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

NOTICE OF MOTION NO.680 OF 2017
IN
COMMERCIAL SUIT NO.258 OF 2015

Adani Power Rajasthan Ltd. & Anr.)….Applicants

IN THE MATTER BETWEEN :

Adani Power Rajasthan Ltd. & Anr.)….Plaintiffs
V/s.
Murmansk Shipping Co. Ltd.)....Defendant

QBE Insurance (Europe) Limited)....Respondent

Mr.Rahul Narichania, Senior Advocate a/w Mr.Pranoy Kottaram, Mr.Ruchir Goenka and Mr.Mayank Suri i/by Bose & Mitra and Co. for applicants/plaintiffs.
Mr.F.E.Devitre, Senior Advocate a/w Mr.Zarir Bharucha i/by Bimal Rajasekhar for respondent-British Marine.

CORAM : K.R.SHRIRAM,J
DATE : 26.7.2018

P.C.:-

1. This Notice of Motion is taken out by plaintiffs for the following reliefs :-

> *"(a) That this Hon'ble Court be pleased to pass an order directing the Respondent No.1 and No.2/QBE Insurance (Europe) Limited to furnish a bank guarantee from a nationalized bank in a sum of Rs.70,85,50,801 (Rupees Seventy Crores Eighty Five Lakhs Fifty thousand Eight Hundred and One) or such sums as this Hon'ble Court deems fit with interest at the rate of 12% per annum on the sum of Rs.70,85,50,801 or such other sums as this Hon'ble Court deems fit from 2nd November 2017 till its payment/realization to the satisfaction of the Prothonotary & Senior Master of this Hon'ble Court ;*

> *(b) Costs ;*
>
> *(c) For such and other reliefs as the nature and circumstances of the case may deem fit and proper."*

2 Plaintiff no.1 had imported a project cargo comprising boiler parts (cargo) from Shanghai, China to Mundra, India on board M.V.Yuriy Arshenevskiy (the vessel) as evidenced by two Bills of Lading bearing no.YA125SHM01 dated 3.8.2011 and bill no.YA125 SHM003040506 also dated 3.8.2011 (the said bills of lading).

Plaintiff no.2 was the cargo insurer. Defendant is the carrier, i.e., owner of the vessel that carried the cargo.

The value of the cargo covered under the two bills of lading, it is stated was USD 7.66 million and USD 2.02 million. 101 packages were loaded on deck and the remaining in the holds. When the vessel arrived at Mundra, there were only 3 packages left on deck and the cargo which were in the holds appeared to have been damaged. It is the case of defendant no.1 that the vessel had encountered heavy weather and therefore, it is exempted from any liability under the provisions of Hague Rules, whereas it is the case of plaintiff that the vessel was unseaworthy. We do not have to go much into that as that is not relevant for this application.

3 Fearing arrest of the vessel, respondent viz. QBE Insurance (Europe) hereinafter referred to as `British Marine' gave a letter of undertaking dated 12.1.2012 (I am told by Shri Devitre and Shri Narichania it is incorrectly typed as 12.1.2011), copy whereof is at Exh.E to the affidavit in support. It will be useful to reproduce the said Letter of Undertaking dated 12.1.2012 (LOU).

" To : Adani Power and Adani Power Rajasthan Limited
7[Th] Floor, Sambhav Building,
Judges Bunglow Road,
Bodakdev,
AHMEDABAD-380 015
Gujarat – India

Dear Sirs,

Ship	:	*M.V."YURIY ARSHENEVSKIY"*
Voyage	:	*Shanghai/Xiamen (China) to Mundra (Gujarat/India)*
Cargo	:	*Shipment of 234 Packages for Supply of Goods and Equipment for 2x660 MW Super Critical Power Project Located at Kawai (Rajasthan/India)*
Bills of Lading	:	*YA125SHMO1/YA125SHM02 and YA125SH)3040506-all dated 03/Aug./2011*
Claims	:	*(a) Lost overboard-101 packages ; (b) Loss of and camage to balance cargo ; and (c) All related Costs and expenses*

In consideration of the owners of and other persons (cargo interest) entitled to sue in respect of the cargo referred to above (hereinafter together referred to as "the Cargo Owners"), agreeing to discharge and take delivery of their Cargo on board the Ship and refraining from taking any action ; (a) in rem against the above-named ship or any other ship in the same ownership, associated ownership or management for the purpose of obtaining security in respect of the above mentioned claims of the Cargo Owners, and/or (b) in personam against Murmansk Shipping company Joint Stock Company of 15 Komintern St, Murmansk, Russian Federation (hereinafter "the Shipowners"), who owned the above named ship *at all material times, and subject to the terms hereof, we British Marine hereby undertake to pay to you on demand such sums as may be awarded by the High Court of Judicature at Mumbai and/or as may be adjudged on any appeal therefrom to be or have been payable by or as may be agreed to be or have been recoverable from the Shipowners (or their successors), or as may be mutually agreed to between the parties hereto, in respect of the said claims, interest and costs of the Cargo Owners. This undertaking is provided subject to the following conditions :*

1. The total of our liability hereunder shall not exceed the sum of US$ 10,658,888.52 (U.S.Dollars Ten Million, Six Hundred and Fifty Eight thousand, Eight Hundred and Eighty Eight Fifty Two Cents) plus interest and costs ;

2. Cargo Owners agree that the principal amount secured at (1) above shall be reduced, if warranted to a sum, jointly agreed by surveyors representing the Shipowners and the Cargo Owners following joint survey of the cargo after discharge. For the sake of clarity, it is stated that surveyors representing both parties shall reach mutual agreement on the value of the Cargo Owner's Claims for security purpose set out hereinabove, no later than 20 days from the date/time of completion of discharge of the cargo.

3. Upon the joint assessment of the Cargo Owners' Claims, as aforesaid, we agree and undetake to provide security for the Cargo Owners' Claims, as ascertained in the joint survey, in the form of a Bank Guarantee for such jointly surveyed/agreed figure from a mutually agreed bank and in a mutually accepted wording or failing such agreement on bank or wording, from an Indian nationalised bank in the standard wording of the High Court of Judicature at Mumbai with logical amendments. Upon such Bank Guarantee being furnished, this Undertaking shall stand discharged.

4. If, however, the joint surveyors are not able to reach agreement as to the matters and within the time provided for in (2) above, the appropriate quantum of security is to be determined by the High Court of Judicature at Mumbai. Such Bank Guarantee shall be issued no later than the 30 days from the date/time of agreement on quantum or court order whichever shall be earlier.

5. We further undertake to keep the Bank Guarantee issued under (3) or (4) above alive until a final judgment/decree by the Bombay High Court or final award, as the case may be, has been served upon the Cargo Owners.

6. Nothing herein amounts to any admission of liability and this undertaking is provided without prejudice to the Shipowners' defences and/or rights to limit liability by reason of any applicable *contract, statute or law.*

This undertaking shall be governed by and construed in accordance with English law. We confirm that our registered or principal office is situated at Plantation Place, 30 Fenchurch Street, London EC3 3BD.

Yours faithfully,
For and on behalf of British Marine

Gerald J.Hamerston *Gary Crowley*
Dated this day : 12th January 2011
London England"

4 Thereafter the cargo was discharged. Damaged cargo was inspected jointly by 4 independent surveyor's representing various interests including plaintiffs, defendant and respondent. As these surveyors were unable to come to a conclusion to the extent of damage caused to the cargo, plaintiffs are relying on final survey report dated 26.11.2014 (said survey report) issued by Plaintiffs' Surveyors-McLarens Insurance Surveyors & Loss Assessors India Pvt. Ltd. (the said Surveyor) to make this application. According to plaintiffs the total gross loss suffered as indicated in the said survey report was US$ 86,32,940/- equivalent to Rs.37,89,86,066 (at conversion rate of US$ 1= Rs.43.90) plus 10% but after certain adjustment the net liability of plaintiff no.2 to plaintiff no.1 is Rs.40,41,99,885/-. The assessment of loss prepared by the said surveyor is as under :-

" 8. ***Assessment of Loss :***

Based on our verifications, identification of the damaged packages, reports of the other surveyors on whom we have relied upon, the loss suffered by the insured is assessed as under : Details of the packages & the individual values are set out in the annexure.

Description	***No. of Pkgs***	***Inv. Value USD***	***Inv. Value INR***
Lost overboard	*98*	*4797205*	*210597300*
Severely damaged	*61*	*2277735*	*99992566*
Rejection after inspection by OEM	*14*	*1092000*	*47938800*
Unidentified	*15*	*466000*	*20457400*
Sound Cargo	*46*	*1056959*	*46400500*
Total	*234*	*9689899*	*425386566*

The policy provides for valuation @ invoice value + 10%. Accordingly the loss is assessed as under :-

Description	***No.of Pkgs***	***Inv.Value USD***	***Inv.Value INR***
Lost overboard	*98*	*4797205*	*21,05,97,300*
Severely damaged	*61*	*2277735*	*9,99,92,566*
Rejection after inspection by OEM	*14*	*1092000*	*4,79,38,800*
Unidentified	*15*	*466000*	*2,04,57,400*
Total	*234 ***	*9689899 **	*37,89,86,066*
Add 10% as per policy condition			*3,78,98,607*
Gross Loss assessed			***41,68,84,673***
Less salvage Gross Rs.1,23,00,000			*1,21,84,788*

less advt exps Rs.115212			
Less Pol.Excess			*5,00,000*
Net liability of insurer's			***40,41,99,885***

* This figure should be USD 8632940

** This figure should be 188

Plaintiffs are therefore, seeking security in the form of a bank guarantee for this amount of Rs.40,41,99,885/- plus interest upto the date of the application.

5 In the meanwhile, when the survey was going on, sometime in July 2012, it dawned on plaintiff that the LoU that the respondent had issued provided an undertaking to pay on demand such sums as may be awarded by the High Court of Judicature at Bombay and/or as may be adjudged on any appeal therefrom interest and costs of the Cargo Owners but as the cargo has been discharged at Mundra, Bombay High Court may not have jurisdiction. Plaintiff therefore, vide its Advocate's letter dated 30.7.2012, called upon respondent to provide appropriate security in the form of a bank guarantee or a revised letter of undertaking within 7 days from the date of the letter whereby respondent would expressly undertake to pay to plaintiffs, on

demand, such sums as may be awarded/adjudged by any competent court against the defendant for any claims arising under the said bill(s) of lading. In response, the respondent issued a clarification letter dated 20.2.2013 as under :-

> "Re : Clarification to the Letter of Undertaking dated 12th January 2012
>
> *We British Marine hereby wish to clarify as follows :*
>
> *1. That under the Letter of Undertaking dated 12th January 2012, Adani Power Limited and Adani Power Rajasthan Limited are not precluded or barred in any manner whatsoever from instituting a suit/action in personam against Murmansk Shipping in the High Court of Judicature, Bombay in respect of their claims under the Bills of lading YA125SHM01 and YA125SHM03040506 dated 3rd August 2011 and to this extent the said Letter of Undertaking dated 12th January 2012 stands clarified.*
>
> *2. That in the event of Adani Power Limited and Adani Power Rajasthan Limited obtaining a judgment and/or decree from the High Court of Judicature, Bombay and/or as may be adjudged on any appeal/s there from in respect of the said claims, Adani Power Limited and Adani Power Rajasthan Limited would be entitled to enforce the said judgment and/or the decree under the Letter of Undertaking dated 12th January 2012.*
>
> *3. That we shall not take any defence or plea of lack of jurisdiction of the High Court of Bombay in any enforcement action initiated by Adani Power Limited and Adani Power Rajasthan Limited to enforce any order and/or judgment and/or decree from the High Court of Judicature, Bombay and/or as may be adjudged on any appeal/s there from in respect of claims arising out of or under bills of lading YA125SHM01 AND YA125SHMO3040506 dated 3 August 2011.*
>
> *4. Save as above all other terms and conditions of the Letter of Undertaking dated 12th January 2012 are to apply to this Supplementary letter and this Letter shall also be governed by and construed as per English law and dispute arising under this supplementary Letter shall be submitted to the exclusive Jurisdiction of the Courts of England and Walves."*

(emphasis supplied)

6 It was Mr.Devitre's case that :

(a) this clarification letter dated 20.2.2013 is in effect substitution of the LoU because in the letter dated 30.7.2012 plaintiff's advocate has demanded appropriate security either in the form of a bank guarantee or a revised letter of undertaking and the respondent gave a revised letter of undertaking which has been accepted way back in February-2013. Therefore, the question of substituting the LoU with a bank guarantee does not arise ;

(b) ex-facie the claim appears to be barred by limitation because the cargo was discharged on or about 18.2.2012 and as recorded in the order dated 20.2.2013 passed by this court in Notice of Motion No.1890 of 2012 in Admiralty Suit No.43 of 2012 the defendant had only agreed to an extension of 21 days for filing the present suit and as those 21 days got over much earlier than the date on which this suit was lodged, the claim is ex-facie barred by limitation ;

(c) the conduct of the plaintiffs has to be noted in as much as even if the court proceeds on the basis that the letter dated 20.2.2013 is only a clarification and the LoU is still in force, still the present suit has been lodged on 13.2.2015 and the present Notice of Motion has been lodged only on 2.11.2017. Shri Devitre submitted that for more than

5 years plaintiff was happy with the LoU and no case has been made out as to what are the changed circumstances that now a Bank Guarantee is required to be furnished ;

(d) except for a bald statement in the affidavit in support and expanded in the rejoinder that defendant and respondent are based outside India with no asset in India, no case is made out as to why respondents' LoU that was good for more than 5 years, is no more good ;

(e) trial in the suit has already begun and there was no need to substitute the LoU with a bank guarantee ;

(f) No correspondence was even initiated by plaintiff seeking bank guarantee in place of the LoU.

7 Shri Narichania submitted that :

(a) the survey got concluded only in December-2012 and the said survey report was received sometime in November-2014 and only at that time plaintiff could ascertain the loss or damage suffered and the suit was lodged thereafter on 13.2.2015 ;

(b) defendant had filed an Admiralty Suit No.43 of 2012 for limitation of its liability setting up a limitation fund. At that time defendant had given an impression that plaintiffs' claim would be adequately secured by the limitation fund that defendant proposed to set up. The said suit was decreed in the year 2016 whereby defendant was directed to constitute limitation fund in accordance with 1996 Protocol of the 1976 Convention on Limitation of Liability for Maritime claims. But thereafter defendant has taken a stand that the cargo interest's claim is secured by way of letter of undertaking and therefore, there is no need to constitute a separate limitation fund ;

(c) the agreement between the parties as reflected in the LoU expressly provides that if the joint surveyors are unable to agree on the value of the cargo owners' claim for security purpose, respondent would furnish appropriate quantum of security that will be determined by this court and such bank guarantee shall be issued not later than 30 days of the court order ;

(d) there was no need to address any communication after the final survey report was received because LoU provided that in case of a disagreement or in case surveyors are unable to agree, the court will decide and the plaintiffs have rightly approached this court, and

(e) There is no time limit prescribed to demand substitution of LoU with Bank Guarantee and respondent having given a commitment in the LoU should not go back on its word.

8 I have heard the counsel and also considered the affidavits and documents. The letter dated 20.2.2013, in my view, does not

replace or substitute the LoU. Letter dated 20.2.2013 is clear, it is only clarificatory. The LoU expressly provided that respondent would pay on demand such sums as may be awarded by the High Court of Judicature at Bombay and/or as may be adjudged from any appeal therefrom. When the plaintiffs realized that Bombay High Court may not have jurisdiction, they addressed communication dated 30.7.2012 calling upon the respondent to either give a bank guarantee or issue a clarification that the defendants would submit to jurisdiction of this court. The letter dated 20.2.2013 only reiterates that the respondent or the defendant will not contest the jurisdiction of this court in an action that may be filed by the plaintiff and also will submit to jurisdiction of Bombay High court. In the letter dated 20.2.2013 the respondent has stated that it was a "clarification" to the LoU ; "We wish to clarify........ and to this extent the said letter of undertaking dated 12th January, 2012 stands clarified"; "Save as above all the terms and conditions of the letter of undertaking dated 12th January 2012 are to apply to this supplementary letter......" Therefore, letter dated 20.2.2013 only supplements the LoU. Supplement means "make up for a deficiency" or "addition" or "strengthen" and it made up so far as jurisdiction of Bombay High Court was concerned.

This has also been clarified by the order dated 20.2.2013 in Notice of Motion No.1890 of 2012 in Admiralty Suit No.43 of 2012 where clause-3(c) reads as under :-

> *"In view of the undertaking given by Counsel for the plaintiff on behalf of and under instructions of the Plaintiff and its P&I Insurance Company British Marine, the plaintiff and its P&I Insurers, British Marine has waived its right to raise any plea to dispute the territorial jurisdiction of this Court to adjudicate any suit that may be brought before it by Defendant No.1 and Defendant No.1A or to so dispute such jurisdiction at the stage of enforcement of the LOU dated 12th January 2012 pursuant to any judgment passed by this Court arising out of any suit that may be filed by Defendant No.1 and 1A against the Plaintiff for the loss and/or damage caused to their cargo carried out of or under the Bill(s) of lading YA125SHM01 and YA125SHM03040506 dated 3rd August, 2011 filed before this Hon'ble Court."*
>
> (emphasis supplied)

9 Therefore, Shri Narichania is correct in stating that the defendant/respondent had an obligation to give a bank guarantee and that obligation never lapsed or came to an end.

10 As regards the issue of limitation raised by Shri Devitre, I am not deciding that issue in this Notice of Motion and it will be decided in the suit.

11 As regards the conduct of the plaintiff as alleged by Shri Devitre that the LoU was given on 12.1.2012, clarification issued on 20.2.2013 and the suit itself has been lodged only on 13.2.2015 and this Notice of Motion has been lodged on 2.11.2017 and therefore, respondent should not be directed to give bank guarantee, the LoU does not prescribe any time limit. Shri Devitre argued that clause-2 of

the LoU provided for survey to be completed within 20 days from the date/time of completion of discharge from the vessel and the bank guarantee shall be issued within 30 days as reflected in clause-4 of the LoU and therefore, 50 days was the limit prescribed. Shri Devitre is not correct. Clause-2 provided that the survey has to be completed within 20 days from the date/completion of discharge of the cargo but that was only for the surveyors to arrive at a mutual agreement on the value of the cargo owner's claim for security purpose and if surveyors were able to agree for the value of the cargo for security purpose, then clause-3 of the LoU would have got triggered. If surveyors were unable to agree within the 20 days period, then clause 4 of the LoU will be applicable and that provides that respondent will provide appropriate quantum of security in the form of a bank guarantee as determined by this court not later than 30 days from the date of the court's order. The 30 days applies to respondent and not to plaintiff. It is obligatory on the part of respondent to furnish the bank guarantee within 30 days of this order.

12 Though the cargo has been discharged on 18.2.2012 but the suit has been lodged only on 13.2.2015 and this Notice of Motion is lodged on 2.11.2017, in my view, as no time limit is prescribed in the LoU, no prejudice is caused to respondent. There is nothing in the

affidavit filed by respondent about any prejudice being caused and even to a pointed question asked by this court, there was no answer. In fact the respondent should thank the plaintiffs as respondent has been saved bank guarantee charges for 5 years or give security to the bank for the bank guarantee for five years, and as on date almost six years.

13 As per the LoU, the agreement was respondent shall furnish a bank guarantee if the surveyors are not able to agree, within 30 days of an order being passed by this court. Plaintiff need not explain the delay or the changed circumstances why they moved after 5 years. Plaintiffs are entitled to take this application at any stage of the suit.

14 Having said that, let us go to the next point as to what is the quantum of security to be furnished. The said survey report gives an assessment of loss as quoted above. The assessment could be split into 2 parts ; (a) cargo lost overboard; and (b) cargo damaged. So far as cargo lost overboard is concerned, there is nothing on record disputing the figure that 98 packages were lost over board or invoice value was USD 47,97,205/- equivalent to Rs.21,05,97,300/-. Therefore, certainly plaintiffs will be entitled to a bank guarantee in this amount.

15 So far as damaged goods are concerned, the court cannot accept the figures as indicated in the said survey report as conclusive. Defendant is entitled to cross-examine the surveyor on the quantum. I am not for a moment saying that defendant cannot cross-examine the surveyors for value of the lost over board cargo. We are only considering quantum of security to be furnished and the right of the defendant to challenge the quantum in the trial is kept open in addition to all other defences. However, admittedly there is damage to some part of the cargo as could be seen from the joint survey report which is at Exh.F to the affidavit in support. From the joint survey I am unable to decide on the extent in terms of value of the damaged cargo. In the said survey report it is stated to be US$ 38,35,735 = Rs.16,83,88,766/-. Though it does not indicate the damage, I would direct the defendant to secure to the extent of 50% of Rs.16,83,88,766 for damaged cargo, i.e., Rs.8,41,94,383/-

Plaintiffs under the LoU are also entitled to some security towards all related costs and expenses which is not quantified. It cannot be denied that plaintiffs would have incurred some related costs and expenses.

16 In the circumstances, the respondent is directed to furnish a bank guarantee in the sum of Rs.30 crores (Rs.21,05,97,300 + Rs.8,41,94,383 + balance of Rs.52,08,317/- towards costs and expenses). As clause-1 of the LoU provides "the total of our liability hereunder shall not exceed the sum of US$10,658,888.52 (U.S.Dollars Ten Million, Six Hundred and Fifty Eight Thousand, Eight Hundred and Eighty Eight Fifty Two Cents) plus interest and costs", the bank guarantee for Rs.30 crores shall also provide for interest @ 10% p.a. from the date of LoU. The total bank guarantee therefore, should be for Rs.30 crores with interest thereon @ 10% p.a. from the date of LoU dated 12.1.2012 until payment/realization.

17 At this stage, Shri Devitre states that for 5 years plaintiff had not asked for this bank guarantee and therefore, a stay of 4 weeks will be justified. Shri Narichania naturally opposes granting of any stay. In my view, plaintiff having waited for more than 5 years, 4 weeks will not make much of a difference. Therefore, time to furnish bank guarantee is extended by further 30 days.

Notice of Motion disposed.

18 I have to note respondent is a P&I club with which the vessel was entered. Respondent protects its members worldwide for third party liabilities and expenses arising from the ownership or operation of ships, including those related to cargo. P&I clubs in general have a reputation in the maritime industry and their letters of undertaking are accepted as it was done in this case. I am certain that there are many other vessels which would be entered with respondent. There could be many such suits that could be filed in this court against vessels entered with respondent and if the respondent is going to take a stand as it has taken in this Notice of Motion, i.e., not honouring its agreement, nobody would accept letters of undertaking from any club, let alone respondent, as security and there are many other bigger P&I clubs and all of them will be bracketed with respondent.

(K.R.SHRIRAM,J)