crew are entitled to claim such amounts as Sheriff's expenses, so is the P&I Club. This also seems to accord with international practice.

49. Insofar as the last bone of contention, i.e. whether pre-arrest wages paid by Swedish Club can be given the status of a maritime lien, is concerned, it appears to us that the law is that such lien is not assignable/ subrogable without prior leave of the court. However, there does not seem any blanket embargo on the transferability of such lien. If the prior leave of the court has been taken, the lien can be transferred. As stated above, Swedish Club cannot be faulted for approaching the Admiralty Court to Kanchan P Dhuri 31 / 37 COMAP-108-2021.odt take leave before making such payments. In any event, Mr. Kamat has fairly conceded that such lien as the crew members had may be considered to be transferred to Swedish Club.

50. In light of the above, both appeals are allowed.

a) The Crew Members, the Appellants in Comm. Appeal No. 111 of 2021, is entitled to payment of USD 11,133.31 out of the sale proceeds as Sheriff's expenses, being the payment of wages for the period of 1 March 2021 till 20 th March 2021 (when the Crew was repatriated). The payment on behalf of the deceased Appellant no. 3, Mr. Putta Ananda Rao, be made to his wife, Mrs. Putta Santhamani, on behalf his legal heirs (wife and 2 minor sons).

b) Swedish Club, the Appellant in Comm. Appeal No. 108 of 2021, is entitled to payment of USD 64,663 as considered Sheriff's expenses, being payment for wages accrued from 22 December 2020 (the date of arrest) till 28 February 2021.

c) The relevant details such as account numbers etc. will be given by the respective advocates to the Prothonotary's office. The Prothonotary and Senior Master is accordingly directed to make payment of such amounts as abovesaid to the Crew Members and Swedish Club.

d) Swedish Club is also entitled to the payment made by it of USD 52,417 to be assigned the status of a maritime lien, being payment for wages accrued from 1 November 2021 to 22 December 2021 (the period prior to arrest). Swedish Club is at Kanchan P Dhuri 32 / 37 COMAP-108-2021.odt liberty to prosecute the suit filed in this regard and to determine priorities and seek payment out thereafter, in accordance with law.

D. GUIDELINES

51. This Court has come across several cases where an arrested vessel has been neglected or otherwise abandoned by its owner leaving the Master and crew on board in the lurch. Often the vessel is fast running out of fuel, lubes, food and provisions. The crew are unaware of the status of the court proceedings and the steps to be taken by them. In view of the prevailing lack of clarity regarding the steps to be taken in the case of an abandoned vessel under arrest, it is necessary to frame some guidelines for the Admiralty Court to follow in such a case. These are only guidelines and the Admiralty Court is at liberty to use its discretion in any given case.

52. A vessel under arrest / its crew will be considered abandoned if:

1.a After the arrest of the vessel, the crew addresses a communication to the owner with a copy to the P&I club, the demise/bareboat charterer (if any), the arresting party and the Sheriff of Mumbai stating that the vessel requires supplies (food/ provisions/ bunkers/ other necessities) and/ or one or more of the crew's wages remain unpaid for at least two months, with details of when the supplies are expected to run out and of the outstanding wages, and Kanchan P Dhuri 33 / 37 COMAP-108-2021.odt

1.b The owner and the demise/bareboat charterer (if any) fails to make the necessary supplies to the vessel and make payment of the said outstanding wages within ten days thereof OR responds stating its inability to maintain the vessel and crew.

53. The arresting party shall bring the crew's communication to the attention of the Admiralty Court within 4 days of such communication.

a If the owner of the arrested vessel has not entered appearance in the suit, the Admiralty Court shall pass an order calling upon the owner and such demise/bareboat charterer (both) to remain present in court within 3 days. The order shall be communicated to the owner by the arresting party. If the owner remains absent, the Admiralty court shall record that the vessel and crew have been abandoned.

b If the owner or demise/bareboat charterer (if any) of the arrested vessel has entered appearance in the suit or appears pursuant to the order above specified, the Admiralty Court shall direct the owner and such demise/bareboat charterer (both) to make the necessary supplies to the vessel and make payment of the said outstanding wages within a further 3 days, failing which the vessel and crew shall be considered abandoned.

54. The arresting party shall also take steps for the expeditious sale of the Kanchan P Dhuri 34 / 37 COMAP-108-2021.odt vessel as soon as the order recording abandonment is passed.

55. If a vessel is so abandoned, and pending the sale of the vessel, any party (including a P&I club which has humanitarian obligations to the crew on board the vessel at the time of abandonment)

desirous of rendering supplies or funding expenses for the safety and/or preservation of such vessel and/or subsistence of the crew and/or payment of wages and/ or repatriation of crew and/ or reducing the crew on board to a skeleton crew and claiming the same as Sheriff's expenses is required to do either of the following:

a Approach the office of the Sheriff of Mumbai to urgently file a report to seek directions from the Admiralty Court for such steps to be taken as may be required and for leave of the Admiralty Court to permit that party to put the office of the Sheriff in funds for such steps and for such expenses to be Sheriff's expenses. The office of the Sheriff shall immediately file a report before the Admiralty Court. All expenses and payments shall be routed through the Sheriff's office.

b Approach the Admiralty Court directly with prior notice to the arresting party concerned as well as the office of the Sheriff of Mumbai seeking leave to do any of the above for the safety and/or preservation of the vessel and/or subsistence of the crew and/or payment of wages. In such case all expenses and payments shall be routed through the office of the Sheriff of Kanchan P Dhuri 35 / 37 COMAP-108-2021.odt Mumbai.

c If such an application is made, the Admiralty Court shall hear the same on an urgent basis and pass necessary orders. Unless there are serious doubts about the expenses, in the interests of the well-being of the abandoned crew members on board the arrested vessel, leave shall generally be granted for such expenses to be Sheriff's Expenses and recoverable from the sale proceeds on an immediate basis.

d Once the vessel has been sold and the sale proceeds have been deposited in court, the Sheriff of Mumbai shall file a report detailing the expenses routed through his/ her office.

56. In case of an emergent situation where the situation on board the vessel is precarious, any party may after giving at least 24 hours' prior notice in writing to the parties to the suit as well as the office of the Sheriff may render the supplies/ incur expenses for a limited period of time i.e. 7 days. Such party must thereafter at the earliest make an application to the Admiralty Court to declare such payments made as Sheriff's Expenses and for any further expenses it desires to incur as per the procedure laid out above.

a Any party seeking reimbursement of such payment made, shall file an application with all relevant documents in support including proof of payments.

Kanchan P Dhuri 36 / 37 COMAP-108-2021.odt b The Admiralty Court shall refer the claim of such party to the Commissioner for taking accounts or such other officer of the Court to examine and scrutinize the claims. The officer so appointed shall give a hearing to the parties and examine and scrutinize the documentation and shall prepare a Report for the Admiralty Court.

57. In the event crew on board an arrested vessel have not been paid their wages, all such crew members shall also be entitled to approach the Admiralty Court to treat their wages accrued post arrest as Sheriff's expenses. The Admiralty Court shall refer the crew's claim to the Commissioner for taking accounts or such other officer of the Court to examine and scrutinize the crew's claims. The Commissioner for taking accounts or such other officer so appointed shall give a hearing to the parties and shall prepare a Report for the Admiralty Court.

58. There may be situations where the vessel and crew have already been abandoned prior to the arrest. A vessel/ crew will be considered to have already been abandoned before the time of arrest if the crew has addressed a communication to the owner with a copy to the P&I club stating that the vessel requires supplies (food/ provisions/ bunkers/ other necessities) and/ or one or more of the crew's wages remain unpaid for at least two months, with details of when the supplies are expected to run out and of the outstanding wages and the owner has failed to supply the vessel or make payment of the outstanding wages within ten days thereof or has responded Kanchan P Dhuri 37 / 37 COMAP-108-2021.odt stating its inability to maintain the vessel and crew. If an abandoned vessel is arrested, for all expenses post the arrest, the procedure above said shall be followed.

59. It is expected that the P&I clubs with which such vessels (whether abandoned before or after the arrest) are entered will promptly approach the Admiralty Court for appropriate orders. The same procedure as stated above for reimbursement of payments made above will apply.

60. The Admiralty Court shall, as far as possible, expeditiously pass orders on all applications including for immediate reimbursement of any such payments as above specified first in terms of priority from the sale proceeds of the vessel.

(MILIND N. JADHAV, J.)

(S.J. KATHAWALLA, J.)