IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ADMIRALTY & VICE-ADMIRALTY JURISDICTION
NOTICE OF MOTION NO. 1646 OF 2013
IN
ADMIRALTY SUIT NO. 29 OF 2013

RAINBOW ACE SHIPPING S.A. Panama,
The Owners of Defendant No. 1 Vessel
M.V. Rainbow Ace .. Applicant

IN THE MATTER BETWEEN :

Lufeng Shipping Co. Ltd. .. Plaintiff

VERSUS

M. V. RAINBOW ACE & ORS. .. Defendants

Mr. Prashant Pratap, Senior Advocate a/w Mr. Nishaan Shetty, Mr. Kumar Abhishek and Ms. Sneha Herwade i/b Krishnamurthy and Co. for plaintiff

Mr. Rahul Narichania, Senior Advocate a/w Mr. Aditya Krishnamurthy, Mr. Ruchir Goenka i/b Bose and Mitra and Co. for defendant No. 1/applicant in NMS/1646/2013.

CORAM : K.R.SHRIRAM, J.
RESERVED ON : 28TH FEBRUARY 2018
PRONOUNCED ON : 21ST MARCH 2018

P.C. :

1. By a judgement and order dated 5 November 2014, the Division Bench has remanded this notice of motion. In order to appreciate the nature and scope of the remand it is necessary to briefly set out a few facts.

2. Plaintiff filed Admiralty Suit No.29 of 2013 for recovery of a sum of about US$ 1,628,658.07 million and obtained on 29 January 2013, an order of arrest of the vessel M.V. Rainbow Ace (the said vessel). The said vessel was owned by Applicant, Rainbow Ace Shipping S.A.,

Panama. The order of arrest was set aside by an order dated 6 May 2013. The matter was carried in Appeal and the Hon'ble Division bench, by an order dated 2 July 2013, was pleased to dismiss the Appeal. The Hon'ble Supreme Court of India, by an order dated 16th July 2013, was pleased to dismiss the SLP filed by Plaintiff. Applicant thereupon filed Notice of Motion No.1646 of 2013 for wrongful arrest claiming damages in the sum of US$ 2,310,255.00 with interest at the rate of 18% p.a. plus reasonable legal costs. This Notice of Motion was heard and came to be disposed (1st hearing) by a judgement and order dated 9 June 2014 (said judgement). It is necessary to refer to the said judgment for the purpose of considering the order of remand of the Division Bench.

3. At the 1st hearing of the Notice of Motion No.1646 of 2013, which is now remanded, an objection was raised by Plaintiff that Applicant is not entitled to any compensation because there was a complete and abject failure on their part to mitigate their losses. The answer of Applicant to this objection was that mitigation was only an option and they were not bound to mitigate. According to Applicant to furnish security and mitigate is only an option and Applicant chose not to exercise this option. It was the consistent stand of Applicant

on Affidavits and during the course of the hearing that furnishing of security is only an option which they chose not to take. At no point of time did applicant say they were unable to take steps to mitigate. Paragraphs 20, 24, 27, 32, 33, 36, 37, 38 and 39 of the said judgment read as under :

> *"20 On this preliminary issue of mitigation, Shri Majumdar submitted that a wrong-doer cannot ask the claimant to show proof of mitigation. He submitted that the Court's ought to be very slow in countenancing any attempt by a wrong-doer to make captious objections to the methods by which those whom he has injured have sought to repair the injury. He submitted that the Court has to only see whether the Applicant acted honestly and reasonably and to furnish security and mitigate is only an option and the Applicant chose not to exercise that option.*
>
> .....
>
> *24 Shri Majumdar also submitted that it was not mandatory that whenever an arrest of vessel is affected, it is obligatory on the part of the party that applies for vacating such order of arrest of the vessel to offer security in terms of the claim made by the Plaintiff in a Suit. He submitted that when a party has obtained an order of arrest wrongfully, the aggrieved party is entitled to claim the losses suffered on account of such wrongful arrest and it can never be argued that the aggrieved party not having exercised the "option" of furnishing security and getting the vessel released, is not entitled to damages which it has suffered. He submitted that a ship owner could have mitigated his losses by furnishing security cannot be the answer to an untenable and dishonest claim. He concluded by saying that furnishing security is an option but not a mandate.*
>
> ......
>
> *27 In my view, it is immaterial whether the matter has arisen out of a collision or a contractual claim or whether it was relating to a company case matter. The fact is all Courts have held that a claimant has a duty to mitigate. There is no compulsion that he should mitigate but he cannot claim those additional amounts from the Defendant No.1, if he chose the more expensive method, i.e., leave the vessel idling.*

.....

32 From all these judgments it is all clear that the nature of the act of the defendant has no relevance to a claimants duty to mitigate. Therefore, the test is whether the action of the Applicant in not furnishing security even by way of letter of undertaking through its P&I Club and let the brand new vessel which had an assured income of US$ 7,500/- per day and in addition to that spend another US$ 5,000/- per day approximately (on an average) for about 162 days is reasonable or not.

33 Whether to put up security and take the vessel away which would continue to earn or not put up security but leave the vessel idling is entirely up to the Applicant to decide. If the Applicant choses to adopt a more expensive method of keeping the vessel idle and thereby lose an assured income of US$ 7,500/- per day and incur an additional expenditure of US$ 5,000/- per day on an average is entirely up to the Applicant. The Applicant is at liberty to do so and by doing so has committed no wrong on or against the Plaintiff or any one else. At the same time the meaning of duty to mitigate the loss or duty to minimise the damage is that the Applicant was not entitled to charge the Plaintiff by way of damages with any greater sum than that which the Applicant reasonably needs to extend for the purpose of making up the loss. Borrowing the expression used in Darbishire vs. Warran (Supra), "Applicant is fully entitled to be as extravagant as he pleases but not at the expense of the Plaintiff."

......

36 During the course of argument to a query put by the Court, the counsel for the Applicant stated that the vessel did not have a P&I Cover for these kind of arrests and hence they could not furnish security. However, from mere perusal of the affidavit in re-joinder shows that the reason for not furnishing security was not non-availability of P&I Cover, but the Applicant opted not to furnish security. If there was no P&I Cover available and if there was no way security in the sum of US$ 1.6 million was possible to be furnished due to financial difficulties of the owner or non availability of P&I Cover, the same would have been explained in the affidavit in re-joinder, particularly when in the affidavit in reply the Plaintiff has taken a stand that the owners had an obligation to mitigate by furnishing security. The stand of *the Applicant in its affidavits and during the hearing was "why should we furnish security?" We were not bound to furnish when the arrest later has been held wrongful. The Plaintiff was not entitled for an order of arrest against Defendant No. 1 and had obtained the order of arrest wrongfully and the stand of the Defendant No. 1 has been vindicated by the orders of the single Judge, the Division Bench and the Apex Court and hence, the applicant cannot be asked why they did not mitigate their loss by furnishing security. The counsels stand was a wrong-doer cannot insist that the person who was wronged should have attempted to cut its losses. I am afraid that is not the position in law.*

37 In my opinion, the action/inaction/stand of Applicant was totally ill advised. It is settled law that any claimant who has a claim in any given situation either for breach of contract or tort has an obligation to mitigate its losses. In my view it will equally apply even in situation like in this case by virtue of the undertaking given by the Plaintiff. Compensation for pecuniary loss imposes on the claimant a duty of taking all reasonable steps to mitigate the loss and debars the claimant from claiming any part of the damage due to his neglect to take such steps. As held in the Best Food case, the Court also would consider the claim of the Applicant owner of the vessel on the basis that if the Applicant filed a Suit for damages what would the Court have done. Certainly the Court would have considered the issue of mitigation as well. A claimant has to be put as far as possible in as good a situation as if the arrest had not taken place. But this principle is qualified by a second, which imposes on a claimant the duty of taking all reasonable steps to mitigate its loss.

38 The order of arrest was served on the vessel on 29th January, 2013 whereas the vessel continued to discharge the cargo and earn charter hire until 5th February, 2013. The Applicant had 8 days to furnish security. Owners of a vessel that is arrested always furnished security immediately upon the arrest order being served so that the vessel is released. Rule 954 of the Bombay High Court (O.S.) Rules provides as under :-

> *"**954. Release of arrested property** – Subject to the provisions of Rule 952, property arrested under a warrant may be ordered to be released.*
>
> *(i) at the request of the plaintiff, before an appearance in person or a Vakalatnama is filed by the defendant; or*

(ii) on the defendant paying into Court the amount claimed in the suit;or
(iii) on the defendant giving such security for the amount claimed in the suit as the Court may direct; or
(iv) on any other ground that the Court may deem just."

Therefore, under this rule when a vessel is arrested, she may be ordered to be released on the owner giving such security for the amount claimed in the Suit as the Court may direct. This is done by considering the vessel's commercial needs and to allow the owner to use the vessel for profit making by substituting the vessel with security. The owner of the vessel arrested exercise this option and furnish security to get their vessel released till such time the action or an application for vacating the order of arrest and return of security is adjudicated upon.

39 In this case also the Defendant No. 1 vessel had a first class P&I Cover. The Applicant could have furnished security by way of a bank guarantee when it had an assured fixed charter earning US$ 7,500/- per day. The Applicant could have atleast offered a club letter of undertaking. It is not the Applicant's case that it offered a club letter of undertaking but the Plaintiff rejected. However, for reasons best known to the Applicant, they chose not to furnish security and thereby lose its assured US$ 7,500/- per day income. In addition the applicant also claim to have spent/incurred an additional US$ 5,000/- per day on an average. It is difficult to fathom the intention of the Applicant because the claim is for US$ 1.6 million, security for which could have been furnished either by way of a bank guarantee or even by way of P&I Club letter of undertaking particularly because the Defendant No.1 vessel was entered for P&I Cover with a first-class P&I Club and she was a brand new vessel. Still by not furnishing such a security for US$ 1.6 million, the Applicant in its wisdom claim to have lost in excess of US$ 2.3 million which they want the Plaintiff to pay. In this claim of US$ 2.3 million loss of charter hire itself is in excess of US$ 1.3 million which was assured under the charter party. I do not wish to question the wisdom of Defendant No. 1 in taking such a stand but it cannot be at the expense of the Plaintiff."

4. Applicant also submitted that its action in applying to the Court for vacating the order of arrest is a step towards mitigation. This was

rejected as not correct in paragraph 40 of the said judgment and it reads as under :-

> *"40 In my view, Shri Majumdar's submissions that the Applicant's action to have the order of arrest vacated has to be taken as a step towards mitigation is also not correct. When the Applicant was aware that this was a highly contested matter, it should have furnished security and enjoyed its assured earnings. It would have made better sense to incur costs on furnishing security which would have been for less and claiming it from the plaintiff than sit tight and claim millions of dollars."*

5. Eventually in paragraph 41, it was held *"Therefore, since it is not the case of Defendant No.1 <u>that it was unable to mitigate its losses</u> or it took all steps to mitigate its losses but still ended up suffering prejudice to the amount as it claims therein, I am not inclined to grant summarily any amount as damages to Applicant. <u>And Applicant did not put forth an alternative claim of the earliest they could have furnished security</u>"* (emphasis supplied).

6. The Division Bench in its judgment dated 5 November 2014 held in paragraph 8 that the only question that arises for consideration in the Appeal is whether Defendants are bound to take steps to mitigate the loss, if any, on account of the vessel being wrongly arrested. The Division Bench agreed with the reasons set out in the said judgement that in the event Defendant seeks to claim compensation for

wrongful arrest they are under a duty to mitigate.

7. In paragraph 9, the Division bench recorded the submission of Applicant (Appellant) that furnishing security was only an option. This was also the consistent stand of Applicant at the 1st hearing of the Notice of Motion. In the said paragraph, it was also observed by the Division Bench that the submission of Applicant (Appellant) was that furnishing of security to have the vessel released would require Defendant to spend money for the benefit of Plaintiff. This meant that putting up security would result in Defendant (Applicant) spending money for Plaintiff's benefit being the cost of putting up security. It is thus clear from the judgment of the Division bench that the stand of Applicant was the same as that taken at the 1st hearing of the notice of motion, viz., that mitigation was only an option which they chose not to adopt. It was not the stand of Applicant that they could not have mitigated because of financial difficulties or otherwise.

8. In Paragraph 47 of the judgment of the Division Bench, the Applicant's (Appellant's) submission is once again recorded that Defendant has an option to furnish security but not bound to do so. The Division Bench has also, in paragraph 54 recorded the finding in

the said judgement that the consistent stand of the Applicant (Appellant) on mitigation was not that it was unable to take steps to mitigate or that it took all reasonable steps to mitigate but furnishing of security is only an option which they chose not to avail of. Paragraph 54 of the judgement of Division Bench reads as under :-

> *"54. This issue has been decided for the first time in these proceedings. The learned Judge has recorded that the appellant only contended that it had no duty to mitigate; that it was not mandatory that whenever an arrest of a vessel is effected, it is obligatory on the part of the party that applies for vacating such order of arrest to offer security in terms of the claim made by the plaintiff and that the aggrieved party is entitled to claim loss suffered on account of such wrongful arrest without any effort to mitigate the loss on account of such wrongful arrest without any effort to mitigate the loss. In paragraph 24, the learned Judge noted that the consistent stand of the appellant to the respondent's submission on mitigation was not that it was unable to take steps to mitigate or that it took all reasonable steps to mitigate, but that furnishing of security is only an option which they chose not to avail of.*
>
> *Despite the same, we intend granting the appellant an opportunity of meeting the case on merits. Firstly, this is the first time that the issue has arisen and has been decided. Secondly, in any event, mitigation itself involves the party aggrieved incurring costs. This is evident even from the respondent's contention. The respondent contended that the appellant ought to have furnished security. Security would be by depositing the claim in court or furnishing a bank guarantee in that amount. Furnishing a bank guarantee involves costs such as depositing the amounts with the bank and/or paying the bank a commission. Thus, a claim cannot be rejected absolutely even if a party does not take steps to mitigate, for, any attempt to mitigate would also involve expenditure. A defence of mitigation would give rise to various contentions on merits. The Court would be required to decide a variety of facts such as whether in the facts and circumstances of the case, there was, in fact, a duty to mitigate; whether a party was in a position to mitigate; even if a party is in a position to mitigate, whether he was bound to do so considering the facts of a given case."*

Thus this puts matter beyond doubt that the consistent stand of Applicant (Appellant) during the 1st hearing as noted by the Division Bench was also the stand of Applicant (Appellant) before the Division Bench.

9. Applicant (Appellant), however, in the alternative, submitted before the Division Bench, as recorded in paragraph 10 of the judgment, that assuming Applicant was under a duty to mitigate its losses, furnishing security is not the only form of mitigation and an Application to have the order of arrest vacated itself constitutes mitigation. Further submission was that even assuming that Applicant (Appellant) was under a duty to mitigate, even furnishing security would require Defendant to incur considerable expenses and at the very least Defendant ought to be granted damages to the extent of the sum required to mitigate. Paragraph 10 reads as under :-

> *"10. Shri Tulzapurkar submitted that alternatively and assuming that the appellant was under a duty to mitigate its losses, furnishing security is not the only form of mitigation. An application to have the order of arrest vacated itself constitutes mitigation. He further submitted that even assuming that the appellant was under a duty to mitigate, the learned Judge was in error in rejecting the claim in its entirety. The learned Judge held that the appellant ought to have furnished security. Even furnishing security would require the defendant to incur considerable expenses. The appellant, therefore, urges that it is entitled at the very least to be granted damages to the extent of the sum required to mitigate damages.*

> *We do not intend deciding these issues in this appeal. As the matter has arisen for the first time, in our opinion, the ends of justice warrant our granting the appellant an opportunity of meeting the case regarding mitigation on merits. Thus, although we have decided to dismiss the appeal, we intend keeping all points on mitigation on merits open, to be contended before the learned single Judge upon remand."*

10. It was thus, only on this alternate submission that the Division bench decided to give a further opportunity to Applicant to claim costs of mitigation as damages and remanded the matter back. This was done because the Appellant had not claimed these costs at the 1st hearing and the Division Bench noted that mitigation itself involves the party aggrieved incurring costs. Furnishing a Bank Guarantee involves costs. Consequently the claim cannot be rejected absolutely if a party does not take steps to mitigate as any attempt to mitigate would also involve expenditure.

11. Shri Narichania, relying on Paragraph 54 of the judgement of the Division Bench, submitted that the remand is to consider the matter entirely once again for a decision on merits. If that was so, the Division Bench would have set aside the said judgement, which it did not. Moreover, Shri Narichania agreed that the Division Bench has concurred with the view in the said judgement that defendants, in the event, it seek to claim compensation for wrongful arrest, it was

under a duty to mitigate. In my view, the further observations in Paragraph 54 of the judgment of Division Bench are only in the nature of factors to be considered in cases where the defence of mitigation is taken. These factors have already been considered in the present case in the said judgment which has been upheld by the Division Bench. Consequently the only issue open on remand is the alternate submission made by the Applicant before the Division Bench and as recorded in paragraph 10 of the judgment of the Division Bench read with the observations of the Division Bench in paragraph 54 that assuming that Applicant (Appellant) had mitigated, the Applicant (Appellant) would have incurred some expenses and consequently these expenses like Bank Guarantee charges, etc. would have to be considered.

12. Parties were granted liberty to file further Affidavits on remand by the Division Bench. However, instead of claiming costs of mitigation on the basis-assuming they had mitigated, Applicant filed Affidavit dated 19 December 2014 (said affidavit) where Applicant took a completely different stand contrary to its earlier stand at the 1st hearing before the Division Bench. In the said Affidavit, Applicant stated :(a) it did not have the financial capability or ability to deposit

cash security of US$ 1,628,658.00.; and (b) that it made inquiries on 12 December 2014 with Standard Chartered Bank, Hong Kong which said it would require 100% cash margin for issuing a Bank Guarantee. This enquiry with Standard Chartered Bank was not made contemporaneously or within a reasonable time after the arrest on 29 January 2013. It is almost two years after the arrest and about 18 months after the release of the vessel in July 2013 and hence cannot be accepted. Applicant also states that it was not capable of providing 100% margin. In support of its submission Applicant produced Bank Statements of its account with China Minsheng Bank and Standard Chartered Bank and stated that the account shows that it did not have sufficient funds for providing security.

13. Applicant is not entitled to now contend that it did not have the financial capacity to furnish security either by cash deposit or Bank Guarantee. This was not Applicant's stand either at the 1st hearing of this notice of motion or before the Division Bench as has been noted in Paragraph 41 of the said judgement dated 9 June 2014 and as noted in Paragraph 54 by the Division Bench. The consistent stand of Applicant at the 1st hearing and before the Division Bench was that furnishing of security was only an option

which they chose not to exercise. This position was deliberately, consciously and consistently taken by Applicant before both Courts. When Applicant says that it was only an option it means that they had the option, to furnish security which means they had the financial capacity to do so. Applicant made an alternate submission as recorded in paragraph 10 of the judgement of Division Bench that even furnishing security would require Defendant to incur considerable expenses which ought to have been granted. This can only mean that they could have furnished security but would have incurred expenses in doing so and these ought to be granted.

14. Applicant even now has not put forth any case that assuming that they had furnished security they would have still suffered a loss or that they would have incurred expenses for furnishing security. Although the latter was their alternate submission before the Division Bench as recorded in paragraph 10 of the judgment and accepted by the Division Bench in paragraph 54 that some costs would have been incurred for furnishing security, nevertheless on remand Applicant has chosen not to make any claim in this regard. In the course of the hearing, a further opportunity was granted by this Court to Applicant to consider if it wished to make any such

claim. After seeking an adjournment for the said purpose, Applicant consciously chose not to make any such claim.

15. Applicant has also not made any claim on the basis that it would have taken Applicant some time to furnish security and it ought to be compensated for the loss incurred during such period. Applicant was again given this opportunity at the hearing before this Court but Applicant declined to do so and insisted on its full claim for detention of 164 days. Shri Pratap submitted that Applicant had in any event 8 days within which it could have furnished security without incurring any loss as the vessel was on hire discharging cargo and this period was reasonable period within which it could have furnished security, as noted in Paragraph 38 of the said judgement. I am not going into this aspect as Applicant was insistent on its full claim for detention of 164 days.

16. In the circumstances, considering the findings in the said judgment and the judgement of the Division Bench dated 5 November 2014 and in the absence of any alternative case pleaded by Applicant, no compensation by way of damages can or ought to be awarded.

17. Concerning Applicant's new case of lack of funds, to justify its full claim for detention of 164 days and inability to mitigate, this new case also fails as evident from the fresh set of documents relied upon by Applicant to show its financial position.

18. Applicant, it should be noted, has not produced a copy of its Balance Sheet which would clearly reflect its financial position. This requires an adverse inference to be drawn.

19. Applicant, admittedly, is a company incorporated in Panama with a share capital of US$ 100 only. Applicant is wholly owned by a company Rainbow Navigation Investment Company Ltd. registered in British Virgin Islands.

20. The construction of defendant no.1 vessel Rainbow Ace owned by Applicant was funded by mortgage of another vessel M.V. Rainbow Harmony owned by Rainbow Nice Shipping Company as per the mortgage documents produced by Plaintiff in the Affidavit in Reply dated 12 January 2015. This document is not disputed by Applicant in its Rejoinder but the contentions are termed as irrelevant. However, in the said Rejoinder, Applicant confirms that the loan was

repaid.

21. The said vessel M.V. Rainbow Ace was delivered by the shipyard on 4 September 2012. Applicant claims, as stated in the said Affidavit that its has only two Bank accounts, viz., one with Standard Chartered Bank, Hong Kong and the other with China Minsheng Bank.

22. From the statement of China Minsheng Bank produced by Applicant with the said Affidavit it is clear that large sums of money aggregating to US$ 36,795,913.79 have been credited to the bank account of Applicant during the period 29 February 2012 to 21 December 2012 and various amounts have been paid out from the said bank account. A sum of US$ 29,815,577.88 has been credited from various unexplained sources to the bank account of Applicant even prior to 4 September 2012 when the said vessel M.V. Rainbow Ace was delivered to Applicant. Prior to this date Applicant had no other ship or assets or income. The sources of these funds have not been disclosed. After the said vessel M.V. Rainbow Ace was delivered to Applicant on 4 September 2012, a sum of US$ 6,980,335.91 has been credited to Applicant's bank account during the period

06.09.2012 to 14.09.2012, i.e., 2 to 10 days after the delivery of the said vessel. Once again during this period Applicant had no source of income save and except from the said vessel which was delivered only on 4 September 2012 and could not have generated US$ 6.980 million in revenues in 10 days.

23. It is therefore evident from this bank statement of China Minsheng Bank that Applicant had access to large amounts of money even when it did not own the ship and had no other source of income. The source(s) of these funds aggregating to US$ 36.795 million have not been disclosed. It is, however, clear that Applicant had access to substantial funds and perhaps could have easily obtained funds in the sum of US$ 1.628 million to secure release the said vessel M.V. Rainbow Ace (1st defendant) by deposit in Court or provided a Bank Guarantee. No explanation has been forthcoming from Applicant as to the source from which these large sums were received into its bank accounts. Neither is any explanation provided as to what attempts it made to obtain funds to provide a Bank Guarantee when the same (finance) was perhaps obtainable.

24. If China Minsheng Bank could admittedly advance funds to Applicant for construction of the vessel on the basis of the mortgage of M.V.

Rainbow Harmony, this Court would not be wrong in assuming that the said bank could easily have advanced funds to Applicant on the mortgage of its own brand new vessel M.V. Rainbow Ace, which did not have any existing mortgage – particularly in view of want of explanation as noted above.

25. Applicant also produced bank statements of Standard Chartered Bank for the period January 2013 to July 2013 and these are annexed to an Affidavit dated 31.1.2015. The statements show :

a) The closing balance on 31.1.2013 was US$ 912,522.00. Out of this a sum of US$ 658,083.82 was received from Rainbow Nice Shipping Ltd. who is the owner of M.V. Rainbow Harmony which was mortgaged to fund the construction of the said vessel M.V. Rainbow Ace. It is thus apparent that Rainbow Nice Shipping Ltd., a sister company, was funding Applicant.

b) The said vessel was arrested on 29 January 2013. As on 4 February 2013 Applicant had US$ 1,021,437.89 in its bank account. The said vessel was still discharging and was put-off hire, only on 6 February 2013.

c) Thus out of the US$ 1.628 million required to be deposited in Court toward security, Applicant already had US$ 1 million. Applicant could have used this amount to secure the release of the said vessel. Applicant has not given any explanation as to why this amount of US$ 1,021,437.89 was not available towards atleast part security.

d) If Applicant could obtain US$ 658,083.82 from Rainbow Nice Shipping Ltd., its sister company, Applicant has not explained why it could not have obtained part of the security amount from the same company as Applicant by then had in excess of US$ 1 million in its Started Chartered Bank account. No explanation is given that they made attempts but could not or it was not possible.

e) The vessel was released from arrest on 6 May 2013. The bank statement for June 2013 shows that Applicant received a sum of US$ 900,000.00 in two tranches from Rainbow Navigation Investment Company Ltd. which is the parent company of Applicant as pleaded by them and recorded in the order dated 6 May 2013 of Kathawalla, J. The SLP was dismissed on 16

July 2013. Immediately thereafter, on 17 July 2013, a further sum of US$ 200,000.00 was received by Applicant from Rainbow Navigation Investment Company Ltd.

f) Thus in all, Applicant received US$ 1.1 million from its parent company Rainbow Navigation Investment Co. Ltd. No explanation is provided that it could not have received these funds from its parent company in January 2013 when the same were required for furnishing security. If the parent company had given them funds in January 2013 then Applicant could have had US$ 2.1 million (US$ 1 million as on 4 February 2013 and US$ 1.1 million which was received in June/July 2013) in January 2013 itself which was in excess of the security required of US$ 1.628 million only.

26. It is therefore clear from the above that as and when Applicant required funds, the same were made available to it by both its parent company Rainbow Navigation Investment Company Ltd. who transferred US$ 1.1 million to Applicant's bank account in June / July 2013 as also by its sister company Rainbow Nice Shipping Company who transferred a sum of US$ 658,083.00 to Applicant's

account on 31 January 2013. That Applicant had access to substantial funds on demand is evident from its own bank statements of its account with Standard Chartered Bank, Hong Kong.

27. Applicant states in its affidavit, the source of funds of Applicant is irrelevant and unnecessary for the purposes of adjudicating the present Notice of Motion. In my view this is relevant, when Applicant states that it had no funds and millions of dollars are shown as being credited to the Bank account of Applicant from various related parties.

28. It may also be noted that no company keeps liquid cash in its bank account. It is always either invested or it is such as can be called for at short notice. The Bank account statements prove that Applicant could call for large amounts of millions of US Dollars whenever needed.

29. All of this indicates that Applicant had access to or the funds and possibly that is why they advisedly did not contend both during the 1st hearing of the notice of motion and the Division bench that they did not have the financial capacity to furnish security and repeatedly asserted that furnishing security was only an option. This also goes

to show that the new contention now raised in the Additional Affidavit that they did not have the financial capacity to furnish security is not only an afterthought but also not true as could be seen from Applicant's own documents, viz., the bank statements of China Minsheng Bank and Standard Chartered Bank, Hong Kong.

30. Therefore, I am unable to accept the alternative plea now raised as an afterthought that it did not have the financial capacity to provide security either by way of cash deposit or a bank guarantees. On the contrary, it also indicates, it was not beyond Applicant to have provided security by cash deposit with Prothonotary & Senior Master in a US$ account or obtained a Bank Guarantee from its very own bank viz. Standard Chartered Bank or from China Minsheng Bank both of which were in a position to provide Bank Guarantee and also against security of the 1st defendant vessel itself, which was mortgage free and a brand new vessel.

31. An Affidavit in response to a query from the Court was filed by Applicant belatedly on 27 February 2018 to show that the legal costs were paid from Applicant's Bank account with Standard Chartered Bank.

32. Shri Pratap submitted that Applicant is not entitled to claim legal costs incurred in contesting the arrest, as a part of its claim for wrongful arrest for the following reasons:-

a) The Ld. Single Judge Kathawalla J. did not award costs when vacating the order of arrest despite the same being prayed for as prayer clause (e) of the Notice of Motion No.235 of 2013.

b) The Division Bench disposed the Appeal with no order as to costs as expressly stated in the judgment dated 5 November 2014.

c) The SLP was dismissed by the Apex Court without issuing notice and no costs were awarded.

In my view, Applicant having incurred legal costs in defending the suit and opposing the order of arrest, are entitled to some reasonable costs. In my view a sum of Rs. 2,00,000/- (Rupees Two Lakhs only) will be reasonable costs. Accordingly, plaintiff to pay a sum of Rs. 2,00,000/- as costs.

33. Notice of Motion disposed accordingly with no order as to costs in this notice of motion.

34. In view of the above, plaintiff is at liberty to move the Korean Court for appropriate orders.

35. Mr. Ruchir Goenka for applicant/defendant No.1 seeks stay of one week of this order. Mr. Pratap states that for one week, they will not move the Korean Court for release of funds.

(K.R. SHRIRAM, J.)