

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ADMIRALTY AND VICE ADMIRALTY JURISDICTION**

**NOTICE OF MOTION NO. 769 OF 2014
IN
ADMIRALTY SUIT (LODG.) NO. 329 OF 2014**

m.v. "ELENI" (IMO No.9460277) .. Applicant
(Orig. Defendant)

IN THE MATTER BETWEEN :

Hanwha General Insurance Co. Ltd. .. Plaintiff
Vs.
m.v. "ELENI" (IMO No.9460277) .. Defendant

Mr.Prashant Pratap, senior advocate a/w. Mr.A.Sinha i/b Harsh Pratap,
advocate for applicant.

Mr.Ravi Kadam, senior advocate a/w. Mr.Rahul Narichania, senior advocate
i/b DSK Legal for defendant.

CORAM : K.R.SHRIRAM, J.

DATED : 5th JANUARY, 2015

P.C.

1 This notice of motion is taken out on behalf of the defendant for dismissal of the suit in view of the order and decree passed by the High Court of Hong Kong and, in the alternative, return the suit to the plaintiff to be presented in the Hong Kong High Court and, in the further alternative, stay the suit *sine die* and return the security furnished by the defendant.

2 This action arises out of a collision on 7th November 2013 between two ships, m.v. Heung-A Dragon and m.v. Eleni, the first defendant vessel, in or near the channel off the Vietnamese port of Phu My.

The plaintiff is claiming against the defendant vessel a sum of US\$ 787,343.94 together with interest at 12% per annum from the date of the suit until payment/realization. The plaintiff is a Korea based Insurance Company who stands as subrogated insurers of five parties whose cargo was onboard the vessel m.v. Heung- A Dragon. The plaintiff claim to have settled the claim of the insured. It is the case of the plaintiff that the collision happened due to the negligence on the part of the first defendant vessel and in the collision the containers carrying the cargo that was insured by the plaintiff, which were onboard m.v. Heung-A Dragon fell overboard and were lost or got flooded and therefore the cargo was a total loss.

3 On 13th November 2013, the owners of the defendant vessel filed an admiralty action No.HCAJ 188/2013 in the High Court of Hong Kong and obtained an order of arrest of m.v. Heung-A Bangkok the sister ship of m.v. Heung-A Dragon. Pursuant to the order of arrest m.v. Heung-A Bangkok was arrested on 13th November 2013. On the same date, the owners of the defendant vessel initiated another admiralty action namely HCAJ No.189/2013 in Hong Kong High Court to limit liability arising out of the incident

of collision. Limitation of liability is very peculiar to maritime industry. A shipowner in a situation like in the present case, where due to collision he can expect various claims, can limit his liability based on the tonnage of the ship and set up a fund called limitation fund. All claimants have to go against the fund. Many countries including India has recognised this and are signatories to or have ratified or have accepted the instruments concluded in the conventions on limitation of liability for maritime claims. India has, infact included it in its domestic law Merchant Shipping Act, 1958, as amended, not the entire provisions of one such convention as explained later, but most of it.

4 On 19th November 2013, the owners of m.v. Heung-A Dragon provided security to secure release of m.v. Heung-A Bangkok. On 25th November 2013, the limitation action namely HCAJ No.189/2013 was amended to include three cargo interests, who are also based in Hong Kong.

5 On 2nd December 2013, the Hong Kong Solicitors of the owners of the defendant vessel addressed an e-mail to the plaintiff's Hong Kong Solicitors informing them that the defendant has commenced limitation action in Hong Kong namely HCAJ No.189/2013 and that some of the cargo interests have

been served and very soon the owners of the defendant vessel would be setting up a limitation fund. The plaintiff's Hong Kong advocates replied querying what did Hong Kong have to do with the case. In reply, the plaintiff's Hong Kong lawyers were informed that m.v. Heung-A Bangkok was arrested by the defendant at Hong Kong and that security has been furnished for her release and that m.v. Heung-A Dragon had called in Hong Kong before proceeding to Vietnam. I am not delving much into the motive of the owners of defendant vessel filing the limitation action in Hong Kong. Suffice to say there was no bar against doing so, they had the liberty to do so and the Hong Kong Court has exercised jurisdiction. No further details are available as to what transpired after December, 2013, but on 9th April 2014, the present admiralty suit was filed by the plaintiff.

6 A caveat against arrest of the defendant vessel under Rule 929 of the High Court (O.S.), Rules had been filed by owners of defendant vessel undertaking to put up security upto US\$ 12 million. Therefore, upon notice, the owners of the defendant vessel furnished security by way of bank guarantee in the sum of US\$ 787,343.94 together with interest at the rate of 12% per annum on the said sum (claim in this suit) for release of the defendant vessel.

On 14th May 2014, the Hong Kong High Court by consent of all parties decreed the limitation action and directed all claimants to file their claims on or before 28th November 2014. This deadline, the counsel for the defendant said has been extended. On 19th May 2014, public notices were issued in three papers including Loyd's list in London and on 21st May 2014 the owners of the defendant vessel deposited HK\$ 48,929,241.96 to create the limitation fund. Having established the limitation fund, the owners of the defendant vessel have taken out the present notice of motion. Henceforth, for brevity, the owners of the defendant vessel is referred to as defendant. It is the case of the defendant that the limitation fund having been created, all parties world over, who have claim against the defendant vessel should go and claim against the limitation fund and therefore, the reliefs as sought in this notice of motion ought to be granted.

7 It is the case of the defendant that the limitation action was commenced in Hong Kong because (a) the defendant arrested m.v. Heung-A Bangkok, the sister vessel of m.v. Heung-A Dragon, for claims in direct connection to the collision; (b) m.v. Heung-A Dragon had called in Hong Kong before she collided with the defendant vessel; (c) three of the cargo interest onboard m.v. Heung-A Dragon (who stand on the same footing as the plaintiff herein) are based in Hong Kong and there were prospects of

claims being brought in that jurisdiction. Hence, the defendant was justified in invoking the jurisdiction of Hong Kong High Court and constituting the funds therein.

8 It is the defendant's case that the funds having already been set up in Hong Kong, in accordance with Article 11 of the Convention on Limitation of Liability for Maritime Claims, 1976 (for brevity 1976 Convention), this Court should direct return of security and further direct the plaintiff to go and stake its claim against the fund. The defendant also submits that the Hong Kong Court has jurisdiction and that is why it exercised its jurisdiction and permitted the defendant to constitute the limitation fund and as provided in the case of the *Seismic Shipping INC and Anr. Vs. Total E & P UK PLC (The "Western Regent")*¹ there is nothing in the 1976 Convention which restricts an action for limitation to an action in which there already exists a claim against the shipowners in the same jurisdiction. The defendant is emphasizing on this because when the defendant filed the limitation action invoking limitation of liability, there was no claim or legal proceedings instituted in Hong Kong High Court against the defendant for claims which will be subject to limitation.

1 (2005) Vol.2 Lloyd's Law Reports 359

9 The defendant also relied on extracts from the Book on Limitation of Liability for Maritime Claims by Patrick Griggs and Others (2005-4th Edition) and Modern Maritime Law and Risk Management by Aleka Mandaraka Sheppard (2009-2nd Edition) to buttress the point that there was nothing in the language of the 1976 Convention which required the person seeking to limit to wait until a claimant brought proceeding in England. Relying on these extracts it was submitted that it is quite common that the person seeking to limit to start limitation proceedings in a jurisdiction of his choice before the liability action is brought and English Courts do not have any difficulty in permitting limitation actions to be brought in a different forum from that of the liability action.

10 In this regard, the defendant also relied on another English Court judgment in the matter of *Caspian Basin Specialised Emergency Salvage Administration & Anr. Vs. Bouygues Offshore S.A. & Ors. (No.4.)*², in which the Court held that the choice of the forum for a limitation action belongs in principle to the party seeking to limit, not to the claimant.

“.....There can be nothing surprising or inappropriate about a limitation action being commenced in the same forum as a claimant action to establish liability; but equally there is nothing unusual about a limitation action taking place in a different forum from that in which liability is being litigated. Moreover, the choice of forum for a

2 (1997) Vol.2, Lloyd's Law Reports 507

limitation action belongs in principle to the party seeking to limit, not to the claimant. It has been established that it would be wrong in principle for a claimant seek to usurp a shipowner's choice of forum for this limitation action by seeking a negative declaration in the liability action to the effect that the shipowner was not entitled to limit.”

(emphasis supplied)

Therefore, I agree that it is rather clear, under 1976 Convention, it is possible and there is nothing wrong to file a free standing limitation action in a forum where no claim has been filed. Moreover, the Hong Kong High Court has permitted that and exercised jurisdiction by permitting the defendant to set up the limitation fund. In India the position would be different. As explained later, such a free standing action cannot be filed and limitation of liability can be invoked only in the event legal proceedings are instituted in respect of claims subject to limitation.

11 Having come to this conclusion, as to why there was nothing wrong in setting up a limitation fund in Hong Kong High Court and the defendant having set up the limitation fund, the next point which requires to be considered is should this Court stay the proceedings, return the security and direct the plaintiff to go to Hong Kong.

12 Let us now consider the provisions of 1976 Convention. Convention on Limitation of Liability for Maritime Claims, 1976 (for the sake of brevity hereinafter referred as '1976 Convention') came into force on 1st December 1986 and United Kingdom of Great Britain and Northern Island was a signatory to the same with a declaration of applications to Hong Kong. Therefore, the 1976 Convention is applicable to Hong Kong.

Article 1 (1) of the 1976 Convention provides that *ship owners and salvors may limit their liability in accordance with the Rules of Convention for claims set out in Article 2*. Article 1(2) provides the term '*ship owner*' means the owner, charterer, manager and operator of a seagoing ship. Article 1(4) provides 'if any claims set out in Article 2 are made against any person for whose act, neglect or default the shipowner is responsible, such person shall be entitled to avail himself of the limitation of liability provided in this Convention and Article 1(5) provides the liability of a shipowner shall include liability in an action brought against the vessel herself. Article 1(7) provides the act invoking limitation of liability shall not constitute an admission of liability.

Under Article 2 it is provided that subject to Articles 3 and 4, the claims mentioned therein whatever the basis of liability may be, shall be subject to limitation of liability. Article 2(1)(a) provides for claims in respect of loss of life or personal injury or loss of or damage to

property.....occurring onboard or in direct connection with the operation of the ship..... and consequential loss resulting therefrom.

Article 3 provides which are the claims excepted from limitation and Article 4 provides a person liable shall not be entitled to limit his liability if it is proved that the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result.

Article 6 provides for the limits of liability or in other words quantum of limitation fund to be constituted.

Article 9 provides that the limits of liability determined in accordance with Article 6 shall apply to the aggregate of all claims which arise on any distinct occasion against the persons mentioned in the said article.

Articles 10, 11, 12, 13 and 14 which are directly relevant for this motion are reproduced herein below :

Article 10 : Limitation of liability without constitution of a limitation fund --

1 Limitation of liability may be invoked notwithstanding that a limitation fund as mentioned in Article 11 has not been constituted. However, a State Party may provide in its national law that, where an action is brought in its Courts to enforce a claim subject to limitation, a person liable may only invoke the right to limit liability if a limitation fund has been constituted in accordance with the provisions of this Convention or

is constituted when the right to limit liability is invoked.

2 If limitation of liability is invoked without the constitution of a limitation fund, the provisions of Article 12 shall apply correspondingly.

3 Questions of procedure arising under the rules of this Article shall be decided in accordance with the national law of the State Party in which action is brought.

CHAPTER III: THE LIMITATION FUND

Article 11 - Constitution of the fund :

1 Any person alleged to be liable may constitute a fund with the Court or other competent authority in any State Party in which legal proceedings are instituted in respect of claims subject to limitation. The fund shall be constituted in the sum of such of the amounts set out in Articles 6 and 7 as are applicable to claims for which that person may be liable, together with interest thereon from the date of the occurrence giving rise to the liability until the date of the constitution of the fund. Any fund thus constituted shall be available only for the payment of claims in respect of which limitation of liability can be invoked.

2 A fund may be constituted, either by depositing the sum, or by producing a guarantee acceptable under the legislation of the State Party where the fund is constituted and considered to be adequate by the Court or other competent authority.

3 A fund constituted by one of the persons mentioned in paragraph 1(a), (b) or (c) or paragraph 2 of Article 9 or his insurer shall be deemed constituted by all persons mentioned in paragraph 1(a), (b) or (c) or paragraph 2, respectively.

Article 12 - Distribution of the fund :

1 Subject to the provisions of paragraphs 1, 2 and 3 of Article 6 and of Article 7, the fund shall be distributed among the claimants in proportion to their established claims against the fund.

2 If, before the fund is distributed, the person liable, or his insurer, has settled a claim against the fund such person shall, up to the amount he has paid, acquire by subrogation the rights which the person so compensated would have enjoyed under this Convention.

3 The right of subrogation provided for in paragraph 2 may also be exercised by persons other than those therein mentioned in respect of any amount of compensation which they may have paid, but only to the extent that such subrogation is permitted under the applicable national law.

4 Where the person liable or any other person establishes that he may be compelled to pay, at a later date, in whole or in part any such amount of compensation with regard to which such person would have enjoyed a right of subrogation pursuant to paragraphs 2 and 3 had the compensation been paid before the fund was distributed, the Court or other competent authority of the State where the fund has been constituted may order that a sufficient sum shall be provisionally set aside to enable such person at such later date to enforce his claim against the fund.

Article 13 - Bar to other actions :

1 Where a limitation fund has been constituted in accordance with Article 11, any person having made a claim against the fund shall be barred from exercising any right in respect of such claim against any other assets of a person by or on behalf of whom the fund has been constituted.

2 After a limitation fund has been constituted in accordance with Article 11, any ship or other property,

belonging to a person on behalf of whom the fund has been constituted, which has been arrested or attached within the jurisdiction of a State Party for a claim which may be raised against the fund, or any security given, may be released by order of the Court or other competent authority of such State. However, such release shall always be ordered if the limitation fund has been constituted:

- (a) at the port where the occurrence took place, or, if it took place out of port, at the first port of call thereafter; or
- (b) at the port of disembarkation in respect of claims for loss of life or personal injury; or
- (c) at the port of discharge in respect of damage to cargo; or
- (d) in the State where the arrest is made.

3 The rules of paragraphs 1 and 2 shall apply only if the claimant may bring a claim against the limitation fund before the Court administering that fund and the fund is actually available and freely transferable in respect of that claim.

Article 14 - Governing law

Subject to the provisions of this Chapter the rules relating to the constitution and distribution of a limitation fund, and all rules of procedure in connexion therewith, shall be governed by the law of the State Party in which the fund is constituted.”

13 Article 13 of the 1976 Convention is relevant to the issue raised in paragraph 11 above, whether this Court should stay the proceedings and direct the plaintiff to go to Hong Kong.

Article 13 is in two parts. In the book on Limitation of liability for Maritime Claims by Patrick Griggs and others referred above at page 77, the

author has written as under :

“Article 13(2) is effectively in two parts :

(1) the factors which must be satisfied before the court can act to release a vessel or property which has been arrested in its jurisdiction. These factors are :

(a) A limitation fund must have been established, by or on behalf of the person to whom the ship or property arrested belongs, in a State Party in which legal proceedings have been instituted in respect of the claims in question. (This State Party does not have to be the same State Party as that in whose territory the ship or property has been arrested.)

(b) The vessel or property must have been arrested or attached for a claim which may be made against the limitation fund which has been established. Therefore, the governing factor is the nature of the claim and it is not a requirement that the claim *has actually been made* against the limitation fund.

(2) Once it is established that the court can act to release a vessel or property which has been arrested, the court has to determine whether circumstances exist in which it is *obliged* to release or whether the circumstances are such that it has a *discretion* whether to release :

(a) The court *must* release the vessel or property if the limitation fund has been constituted :

(i) at the place where the occurrence took place, or, if it took place out of port, at the first port of call thereafter; or

(ii) at the port of disembarkation in respect of claims for loss of life or personal injury ; or

(iii) at the port of discharge in respect of damage to cargo; or

(iv) in the State where the arrest is made.

(b) The court has a *discretion* whether to release

the vessel or property in circumstances other than these set out in (a).

14 In what circumstances should the Court exercise its discretion in favour of the shipowners, is discussed by the English Court of Appeal in the matter of *Herceg Novi (owners) Vs. Ming Galaxy (owners)*³ relied upon by the defendant. In the said judgment, the Court reached the following conclusion :

“We have to say that we agree with Waung J and with Liu JA, rather than with the majority of the Court of Appeal in Hong Kong and the English judges at first instance. We reach that decision for three reasons :

(1) The 1976 convention has not received universal acceptance, or anything like it. It is not 'an internationally sanctioned and objective view of where substantial justice is now viewed as lying'. It is simply the view of some 30 states.

(2) The International Maritime Organisation is not a legislature. It may commend the 1976 convention to the international community. But if by doing so it were found to have enacted an international consensus, that would be to deprive sovereign states to a large extent of their right to stay with some other regime. We say that because jurisdiction could often be obtained by arresting a ship in a 1976 country, and if that action were allowed to proceed despite there being a more appropriate forum where 1957 prevailed, the 1957 country would be left with no effective use for its own law.

(3) In our view, it is quite impossible to say that substantial justice is not available in Singapore, seeing

3 (1998) 2 Lloyd's Rep.454 Court of Appeal (Civil Division)

that there is a significant body of agreement among civilised nations with the law as it is there administered. The preference for the 1976 convention has no greater justification than for the 1957 regime. Loss in the cases we are considering will often be borne by the insurers of one side or the other. The 1976 convention provides a greater degree of certainty, which they, will perhaps welcome. But in terms of abstract justice, neither convention is objectively more just than the other. Our task is not to decide whether our law is better than the law of Singapore. It is to decide whether substantial justice will be done in Singapore. In our view it will be. This appeal should be allowed, and an unconditional stay of the English action granted.”

Therefore, the Court stayed the proceedings of the claimants in England and directed them to seek against the limitation fund set up by the owners in Singapore where the Convention Relating to the Limitation of Owners of Seagoing Ships of 1957 (1957 Convention) prevailed, even though under 1957 Convention, the limitation amount to be constituted is less than the amount to be constituted under the 1976 Convention. Relying on this, the defendant stated that even though under the 1996 Protocol, which is applicable in India, the amount of limitation fund is higher than the limitation amount set up in Hong Kong under 1976 Convention, this Court should follow what the English Court of Appeal has said and direct the plaintiff to go to Hong Kong and seek its claim against the limitation fund by staying these proceedings.

15 With due respect to the English Court, everybody knows substantial justice will be done in Singapore. For that matter in all Courts. But I cannot accept one of the reasons which has prevailed strongly for the English Court to arrive at their conclusion is “Loss in the cases we are considering will often be borne by the insurers of one side or the other...”. In my view even if the insurance companies are going to bear the loss, even they are entitled to be protected and in this case, the plaintiff was the Insurer of five of the cargo that was carried on board m.v. Heung-A Dragon. Are they not entitled to compensation to the best possible extent? Though the limitation action was filed in Hong Kong prior in point of time to the suit filed in this Court that we are deciding, the limitation fund itself was set up after the present suit was filed and security was furnished in this Court.

16 The basic reason why various States recognised the desirability of determining certain uniform rules relating to the limitation of liability for maritime claim is because almost in all situation, the cargo interest may commence action in different forums in different States and the shipowner will have to go on furnishing security and defend the actions in each forum. That is how the 1957 convention came into being under which the shipowners could limit liability to the extent mentioned therein provided the owner was able to prove that the action for which the claim arose, did not

arise due to any actual fact or privity on the part of the owner. There were various matters later which raised further complications and therefore 1976 convention was concluded whereby the person entitled to limit liability was extended to include salvors rendering services in direct connection with salvage operations and the term 'shipowner' included the owner, charter, manager and operator of a seagoing ship. The limits were enhanced under the 1976 convention but the onus was shifted from the person entitled to limit his liability to the party opposing constitution of limitation fund.

17 Article 4 of the 1976 convention provides a person liable shall not be entitled to limit his liability if it is proved that the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result. Therefore, the person entitled to limit liability would always limit liability unless it is proved against him that the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result. This is a very difficult fact to prove and therefore, under the 1976 Convention generally a shipowner should be able to always limit his liability. That is why the amount of fund was enhanced as against 1957 Convention.

The 1976 Convention was amended by the Protocol of 1996 to which India is also a signatory. There is not much difference between the 1976 Convention and 1996 Protocol. One notable difference is the limits of liability under Article 6 has been enhanced substantially. It is for that reason, the plaintiff is saying that the defendant went to Hong Kong even though Hong Kong had nothing to do with the collision or had no connection with the collision and set up limitation fund so that they could pay lesser amount than in India.

18 The counsel for the defendant stated that the defendant had already filed HCAJ No.188/2013 against Heung-A Dragon in Hong Kong by arresting the sister ship of Heung-A Dragon in which evidence will be recorded and same evidence will be available even for the benefit of HCAJ No.189/2013. Therefore, Hong Kong is a convenient forum and as concluded by the English Court of Appeal in the *Herceg Novi* case (supra), this Court also should stay this suit and direct the plaintiff to go to Hong Kong even if the limitation amount is less because in the Hong Kong High Court substantial justice will be done to the parties. They also submitted that some of the cargo claimants who are defendants in the Hong Kong proceedings HCAJ No.189/2013 have consented to setting up the limitation fund.

19 Counsel for the defendant further submitted that the stand of the plaintiff that the defendant has set up limitation fund under the 1976 Convention deliberately is also not correct. Counsel submitted that the 1996 Protocol which the plaintiff stated is applicable in India is not much at variance with the 1976 Convention except the quantum of limitation fund to be established. According to counsel, 1976 Convention is still applicable to India read with 1996 Protocol because as recently as October 2014, India has not denounced the 1976 Convention.

20 As regards the contention of the plaintiff that the defendant cannot seek the reliefs as sought as there is a mismatch between the funds to be constituted under the 1976 Convention and the 1996 Protocol, the counsel for the defendant relied upon a passage from the book on Liability Regimes in Contemporary Maritime Law edited by Prof. D. Rhidian Thomas (2007 edition), where, the author has, at page 306, para 16.22, commented as under :

“

Any limitation fund established in a 1976 State will not be in the amount required by the 1996 Protocol and therefore on an ordinary reading of the amended version of Schedule 7 to the 1995 Act will not be a fund constituted in accordance with Article 11. Accordingly, because such a fund is not a fund constituted in accordance with Article 11, then the English Court is not obliged to stay under the mandatory provisions of

Article 13.2 nor is the discretionary power under Article 13.2 applicable.”

The counsel for defendant also submitted that India not having denounced the 1976 Convention and India was a signatory to the 1976 Convention and is also a signatory to the 1996 Protocol, reading Article 9(4) of the 1996 Protocol, read with the passage mentioned above, the Court should exercise the discretion in favour of the defendant.

21 As regards, the plaintiff's contention that there are suits filed by various claimants in Marshall Islands where the defendant vessel is registered which are pending and therefore, this suit also should be proceeded with, the counsel for the defendant submitted that pursuant to an order dated 22nd October 2014, the proceedings in the Marshall Islands have been stayed until 22nd April, 2015 or until the Hong Kong Court decides on the liability in HCAJ No.188/2013 whichever occurs first. Counsel, however, was also not able to state with certainty as to whether the defendant has furnished any security in Marshall Islands or not because the order dated 22nd October 2014 is silent in that regard.

22 Submissions were also made on the applicability of Part XA of the Merchant Shipping Act, 1958 (MS Act) to this suit. The plaintiff's counsel contended that it was applicable, whereas the defendant's counsel submitted that it is not applicable because it contemplates only a fund constituted in India. I have dealt with this later.

23 According to the counsel for the defendant, the only thing which needs to be looked into is 1976 Convention. Counsel concluded by saying that this Court should exercise its discretion in favour of the defendant and must grant reliefs as sought. He also relied on the judgment of the Apex Court in ***O. Konavalov Vs. Commander, Coast Guard Region & Ors.***⁴ to say that the comity of nations is a reciprocal courtesy which one member of the family of nations owes to the others and requires that one Court should respect the other.

24 Mr.Kadam, counsel for the defendant relied upon a judgment of House of Lords in the matter of ***Spiliada Maritime Corporation Vs. Cansulex Ltd. (The “Spiliada”)***⁵ to submit that if the Court is satisfied that there is another forum which is *prima-facie* the appropriate forum for trial of the action then it will ordinarily not refuse stay unless there are

4 (2006) 4 SCC 620

5 (1987) Vol.1 Lloyd's Law Reports 11

circumstances by reason of which justice requires that a stay should not nevertheless be granted. One such factor can be established cogent evidence that the plaintiff will obtain justice in the foreign jurisdiction.

25 Mr. Kadam also submitted that the key to the issue that has to be considered is what is in the best interest of all the parties and meets the ends of justice. He also submitted that an advantage to the plaintiff will ordinarily give rise to a disadvantage to the defendant. The advantage could be that damages awarded may be on a higher scale or a more complete procedure of discovery or a power to award interest or a more generous limitation period. He submitted that as general view, relying upon the *Spiliada* (supra), the Court should not be deterred from granting a stay of proceedings simply because the plaintiff will be deprived of such an advantage, provided that the Court is satisfied that substantial justice will be done in the appropriate forum overseas.

26 It is the plaintiff's case that the collision happened due to the fault of the defendant vessel. Mr. Pratap, counsel for the plaintiff also submitted that under the MS Act or the 1996 Protocol, the limitation fund will be about US\$ 6.2 million. At the same time, in the action that was filed in Gujarat High Court against the defendant vessel by the owners of Heung-A Dragon,

the defendant has given security to the owners of Heung-A Dragon in a sum in excess of US\$ 40 million as against the limitation fund. He states that if the defendant has limited liability, then where was the need to furnish security in excess of US\$ 40 million. Therefore, they had a special arrangement and because of this special arrangement, the owners of Heung-A Dragon who are the first defendant in HCAJ/189/2013 consented for the decree passed by the Hong Kong Court to set up limitation fund. He submitted that therefore the Court should not pay much importance to a consent decree obtained in this fashion. In response, the counsel for the defendant submitted that the plaintiff in that case was a shipowner whereas the plaintiff herein is the cargo interest and hence the plaintiff herein cannot expect to be treated on the same footing as a shipowner. The whole thing according to him is a matter of negotiation. I cannot accept this submission of the plaintiff's counsel. I see no reason why the plaintiff should be discriminated against, just because they are cargo interests and not shipowners.

27 Mr. Pratap, counsel for the plaintiff also submitted that even though the defendant had filed the limitation action HCAJ/189/2013 in Hong Kong in November, 2013, still the defendant was expecting many claims in India and therefore, on 7th April 2014, the defendant filed a caveat against arrest in

Bombay agreeing to furnish security upto sum of Rs.74 crores equivalent about US\$ 12 million. The defendant vessel arrived on 9th April 2014 and later after one or two extensions, the defendant furnished security in the sum of US\$ 787,343.94 with 12% p.a. interest which is the claim amount in the suit. On that day, the fund had not been set up in Hong Kong. The fund was set up only on 14th May 2014. The counsel for the plaintiff further submitted that as defendant had filed caveat to secure upto about US\$ 12 million and the plaintiff's claim is only about US\$ 787,343.94, they were expecting many more applications for arrest and that is why the caveat was to secure upto US\$ 12 million.

He submitted that after setting up the funds on 14th May 2014, the defendant took out the present notice of motion and requested the Court to pass an order deferring the need to file the written statement and therefore, the stand of the defendant that the present suit has not progressed much is not correct because otherwise, the defendant would have had to file the written statement and issues would have been framed within a month and by now affidavits in evidence could have been filed. He submitted that the submission of the defendant that the Hong Kong proceedings have moved far and this suit has not progressed at all is not correct.

28 On the point as to MS Act is applicable or not, it has to be noted that India although has signed the 1976 Convention and the 1996 Protocol, the entire Convention has not been enacted as a part of domestic law. Part XA of the MS Act sets out provisions pertaining to limitation of liability. Only some of the provisions of the Convention as amended have been incorporated into the MS Act. This shows the Parliament did not want to include those provisions of the Convention which are not incorporated in Part XA of the MS Act. Notable among the exceptions are the following:

- a) The Article 4 of the Convention which refers to conduct barring limitation, or breaking limitation as is more commonly understood.
- b) The free standing right to limit liability set out in Article X of the Convention. Thus limitation of liability can only be invoked in the event legal proceedings are instituted in respect of claims subject to limitation as provided in Section 352C (1).
- c) Article 13 of the Convention has not been incorporated into the domestic legislation in its entirety. Only the second part of Article 13(2) [the mandatory provisions] and Article 13(3) is incorporated with some changes.

29 The English Merchant Shipping Act 1995 sets out the 1976 Convention in Schedule 7 and the Convention has been adopted in its entirety as a part of the English Merchant Shipping Act. This is not the position under Indian law. Consequently the English decisions and commentaries on Article 10 and Article 13 are not really relevant.

30 Section 352 E of the Merchant Shipping Act, 1958 provides for the scope of application of Part X-A. It provides, *interalia*, that

“The provisions of Part X-A shall apply whenever any person referred to in sub section (1) of Section 352A seeks to limit his liability before the Court or seeks to procure the release of a ship or other property or the discharge of any guarantee given within the Indian jurisdiction”.

The defendant is the ship-owner as referred to in sub section (1) of Section 352A and is seeking discharge of a bank guarantee provided by it in this Court. Consequently the defendant is covered by Section 352E. Part X-A of MS Act, therefore, would apply in this case. For the purpose of seeking discharge of the bank guarantee, the defendant is required to make an application under Part XA and is entitled to the discharge of the guarantee only in the event the defendant is able to satisfy the requirements of Part XA and not otherwise.

31 It is the defendant's case that they have set up a Limitation Fund in Hong Kong and deposited the fund amount in the Hong Kong High Court. Where a Limitation Fund has been set up, under the MS Act, a party can seek release of security only if the party satisfies the provision of Section 352D(6). The provisions of Section 352D(1), (2) and (3) do not apply.

32 In my view, the defendant does not satisfy the requirements of Section 352D(6) because the Limitation Fund has been constituted in Hong Kong which is not the port as identified in Section 352D(6). Consequently the other requirements of Section 352D(7) are not required to be considered because the threshold compliance with Section 352D(6) is not met. It is, however, the case of the plaintiff that they have not brought any claim against the fund before the Court administering the Fund and neither is the fund actually available and freely transferable.

33 Section 352D (6) and (7) are a clear departure from Article 13(2) of the 1976 Convention. The discretion given to the Court for release of security under the first part of Article 13(2) is not incorporated in Part XA of the MS Act. Only the latter half of Article 13(2) which provides for a mandatory release of security has been incorporated with a slight modification. The intention of the legislature is clear. There will be a release of security only if the mandatory provisions of Section 352D(6) are complied with and not otherwise.

34 The High Court referred to in Section 352D(7) is the “High Court administering the Fund”. In the present case, the High Court which is administering the Fund is the Hong Kong High Court. The definition of

High Court in Section 3(15) of the Merchant Shipping Act is not applicable because Section 3(15) refers to the High Court in relation to a vessel. The High Court in relation to a vessel may not be the High Court administering the Fund because a Fund can be set up in any relevant port. Likewise, the definition of “High Court” in the General Clauses Act as submitted by the counsel for the defendant is also not relevant because the High Court is expressly identified in Section 352 D(7) of the MS Act as the High Court administering the Fund. Which is the High Court administering the fund is a question of fact in each case and is not confined to the High Court in relation to a vessel.

35 The submission of the defendant that Section 352D(6) and (7) apply only in the event a Limitation Fund is set up in a High Court in India is not correct. In the event a Limitation Fund is set up in India then the provisions of Section 352C apply such that after the Fund is constituted no person entitled to claim against the Fund shall be entitled to exercise any right against any other assets of the ship-owner. Thus, if the defendant had set up a Limitation Fund in a High Court in India, the defendant would then be able to seek an order setting aside the arrest and for return of security under the provisions of Section 352C(3). However, if a Limitation Fund is set up in a Court other than a Court in India, then the provisions of Section

352D(6) apply.

36 Furthermore, if the defendant's submission that the MS Act applies only if the Fund is constituted in India, is to be accepted, then the effect will be that there is no provision under Part XA which provides for return of the bank guarantee if the Fund has been constituted outside India. That can never be the intention because Part XA in Section 352D(3) also permits release of security if prior security is given in India or elsewhere. Likewise it permits release of security if a Limitation Fund is set up in a port as identified in Section 352D(6), provided the requirements of Section 352D(7) are met. Therefore the intention is to permit release of security in certain circumstances if prior security is given outside India, in a relevant port, in a convention country or a Fund is constituted in the relevant port wherever it is situated and is freely available.

37 Once it is clear that MS Act permits release of security only in a certain situation and not otherwise, it is equally clear that if the requirements of MS Act are not complied with, then the defendant is not entitled to return of security. This is the public policy of India and a public policy, as held by the Apex Court in ***VO Tractoroexport v/s. Tarapore and***

Company⁶ must prevail over any provisions of the Convention which are not a part of domestic law and any principle of comity of nations or international law.

38 The problem of Renvoi in conflict of laws suggests the predicament of the domestic courts in deciding matters relating to the comity of nation. A question arises as to whether international law would apply with the aid of the domestic law and if yes, then what is the extent with which it would apply.

39 The comity of nations requires the rules of international law may be accommodated in the municipal law to the extent they do not run in conflict with the internal laws. While applying international law, the sovereignty and supremacy of the powers of the legislature to also be kept in mind. Thus comity of nations or no, when there is a conflict, the internal law of the land will prevail.

40 Article 51 of the Constitution of India directs that the state shall endeavor to foster respect for international law and treaty obligations. Indian Courts have also given positive response to developments in

6 1969 (3) SCC 562

international law as manifested through their judgments in several areas.

41 The Apex Court in ***Gramophone Company Limited vs. Birendra Bahadur Pandey***⁷ has held that “nations must match with the international community and the municipal laws must respect the rules of international law even as nations respect international opinion. The Court suggested a harmony be brought between the two. However in case of conflict, the municipal law would prevail.

42 On the submissions of the defendant that Hong Kong is a convenient forum as stated in paragraph 19 above, Mr. Pratap submitted that even if the test of forum non convenience is to be applied, then if all witnesses could go to Hong Kong which is not a natural forum, they could also come to India. Natural forum is a place where the collision took place or if the collision happened in mid-sea, the next port of call of the vessel. He further submitted that in any event, the judgment of the Hong Kong Court of Appeal in the matter of ***m.v. Kapitan Shvetsov***⁸ is a complete answer on this point. Application of the Hong Kong judgment and the principles set out therein would be consistent with the principle of comity of courts and this Hon’ble Court should be applying the same test as applied by the Hong

7 (1984) 2 SCC 534

8 (1998) 1 LLR 199

Kong Court of Appeal. English decisions are not relevant because it is comity between India and Hong Kong that is required to be considered and not India and England.

Mr. Pratap further submitted that apart from the fact that Hong Kong is not the natural forum and not a more appropriate forum than India, the plaintiff will suffer a tremendous juridical disadvantage if they are required to litigate in Hong Kong where the Limit of Liability is substantially lower than in India. In fact Indian Public policy is reflected in Part XA of the MS Act which applies the higher 1999 Protocol limits and a plaintiff who has invoked the jurisdiction of this Hon'ble Court as of right ought not to be denied the benefit of the higher limit that Indian Public Policy provides. Consequently irreparable loss, harm and prejudice will be caused to the plaintiff which far outweighs any advantage to the defendant in terms of convenience, if any.

43 What is to be really looked into is whether the plaintiff will be at a great disadvantage and a great injustice will be caused to them or not. Defendant has given security for US\$ 40 million in the Gujarat proceedings to secure the claim of the owners of m.v. Heung-A Dragon when the limitation of liability in India would have been only US\$ 6.2 million and a limitation fund has already been set up in Hong Kong. No acceptable

explanation for this also came forth from the defendant. Therefore, it does appear that there was a special arrangement between the defendant and owners of Heung-A Dragon. Should they decide to settle the liability action in Hong Kong, viz., HCAJ 188/2013 and apportion the liability and settle the matter at 50% - 50% or 30% fault against defendant vessel and 70% against Heung-A Dragon the amount that the plaintiff herein will recover, would be limited to so much less than the sum they may recover in this country. The difference in limitation fund between India and Hong Kong is 1:2.4. This means if in Hong Kong the fund to be set up is US\$ 1 in India it will be US\$ 2.4 under the MS Act, 1958.

44 The Hong Kong Court of Appeal in the matter of ***Kapitan Shvetsov*** (supra) relied upon by plaintiff, did not stay the action even though the proceedings in Singapore arising out of the same collision had progressed substantially. In this case, there was collision between Russian Ship, Kapitan Shvetsov owned by the plaintiff and the defendant Singaporean Ship Nanta Bhum in the channel of Chao Phraya river in Thailand. Neither of the shipowners wanted proceedings in Bangkok. The defendant brought an action *in rem* in the Singapore Court claiming damages against the owners of Russian Ship, who commenced action in Hong Kong against the owners of Singapore ship claiming damages. The Russian owners applied

for a stay of the Singaporean action but their application was not granted. The Singaporean owners reciprocated by applying to stay the Hong Kong action in favour of Singapore. The 1957 Convention applied in Singapore which provided for setting up a lesser fund compared to 1976 Convention which was applicable in Hong Kong.

45 The Hong Kong Court of Appeal proceeded on the basis that both the parties have not filed action in the natural forum which in that case would have been Bangkok. Each party preferred its own chosen forum and was exercising its principal right of access to that forum a right which Court should not disturb even though the balance of factors is strongly in favour of the defendant. The Court did not stay the proceedings even though there will be multiplicity of proceedings or parallel proceedings in Singapore and Hong Kong, and there was a possibility that there may be an overlap and the Court may come to different conclusion. The Court also went on the basis that if witnesses can go to Singapore from Thailand certainly they could also come to Hong Kong. What really tilted the case in favour of the plaintiff is that the limit of liability under the 1957 Convention in the Singapore proceedings would be US\$ 9,55,000/- whereas in Hong Kong where the 1976 Convention apply, it would exceed US\$ 1.5. million. The Court while

concluding held as under :

The position boils down to this. The Russian owners have properly invoked the jurisdiction of the Hong Kong Court for the adjudication of their claim. They have a right to have their claim determined by the Hong Kong Court. In principle, this right cannot be lightly disturbed. The Singapore owners have not brought proceedings in a forum which is natural to the action; that is, the forum with which the action has the most real and substantial connection. Additionally, there is a considerable juridical disadvantage to the Russian owners if they were forced to prosecute their claim in Singapore; the interest of both parties and the ends of justice do not demand that they be driven from their chosen forum.

Once this point is reached, the conclusion is inevitable that the Singapore owners' motion to stay is ill-founded and should have been dismissed.

I would allow this appeal, discharge the Judge's order and dismiss the Singapore owners' application to stay the Hong Kong proceedings.

I would also make an order nisi that the Singapore owners should pay the costs here and below.

46 In the present case also the facts are similar to that in ***Kapitan Shvetsov*** (supra). In the present case, Hong Kong where the defendant has invoked limitation of liability and constituted a fund is not a natural forum. The plaintiff herein, has chosen this forum which has jurisdiction over the

defendant vessel. Therefore, both the parties have chosen forums which are not the natural forums and one should not have the inherent juridical advantage over the other. Moreover, the plaintiff herein if dragged to go to Hong Kong, will recover a lot less amount than what they would otherwise recover if a fund had been set up in India. The admitted position is that the defendant herein though having set a limitation fund in Hong Kong has given an additional security of US\$ 40 million to the owners of Heung-A Dragon which was carrying the plaintiff's cargo. The defendant is also willing to secure the claim of those cargo interest who has sued the defendant in South Africa and in Marshall Islands, as stated by the counsel for the defendant on instructions.

47 Mr.Pratap also relied upon a judgment of the English Court in the matter of *The Vishva Abha*⁹ where again the English Court did not grant a stay. The court in page 314 and 315 has held as under :

“.....The action has been brought by the plaintiff cargo-owners in this court as of right. Accordingly, I must direct myself initially by the principle, enunciated by Lord Goff on p.11, col.1: p.477 where he says :

In my opinion, the burden resting on the defendant is not just to show that England is

9 (1990) Vol.2 Lloyd's Law Reports 312

not the natural or appropriate forum for the available forum which is clearly or distinctly more appropriate than the England forum. In this way, proper regard is paid to the fact that jurisdiction has been founded in England as of right.

The defendants are parties to litigation in South Africa, It is because that was the country in which they found the ship *Dias* under another name. They had attempted to find the ship and to serve a writ on her at other ports in the world ---Whether or not there was a Court or emporium in which they could ship.....in those ports, I know not; but it was entirely a matter of chance that the defendants in this action were able to find *Dias* in Durban and commence litigation there by arresting her. By doing so, they may have obtained an advantage because the limit of liability in South Africa is still the limit set by the 1957 Convention which is substantially lower than the limit set by the 1976 Convention which was been adopted in this country.

.....if *Vishva Apurva* were to invoke limitation in South Africa, the fund would be in the region of £367,500 at today's rate of exchange for the rand. If *Vishva Apurva* were to invoke limitation in England, the fund would be more than £1.5 million. So there may well be a powerful and important juridical advantage to the plaintiffs in litigating in England, and a powerful juridical advantage to the defendants if they can force the plaintiffs to bring their action in South Africa.

.....that the action which has been commenced in England is an action commenced by the owners of cargo. The action which is currently running in South Africa is an action between the two ship owners.

.....which is whether the defendants have shown that the South African forum is clearly or distinctly more appropriate than the English forum, I have to look to see what are the factors which affect the convenience or expense of both parties firstly, that the defendants will be faced with the prospect of litigating the same same issue twice; once in England and once in South Africa, unless I stay this action. He says, secondly, that there is a danger that the view which this Court takes as to liability may be different from the view which is taken by the South African Court, and that is something which should, if possible, be avoided.

Dealing with the latter point first, it seems to me that it is relevant that the litigation in this country, this action, is not between the same parties as the litigation currently being pursued in South Africa, and that the plaintiffs prima-facie should not be deprived of litigating in the forum of their choice merely because others have chosen to litigate in South Africa. However, the point goes further in this case because, as I have already pointed out, it was mere chance which dictated that the defendants have found themselves litigating in South Africa..... It seems to me that there are occasions when it is not possible to avoid two different jurisdictions, even with the possibility of two different decisions. So that is only a theoretical possibility. Indeed, so far as the defendants are concerned, they may possibly have the advantage in this country that the plaintiffs will be unable to call any witnesses to give oral evidence ---- and that is a severe disadvantage in a collision action.

.....

There is one other matter which has been ventilated, and that is the question of potential delay.....a possibility that a collision action

in South Africa would be heard rather later than in this country, but not materially so. It is a point that has not impressed me greatly.

.....if the action proceeds to trial in this country and if the plaintiffs recover damages in excess of £1.5 million. On the other hand, assuming that the South African Court took precisely the same view on liability, the plaintiffs would recover only their share of £367,000. It does seem to me that it would be a grave injustice to deprive them of their right to litigate in this country and send them to South Africa where their chances of recovering damages would be limited to so much less than the sum they may recover in this country.

I have balanced that against the expense to which the defendants will be put in litigating in both the countries, but the expense of bringing a few witnesses to England is as nothing compared with the very substantial sum involved in the difference between the limits of liability in this country and South Africa. For these reasons, the motion is dismissed.

48 I am also not convinced that Hong Kong is a distinctly more appropriate forum than this Court. The shipowners often have to face litigation in different parts of World and for a variety of reasons these shipowners have got to face litigation arising out of this in a number of jurisdictions. I do not think that the interest of justice demand that the present plaintiff who have brought an action in this Country as a matter of right, should be required to litigate in Hong Kong merely because the defendant has chosen to bring an action in Hong Kong which is also not a

natural forum. Even in the *Herceg Novi* (supra) relied upon by the counsel for the defendant, one of the factors that tilted in favour of English Court staying the English proceedings is that the other proceedings were in England which was not a natural forum where the first action was filed.

49 Fifty-Eight (58) countries, I am told, have signed the 1976 Convention out of which Forty-Nine (49) countries are signatories to the 1996 Protocol including India. Therefore, the balance of convenience should tilt in favour of the plaintiff.

50 Therefore, the inevitable conclusion that I would arrive at is that the defendant's motion to dismiss the suit or return the plaint to the plaintiff to be presented in the Hong Kong High Court or stay the suit and return the security cannot be granted.

Notice of Motion is accordingly disposed as rejected. Costs to be costs in the suit.

51 At the same time the defendants have stated that in HCAJ/188/2013, in Hong Kong (a) inspection and discovery of documents is complete, (b) pleadings have been closed, (c) witness statements have already been exchanged, (d) experts have been retained by both parties, (e) trial is due to

progress and (f) the Court first will determine the liability before the quantum issue. The suit in this court has not progressed so much.

52 In my view, judicial time can be saved, if this Court does not simultaneously commences trial arising out of the same collision in which trial is going to begin in Hong Kong High Court. It would, therefore, be better to wait and see the outcome of the Hong Kong proceedings. It is also possible that this Court may accept the Hong Kong High Court's decision on liability. The plaintiff herein may also accept. Therefore, the parties are directed to advise this Court as soon as the Hong Kong High Court issues its decision in HCAJ/188/2013 or by 30th April, 2015 report to the Court on the status of HCAJ/188/2013, whichever first occurs. In the meanwhile, the defendant is directed to file the written statement within four weeks from today.

(K.R. SHRIRAM, J.)