

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ADMIRALTY & VICE ADMIRALTY JURISDICTION

NOTICE OF MOTION NO. 2109 OF 2016INADMIRALTY SUIT NO.41 OF 2015

DVB Group Merchant Bank (Asia) Ltd.

...Plaintiff

V/s

m.v. "Malaviya Twenty Three"

IMO number: 9299082 & Ors.

...Defendants

*Mr. Rahul Narichania, Senior Advocate with Ms. Pooja Kapadia i/b. M/s. Mulla & Mulla & Craigie Blunt & Caroe for Plaintiff**Mr. Manoj Khatri for Defendant Nos. 1 to 6 and 9.**Mr. Shiv Vats representative of Defendant No.6 was present.**Mr. Pankaj Savant, Senior Advocate with Mr. Aziz Khan i/b. M/s. Divya Shah Associates for Defendant No.7.***CORAM: S. J. KATHAWALLA, J.****DATE: 21st SEPTEMBER, 2016****P.C.**

1. An order dated 23rd August 2016 came to be passed in the present Notice of Motion in terms of prayer clauses (a), (b), (c) and (f) which clauses read as under:

“(a) The Defendant No.6, its servants, agents and assigns be ordered and directed by this Hon’ble Court to sail the Defendant No.9 vessel (Malaviya (9) from Brazil to Curacao immediately and at the very latest on or before 15th August 2016;

(b) That this Hon’ble Court be pleased to direct that the existing crew members be signed off by Defendant No.6 and a skeletal crew be appointed on board the Defendant No.9 vessel immediately upon arriving in Curacao as the case may be;

(c) That Defendant No.6 be ordered and directed by this Hon’ble Court to disclose on oath within 7 days hereof the balance charter hire due and payable by M/s. Petroleo Brasileiro SA – Petrobras to Defendant No.6 under the Charter Party dated 12th January 2012 and; the date when payment is due.

(f) In the alternative to prayer clause (e), Defendant No.6 be ordered and directed to utilize the balance amount of charter hire due and payable by M/s. Petroleo Brasileiro SA – Petrobras to settle all vessel related liabilities of the Defendant No.9 vessel and the balance if any to be utilized to clear other outstanding liabilities due and payable by Defendant No.6 in respect of the Defendant Nos. 1 to 5 vessels (viz. Malaviya 23, Malaviya 24, Malaviya 25, Malaviya 27 and Malaviya 28);”

2. Mr. Narichania, Learned Senior Counsel appearing on behalf of the Plaintiff states that charter hire of Defendant No.1 to 5 and Defendant No.9 vessels admittedly were assigned to the Plaintiff as per the various Earnings Assignments. Due to severe financial constraints of Defendant No.6, at the request of Defendant No.6, the Plaintiff agreed to allow Defendant No.6 to utilize the charter hire of Defendant No.9, Defendant No.3 and Defendant No.4 vessels for the purpose of meeting operational expenses of all the Defendant vessels. Vide clause 11 of the Consent Terms dated 3rd October, 2015 (which continues to hold the field) Defendant 6 was required to pay all the masters, crew wages including bunkers in respect of Defendant no. 1 to 6 and 9 vessels on time. Defendant No.6 has admittedly failed to do so. The Charter Party with Petrobras came to an end on or about July 2016. Defendant No.6 had disclosed to the Sheriff of Mumbai that a sum of approximately USD 3.8 Million is due and payable by Petrobras to Defendant No.6 towards balance charter hire in respect of Defendant No.9 vessel. The Plaintiff apprehending that the charter hire of USD 3.8 Million would be misappropriated by Defendant No.6, sought injunctive reliefs from this Court to restrain utilization of these monies. Vide an order dated 23rd August 2016, this Court recorded the statement of Defendant No.6 to the effect that Defendant No.6 would not utilize these monies as and when received from Petrobras for a period of one week from the date of the order. In the meantime, by an order dated 29th August 2016, the statement made on behalf of Defendant No.6 (recorded in the

Order dated 23rd August 2016) was ordered to be continued. The said statement of Defendant No.6 accordingly continues.

3. The Court is informed that on or about 28th June 2016, Defendant No.6 without knowledge and consent of the Plaintiff entered into Consent Terms in Brazil with M/s. Brasbunkers (a creditor of Defendant No.6) to pay the claim of Brasbunkers in the sum of USD 2,577,683.87. This fact was disclosed much later in point of time i.e. after the Plaintiffs sought orders for disclosure. The Plaintiff vide its Affidavit dated 29th August 2016 disclosed the said Consent Terms dated 28th June 2016.

4. Mr. Narichania informs the Court that now the Brazilian Court has taken on record the Consent Terms and pursuant thereto a sum of USD 2,501,115 is likely to be paid by Defendant No.6 (from the charter hire to be received from Petrobras) to Brasbunkers.

5. Mr. Narichania has submitted a chart which shows that after payment of the claim of Brasbunkers (from the charter hire of USD 3.8 million) a sum of approx. USD 1.3 million will be in excess and available to Defendant No.6. He accordingly submitted that without prejudice to all the rights and contentions of the Plaintiff. Defendant No.6 ought to be directed to deposit this excess amount of USD 1.3

million immediately upon receipt thereof from Petrobras to the credit of the present suit.

6. At the hearing on 19th September 2016, Mr. Khatri appearing on behalf of Defendant Nos.1 to 6 and 9 stated that he would take instructions from his clients on the exact figure which is in excess and will revert to the Court on 21st September 2016. At the hearing of 21st September 2016, Mr. Khatri surprisingly stated that there is no excess amount of charter hire due from Petrobras.

7. This comes as a rude shock to the Plaintiff. The Plaintiff is admittedly a secured creditor of Defendant No.9 vessel and is admittedly the assignee of the charter hire of all the Defendant vessels. In my view, the Plaintiff was justified in seeking such a relief especially owing to the various breaches already committed by Defendant No.6 of the orders of this Court as also its financial embarrassed state. Defendant No.6 has agreed to pay monies to Brasbunkers from the charter hire of Defendant No.9 vessel. As stated earlier, the charter hire of Defendant No.9 vessel has been assigned to the Plaintiff. Brasbunkers are unsecured creditors who benefit from this payment at the cost of the Plaintiff. These Consent Terms were entered, into keeping the Plaintiff in the dark. This conduct to say the least is deceitful. In fact the Plaintiff and this Court became aware of the Consent Terms dated 28th June, 2016 between Brasbunkers and Defendant No.6 only upon such disclosure

being made by Defendant No.6 by its Affidavit dated 29th August, 2016. Defendant No.6 had no right to enter into these Consent Terms dated 28th June, 2016 without permission of the Plaintiff as the charter hire has been assigned to the Plaintiff. The Plaintiff agreed to permit the charter hire (though the Defendant no. 9 vessel's charter hire is assigned to the Plaintiff) to be used to meet operational expenses of Defendant No.9 vessel. Defendant No.6 in breach of this understanding and agreement wrongfully entered into Consent Terms with Brasbunkers. What is worse is that the Consent Terms contemplate payment to Brasbunkers (from the charter hire of Defendant No.9 vessel) for claims by Brasbunkers against another vessel Malaviya 29 (M29) apart from Defendant No.9 vessel. The vessel M29 is not mortgaged to the Plaintiff. Defendant No.6 had no right to make a commitment to pay dues of M29 from the charter hire of Defendant No.9 vessel. The conduct of Defendant No.6 is clearly malafide. Be that as it may, the Plaintiff's interest needs protection. Defendant No.6 is accordingly directed not to utilize the sum of USD 3.8 Million to pay Brasbunkers unless it obtains leave of this Court. Further in light of the misconduct of Defendant No.6, they are also directed to file an Affidavit within one week from today with a certificate from their Auditors giving a summary of the fund flow of Defendant No.6 and how the charter hire of Defendant No.9 vessel has been utilized in the last 9 months. Defendant No.6 is also directed to disclose in the Affidavit how and why they now say that no excess

charter hire in respect of Defendant No.9 vessel is available to be deposited in this Court. Mr. Khatri states that Defendant No.6 will file the Affidavit as directed.

8. Defendant No.6 is ordered and directed to keep the Plaintiff informed from time to time about the status of these monies to be received from Petrobras. Defendant No.6 is also ordered to reply within 3 working days of receipt of any communication from the Plaintiff or its Advocates seeking information regarding the payment of charter hire by Petrobras.

9. In so far as the movement of Defendant No.9 vessel from Brazil to Curacao is concerned, Defendant No.6 was required to move Defendant No.9 vessel to Curacao from Brazil on or before 29th August 2016. Mr. Narichania states that to date, no action has been taken by the Defendant No.6 to comply with the terms of the order dated 23rd August, 2016. Mr. Khatri on behalf of Defendant No.6 states that Defendant No.6 is unable to comply with the order to move the vessel from Brazil to Curacao due to pending claims against Defendant No.9 vessel and the orders passed by the Brazilian Courts.

10. This situation has been brought about by the default of Defendant No.6. The Plaintiff continues to suffer because of the misdeeds of Defendant No.6.

11. Mr. Narichania on behalf of the Plaintiff states that if Defendant No.9 vessel remains in Brazil, the objective of the Plaintiff in seeking the reliefs as per the order dated 23rd August 2016 for movement of Defendant No.9 vessel will be defeated. He further submits that each days delay is working to the prejudice of the Plaintiff (who are the secured mortgagees of the Defendant No.9 vessel). In view of Defendant No.6 expressing inability to comply with the order dated 23rd August 2016, the Plaintiff Bank has (without prejudice to its rights and contentions and without relieving Defendant No.6 of its obligation) volunteered to sail Defendant No.9 vessel out of Brazil to Curacao, negotiate and settle the claims with the various creditors of the Defendant No.9 vessel in Brazil on the best possible terms if the claims are found to be tenable.

12. Mr. Narichania however states that:

- (a) the Plaintiff however can only do so as an agent of the Sheriff of Mumbai and with leave of this Court,
- (b) that in the event of any settlement of claims fructifying and the Plaintiff making such payment to the creditors, the payment should be treated as Sheriff's costs, charges and expenses to have a first charge and priority on the sale proceeds of Defendant No.9 vessel.

13. Mr. Khatri states that:

(a) Defendant No.6, has no objection if the Plaintiff takes all necessary steps as agent of the Sheriff of Mumbai to sail the vessel out of Brazilian waters including the negotiating and settling of all claims with the creditors of Defendant No.9 vessel,

(b) that payment of claims of the creditors in Brazil of Defendant No.9 vessel by the Plaintiff may be treated as Sheriff's costs, charges and expenses to have a first charge and priority over the sale proceeds of Defendant No.9 vessel.

14. As per clause 11 of the consent terms dated 3rd October 2015, it is the obligation of the Defendant No.6 to make payment to the master, crew wages and the disbursements and operating expenses including the payment of bunkers with respect to all the Defendant vessels.

15. The claims of the Plaintiff against Defendant No.6 is about USD 34 Million plus with interest, costs and legal fees. It is the obligation of Defendant No.6 to settle these claims of the various creditors in Brazil. The Plaintiff however in order to protect its security has without prejudice to all its rights and contentions offered to do the same on the terms stated above.

16. In light of the facts above, the Court grants the Plaintiff liberty to act as an agent of the Sheriff of Mumbai to negotiate and settle claims of creditors in Brazil

of Defendant No.9 vessel. Such payment by the Plaintiff to the creditors if made shall be treated as Sheriff's costs, charges and expenses to rank as first charge and priority over the sale proceeds of Defendant No.9 vessel. Should the Plaintiff make payment of any of the creditors of Defendant No.9 vessel, and/or the vessel M29, the Plaintiff shall obtain valid receipts from the creditors and submit the same in Court with proof of remittance and details of the claims.

17. At the hearing of the Notice of Motion on 23rd August 2016, prayer (h) had been kept in abeyance, while passing the order dated 23rd August 2016. Since Defendant No.6 has to date failed to take steps to sail the vessel from Brazil to Curacao, the reliefs in prayer (h) are all the more necessary and are accordingly granted. Additionally the Plaintiff is at liberty to appoint a master mariner (as supernumery) to board the vessel at Brazil on its onward journey from Brazil to Curacao.

18. It is clarified that all costs, charges, expenses, dues, levies, duties etc. incurred by the Plaintiff to sail Defendant No.9 vessel from Brazil to Curacao shall rank as Sheriff's costs, charges and expenses to rank as first charge and priority over the sale proceeds of Defendant No.9 vessel.

19. The Plaintiffs are at liberty to sail Defendant No.9 vessel from Brazil to Curacao and are also at liberty to settle claims and remove impediments/ obstacles etc. for sailing away Defendant No.9 vessel from Brazil to Curacao. The liberty granted to the Plaintiff as above does not absolve in any manner Defendant No.6 of its obligations to comply with orders of this Court.

20. Defendant No.6 is directed to render all possible assistance and cooperation to the Plaintiff including making necessary applications if any as requested by the Plaintiff.

The Notice of Motion is accordingly disposed off with costs.

(S. J. KATHAWALLA, J.)