

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

NOTICE OF MOTION (L) NO. 2418 OF 2015

IN

ADMIRALTY SUIT (L) NO. 854 OF 2015

M.T. EVERRICH 8 ... Applicant
(Orig. Defendant)

In the matter of

Mare Maritime Singapore Pte. Ltd. ... Plaintiff

vs.

M.T. EVERRICH 8 ... Defendant

Mr. Rahul Narichania, Senior Advocate, instructed by Mr. Mustafa Motiwala, for the Applicant.

Mr. Vishal Seth, instructed by Mr. Bimal Rajasekhar for the Plaintiff.

Mr. Harsh Pratap for Hindustan Petroleum Corporation Ltd.

Coram: S.J. Kathawalla, J.

Date : 14th September, 2015.

ORAL JUDGMENT:

1. The present Notice of Motion has been filed by the head owners of Defendant Vessel m.t. Everrich 8 (hereinafter referred to as "the Applicant") for transfer of the Defendant vessel (under arrest) from the port of Ennore, to the port of Haldia to facilitate discharge of remaining cargo of Butane and Propane i.e. Liquid Petroleum Gas (LPG).

2. Defendant No. 1 Vessel was arrested at the port of Ennore, Tamil Nadu pursuant to an Order of arrest dated 20th August, 2015 passed by this Court in the above Admiralty suit.
3. The Applicant has stated that it has through its subsidiary Yuanland Ltd. entered into a Voyage Charter Party dated 13th August, 2014 read with Addendums I and II with one Rakha Al Khaleej International LLC (“Rakha”) for carriage of LPG on board the Defendant Vessel.
4. Rakha in turn sub chartered the Defendant Vessel to Indian Oil Corporation Limited (IOCL), a Government of India undertaking for carriage of Propane and Butane (LPG) from port of Ras-Laffan to port of Sikka, port of Ennore and port of Haldia. The Applicant has discharged part cargo at port of Ennore. The balance cargo of 20,998 MTs of Propane and Butane (LPG) is required to be delivered to IOCL, Bharat Petroleum Corporation Limited (BPCL) and Hindustan Petroleum Corporation Limited (“HPCL”) at the port of Haldia.
5. Mr. Narichania, Learned Senior Counsel appearing on behalf of the Applicant submits that:
 - (i) each day of delay is causing monetary loss and prejudice to the owners;

- (ii) the charterer and receiver of the cargo requires the balance cargo to be delivered at port of Haldia as the stock levels are very low and any further delay could lead to problems for the receivers and third parties;
- (iii) the Applicant will be saddled with heavy claims due to late delivery and/or short delivery of the cargo;
- (iv) the Defendant Vessel needs to be repaired at port of Haldia.

The Applicant has agreed to be subjected to conditions to ensure that the Defendant Vessel makes the transfer under arrest from port of Ennore to port of Haldia. These conditions have been articulated in paragraphs 9 to 14 of the Affidavit in support of Notice of Motion.

6. Mr. Vishal Sheth, learned Counsel appearing on behalf of the Plaintiff has opposed the present Application on the following grounds:

- (i) that the proposed voyage will in all probability require the Defendant Vessel to sail into international waters or at least be in a position where she can easily slip into international waters causing the Court to lose jurisdiction over the Defendant Vessel;
- (ii) that the Applicant whilst referring to an entirely different matter made some uncharitable remarks regarding the Indian Courts in an email at Exhibit "Ä" to the Affidavit in Reply. The relevant portion of the said email reads as under:

*“I contact you for resolving the problem of Everrich 8 in Ennore as soon as possible. **I have a bad thought in Indian Court** due to some my last experience so I’m really worried in this case.”*

It is alleged that since the Applicant views this Court in a “suspicious manner”, it may not honour orders passed by or undertaking issued to this Hon’ble Court;

- (iii) that the Applicant is a foreign company having no assets other than the Defendant Vessel;
- (iv) that the Applicant through its erstwhile Advocates’ email dated 28th August, 2015 (Exhibit “B” Affidavit in Reply) falsely stated the geographical location of the Defendant Vessel and the status of the service of the order of arrest in an attempt to avoid the jurisdiction of this Court;
- (v) that LPG is hazardous cargo and since the vessel requires repairs, it is unsafe for the vessel to undertake the voyage from the port of Ennore to port of Haldia;
- (vi) that there is a risk of Defendant Vessel colliding with a maritime object or breaking down en route or incurring maritime liens which will have priority over the Plaintiff’s claim;
- (vii) that the cargo can be transhipped onto another vessel to effectuate ultimate delivery at port of Haldia; or

- (viii) that the IOCL, BPCL, HPCL/Receivers can take delivery of the cargo at the port of Ennore; or can purchase the similar cargo from other suppliers and thereafter recover their losses from the Applicant.
- (ix) that commercial consideration of the Applicant or IOCL, BPCL, HPCL/the receivers cannot be a ground for allowing the application or putting the Plaintiff's security at risk.
7. Mr. Narichania, learned Senior Counsel on behalf of the Applicant has categorically refuted the allegations and apprehensions of the Plaintiff and has characterized them as being unreasonable and without basis or substance.
8. It is submitted by Mr. Narichania that the Applicant's erstwhile Advocates' email dated 28th August, 2015 was addressed due to some miscommunication. Further, the said email does not challenge nor create grounds to challenge the jurisdiction of this Court.
9. Insofar as the email at Exhibit "A" to the Affidavit in Reply is concerned, Mr. Narichania has submitted that the said email was addressed by a person who is not proficient in English and further it did not cast any aspersions on the Court. The said email described an earlier incident where a litigant had instituted proceedings against the Applicant in this Court, which was an abuse of the process of the Court.

10. Mr. Narichania further submitted that the Plaintiff has attempted to create unnecessary prejudice against the Applicant with reference to the issues raised by the Plaintiff in paragraphs 6(ii) and 6(iv) above.
11. In my view, the present application cannot be decided on prejudice. Each application has to be considered on its own merits. The email at Exhibit "A" to the Affidavit in Reply does not in my view cast any aspersions on the Court to warrant any adverse reaction. I am satisfied with the explanation put forth by the Applicant.
12. Insofar as the email dated 28th August, 2015 (Exhibit "B" to the Affidavit in Reply) is concerned, the said email may have been sent due to some miscommunication. The Applicant has not challenged the jurisdiction of this Court due to any of the reasons stated in the email dated 28th August, 2015. Therefore, reliance on the email dated 28th August, 2015 does not take the Plaintiff's case any further.
13. In order to test the rival contention of the parties, I directed the Applicant to obtain a Survey Report to ascertain value of the Vessel and its seaworthiness.
14. The Applicant has tendered a Survey Report dated 9th September, 2015 of Ericson & Richards Surveyors Pvt. Ltd. certifying the value of the Vessel to be approx. Rs.142.20 Crores. M/s. Ericson & Richards Surveyors Pvt. Ltd. has also filled in a Condition Survey Report Form setting out the condition of the Vessel in

considerable detail and certifying it to be fit for the purpose. This clearly addresses the concern and apprehension of the Plaintiff vis-à-vis the seaworthiness of the Defendant Vessel and its ability to undertake the voyage to the port of Haldia.

15. Insofar as the next contention of the Plaintiff vis-à-vis the Defendant Vessel colliding with a maritime object or incurring maritime liens; this apprehension is without any foundation. The Defendant Vessel can meet with a collision even at port of Ennore if another vessel collides with her. The Defendant Vessel cannot be prevented from sailing to port Haldia due to a mere apprehension of the Plaintiff.
16. Insofar as the next contention of the Plaintiff regarding the cargo being transhipped to another vessel, this suggestion is also unrealistic and fraught with risk as to the safety of the cargo on board the Defendant Vessel. The cargo is inflammable and hazardous. Accordingly, there is a risk of:
 - (i) a conflagration during intership transfer;
 - (ii) leakage during intership transfer which may cause pollution in the sea;
 - (iii) shortage of cargo during intership transfer;
 - (iv) contamination of cargo due to intership transfer.

17. Even assuming intership transfer is possible without any risk, the costs involved would be exorbitant and there would be considerable delay in arranging for another vessel. It may not be possible to find another LPG tanker at such short notice. Such a vessel would have to be certified to be fit to receive the cargo in its tanks. The entire process could take over a month and this makes the Plaintiff's suggestion and proposal unrealistic and unpragmatic in view of what is stated hereinbelow:
18. In order to ascertain the factual position, this Court passed an Order dated 11th September, 2015 inter alia directing IOCL and HPCL to depute their Officer, who has full knowledge of the Court to attend the Court on 14th September, 2015 at 3.00 P.M. BPCL was separately notified by the Applicants Advocates to depute its representative to Court on the aforesaid date and time.
19. Today, Mr. M.M. Prasad, Senior Manager, LPG (Distribution) of HPCL is present in Court. HPCL is also represented by Advocate Mr. Harsh Pratap. The matter was kept back for some time because the representatives of IOCL and BPCL were not present. At 4.00 P.M., the matter is once again called out, when Mr. M.M. Prasad of HPCL has informed the Court that he was in touch with the concerned Officials of IOCL and BPCL on the telephone and they have informed him that they are unable to attend the Court, but HPCL as the leader could inform the Court that the stand and position of IOCL and BPCL were similar to that of HPCL.

20. Accordingly, I enquired from Mr. M.M. Prasad of HPCL what the stand and position of all three companies were.
21. Mr. M.M. Prasad of HPCL informed the Court that:
- (i) the cargo in question was required at the port of Haldia only and that there was no provision to stock further cargo at Ennore, which had sufficient stock available; and;
 - (ii) the cargo in question should be delivered at the port of Haldia within the next 7-10 days, failing which, there could be problem due to depletion of stock.
22. In view of this, there is no question of the balance cargo being discharged at the port of Ennore. It is imperative that the balance cargo be delivered at the port of Haldia as soon as possible. The Court was informed that the sailing time of the vessel from the Port of Ennore to Haldia is not less than 5-6 days. Hence, since time on hand is short, it is not in anybody's interest that the Defendant Vessel continue to lie detained indefinitely at the port of Ennore with hazardous and inflammable cargo on-board.
23. It is in the interest of all concerned that the Defendant Vessel discharge the balance cargo at the Port of Haldia, so that the cargo can be utilized at the earliest by IOCL, BPCL and HPCL.

24. Insofar as the apprehension of the Plaintiff that the vessel may enter international waters during its voyage and jump arrest, causing the Court to lose its jurisdiction; this Court by an Order 4th September, 2015 directed the Commandant, Indian Coast Guard, Western Region to depute a responsible officer to remain present in Court on 7th September, 2015 at 3.00 P.M. to ascertain the factual position.
25. Accordingly, on 7th September, 2015 at 3.00 P.M., three Officials of the Indian Coast Guard attended the Court. One DIG Donny Michael of the Indian Coast Guard informed the Court:
- (i) that it was possible for the Defendant Vessel to sail on its voyage from the port of Ennore to the port of Haldia within Indian territorial waters;
 - (ii) for a short duration of the voyage, i.e. 6-8 hours, there is a possibility that the Defendant Vessel may at a particular location en route in certain exigencies be required to enter international waters;
 - (iii) that it was possible for the Indian Coast Guard to keep the Defendant Vessel under surveillance if the Defendant Vessel reported her coordinates/location to the Indian Coast Guard every four hours;
 - (iv) that if the Defendant Vessel violated any orders of the Court, the Indian Coast Guard could pursue the Defendant Vessel and direct it back into Indian territorial waters.

26. When the Court enquired what the Coast Guards could do if the Defendant Vessel refused to obey the directions of the Indian Coast Guards DIG Donny Michael informed the Court that in that event, the Indian Coast Guard would use its “might”. Further, all costs and expenses in pursuit of the Defendant Vessel would be recovered from the Defendant Vessel.
27. In these circumstances, if there are adequate safeguards imposed, there is hardly any risk of the Defendant Vessel jumping arrest.
28. Similar applications such as the present one have been made to the Courts in the past. The Division Bench of this Court in the case of *Lufeng Shipping Co. Ltd. Vs. M.V. Rainbow Ace and anr. in Appeal Lodging No. 228 of 2013 in Notice of Motion No. 235 of 2013 in Admiralty Suit No 29 of 2013* ordered the Vessel M.V. Rainbow Ace (under arrest) to be moved from the port of Pipavav to the port of Mumbai. The Division Bench of this Court as a precaution further directed the Prothonotary & Senior Master of this Court to send the Court Bailiff to accompany the Vessel on its voyage from the Port of Pipavav to the Port of Mumbai.
29. The Hon’ble Gujarat High Court in the case of *M.V. Cape Climber vs. Glory Wealth Shipping Pvt. Ltd. in Civil Application (OJ) No. 96 of 2015 in Admiralty Suit No 30 of 2014* had the occasion to consider a similar application for transfer of a vessel under arrest. In this case, the Counsel for the Applicant/Owner submitted that

the Applicant/Owner was suffering crippling losses at the port of Mundhra due to very high anchorage charges. The Applicant/Owner therefore applied to the Court for transfer of the vessel from the port of Mundhra to the port of Kandla where the anchorage charges were far lower than the port of Mundhra. This Application was opposed by the Plaintiff and in the alternative the Plaintiff submitted to the Court that if the Court was inclined to grant the application, adequate safeguards should be in place to ensure that the order of the Court was complied with. The Plaintiff also sought an undertaking from the Defendant Vessel to continue to be under arrest and duly anchored at the port of Kandla.

30. The Hon'ble Gujarat High Court accordingly allowed the application by imposing various safeguards, which reads thus:

“The defendant vessel is permitted to sail under arrest to the outer anchorage of Kandla Port. The Registrar General of this Court shall forthwith depute a responsible officer to go to Mundra Port and bring the defendant vessel to the outer anchorage of Kandla Port. For the sake of convenience, it is made clear that the officer so deputed by the Registrar General will be on Board the vessel in question and the vessel will be under his control for the purpose of implementation of this order. The Coast Guard, Mundra shall also depute an officer to accompany the officer deputed by the Registrar General of this court. The entire cost that will be incurred by the officer deputed by the Registrar General as well as by the Coast Guard shall be borne at the first instance by the defendant, that is, the owners and parties interested in the vessel M.V. CAPE CLIMBER, IMPO NO. 90-6806. All the concerned authorities, namely, the Port authorities at Mundra and Kandla, the Customs authorities and the Coast Guard authorities both at Mundra and Kandla shall provide necessary assistance to the officer deputed by the Registrar General for implementing the above order. The Constituted Power of Attorney who has affirmed the present application shall file an undertaking on behalf of the applicant to the effect that the vessel would continue to be under arrest and would be duly anchored at the outer anchorage of Kandla Port.

All the customs papers and passports and vessel papers which are with the Customs Department at Mundra shall be directly handed over to the concerned officer at Kandla customs.

31. There is another judgment of a learned Single Judge of this Court in the case of *Jaldhi Overseas Pte. Ltd. Plaintiff vs. M.V. Daebo Lumut and Anr. Defendants in Notice of Motion (L) No. 1070 of 2015 in Admiralty Suit (L) No. 257 of 2015 dated 30th April, 2015.*
32. In this case, the learned single Judge rejected the Application taken out by Mercator Line (Singapore) Ltd. (the voyage charterer's of the Defendant Vessel) for transfer of the vessel under arrest from the port of Vishakhapatnam to the port of Haldia to facilitate the discharge of balance cargo of Coaking Coal. Some of the facts which weighed with the Court to reject the application for transfer are stated below:
- (i) The Application was filed by the voyage charterer of Vessel and not by the Owners of the Vessel;
 - (ii) The Master and crew on board the Vessel were not employed by the voyage charterer, but were the servants and/or agents of the owner of the vessel. Thus, there was no guarantee that the crew would cooperate and dutifully transport the cargo to Haldia and voluntarily submit to the continuation of the arrest at the hands of the authorities at Haldia;

- (iii) It was common ground between the parties that in order to traverse the distance from the port of Vishakhapatnam to the port of Haldia, the vessel would have to sail outside the Indian territorial waters;
 - (iv) The owner of the vessel was in the midst of bankruptcy proceedings;
 - (v) There was nothing on record in this case to explain why the cargo could not be accepted/delivered at Vizag itself;
33. It is pertinent to note that the learned Single Judge in this case has recognized the fact that in a given case, it may be possible to accept the owners' undertaking or other security in the interregnum and permit the vessel to sail under arrest. The learned Single Judge has observed as follows:

“8. As a matter of principle, and certainly not without there being any special reasons for making a departure from the ordinary rule, this Court would not permit sailing of a ship under arrest out of its jurisdiction, i.e. beyond the territorial waters of India. It may not be possible to spell out these special reasons, and I suppose it would have to be necessarily left to the discretion of the Court on a case by case basis, but one thing is clear. Even when such special reasons exist, the Court will have to adequately ensure that the order of arrest is not overreached and there remains an adequate security for the plaintiff's claim. In a given case, it may be possible to accept the owners' undertaking or other security in the interregnum and permit the vessel to sail under arrest. It may be possible to temporarily secure the plaintiff's claim by other means. The freighters or cargo owners may be permitted to provide such interim security, till the vessel is once again secured within the territorial jurisdiction of the admiralty Court.” (Emphasis supplied.)

The question that therefore arises is whether there are special reasons or circumstances to warrant the transfer of a vessel under arrest from one port to

another and whether adequate safeguards can be imposed to ensure that the order of this Court is complied with.

34. I have considered the aforesaid three judgments. The judgments of the learned single Judge of this Court in the case of *Jaldhi Overseas Pte. Ltd. (supra)* turned on its own facts as alluded to above. It is settled law that a judgment is an authority for what it decides and not what may even logically be deduced therefrom. Before a precedent can be applied, the Court must ascertain whether the facts of the two cases are similar. A judgment cannot be read like a statute.

35. In the present case, it is evident that the facts of the *Jaldhi Overseas Pte. Ltd. (supra)* are different and distinguishable from the facts in the present case. In the present case:-

(i) the Application has been filed by the owner of the Defendant Vessel, who has also furnished an unconditional and unequivocal undertaking dated 31st August, 2015 that it shall remain continue to remain under arrest within territorial waters of India upto Haldia and remain under arrest at Haldia until further orders of this Court. The undertaking is at Exhibit-A page 75 of the Affidavit in Rejoinder of the Applicant. The undertaking is comprehensive in its nature and I do not see any reason why the Court cannot accept such an undertaking especially where adequate safeguards are imposed to ensure that the order of this Court is not breached or violated;

- (ii) Since the owner has filed the present application, it is evident that the Master and crew who are the servants and/or agents of the owner will act as per the instructions of the owner. The owner will also be responsible for the action of the Master and crew. There is no reason to apprehend that the Master and Crew will not cooperate and dutifully transport the vessel to Haldia or otherwise breach or violate the order of this Court;
- (iii) The value of the Plaintiff's claim is only about Rs.6 Crores, whereas the value of the Defendant Vessel is approx. Rs.142.20 Crores. I do not think the owner of the Defendant Vessel would want to risk its assets valued at Rs.142.20 Crores to evade a claim of only about Rs.6 Crores;
- (iv) The Defendant Vessel is carrying approx. 29,000 MTs of Butane and Propane (LPG) which is to be discharged and delivered at port of Haldia to three Indian public sector undertakings i.e. IOCL, BPCL and HPCL. The Court is also informed that the Defendant Vessel regularly carries on business in India and therefore, the owner of the Defendant Vessel would not want to do any act, deed or thing which would jeopardise their business prospects in India. If the Defendant Vessel were to sail away outside the Indian territorial waters, its actions would amount to an act of conversion of the cargo. It would also constitute a criminal offence. In these circumstances, it is difficult to accept the Plaintiff's contention that the Defendant Vessel will jump arrest especially when there are adequate safeguards imposed by the Court;

- (v) The Defendant vessel is carrying inflammable and hazardous cargo. It does not make sense for the Defendant Vessel to lie anchored indefinitely at the port of Ennore with this hazardous cargo on board;
 - (vi) IOCL, BPCL and HPCL have informed the Court that if the cargo is not delivered within 7 to 10 days, they will suffer prejudice due to low level of the stock at Haldia. It is in public interest to ensure that these public sector undertakings are not put to such prejudice;
 - (vii) The Applicant has undertaken to bear all costs, charges and expenses associated with and/or relating to the transfer of the Defendant Vessel under arrest to the port of Haldia.
36. The Plaintiff's submission that the above three public sector companies can very well purchase cargo through another supplier is unreasonable and not pragmatic. Procuring of a fresh stock of similar cargo from a supplier would cause considerable delay and lead to further costs and expenses. Given the fact that the cargo is urgently required, it does not make sense to cause such prejudice to third parties especially when the cargo is not under arrest.
37. What would have happened had the cargo been perishable in nature? Would the Court be expected "to sit on its hands" and allow the cargo to perish? Would the Court thereby allow prejudice to be caused to third parties or would the Court be proactive given the exigencies and special circumstances of the case?

38. In my view, the Court should take a pragmatic view and not summarily reject an application for transfer of a vessel without balancing equities taking into account the overall situation and the special circumstances of each case. As far as possible an order of arrest should not cause prejudice to third parties such as IOCL, BPCL and HPCL.
39. In my view, there are special reasons and special circumstances made out to pass the present order.
40. With adequate safeguards which are more particularly set out herein below, the Defendant Vessel can always sail under arrest to the port of Haldia.
41. The Applicant's application is therefore made absolute in terms of prayer (a) subject to further orders as stated hereinbelow:-
- (i) Capt. Xerxes Aga (who is a master mariner) shall board the vessel M.T. Everrich 8, on its voyage from port of Ennore to port of Haldia;
 - (ii) Capt. Xerxes Aga is permitted to enter the bridge and/or any other area of the vessel M.T. Everrich 8 for the purpose of carrying out his duties to supervise the sailing of the vessel from the port of Ennore to Port of Haldia and; to ensure that the Defendant Vessel does not violate any orders of this Court;

- (iii) Capt. Xerxes Aga will have unrestricted access to VHF System, Telecommunication Systems and will be entitled to make contact with Indian Coast Guard and/or any other Indian Government authorities in relation to any matter that he deems fit whilst on board the vessel;
- (iv) Supt. of Police/Commissioner of Police/Director General of Police of Ennore as the case may be, is ordered and directed to forthwith place on board the Vessel M.T. Everrich 8 an armed guard on its voyage from port of Ennore to port of Haldia. The costs and expenses for deputation of the armed guard shall be paid by the Applicant to the police authorities directly;
- (v) On arrival of the vessel M.T. Everrich 8 at Port of Haldia Capt. Xerxes Aga and the armed guard will disembark from the vessel M.T. Everrich 8 and return to their respective destinations;
- (vi) The Applicant undertakes to the Court that it shall bear all costs, fees, charges and expenses associated with and/or related to the transfer of the vessel from the Port of Ennore to Port of Haldia. This undertaking also includes the undertaking to pay the boarding, lodging, airfare, transport of Capt. Xerxes Aga and the armed guard. The Undertaking is accepted by the Court;
- (vii) The vessel will on her voyage from the port of Ennore to port of Haldia make every possible attempt to sail within the Indian territorial waters;

- (viii) If due to any exigencies, the vessel is required to enter into international waters, the vessel will notify the Indian Coast Guard immediately and report its location/coordinates to the Indian Coast Guard on hourly basis, during this period of time;
 - (ix) At all other times, the vessel will report her location/coordinates to the Indian Coast Guard every 2 hours during the period of her sailing to the Port of Ennore to Port of Haldia;
 - (x) The Indian Coast Guards, Western Region and Southern Region are directed to coordinate and cooperate with each other to ensure that the order of this Court is implemented in its letter and spirit;
 - (xi) In the event, the Indian Coast Guards have reason to believe that the Order of this Court is being violated/breached, it may take all necessary measures in accordance with law to ensure that the order of this Court is complied with;
 - (xii) The Applicant has furnished an Undertaking dated 31st August, 2015. The said undertaking is taken on record and is accepted.
42. The Superintendent/Commissioner of Police/Director of Police, Port authorities of Ennore and the port authorities of Haldia, the Custom Authorities at Ennore and Haldia and the Indian Coast Guards, Western Region and Southern Region are directed to act upon an ordinary copy of the Order duly authenticated by the Associate of this Court.

43. The Sheriff of Mumbai to address official communications to all concerned authorities about the present order.

Notice of Motion is accordingly disposed off.

Certified copy expedited.

(S.J. KATHAWALLA, J.)

CERTIFICATE

Certified to be true and correct copy of the original signed Judgement.