

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**ADMIRALTY & VICE ADMIRALTY JURISDICTION****NOTICE OF MOTION (L) NO.74 OF 2017****IN****COMMERCIAL ADMIRALTY SUIT (L) NO.51 OF 2017**

S.R.K. Chemicals Ltd. ... Applicant

In the matter between

Pacific Gulf Shipping (Singapore) Pte. Ltd. ... Plaintiff

Versus

S.R.K. Chemicals Ltd. & Anr. ... Defendants

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Mr. Ashwin Shanker, a/w. Mr. Bimal Rajasekhar, for the Plaintiff.

Mr. Rahul Narichania, Senior Advocate, a/w. Mr. Prathamesh Kamat, Mr. Shiv Iyer, and Ms. Aditi Maheshwari, i/b. Ganesh & Co., for Defendants/Applicant in NMCDL/74 of 2017.

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CORAM : S.C.GUPTE, J.

DATED : 1 SEPTEMBER 2017

JUDGMENT:

. By this Notice of Motion, the Applicant (original Defendant No.1) prays for release of 20,000 MT of salt kept as a security and lying at an open yard at Kutch in Gujarat in lieu of arrested cargo laden / to be laden on board the vessel M.V. SHENG CHENG HAI at Kandla Port in Gujarat in the present admiralty suit, and for damages towards expenses incurred by the Applicant for storage of the goods. The notice of motion is

on the basis that the arrest order obtained in respect of the cargo, for release of which this security is kept, is wrongful.

2. The short facts of the case may be stated as follows :

The Plaintiff is a company based in Singapore, carrying on business of chartering of vessels. Defendant No.1 is a salt trader and exporter, whereas Defendant No.2 is said to be cargo of 20,000 MT of industrial salt laden/to be laden on board a particular vessel, namely, M.V. SHENG CHENG HAI. The Plaintiff's claim in the present admiralty suit arises out of a voyage charterparty agreement between the Plaintiff (as owner) and Defendant No.1 (as charterer) for carriage of salt by the vessel, M.V. PACIFIC PIONEER, from the load port of Kandla to the discharge port of Chittagong. The claim is on the basis that the chartered vessel incurred demurrage of USD 8942.73 and USD 134,506.68, respectively, at the load and discharge ports under the voyage charterparty contract, which provided for demurrage at the rate of USD 7750 per day of delay in conducting loading and discharging operations. Relying on laytime calculations and correspondence between the parties in this behalf, the Plaintiff laid a claim and invoked the arbitration agreement between the parties for arbitration in London. Based on this claim, the Plaintiff proceeded with the present action *in rem* against Defendant No.2 cargo owned by Defendant No.1. The claim formulated in the particulars annexed to the plaint comprises of outstanding demurrage, interest and costs in the sum of USD 221,656.29. By an order dated 10 February 2017, on an ex-parte application of the Plaintiff, Defendant No.2 cargo was arrested by this Court. On 13 February 2017, at the request of Defendant

No.1, against the security of 20,000 MT of industrial salt belonging to Defendant No.1 and lying in an open yard at Kutch in Gujarat, the order of arrest of 10 February, 2017 was vacated and the vessel M.V. SHENG CHENG HAI laden with Defendant No.2 cargo was allowed to sail. Defendant No.1 has now applied for release of this security, challenging the arrest as impermissible and wrongful.

3. The central question which falls for consideration of this Court in this motion is whether and, if at all, in what circumstances, arrest of cargo is permissible under the admiralty jurisdiction of this Court, particularly if the arrest is sought *de hors* the ship or vessel. To answer this question one needs to understand the fundamentals of an admiralty action in the context of the device of arrest – its necessity, the purpose sought to be achieved thereby, and then consider whether the present arrest of cargo fits into this scheme of things.

4. As always, we must start our quest with first ascertaining the applicable law and then see if it, at all, countenances and if so, to what extent, arrest of cargo. As the Supreme Court held in the celebrated case of **M.V. Elisabeth vs. Harwan Investment and Trading Co.**¹, the powers of our admiralty courts are traceable, in the first place, to the Admiralty Courts Act, 1861, through the Letters Patent of 1865 read with the Colonial Courts of Admiralty Act, 1890 and the Colonial Courts of Admiralty Act, 1891. By the last mentioned two Acts, the High Courts established by Letters Patent were invested with the same admiralty jurisdiction as was vested in the High Court of England. Then came the Government of India

1 1993 Supp (2) SCC 433

Act, 1915, declaring that all High Courts established by Letters Patent were courts of record and had such original and appellate jurisdiction including admiralty jurisdiction as had been vested in them by Letters Patent. The Government of India Act, 1935, which followed, reiterated this position and provided that the jurisdiction, the law administered and the powers of judges of these High Courts were the same as immediately prior to the commencement of Part III of that Act (Sections 220 and 223). Finally, the Constitution of India, by Article 225, declared that this jurisdiction, law and powers were the same as immediately before the Constitution. The effect of these laws, read in the context of what the Colonial Courts of Admiralty Act, 1890, as held by the Supreme Court in **M.V. Elisabeth**, did, was to “*equate the admiralty jurisdiction of Indian High Courts over places, persons, matters and things to that of the English High Court*”, and as on the date of coming into force of the Constitution of India, the Indian High Courts exercised the same jurisdiction as the English High Court would on that date over these matters. What **M.V. Elisabeth** basically did was not just to bring up the admiralty jurisdiction of our High Courts to that of the English High Court as of the date of the Constitution, but to take it even upto the various International Conventions including the Arrest Convention of 1952. The Court held :

“These conventions contain the unified rules of law drawn from different legal systems. Although many of these conventions have yet to be ratified by India, they embody principles of law recognized by the generality of maritime States, and can therefore be regarded as part of our common law.”

Our High Courts, accordingly, could apply the law and administer admiralty jurisdiction by drawing upon these International

conventions. The later case of the Supreme Court, **Liverpool & London S.P. & I. Association Ltd. vs. M.V. Sea Success I**², followed up and took the matter further so as to include within the jurisdiction of the Indian admiralty courts the authority and powers under the later international convention, namely, Arrest Convention of 1999. The Court held as follows :

“59. M.V. Elisabeth is an authority for the proposition that the changing global scenario should be kept in mind having regard to the fact that there does not exist any primary act touching the subject and in absence any domestic legislation to the contrary; if the 1952 Arrest Convention had been applied, although India was not a signatory thereto, there is obviously no reason as to why the 1999 Arrest Convention should not be applied.

60. Application of the 1999 Convention in the process of interpretive charges, however, would be subject to: (1) domestic law which may be enacted by Parliament; and (2) it should be applied only for enforcement of a contract involving public law character.”

The Supreme Court in **Sea Success** also sounded a caution that though *“the jurisdiction of the courts in India is akin to the jurisdiction of the English courts but the same would not mean that the Indian High Courts are not free to take a different view from those of the English courts. As regards application of a statute law the India High Courts would follow the pre-independence statute but Indian courts need not follow the judge-made law.....M.V. Elisabeth defines the jurisdiction of the court but does not limit or restrict it.”*

5. That completes our survey of the applicable law. Indian

2 (2004) 9 SCC 512

Courts, at the end of it we may note, are free to apply all pre-independence English statutes, though not necessarily the judge-made law of that era, and even apply the principles of the two international conventions, that is to say, the Arrest Conventions of 1952 and 1999 insofar as arrests in their admiralty jurisdiction are concerned. (We will consider later if, in addition to these, our Courts can even apply the principles or laws of other maritime nations including the U.S. and Australia, as contended by learned Counsel for the Plaintiff.)

6. Coming now to the matter of arrest, in olden times, the ordinary mode of commencement of an admiralty action was by arrest either of the person of the defendant or of his goods. Arrest of goods was quite as frequent as arrest of the ship, it being immaterial what the goods were, so long as they were the goods of the defendant and were within the admiralty jurisdiction at the time of arrest. The jurisdiction of the admiralty court was in fact founded on such arrest. By 1840, however, both arrest of the person and of property belonging to him had become obsolete. Arrest, either of person or property, had long ceased to be necessary in order to found jurisdiction. The admiralty law of later years instead conferred upon the claimant a right *in rem* to proceed against the ship or cargo in relation to which the claim arose. Such right was distinguished from a right *in personam* to proceed against the owner. The foundation of an action *in rem*, which is a peculiarity of the Anglo-American law, arises, as observed by the Supreme Court in the case of **M.V. Elisabeth** (supra), from a maritime lien. A maritime lien arises by operation of law and exists as a claim upon the property, secret and invisible, and may be defined as “*a privileged claim upon maritime property for service done to it or injury caused*

by it, and accruing from the moment when the claim attaches and travelling with the property unconditionally and enforced by means of an action *in rem*³. During the first half of the 19th century the ambit of admiralty procedure *in rem* was treated as co-terminus with the ambit of maritime lien. It was thought that when there was a maritime lien, the right to proceed *in rem* existed and that when there was no maritime lien, the right to proceed *in rem* did not exist. This belief found expression in the 1851 judgment of Privy Council in **The Bold Buccleugh** reported under the name of **Harmer vs. Bell**⁴. The Privy Council in that judgment observed that “a maritime lien is a foundation of the proceeding *in rem*, a process to make perfect a right inchoate from the moment the lien attaches and whilst it must be admitted that where such a lien exists, a proceeding *in rem* may be had, it will be found to be equally true, that in all cases where a proceeding *in rem* is the proper course, there a maritime lien exists, which gives a privilege or claim upon the thing, to be carried into effect by legal process.” What is important to note for our purposes is that the *res* to which the maritime lien attached was always directly connected with the cause of action. In fact, there was a complete absence of any reported case in the 100 years or so prior to 1840 in which an attempt to arrest any ship or property unconnected with the cause of action was ever made. That was in itself conclusive that the procedure *in rem* was not regarded in the admiralty court as extending to such other ship or property.

7. The maritime liens recognised by English law are those in respect of bottomry and respondentia bonds, salvage of property, seamen's wages and damage. The first statutory recognition of these liens in England

3 Griffith Price, *The Law of Maritime Liens* 1 (1940)

4 7 Moo. P.C. 267, 284.

came in 1840 when the Admiralty Court Act of 1840 was enacted, empowering the Admiralty Court to decide all questions as to the title or ownership of any ship or vessel, arising in any cause of salvage, damage, wages or bottomry. By clause (6) of that Act, jurisdiction was extended to decide all claims whatsoever in the nature of salvage for services rendered to or damage received by any ship or sea-going vessel or in the nature of towage, etc. The law on bottomry under the English jurisdiction was covered under Section 4 of the Admiralty Court Act, whereas the law on salvage was covered under Section 6 of that Act. Only maritime property could be the subject of salvage. Such property would be the ship, cargo or apparel or any other property belonging to it but did not include raft of timber, which did not form part of cargo. Damage done by or to a ship was covered under the maritime lien by Section 6 of the Admiralty Court Act, 1840. These provisions were retained and expanded by the Admiralty Courts Act of 1861, which was later replaced by the Administration of Justice Act, 1920. That was the position as on the date of coming into force of the Constitution of India. It can be safely asserted that these liens alone gave rise to a maritime action *in rem* in India on the date of the Constitution.

8. The Arrest Convention of 1952 adopted a list of maritime claims in Article 1, to secure which the judicial process of “arrest”, meaning detention of a ship, could issue. These included seventeen claims. The original subjects of maritime lien were thus substituted by a list of seventeen maritime claims for which arrest was permissible under the Convention. The Convention, however, did not make any exception to the original principle that no property other than that directly connected to the cause of action could be arrested, save and except the case of a sister

ship. Article 3 of the Convention provided for arrest of a ship. It laid down two necessary conditions for such arrest, namely, such ship must either be (a) the offending ship (which is, and when the action is brought, beneficially owned as respects all its shares or chartered by demise by the person who would be personally liable on the claim), or (b) any other ship (known as 'sister ship'), which is beneficially owned as respects all its shares when the action is brought by the party who, when the cause of action arose, was personally liable on the claim and was either the owner, or the demise charterer, of the offending ship.

9. Then came 1999 Arrest Convention with certain new developments. The list of claims, which gave rise to arrest, were increased from seventeen categories mentioned in the 1952 Convention to twenty two categories. Six new arrest heads were added after removing bottomry. The scope of applying jurisdiction under 1999 Arrest Convention was made wider. Such jurisdiction could be invoked even in respect of ships which fell under the jurisdiction of the contracting state without considering the flag of the contracting or not contracting state. Besides, unlike the 1952 Arrest Convention, the Convention of 1999 not only concerned sea going ships, but applied to other ships as well, though the contracting countries retained the right not to apply the convention to non-sea-going ships or ships with no flag of a contracting country. Though the 1999 Convention, thus, expands the scope of arrest, it nevertheless does not detract from the original requirement of the ship being either the offending ship or its sister ship, as defined above, for effecting the arrest.

10. It is thus beyond the pale of controversy that only that ship or

cargo can be subjected to arrest, which is directly connected with the cause of action. An example would be a ship or cargo, for the salvage of which expenditure had to be incurred by the claimants, or a ship which was involved in the damage caused by the accident to the claimant's property. The only exception would be the case of a sister ship. Insofar as cargo is concerned, arrests have been permitted in the case of either salvage or unpaid freight. The case of unpaid freight, of course, is intimately connected with the arrest of a ship. If and to the extent a ship is liable to arrest for any maritime claim against the owner or demise charterer, as the case may be, so is the unpaid freight receivable by the owner or demise charterer of that ship from any cargo-owner. This freight can be attached by subjecting the cargo on board the offending ship to arrest. Originally, there existed a maritime lien for freight, which is "consequential upon", and absolutely dependent on, the existence of a maritime lien on the ship earning the freight⁵. This lien was liable to be terminated by payment of freight to the shipowner or demise charterer, as the case may be. Cargo is also susceptible to a maritime lien in respect of claims based on bottomry and respondentia and salvage⁶. Other than for enforcement of these liens, there is no known case of arrest of cargo.

11. Two English cases on arrest of cargo make this point clear. On 16 September, 1865, the *Flora*, a Spanish barque, bound from Havana to Hamburg direct, with a cargo of tobacco, came into collision with the *Allan* in the British Channel, and put into Plymouth for repairs. On the very next day, the *Flora* and her cargo were arrested in a cause of damage in

⁵ *The Castlegate* (1893) A.C. 38

⁶ See, *Enforcement of Maritime Claims*, by D.C. Jackson (3rd Edition), P.459.

collision. On a motion to set aside that arrest, the Court held as follows⁷ :

“It is beyond all question that the cargo on board a ship which does damage to another ship in collision is in no respect responsible for the damage. It is equally clear that the freight due, the property of the owners of the ship doing the damage is attachable to make good that damage; and in ordinary cases, the cargo is arrested for the purpose of making the owners of the cargo, who at that time owe the freight to the shipowners, pay into court to answer the damage which the latter are bound to make good. But the cargo is liable to arrest for no other purpose whatever. The owners of the cargo are in no respect to blame for the delictus of the ship qua owners of the cargo. They have no right of interference or control over the conduct of the ship; and, therefore, to make them in any way responsible, would be against the first principles of justice.”

12. In another case of collision, **THE “LEO”**⁸, the Court held that the owners of a ship, having received damage from another ship, have no claim against the owners of the cargo laden on board the ship doing the damage. They, the owners of the cargo, have been guilty of no tort whatever. On the other hand, those who have received the damage are entitled to be indemnified out of the freight as well as the ship. The Court held :

“The freight in all but excepted cases, which I do not notice, being due to the owner of the ship, the Court gives its aid by arresting the cargo for the freight, that what is due to the owner of the ship doing the damage may be secured to those who receive the damage. Then, as the present plaintiffs have no claim against the owners of the cargo, and cannot impose any burden on them for the wrong committed by the ship, what is the proper measure of freight to be recovered. Manifestly that which is due from the owners of the cargo to the owners of the ship. What is that amount ? The amount of gross freight, less the deductions agreed

⁷ The Flora : Hilary Term, XXIX Vict. Vol.I. 45

⁸ THE “LEO” 198 LUSH. 445

to be allowed between them. ”

13. None of the Indian cases on arrest of cargo support the Plaintiff's application. A Division Bench of our Court in the case of **Best Food International Pvt. Ltd. vs. Navbharat International Ltd.**⁹ considered the arrest of cargo ordered by a learned Single Judge of our Court. The argument before the Court was that a suit to arrest the cargo on board a vessel would be maintainable because of the use of the word 'property' in Rules 929 to 931 and 939 to 941 of the High Court (Original Side) Rules. Cargo was impleaded as Defendant No.1 in that suit without impleadment of the vessel or its owner. Presentation of the plaint so framed under the admiralty jurisdiction of this Court was sought to be justified on the ground that the contract involving the cargo was a FOB contract, which presumed involvement of a vessel or a ship and accordingly a claim for breach of such a contract came within the purview of this Court's admiralty jurisdiction and the cargo could be sued in such capacity. The Court found that the contract like this did not involve any maritime element or maritime flavour.

14. In **M.V. Geowave Commander**¹⁰, a learned Single Judge of this Court considered whether this Court in exercise of its admiralty jurisdiction could arrest bunkers. The claim in the suit was against the bunkers on board with no claim against the vessel and independent of the vessel. The Court held that even if the bunker supplies are necessities and for a claim of necessities the vessel could be arrested, the same principle could not apply to the arrest of bunkers when there is no claim against the

9 2011 Supp Bom CR 283

10 2014 SCC OnLine Bom 1895

vessel and independent of the vessel. The Court went on to add that even the arrest of cargo or freight can only be upto the limited extent of the amount payable for the cargo or freight to the owner. The Court, in particular, observed as follows:

“In common law the freight is deemed earned only upon completion of voyage. Therefore, the owner of the cargo would pay for freight only when the cargo arrives at destination. In a situation where a person who has a claim against the owner of the ship brings an action in rem, he would also apply for and obtain the arrest of the cargo on board so that when the owner of the cargo comes to take delivery of the cargo, he would deposit the freight payable to the credit of the suit. Otherwise the owner of the ship would appropriate the freight. Similarly, if the freight is yet to be paid to the owner of the vessel against whom the claim is made, to that extent the freight could be arrested. Nothing more than that.”

15. In **Bulk Ship Management S.E.A.**¹¹, a learned Single Judge of our Court affirmed that the Court of admiralty has no authority to grant process against freight simplicitor for the purposes of enforcing a maritime claim/lien upon it, save and except as consequential upon and in connection with the process against the ship and that if there was no right to proceed against the ship, there would be none against the freight. The Court held that no process having for its sole object the attachment of cargo in order to enforce a maritime lien for freight can issue. The Court held that any claim in respect of freight is parasitic in character and depended upon the entitlement to proceed against the vessel.

16. Learned Counsel for the Plaintiff relies on American, Australian and Canadian statutes, which permit arrest of cargo without

¹¹ 2013 (3) Bom CR 380

reference to the arrest of the ship. Learned Counsel submits that under the principles of **M.V. Elisabeth** read with the subsequent case of **M.V. Sea Success I**, our Courts should recognize the remedies adopted by American, Australian and Canadian Maritime Law. The argument does not merit countenance. The principle of **M.V. Elisabeth**, which was reiterated by **M.V. Sea Success I**, for deriving powers of arrest from various International Conventions was that these conventions contain unified rules of law drawn from different legal systems and that although many of these conventions are yet to be ratified by India, they embody principles of law recognized by the generality of maritime states, and can therefore be regarded as part of our common law. It is one thing to adopt these principles recognized by the generality of maritime states as part of our common law, but quite another to actually incorporate statutory provisions of particular maritime nations as part of our law. These former conventions could be termed as International common law or transnational law rooted in and evolved out of the general principles of national laws, and in the absence of any specific statutory provisions in our municipal law, can be adopted and adapted by Indian Courts to supplement and complement our national statutes on the subject. These principles, as held in **M. V. Elisabeth**, “*aid the court in filling up the lacunae in the Merchant Shipping Act and other enactments concerning shipping.*” There is one more aspect, which we could bear in mind in this regard. The general observations in **M.V. Elisabeth** that the powers of the court are plenary and unlimited unless barred expressly or by necessary implications and absent such curtailment of jurisdiction, all remedies which are available to the court to administer justice are available to a claimant against a foreign ship found within the jurisdiction of the High Court concerned, do not

suggest that our courts could order arrest of cargo hitherto unknown to our law. This is not a procedural matter, where our courts have to evolve their own procedure to meet with any contingency and whilst doing so, seek aid of any law or legal principle adopted by a foreign jurisdiction. Arrest of cargo in connection with a claim unconnected with it would be a matter of substantive law and not just a procedural issue. It is a matter pertaining to jurisdiction. It must be shown that the Admiralty Court does have such jurisdiction, either with reference to a statute or the authority of a decided case of our Court. As I have explained above, neither law nor authority supports such a proposition.

17. Accordingly, the arrest of cargo in the present case cannot be sustained.

18. In the premises, the Notice of Motion is made absolute in terms of prayer clauses (a) and (b). Insofar as prayer clause (d) is concerned, the same is kept open for being argued at the hearing of the suit. Notice of Motion is disposed of accordingly. Costs to be costs in the cause.

19. Learned Counsel for the Defendants submits that since the motion is allowed by holding that this court, in the first place, did not have jurisdiction to arrest Defendant No.2 cargo and the jurisdiction assumed by this court being solely on the basis of this arrest, the court should order dismissal of the suit *in praesenti*. Learned Counsel relies on the judgment of this court in the case of **Siva Bulk Limited vs. m.v. AODAVAO**¹². Learned

¹² Commercial Suit No.334/2016, order dated 18 July 2017

Counsel for the Plaintiff contests this position. Learned Counsel submits that the court has jurisdiction even in personam insofar as the claim forming part of the present suit is concerned. Learned Counsel submits that he would like to make detailed submissions on the issue.

20. In the premises, this court is of the view that in the interest of justice, the question as to whether the suit should be dismissed on the ground suggested by learned Counsel for the Defendants should be framed as a preliminary issue under Order 14 Rule 2 of the Code of Civil Procedure, since the issue is a pure question of law, in any event to be decided on the basis of pleadings of the parties before the court, and likely to dispose of the whole suit if decided in favour of the Defendants. Accordingly, the following issue is framed as a preliminary issue under Order 14 Rule 2 of the CPC.

“Whether, considering the fact that the assumption of admiralty jurisdiction of this court is itself held to be impermissible, the suit ought to be dismissed without reference to any other issues in the suit?”

21. The admiralty suit to appear for hearing of this preliminary issue on 22 September 2017.

22. Learned Counsel for the Plaintiff seeks stay of this order for a period of four weeks. Learned Counsel for the Defendants objects to continuation of the stay. Learned Counsel submits that this court having come to the conclusion that the arrest is *ex facie* bad in law and

impermissible, the present application for stay which results into continuation of the arrest should not be entertained. Considering the fact that the arrest has been in place for more than six months, this court is of the view that it can be continued for a further period of three weeks subject to the Plaintiff securing the Defendants for the costs resulting thereby. Such costs would occur both by reason of preventing the Defendants from disposing of their goods and also of having them to store the goods in pursuance of the stay order. On a broad estimate, the costs are estimated at Rupees Two lakhs for a period of three weeks from today. The Plaintiff shall accordingly deposit in this court a sum of Rupees Two lakhs within a period of one week from today. Subject to such deposit, the security ordered by this court on 13 February 2017 shall continue to operate for a further period of three weeks from today. In case this amount is not deposited in the court within one week, the stay shall stand vacated at the expiry of one week.

(S.C. GUPTE, J.)