

**IN THE HIGH Court OF JUDICATURE AT BOMBAY
ADMIRALTY AND VICE ADMIRALTY JURISDICTION
IN ITS COMMERCIAL DIVISION
COMMERCIAL SUIT NO.334 OF 2016**

Siva Bulk Limited

....Plaintiff

Vs.

m.v. Aodabao & Anr.

....Defendants

Mr. Bimal Rajasekhar i/b. Mr. Ashwin Shankar for plaintiff.

Mr. Prashant Pratap, senior advocate a/w. Mr. Hari Wadhwana i/b.
Mr. Ashwini Sinha for defendant no.1.

**CORAM : K.R.SHRIRAM, J.
RESERVED ON : 23rd JUNE, 2017
PRONOUNCED ON : 18th JULY, 2017**

PC.:

1 On 9th June 2017, when the suit was listed for directions, Mr. Pratap, learned senior counsel for 1st defendant made an oral application that the suit should be dismissed on the ground that the arrest of 1st defendant vessel, on the basis of which this Hon'ble Court had assumed jurisdiction over the vessel, had been set aside. The submission was that where the sole ground of jurisdiction for filing an admiralty suit against a vessel was the presence of the vessel which is arrested, the Hon'ble Court ceases to have jurisdiction once the arrest is set aside and the suit will have to be dismissed as against the vessel. This Court directed that the matter be listed for arguments on this limited issue of law and was heard on 23rd June, 2017.

Plaintiff's counsel, Shri Rajasekhar, raised a preliminary objection that (a) such an application cannot be made orally in this matter and 1st defendant should take out an application under Order 7 Rule 11 of the Code of Civil Procedure, 1908 for the relief sought and (b) the Division Bench of this court has held whether the order of arrest of the vessel was wrongful would, in the facts and circumstances of the case, require further adjudication and the observations on this aspect are prima facie in nature.

2 It should be noted that on 9th June 2017, plaintiff's counsel agreed to withdraw the suit as nothing survived, but set a precondition that 1st defendant should make a statement that they will not claim from/sue plaintiff for damages for wrongful arrest. Mr. Pratap refused, and correctly so, to make any such statement. It should be noted that plaintiff as required under Rule 941 of the High Court (O.S.) Rules have given an undertaking to the Court to pay such sum by way of damages as the Court may award as compensation in the event of a party affected sustaining prejudice by such order.

3 It is also necessary to note that the Division Bench also kept open only the issue as to whether the arrest was wrongful to be considered by the Single Judge, at the stage of deciding the notice of motion, which the owners of defendant no.1 vessel may take out. We are not deciding that at this point of time.

4 What the Court is deciding is when the Court had exercised jurisdiction over a vessel, by arresting the vessel, on the basis that she was a sister vessel of the vessel against which plaintiff had a claim, should the suit be kept pending or be dismissed when the Court comes to a conclusion that the arrested vessel was not a sister vessel and recalls/sets aside the order of arrest. Would it mean the Court has revoked its jurisdiction?

5 Both counsel tendered detailed written submissions.

6 The suit is filed *in rem* against the 1st defendant vessel M.V. Aodabao and 2nd defendant vessel M.V. Ao Hong Ma. It is the case of plaintiff that they have a maritime claim in connection with a charterparty entered into with one Cross Ocean Shipping Ltd. Samoa for charter of 2nd defendant. Plaintiff sub-chartered 2nd defendant to one Al Ghurair Resources LLC Dubai for carriage of a cargo of wheat from Canada to the Persian Gulf. Enroute, the said vessel was arrested at Singapore and could not perform the voyage to the port of discharge. The cargo was trans-shipped and loaded on another vessel chartered by Al Ghurair Resources LLC Dubai who claimed various amounts from plaintiff under the sub-charterparty. Plaintiff terminated their charterparty with Cross Ocean Shipping Ltd. and claimed various amounts towards the losses and damages suffered by them on account of a breach of contract by Cross Ocean Shipping Ltd.

7 Accordingly, plaintiff claims that they have a maritime claim arising out of their charterparty with Cross Ocean Shipping Ltd. for charter of 2nd defendant.

8 Plaintiff, however, sought to arrest 1st defendant on the ground that 1st defendant is a sister ship of 2nd defendant. The specific pleading of plaintiff in amended para 2A of the plaint was *“The plaintiff states that the COSCO is the beneficial owner of the 1st and 2nd defendant vessels.....”*.

9 The 1st defendant vessel was arrested pursuant to an *ex-parte* order of arrest dated 7th March, 2016.

10 An application being Notice of Motion (L) No.843 of 2016 was moved by 1st defendant to *“vacate and/or set aside the order of arrest of the 1st defendant vessel”*. Further prayer made was that plaintiff be ordered to secure the claim of 1st defendant for damages for wrongful arrest.

11 The Ld. Single Judge by a judgment dated 6th June 2016 unconditionally vacated the *ex-parte* order of arrest. The Ld. Single Judge observed in paragraph 26,

“I am therefore of the view that plaintiff have miserably failed in establishing even prima facie, that the Beneficial Owner of defendant no.1 vessel and defendant no.2 vessel is COSCO. As against this, defendant no.1 has produced direct primary evidence in regard to the ownership of the first defendant vessel and the shareholders of the registered owner of the first defendant vessel..... It would be vexatious and operative and an abuse of the process of the Court to maintain the arrest of defendant no.1. No equity minded Court would countenance continuation of the order of

arrest for a single day more in the facts and circumstances of the case. The order of arrest of defendant no.1 vessel was thus wrongfully obtained. In my view plaintiff have failed to satisfy the test for maintaining the order of arrest. In view therefore, the order of arrest is vacated unconditionally." (emphasis applied).

The Ld. Single Judge also granted 1st defendant liberty to take out a fresh motion seeking the loss caused to it which shall be decided on its own merit.

The Ld. Single Judge also ordered plaintiff to pay costs of the Notice of Motion to 1st defendant. Mr. Pratap stated costs have not been paid till date.

12 An appeal was filed by plaintiff which was summarily dismissed by an order dated 13th June, 2016.

13 Mr. Pratap submitted that since the suit is an action *in rem* and the Court assumes jurisdiction by passing an order for arrest of 1st defendant vessel which is granted *ex-parte* and since the order of arrest has been vacated unconditionally after hearing 1st defendant, the question that arises is whether the suit can now be prosecuted or should stand dismissed once the order of arrest is vacated unconditionally in the facts and circumstances of the case.

14 It is necessary to consider the nature of an action *in rem*. In order for plaintiff to show that the Court has jurisdiction to pass an order of

arrest in an action *in rem*, plaintiff has to demonstrate the following:

(a) That defendant vessel, which is sought to be arrested, is within jurisdiction.

(b) That plaintiff has a maritime claim and for this purpose plaintiff has to show that its claim falls under one or more of the maritime claims set out in Article 1(1) of the Arrest Convention, 1999.

(c) plaintiff has to show that the person who owned the ship at the time when the maritime claim arose is liable for the claim and is owner of the ship when the arrest is effected. In the event, the maritime claim is also a maritime lien then there is no need to show personal liability of the owner as a maritime lien attaches to the vessel (*res*) irrespective of who the owner is.

(d) Alternatively, plaintiff has to show that the vessel sought to be arrested is a sister ship of the vessel in respect of which the maritime claim arose, i.e., the owner of the two vessels is one and the same.

In the event, plaintiff is unable to satisfy all these four requirements, which are a pre-requisite to the exercise of jurisdiction, then the order of arrest has to be refused or *ex-parte* order, if granted, is liable to be vacated and/or recalled.

15 In the present case an *ex-parte* order of arrest of 1st defendant was granted based on the averments made in the plaint that 1st defendant

is a sister ship of 2nd defendant and the common owner is COSCO. 1st defendant filed an Application to vacate the order of arrest on the ground that 1st defendant is not a sister ship of 2nd defendant and COSCO is not the owner of 1st defendant. 1st defendant also produced the ownership documents of the vessel which showed that the registered owner was Aodabao Shipping (HK) Company, Hong Kong, whose shareholders and directors were two individuals, Mr. Sun Xian Liang and Mr. Chen Dong Sheng as per the document issued by the Hong Kong Companies Registry. This demonstrated *ex-facie* that the registered owner of 1st defendant was not COSCO which stands for China Ocean Shipping Company, an entity owned by the Government of the Republic of China.

16 Consequently, the jurisdictional test that the registered owner of 1st defendant is also the owner of 2nd defendant was not met. The Court, therefore, had no jurisdiction to arrest 1st defendant vessel. In the light of this the order of arrest was vacated unconditionally.

17 Once an order of arrest in an action *in rem* is set aside on the ground that no case is made out that defendant vessel which was arrested is a sister ship of the vessel in respect of which the claim arose then the action comes to an end and the suit is liable to be dismissed. This is because the Court assumes jurisdiction by an order of arrest granted *ex-parte*. If it is shown by defendant that the jurisdictional test is not met

and the Court erroneously exercised jurisdiction, then the Court will vacate the order of arrest. In such a situation, when the order of arrest by which the Court assumed jurisdiction is vacated and/or set aside this means that the Court is recalling its order exercising jurisdiction. Once this happens the action *in rem* comes to an end.

18 The following passages from the judgment of the Apex Court in the case of *m.v. Elizabeth*¹ set out the nature of an action *in rem* and its purpose.

In Paragraph 48 “A ship may be arrested (i) to acquire jurisdiction; or (ii) to obtain security for satisfaction of the claim when decreed; or.....”.

In Paragraph 54 “a personal action may be brought against defendant if he is either present in the country or submits to jurisdiction. If the foreign owner of an arrested ship appears before the Court and deposits security as bail for the release of his ship against which proceedings *in rem* have been instituted, he submits himself to jurisdiction.”

In Paragraph 55 “such an action may constitute an inducement to the owner to submit to the jurisdiction of the Court thereby making himself liable to be proceeded against by plaintiff *in personam*”.

In Paragraph 56 “it is by means of an action *in rem* that the arrest of a particular ship is secured by plaintiff. If the owner does not submit to the jurisdiction and appear before the Court to put in bail and release the ship, it is liable to be condemned and sold to satisfy the claims against her. If, however, the owner submits to jurisdiction and obtains the release of the ship by depositing security, he becomes personally liable to be proceeded against *in personam* in execution of the judgment if the amount decreed exceeds the amount of the bail. The arrest of the foreign ship by means of an action *in rem* is thus a means of assuming jurisdiction by the competent Court” (emphasis supplied).

In Paragraph 58 “the real purpose of arrest in both the English and the Civil Law systems is to obtain security as a guarantee for satisfaction of the decree, although arrest in England is the basis of assumption of jurisdiction, unless the owner has submitted to jurisdiction.

In Paragraph 82 “the admiralty jurisdiction of the High Court is dependent on the

1. (1993) 2 SCC 433

presence of the foreign ship in Indian waters and founded on the arrest of that ship”.

19 If an *ex-parte* order of arrest is made, the owner of defendant vessel is entitled to contest the arrest by either applying to the Court to set aside the arrest forthwith without giving security or to provide security on a without prejudice basis and apply to the Court to set aside the arrest. Defendant can apply to the Court to set aside the arrest on the ground that the jurisdictional test necessary for an order of arrest to be granted is not satisfied by plaintiff. For this, defendant can show that (a) the vessel was not within jurisdiction when the order of arrest was obtained or (b) there is no maritime claim as defined under the Article 1(1) of the Arrest Convention or (c) the owner of defendant vessel is not liable in respect of the maritime claim or (d) in the case of a sister ship arrest, the owner of defendant vessel which has been arrested is not the owner of the vessel in connection with which the claim arose.

20 If defendant is able to satisfy the Court on the above, then the Court will ordinarily vacate and/or set aside the order of arrest. If the Court does so, it means that the Court is satisfied that it has no jurisdiction to arrest defendant vessel.

21 Mr. Rajshekhar submitted,

(a) once the Court has correctly exercised jurisdiction, it will continue to have jurisdiction and it has been so held in **Wallace**

Pharmaceuticals Pvt. Ltd. vs. m.v. Bunga Bidara². Counsel submitted that in that matter, once the arrest was vacated on account of lack of a *prima facie* case, defendant vessel took out an application for dismissal of the suit as against them on two grounds – one of the Court not having jurisdiction, on account of the setting aside of the arrest and the other of the suit deserving to be dismissed in view of the facts and circumstances of that case and the Court disagreed with defendant vessel and held, in paragraph 15 “*The submission of Mr. Pratap that once the order of arrest is vacated and security furnished is ordered to be returned, the Court loses its jurisdiction or ceases to have jurisdiction cannot be accepted..... Once the Court has correctly exercised jurisdiction, it will continue to always have jurisdiction.*” According to Mr. Rajshekhar the said case applies squarely to the present case as well.

(b) 1st defendant seeks to distinguish *Bunga Bidara* (supra) by contending that, there, since the vessel arrested was the very same vessel in respect of which the claim arose, the Court had “*correctly exercised jurisdiction*” even though eventually it came to a finding that the arrest was not valid. The submissions of Mr. Pratap that such a finding did not make the suit without jurisdiction since the finding was on the merits is an incoherent argument which, if accepted, would lead to a situation where a sister ship arrest which is vacated will result in a dismissal of the suit on the ground of lack of jurisdiction while an action against the offending ship

itself will not similarly be dismissed on setting aside of the order of arrest.

(c) 1st defendant's submission is based on the logic that a valid arrest is what grants the Court jurisdiction over a vessel. Once the arrest is held to be invalid, such jurisdiction goes. The sequitur of defendant's submission must be that the vacating of an order of arrest results in the Court not having jurisdiction in all such cases. Within the framework of its argument, there is no space for an exception that in certain cases, the vacating of an order of arrest will not result in the Court not having jurisdiction. If a claim can continue irrespective of whether plaintiff makes a *prima facie* case as long as its claim is against the offending vessel, defendant's "jurisdictional test" theory falls.

(d) plaintiff, therefore, submits that the dicta in *Bunga Bidara* (supra) applies squarely to 1st defendant's present submission. The Court "correctly exercised jurisdiction" on account of the presence of the vessel in territorial waters. The vessel's presence is the only test for whether the Court has "correctly" exercised jurisdiction. The Court continues to have jurisdiction notwithstanding that plaintiff failed to make out a *prima facie* case to sustain the arrest.

22 I do not agree with Mr. Rajasekhar. *Bunga Bidara* (supra) was the case where an order of arrest was obtained in respect of 1st defendant vessel *m.v. BUNGA BIDARA* by plaintiff for breach of contract of carriage.

Alternative case was also pleaded in tort. The Ld. Single Judge and the Division Bench both found that plaintiff has not made out any *prima facie* case to maintain the action either in contract or in tort. Consequently, security which was given for release of the vessel on a without prejudice basis was ordered to be returned. The Supreme Court also dismissed the appeal.

A Notice of Motion was taken out by defendant no.2 for dismissal of the suit as against defendant nos.1 and 2. This Court allowed the notice of motion and dismissed the suit. This Court observed in paragraph 15 that merely because the order of arrest is vacated and security furnished is ordered to be retained the Court does not cease to have jurisdiction. It was further observed that “*once the Court has correctly exercised jurisdiction it will continue to always have jurisdiction*” (emphasis supplied).

The above observation has to be considered in the context of the facts of that case. The order of arrest was recalled and/or vacated not on the ground that the jurisdictional test necessary for the purpose of arrest of a ship was not satisfied. The order of arrest was vacated on the ground that there was no cause of action in contract or in tort against defendant vessel and its owners. This is a finding on the merits of the case and not a finding on jurisdiction. It was for that reason the Court observed in paragraph 15 that “*Once the Court has correctly exercised jurisdiction, it will*

continue to always have jurisdiction”.

23 The question, therefore, is whether the Court has correctly exercised jurisdiction in this case. Mr. Pratap submits that the Court has not correctly exercised jurisdiction since the jurisdictional requirement that 1st defendant is a sister ship of 2nd defendant, has not been met or satisfied and hence the order of arrest was vacated.

24 Thus the observations of the Court in paragraph 15 of the judgment in *Bunga Bidara* (supra) have to be read in the context of the facts and circumstances of that case. There it was the absence of a *prima facie* case on merits where plaintiff failed to show that his goods were in fact shipped on board defendant vessel, that led to the order of arrest being vacated and the suit being dismissed on the ground that there was no cause of action against defendant vessel either in contract or in tort. And more importantly it was only the “*in rem*” action against the vessel and its owner that was dismissed and not the “*in personam*” action against defendant nos.3 and 4. This is completely different from the present case of *M.V. AODABAO* which is purely an action *in rem* with no other *in personam* defendant.

25 Once it is held that the vessel arrested is not a sister ship of the vessel in respect of which the claim arose then the Court does not have

jurisdiction to arrest the vessel in question. In the event the order of arrest is vacated and/or recalled, the only sequitur of this is that the Court which initially exercised jurisdiction has recalled its own order exercising jurisdiction and *status quo ante* is restored. This is because arrest is a means of assuming jurisdiction [paragraph 56 of M.V. Elizabeth (supra)]. Once this finding is made then nothing further is required to be done and the suit comes to an end as there is no other defendant save and except the ship and the Court has found that it has no jurisdiction to arrest the ship because it is not a sister ship.

26 In the light of the above, it is necessary to consider the jurisdiction averments in the plaint in paragraph 16 which are as follows:

“In view of the contumacious failure and neglect by defendant to make payment of the undisputed invoices referred to above, plaintiff being left with no other option, is presently entitled to proceed in rem against the 1st Defendant vessel by arrest, condemnation and sale, in order to obtain security for its undisputed claim, as the 1st Defendant vessel is the only asset within the admiralty jurisdiction of this Hon’ble Court that can be proceeded against as security for plaintiff’s undisputed claim, as the 1st Defendant vessel is the only asset within the admiralty jurisdiction of this Hon’ble Court that can be proceeded against as security for plaintiff’s undisputed maritime claim against defendant vessel”.

27 Thus the pleading of plaintiff is also that it is entitled to proceed *in rem* against the vessel by arrest in order to obtain security for its claim. Once it is held that plaintiff is not entitled to proceed *in rem* and arrest the vessel to obtain security in respect of its claim then the action *in rem* comes to an end and cannot be proceeded with any further. Further in

paragraph 19 of the plaint it is stated that “*In the absence of an order of arrest plaintiff’s suit would be rendered infructuous.*” This itself shows that the order of arrest is required to be sustained in order for plaintiff’s suit to proceed to trial and if it is not sustained but vacated then suit becomes infructuous and comes to an end and cannot be proceeded with.

28 In such a situation no application is thereafter necessary as the Court by its own findings has taken the view that it has no jurisdiction to entertain the suit. The dismissal of the suit is a consequential order in the light of the findings of the Court that 1st defendant vessel is not liable to be arrested.

29 Mr. Rajasekhar also submitted that a failure to make out a *prima facie* case for arrest cannot result in a dismissal of the suit, unless the plaint fails to make out a cause of action. Counsel said in such a case, 1st defendant can move an application for rejection of the plaint and no application under Order 7 Rule 11 of the Code of Civil Procedure has been taken by defendant no.1.

30 The submission of Mr. Pratap in response was that if the order of arrest is vacated or recalled on the ground that the jurisdictional test as set out in the 1999 Arrest Convention is not satisfied, the suit *in rem* terminates and is liable to be dismissed. Alternatively, it is open to the

Court to reject the plaint and dismiss the suit under Order 7 Rule 11 of the Code of Civil Procedure, 1908 as 1st defendant vessel is not a sister ship and consequently there is no cause of action against the said vessel. Such powers can be exercised *suo motu* in the absence of any application.

I agree with Mr. Pratap. This has been so held by the Hon'ble Supreme Court of India in the case of ***Umesh Chandra Saxena & Ors. v/s. Administrator General, U.P. Allahabad and others***³ where the Court observed that “*we would only add that an action under Order 7 Rule 11 of CPC does not await an application by any party*”. This was followed and applied by this Court in ***Rushab Shpping International LLC v/s. the Bunkers on board the ship M.V. AFRICAN EAGLE***⁴. The Court proceeded to reject the plaint without any application having been filed by defendant.

31 In the present case, therefore recall of the order of arrest on the ground that the vessel is not a sister ship is itself sufficient for dismissal of the suit since the Court would have no jurisdiction to proceed against 1st defendant vessel. Alternatively, it is open to this Court to *suo motu* reject the plaint on the ground that it is barred by law and as not disclosing any cause of action against defendant no.1 vessel under Order 7 Rule 11(a) of CPC.

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. AIR (1999) Allahabad 109

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. 2014 SCC OnLine Bom 620

32 Mr. Rajasekhar in his written submissions submitted, since the finding of the Single Judge was in interlocutory proceeding, this cannot result in a dismissal of the suit. Mr. Rajasekhar has relied upon ***Avdel Tools and Services vs. Trufit Fasteners Pvt. Ltd.***⁵ to submit that in interlocutory proceedings, the Court can express only its tentative view, which always is subject to final decision and does not cause any prejudice to the concerned party and that plaintiff will be, during trial and using the various procedures of interrogatories, discovery and inspection, able to prove that its maritime claim was capable of enforcement against the vessel arrested. In such a case, the *prima facie* finding will stand replaced with a contrary final finding. 1st defendant's contention that the suit should be dismissed on a *prima facie* finding without granting plaintiff an opportunity to substantiate his case with evidence is not correct.

33 Though generally in interlocutory proceedings Courts express only its tentative view, that is not the case in the matter at hand. The findings of the Single Judge is,

“It would be vexatious and oppressive and an abuse of the process of the Court to maintain the arrest of defendant no.1. No equity minded Court would countenance continuation of the order of arrest for a single day more in the facts and circumstances of the case”.

In view of such a finding, the suit ought to be dismissed and/or

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. 2009 (1) Bom CR 746

the plaint rejected. Not only the plaint does not disclose a clear right to sue but plaintiff's case is based on falsehood that 1st defendant is a sister ship of 2nd defendant even though the document of ownership of 1st defendant proves otherwise and these were not even disputed by plaintiff. Thus, plaintiff had no right to approach this Court and ought to be summarily thrown out. Plaintiff knew and/or ought to have known that 1st defendant was owned by Aodabao Shipping (HK) Co. Ltd., Hong Kong, whose sole shareholders and Directors were two Chinese nationals Mr. Sun Xian Liang and Mr. Chen Dong Sheng. Their ownership details were publicly available with the Registrar of Companies, Hong Kong and could have easily been obtained by plaintiff. Moreover when 1st defendant produced them, plaintiff did not dispute the same. In fact, plaintiff should have voluntarily asked the ship to be released. Instead they chose to maintain their false and untenable argument that the ship was owned by COSCO, which was false to their knowledge.

34 The observations of the Hon'ble Supreme Court in ***S.P. Chengalvaraya Naidu v/s. Jagannath (Dead) by LRS. and Ors.***⁶ are relevant in this context. The court observed,

“The Courts of law are meant for imparting justice between the parties. One who comes to the Court must come with clean hands..... We have no hesitation to say that a person whose case is based on falsehood, has no right to approach the Court. He can be summarily thrown out at any stage of the litigation”.

The Apex Court also observed in paragraph 6 of the said judgment that :

“A fraud is an act of deliberate deception with the design of securing something by taking unfair advantage of another”.

35. In the present case plaintiff came to Court with a false case that 1st defendant vessel was beneficially owned by COSCO with a view to securing an order of arrest and obtaining security. COSCO stands for China Ocean Shipping Group Co. as per plaintiff's own documents and also their pleading in paragraph 2 is *“It is beneficially owned by COSCO, Beijing, China.”* 1st defendant produced ownership document to show that the vessel was not owned by COSCO and that COSCO was a company owned by the Chinese Government and it can never be alleged that a Government of a country was indulging in fraudulent activities of setting up a sham company to defraud creditors. 1st defendant also produced document to show that COSCO was merged with another Chinese State owned company called China Shipping (Group) Company on 4th January, 2016 and the merged entity was named as China COSCO Shipping Corporation Ltd. In the circumstances, COSCO as an entity did not even exist on the date of arrest which was 7th March, 2016. When faced with this, plaintiff stood completely exposed and thereafter plaintiff changed its stand and said that

COSCO stands for Cross Ocean Shipping Company Ltd.

36 This shows that plaintiff sought to play a fraud on this Court and on 1st defendant by deceiving this Court that 1st defendant vessel was owned by COSCO, which stood for China Ocean Shipping Group Co. as per plaintiff's own documents filed with the plaint. Plaintiff did this to secure an *ex-parte* order of arrest to which it was not entitled to. Plaintiff sought to take unfair advantage of the fact that 1st defendant was not served/represented at that stage. Such a plaint ought to be summarily thrown out and the suit dismissed.

37 The Apex Court, in *I.T.C. Ltd. vs. Debts Recovery Appellate Tribunal and Ors.*⁷, has held, relying upon (*T. Arivandandam vs. T.V. Satyapal.*), that the Court should consider whether real cause of action has been set out in the plaint or something purely illusory has been stated and clever drafting creating illusions of cause of action are not permitted in law and a clear right to sue be shown in the plaint. Paragraphs 16 and 27 of the said judgment read as under :

“16. The question is whether a real cause of action has been set out in the plaint or something purely illusory has been stated with a view to get out of Order 7 Rule 11 C.P.C. Clever drafting creating illusions of cause of action are not permitted in law and a clear right to sue should be shown in the plaint. (See *T. Arivandandam vs. T.V. Satyapal.*)

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27. As stated above non-movement of goods by the seller could be due to a variety of tenable or untenable reasons, the seller may be in breach of

the contract but that by itself does not permit a plaintiff to use the word "fraud" in the plaint and get over any objections that may be raised by way of filing an application under Order 7 Rule 11 CPC. As pointed out by Krishna Iyer, J. in T.Arivandandam's case, the ritual of repeating a word or creation of an illusion in the plaint can certainly be unravelled and exposed by the Court while dealing with an application under Order 7 Rule 11(a). Inasmuch as the mere allegation of drawal of monies without movement of goods does not amount to a cause of action based on 'fraud', the Bank cannot take shelter under the words 'fraud' or 'misrepresentation' used in the plaint."

38 The Apex Court and this Court have, on many occasions, stated that if a party comes to the Court with unclean hands, which in this case plaintiff has, the party should be dealt with very strongly and substantial costs also should be imposed on the party. The conduct of plaintiff intends to impede and prejudice the administration of justice. Judiciary is the bedrock and handmaid of orderly life and civilized society. In ***M/s. Sciemed Overseas Inc. V/s. BOC India Ltd. & Ors.***⁸, the Apex Court has lamented about the unhealthy trend in filing of affidavits which are not truthful. Para 2 of the said judgment reads as under:

"2. A global search of cases pertaining to the filing of a false affidavit indicates that the number of such cases that are reported has shown an alarming increase in the last fifteen years as compared to the number of such cases prior to that. This is illustrative of the malaise that is slowly but surely creeping in. This 'trend' is certainly an unhealthy one that should be strongly discouraged, well before the filing of false affidavits gets to be treated as a routine and normal affair."

39 Kuldip Singh, J (as he then was) in ***S.P. Chengalvaraya Naidu (Dead) by LRs. V/s. Jagannath (Dead) by LRs. and Ors.***⁹, in paragraph 5

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. 2016 AII SCR 370

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. (1994) 1 SCC 1

observed :

“5We are constrained to say that more often than not, process of the Court is being abused. Property-grabbers, tax-evaders, bank loan-dodgers and other unscrupulous persons from all walks of life find the Court - process a convenient lever to retain the illegal-gains indefinitely. We have no hesitation to say that a person, who's case is based on falsehood, has no right to approach the Court. He can be summarily thrown out at any stage of the litigation.”

40 In ***Oswal Fats and Oils Limited v/s. Additional Commissioner (Administration), Bareilly Division, Bareilly and Ors.***¹⁰

the Apex Court followed the same principal that if a person is found guilty of concealment of material facts or making an attempt to pollute the pure stream of justice, the Court not only has the right but a duty to deny relief to such person.

41 In ***Dalip Singh v/s. State of Uttar Pradesh & Ors.***¹¹, the Court bemoaned that a new creed of litigants has cropped up who do not have any respect for truth and they shamelessly resort to falsehood and unethical means for achieving their goals. Such a litigant who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands, is not entitled to any relief.

42 In the case of ***T. Arivandandam vs. T.V. Satyapal and Anr***¹².

10 . (2010) 4 SCC 728

11 . (2010) 2 SCC 114

12 . (1977) 4 SCC 467

the Apex Court observed

“if on a meaningful – not formal – reading of the plaint it is manifestly vexatious and meritless in the sense of not disclosing a clear right to sue, it should exercise its power under Order VII Rule 11 C.P.C. taking care to see that the ground mentioned therein is fulfilled. If clever drafting has created the illusion of a cause of action, the Court must nip it in the bud at the first hearing by examining the party searchingly under Order X, C.P.C. An activist judge is the answer to irresponsible law suits.”

43 Clearly these observations apply to the facts of the present case where an illusion by clever drafting, I would say dishonest drafting, was resorted to give the impression that 1st defendant is a sister ship of 2nd defendant. In this context the pleading in paragraph 16 of the plaint may once again be seen,

“In view of the contumacious failure and neglect by defendant to make payment of the undisputed invoices referred to above, plaintiff being left with no other option, is presently entitled to proceed in rem against the 1st defendant vessel by arrest, condemnation and sale, in order to obtain security for its undisputed claim, as the 1st defendant vessel is the only asset within the admiralty jurisdiction of this Hon’ble Court that can be proceeded against as security for plaintiff’s undisputed claim, as the 1st defendant vessel is the only asset within the admiralty jurisdiction of this Hon’ble Court that can be proceeded against as security for plaintiff’s undisputed maritime claim against defendant vessel”.

The pleading is *ex-facie* false because there is no failure and neglect by 1st defendant to make payment of the invoices because no invoices were sent to 1st defendant vessel nor can it be said that plaintiff has an undisputed maritime claim against owners of 1st defendant as its claim is against only 2nd defendant. Similarly, in paragraph 13 it is pleaded that plaintiff has suffered various losses as a result of breaches by defendants whereas admittedly there is no breach by 1st defendant. All this

was to create a false case of cause of action against 1st defendant vessel. On this ground also the suit requires to be dismissed.

44 Plaintiff accept that the owner of 1st defendant vessel has not submitted to jurisdiction but has applied to set aside the order of arrest. It follows from this that if the order of arrest is set aside on the ground that 1st defendant vessel is not a sister ship then there can be no jurisdiction nor submission to jurisdiction by the owner. If that is the position, then there is no defendant or entity against whom the suit can proceed. Consequently, the suit has to be dismissed and cannot be proceeded with. There can be no question of trial of a suit in which the Court has held that defendant vessel is not a sister ship and cannot be arrested.

45 Plaintiff's submission that presence of the vessel is the only requirement for the Court to assume jurisdiction, is incorrect. For a Court to exercise admiralty jurisdiction for arrest of a vessel the jurisdictional test to be satisfied by plaintiff is as set out in paragraph 14 above and flows from the 1999 Arrest Convention which is applied by Courts in India. The physical presence of the vessel is mandatory and only one of the requirements but not the sole requirement. For example, if the ship is present in territorial waters but is not the relevant vessel or a sister ship then the ship cannot be arrested.

46 Counsel for Plaintiff also submitted that the observations of the single judge while vacating the order of arrest was only prima facie and relied upon paragraph 13 of the order of the Division Bench dated 13th June, 2016 which states as under:

“However, we note that merely because the Respondents have made out a case warranting the vacation of arrest order, that by itself does not mean and imply that the Appellant had obtained wrongful arrest of the vessel. The issue, as to whether arrest of the vessel was wrongful or not would, in the facts and circumstances of the case, require further adjudication. The observations on this aspect in the impugned order, are prima-facie in nature and therefore, there is no necessity for interfering with the impugned judgment and order or for expunging the said remarks. We have no doubt that the issue as to whether the arrest was wrongful or not will be considered by the learned Single Judge, at the stage of deciding the notice of motion, which the Respondents may take out in pursuance of the liberty granted in the impugned judgment and order. Accordingly, all contentions of all parties on this issue are kept open.”

This does not assist plaintiff in any manner whatsoever. The observation of the Division Bench is only in the context of any application that defendant no.1 may make for damages for wrongful arrest. This does not in any manner negate or dilute or water down the findings of the learned Single Judge on the reason why the order of arrest was liable to be vacated.

47 Summarizing the position, once an *ex-parte* order of arrest is recalled and/or vacated on the ground that either there is no maritime claim or the owner of the vessel is not liable in respect of the claim or that the vessel is not a sister ship of the vessel liable in respect of the claim, then in all such cases the action *in rem* terminates and the suit *in rem* is liable to

be dismissed. This is because arrest is a means of assuming jurisdiction. If the order assuming jurisdiction is vacated or recalled on the abovementioned grounds, then it means that the Court is of the view that there is no jurisdiction to arrest the ship. In the event, the suit is also *in personam* against other defendants against whom the Court has jurisdiction not by virtue of arrest of the vessel but otherwise, then the suit may proceed *in personam* against such defendants.

48 In the present case the order of arrest was vacated on the ground that “*plaintiff have miserably failed in establishing, even prima facie, that the Beneficial Owner of defendant no.1 Vessel and defendant no. 2 is COSCO*”. This is a jurisdictional requirement that the vessel must be a sister ship which plaintiff has failed to satisfy.

49 I must hasten to add that there could be a situation where security is ordered to be returned on the ground that though the Court has jurisdiction to arrest the ship, yet no case for security is made out because plaintiff has failed to make out a *prima facie* case that they have suffered a loss or on quantum. In such case the suit may well continue *in personam* if the owner of the ship is made a party or there is submission to jurisdiction (as there would be if the owner contests on merits). There could also be situations where the Court comes to a finding on merits that there is no cause of action in contract or in tort and dismisses the suit against the

vessel and its owner (as in the case of the *Bunga Bidara*). Hence there could be other fact situations. However, if the arrest is vacated on the ground that the jurisdictional requirements are not satisfied then the action *in rem* terminates and the suit cannot be proceeded further and is liable to be dismissed. No application is necessary. The order vacating the arrest is sufficient.

50 Hence, suit dismissed with costs. For this hearing the plaintiff to pay a sum of Rs. 2,00,000/- as costs to 1st defendant.

51 The right of defendant no.1 and liberty granted earlier by this Court to claim damages from plaintiff based on the undertaking given by plaintiff under Rule 941 of High Court (O.S.) Rules is kept open.

(K.R. SHRIRAM, J.)