

HON'BLE SRI JUSTICE SANJAY KUMAR
AND
THE HON'BLE SRI JUSTICE M.GANGA RAO
COMMERCIAL COURT APPEAL NO.22 OF 2018

J U D G M E N T
(Per Hon'ble Sri Justice Sanjay Kumar)

This appeal under Section 13(1A) read with Section 2(c)(iii) of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015, arises out of the common order dated 26.07.2018 passed by a learned Judge of this Court in I.A.Nos.2 and 3 of 2018 in Commercial Suit No.3 of 2017. The said suit was filed by the appellant herein with the following prayers:

'That for the reasons stated above and submissions made hereinabove, the Plaintiff prays for a Judgment & Decree in his favor and against the Defendants:

- a. that the 1st Defendant Vessel along with her hull, tackle, engines, gears, plant, machinery, articles, things apparel, equipment, stores and other paraphernalia on board be arrested by and under the order of this Hon'ble Court for satisfaction of the Plaintiff's claim, costs and poundage;
- b. Pass a decree in favour of the Plaintiff for a sum USD 512,615.09 (United States Dollars Five Lakh Twelve Thousand Six Hundred Fifteen and Nine cents only). The Principal claim amount being USD 492,615.09 and interest of 2% per month on the principal amount till realization of the said monies along with USD 20,000 towards cost of legal proceedings in India plus Sheriff's Poundage, more particularly set out in particulars of claim;
- c. that the Defendant Vessel along with her hull, tackle, engines, gears, plant, machinery, articles, things apparel, equipment, stores and other paraphernalia on board be appropriated and the sale proceeds thereof be held towards satisfaction of Plaintiff's claim, costs and poundage;
- d. For a direction to adjust the sale proceeds of the 1st Defendant Vessel against the suit claim with interest and costs;
- e. Let the Defendants be ordered to compensate or make good the loss, damage and expenditure suffered / incurred / sustained by the Plaintiff in the process;
- f. Let the Defendants be directed to pay to the Plaintiff the costs of the suit and Poundage; AND

- g. Any other relief (s) may kindly be granted in favour of the Plaintiff under the facts and circumstances of the case as this Hon'ble Court may deem fit and proper.'

The appellant/plaintiff is Monjasa DMCC, a company incorporated under the laws of United Arab Emirates (UAE), having its registered office at Dubai, UAE. The first respondent/first defendant is MV KIVELI (IMO – 8204731), a foreign vessel flying the flag of Liberia. The second respondent/second defendant is Krishnapatnam Port Company Limited, Krishnapatnam, Andhra Pradesh. The third respondent/third defendant is Sagar Ship Management Pte Ltd., Singapore, the charterer of MV KIVELI.

Parties shall hereinafter be referred to as arrayed in the suit.

Initially, by interim order dated 25.10.2017 passed in the suit, a learned Judge of this Court granted an ad interim injunction restraining the first defendant vessel from leaving the port limits of the second defendant until further orders. Application No.5 of 2017 was thereupon filed by the first defendant vessel seeking a direction to the Registrar (Judicial) of this Court to accept security in the Indian equivalent of US\$ 512,615.09 claimed by the plaintiff, being a sum of Rs.3,38,30,096/-, by way of a demand draft and in lieu of the said security being furnished, to pass an order vacating the order of injunction dated 25.10.2017 and to direct release of the vessel forthwith. By order dated 01.11.2017, a learned Judge of this Court took note of the readiness of the first defendant vessel to secure the amount covered by the suit claim without prejudice to its rights and contentions and directed the Registrar (Judicial) of this Court to take the demand draft for the sum of Rs.3,38,30,096/- and to deposit the same to the credit of the suit. The interim order dated 25.10.2017 was vacated and the amount in deposit was made subject to further orders in the suit. At that stage, I.A.No.2 of 2018 was filed by the first defendant vessel to vacate the *ex parte* order of arrest/

injunction dated 25.10.2017 and to direct refund of the amount of Rs.3,38,30,096/- deposited by it along with the interest accrued thereon. I.A.No.3 of 2018 was filed by the first defendant vessel seeking a direction to the plaintiff to secure its own claim for damages in the sum of Indian National Rupees equivalent to US\$ 60,236.01 with interest thereon @ 12% per annum for its wrongful arrest and to deposit the same either by way of cash security in the form of a demand draft or through a bank guarantee drawn in favour of the Registrar (Judicial) of this Court. By the common order dated 26.07.2018, presently under appeal, the learned Judge allowed I.A.No.2 of 2018 vacating in toto the order dated 25.10.2017, as modified by the order dated 01.11.2017 passed in Application No.5 of 2017, and directing refund of the sum of Rs.3,38,30,096/- deposited by the first defendant vessel through its owner with the Registrar (Judicial) of this Court along with accrued interest thereon. I.A.No.3 of 2018 was also allowed by the said common order, directing the plaintiff to secure the amount of US\$ 60,236.01 with interest by deposit of a demand draft in favour of the Registrar (Judicial) of this Court within a time frame. This amount was directed to be kept in deposit till the disposal of the suit, unless otherwise directed. Aggrieved by this common order, the plaintiff is in appeal.

Facts, to the extent relevant, are as follows: Monford Management Limited, a company incorporated under the laws of Liberia, having its registered address at Monrovia, Liberia, is the owner of MV KIVELI (IMO 8204731), the first defendant vessel. It entered into a time charterparty on 22.04.2013 with Sagar Ship Management SDN PHD, the third defendant. In terms of the said charterparty, the charterer was responsible for supply of Intermediate Fuel Oil (*hereinafter*, referred to as 'bunkers') of a quality suitable for the first defendant vessel. Pursuant to this arrangement,

the third defendant-charterer entered into a contract with Monjasa DMCC, the plaintiff, for supply of bunkers to the first defendant vessel at Colombo. It is an admitted fact that 699.85 MTs of bunkers were supplied to the first defendant vessel at Colombo on 14.06.2013 by Lanka Marine Services (Pvt) Ltd., Colombo, Sri Lanka, agent of the plaintiff. The Bunker Delivery Note dated 14.06.2013 of Lanka Marine Services (Pvt) Ltd. bears an endorsement made by the Engineer of the first defendant vessel and it reads thus:

‘The goods and/or services being hereby acknowledged, receipted for, and/or ordered are being accepted and/or ordered solely for the account of charterers of the MV KIVELI and not for the account of said vessel or her owner. Accordingly, no lien or other claim against said vessel can arise therefor’.

The plaintiff raised Invoice dated 24.06.2013 for this supply of bunkers in the following name:

‘MV KIVELI and/or master and/or owners and/or charterers and/or managers and/or operators and/or Sagar Ship Management Pte Ltd
10 Anson Road #35-13A
International Plaza
079903 – Singapore
Singapore’

Therein, the plaintiff stated that the amount due for supply of bunkers was US\$ 471,552.42 and that payment should be made no later than 03.07.2013. A further condition was recorded that for late payment, a monthly interest of 2% per month would be payable.

The aforesaid invoice was therefore raised upon the address of the third defendant-charterer.

Perusal of the plaint reflects the following averments: The suit claim of the plaintiff was pegged at US\$ 512,615.09, being the principal claim of US\$ 492,615.09 and interest @ 2% per month on the said principal amount along with US\$ 20,000 towards costs of legal proceedings in India. The

plaintiff asserted that it was entitled to receive the said amount on account of it having supplied bunkers to the first defendant vessel and as the said vessel had used and/or consumed and/or benefited from the said bunkers and/or availed of the same for prosecuting her voyages but the plaintiff had not been paid for the bunkers supplied. The plaintiff stated that it was therefore constrained to file the present suit. According to it, on or about 05.06.2013, the third defendant-charterer approached the plaintiff on behalf of the owners/master/charterer and/or managers and/or operators and/or agents of the first defendant vessel to supply 400 MTs of bunkers to the first defendant vessel at Colombo between 09.06.2013 and 11.06.2013. Accordingly, the plaintiff issued bunker confirmation dated 06.06.2013 stating that the supply to be made would be governed by Monjasa Terms and Conditions, January 2012. On 05.06.2013, the third defendant-charterer addressed an e-mail to the Master of the first defendant vessel informing him that 400 MTs of bunkers had been arranged and instructed the Master to extend full co-operation for the said supply. On 07.06.2013, the third defendant-charterer informed the plaintiff that the owners wished to appoint a bunker surveyor for inspecting the bunkers and the same was agreed to by the plaintiff on the same day. On 10.06.2013, the quantity of bunkers to be supplied was increased to 700 MTs and the same was confirmed by the third defendant-charterer on behalf of the owners/master/charterer and/or managers and/or operators and/or agents of the first defendant vessel. On 14.06.2013, the plaintiff, through its nominated physical supplier at Colombo, supplied 699.85 MTs of bunkers to the first defendant vessel. The Engineer of the first defendant vessel acknowledged receipt of the bunkers by endorsing the Bunker Delivery Note dated 14.06.2013. On 24.06.2013, the plaintiff raised an invoice for the sum of US\$ 471,552.42, making it clear

that late payment would attract interest @ 2% per month. Though the due date mentioned in the invoice was 03.07.2013, payment was not made. E-mail dated 20.01.2014 was issued by the plaintiff to the owners of the first defendant vessel calling upon them to pay the outstanding amount immediately, failing which the plaintiff would be constrained to arrest the vessel. The owners of the first defendant vessel disputed the claim of the plaintiff *vide* e-mail dated 21.01.2014. According to the plaintiff, its claim for supply of bunkers made to the first defendant vessel stood at US\$ 471,552.42, the invoice amount, plus US\$ 442,001.80 towards accrued interest from the due date. As the plaintiff had not received the outstanding sum, it made an arrest application before the Court at Dubai for detaining the first defendant vessel. However, the Dubai Court granted provisional attachment for the principal amount and the first defendant vessel was released upon deposit of US\$ 471,552.42 in the Dubai Court. The plaintiff craved leave to refer to and rely upon the Dubai Court proceedings as and when produced. The plaintiff claimed that the bunkers were supplied to the faith and credit of the defendant vessel and/or master and/or owners and/or charterers and/or managers and/or operators. As the bunkers were received by the first defendant vessel and were consumed by her for prosecuting her voyages, the defendant vessel and/or master and/or owners and/or charterers and/or managers and/or operators were liable to make payment to the plaintiff, failing which it was entitled to proceed against the vessel. The plaintiff's outstanding claim was quantified at US\$ 512,615.09, being the principal claim of US\$ 492,615.09 with interest of 2% per month on the said principal amount till realisation along with US\$ 20,000 towards costs of legal proceedings in India. The supply of bunkers was stated to be supplies of goods or material for operation and maintenance of the ship and therefore

constituted 'necessaries'. The plaintiff stated that the same would give rise to and/or constitute a maritime claim/lien. The plaintiff claimed that it was entitled to proceed *in rem* against the vessel for security for its claim for the cost of bunkers supplied and delivered and was entitled to ask for arrest of the vessel. The plaintiff further stated that its claim was for the delayed payment for supply of necessities and it was a recognised maritime claim/lien within the Admiralty Courts Act, 1861 and various International Conventions. The plaintiff asserted that it was entitled to proceed against the first defendant vessel *in rem* and *in personam* as it had a maritime lien against the vessel and was entitled to arrest, condemnation and sale of the vessel for satisfaction of its claims. Again, in para (r) of the plaint, the plaintiff averred that its claim was for unpaid bunker supply and that it had a maritime lien and maritime claim against the vessel. The cause of action paragraph in the plaint mentioned the fact that the first defendant vessel had entered the territorial waters of India and was docked at the second defendant port on 24.10.2017. According to the plaintiff, it was expected to sail out on 25.10.2017 after completing her cargo operations. It was on the strength of these averments that the plaintiff filed the suit.

The plea of the first defendant vessel in the affidavits filed in support of I.A.Nos.2 and 3 of 2018 filed by it in the suit was to the effect that the suit was misconceived and was therefore not maintainable. According to Monford Management Limited, the registered owner of the first defendant vessel, the claim of the plaintiff could be only against the third defendant-charterer and not against either the first defendant vessel or its owner. It was pointed out that the third defendant-charterer was not a demise charterer or the owner of the vessel at the time of obtaining the order of arrest on 25.10.2017 and that in any event, supply of 'necessaries' would not

constitute a maritime lien, whereby the plaintiff could proceed against the vessel without first establishing that the owner of the vessel was also liable for the claim. It pointed out that security had been offered in terms of the averments made in Application No.5 of 2017 filed in the suit so as to facilitate release of the arrested vessel forthwith and that the same was without prejudice to its defence in the suit. It further pointed out that the claim for bunkers as 'necessaries' did not give rise to a maritime lien but only a maritime claim and for such a claim to be maintainable against the vessel, the owner of the vessel has to be liable *in personam* to the supplier and in the absence of any privity of contract, there could be no liability on the part of the vessel and no action *in rem* could be maintained against it.

It appears that the first defendant vessel, represented by its registered owner, also filed I.A.No.1 of 2018 in the suit seeking dismissal of the suit as against it or in the alternative, to delete the name of the first defendant vessel from the array of parties. This application is still pending consideration before the learned Judge.

Be that as it may.

Perusal of the common order under appeal reflects that the learned Commercial Division Judge, having examined the rival pleadings, framed the following points for consideration:

- (a) Whether the applicant in I.A.No.2 of 2018 (1st defendant) is entitled to any relief therein by vacating in toto the order dt.25-10-2017 in I.A.No.1 of 2017 as modified in I.A.No.5 of 2017 on 01-11-2017?
- (b) What relief, if at all, is to be granted in I.A.No.3 of 2018 to the applicant therein (1st defendant)?

Upon considering case law on various aspects of admiralty jurisdiction, the learned Judge referred to the provisions of the Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017 (*for brevity*, 'the Act of 2017'). Noting that the principal amount of US\$ 471,552.42 claimed by the plaintiff

for supply of bunkers was already secured by the order of the Dubai Court, the learned Judge noted that the claim in the present suit essentially related to the interest component at 2% per month on the said principal amount which, as per the plaint, would come to US\$ 512,615.09. Applying the provisions of the Act of 2017, the learned Judge noted that as per Section 5(1)(a) thereof, arrest of a vessel could be made only if the person who owned the vessel at the time when the maritime claim arose was liable for the claim and was the owner of the vessel when the arrest was effected or under Section 5(1)(b), if the demise charterer of the vessel, at the time when the maritime claim arose, was liable for the claim and was the demise charterer or the owner of the vessel when the arrest was effected. As the first defendant vessel was on a time charter with the third defendant-charterer when the bunker supply was made and the endorsement on the Bunker Delivery Note dated 14.06.2013 made it clear that supply of bunkers was not on the account of the vessel or its owner, the learned Judge held that there was no privity of contract between the owner of the vessel and the plaintiff. Having regard to the legal position and the specific endorsement on the Bunker Delivery Note dated 14.06.2013, the learned Judge held that *prima facie* there was no liability on the part of the owner of the vessel and if at all there was any liability, it would be that of the third defendant-charterer only. The learned Judge was quick to add that he was not expressing any opinion about the liability of the third defendant-charterer who had not entered appearance as on that date and concluded that the plaintiff had not made out a case for arrest of the vessel and that the arrest appeared to be wrongful. The learned Judge therefore directed refund of the amount of Rs.3,38,30,096/- deposited by the first defendant vessel, through its owner, with accrued interest. Point (a) was answered accordingly.

As regards Point (b), the learned Judge noted that the pleadings in support of I.A.No.3 of 2018 were to the effect that arrest of the first defendant vessel had resulted in losses being caused in the form of loss of charter hire apart from losses due to idling, cost of bunkers, legal costs, etc. The losses due to charter hire for the period of detention were computed by the first defendant vessel at US\$ 54,262.96 and a sum of US\$ 5,973.05 was claimed towards bunker costs during the period of idling. The total amount claimed was US\$ 60,236.01 as damages for the loss caused by the arrest of the vessel. The plaintiff countered this I.A. stating that unless the first defendant vessel made a counter-claim, such an interim order could not be sought. The learned Judge observed that even if the plaintiff had a *prima facie* case against the third defendant-charterer, it did not have an arguable best case for claiming arrest of the vessel, as existence of the time charterparty was borne out by the document produced by the first defendant vessel. The learned Judge further observed that as the said vessel was arrested and was detained from 25.10.2017 to 31.10.2017, the claim of the first defendant for loss of charter hire and bunker costs could not be said to be improbable. Reference was made by the learned Judge to VIDESH SANCHAR NIGAM LTD. V/ s. M.V.KAPITAN KUD¹, wherein the Supreme Court observed that while granting an interim injunction, the Court is enjoined to impose a condition that in the event of the plaintiff failing to prove the case set up and if damages are caused to the defendant due to the injunction granted by the Court, it could impose a condition for payment of damages caused to the defendant in the same proceeding without relegating the parties to a separate suit. Applying this principle, the learned Judge opined that probable loss to the first defendant vessel had arisen on

¹ (1996) 7 SCC 127

account of the order of its arrest and found that it was a fit case to direct the plaintiff to secure the amount of US\$ 60,236.01 along with interest thereon @ 12% per annum by way of deposit in the form of a demand draft drawn up in favour of the Registrar (Judicial) of this Court within a time frame.

At this stage, it may be noted that though the plaintiff seems to have a grievance with the aforestated common order in relation to both I.As., only one appeal has been filed by it. When two separate I.As. were clubbed together for a conjoined disposal, it does not mean that the common order in relation to the two I.As. can be subjected to appellate review in one single appeal. The plaintiff had to file two separate appeals but, unwittingly or otherwise, it did not choose to do so and filed one single appeal. In this regard, reference may be made to SRI GANGAI VINAYAGAR TEMPLE V/ s. MEENAKSHI AMMAL², where only one appeal was filed though there were two decrees. Therein, the Supreme Court observed thus:

Procedural norms, technicalities and processal law evolve after years of empirical experience, and to ignore them or give them short shrift inevitably defeats justice. In the instance of suits in which common issues have been framed and a common Trial has been conducted, the losing party must file appeals in respect of all adverse decrees founded even on partially adverse or contrary speaking judgments. While so opining we do not intend to whittle down the principle that appeals are not expected to be filed against every inconvenient or disagreeable or unpropitious or unfavourable finding or observation contained in a judgment, but that this can be done by way of cross-objections if the occasion arises. The decree not assailed thereupon metamorphoses into the character of a "former suit". If this is not to be so viewed, it would be possible to set at naught a decree passed in Suit A by only challenging the decree in Suit B. Law considers it an anathema to allow a party to achieve a result indirectly when it has deliberately or negligently failed to directly initiate proceedings towards this purpose. Laws of procedure have picturesquely been referred to as handmaidens to justice, but this

² (2015) 3 SCC 624

does not mean that they can be wantonly ignored because, if so done, a miscarriage of justice inevitably and inexorably ensues. Statutory law and processal law are two sides of the judicial drachma, each being the obverse of the other.

It may also be noted that arguments were advanced by Sri V.K.Ramabhadran, learned senior counsel appearing for Ms.Rubaina Khatoon, learned counsel for the plaintiff, mainly concentrating on I.A.No.2 of 2018, whereby the learned Judge directed refund of the security amount of Rs.3,38,30,096/- to the first defendant vessel pending the suit. Even in the written arguments dated 03.10.2018 filed on behalf of the plaintiff, the concluding paragraph reads to the effect that the appeal requires to be allowed and the impugned judgment passed by the learned Judge vacating the order of injunction is liable to be set aside. It is thus clear that though the appeal is purportedly sought to be maintained against the common order in relation to both I.As., the grievance of the plaintiff seems to be more against the order directing refund of the security amount deposited by the first defendant vessel. This Court therefore proceeds by treating this appeal as one filed against the common order dated 26.07.2018 in so far as it relates to only I.A.No.2 of 2018 and not I.A.No.3 of 2018.

By order dated 08.08.2018 passed in this appeal, this Court recorded the undertaking given on behalf of the first defendant vessel that it would not apply for withdrawal of the amount deposited by it and also stayed the direction to the plaintiff to secure the sum of US\$ 60,235.01, with interest thereon, till this appeal was heard. While reserving judgment in this appeal on 25.09.2018, this Court directed that the order of stay granted on 08.08.2018 shall continue to operate till pronouncement of judgment.

At this stage, it may be noted that though Sri V.K.Ramabhadran, learned senior counsel, and Sri Amitava Majumdar, learned counsel

appearing for M/s Indus Law Firm, learned counsel for the first defendant vessel, advanced a multitude of contentions touching upon the merits of the matter supported by an abundance of case law, we are conscious of the fact that this appeal arises out of an interlocutory order and the suit itself is still pending consideration. It appears that the first defendant vessel filed its written statement therein only in February, 2018, and the third defendant-charterer is yet to enter appearance. We may also note that the application filed by the first defendant vessel seeking dismissal of the suit as against it is also pending consideration. It would therefore be wholly premature for us to go into issues that would arise for consideration in the suit. At this stage, the only aspect that needs to be addressed is whether the learned Judge was justified in directing refund of the security amount that was deposited by the first defendant vessel for obtaining its release.

It may also be noted that Commercial Suit No.3 of 2017 was instituted on the file of this Court in October, 2017, whereas the Act of 2017 came into force on 01.04.2018, in terms of the Notification published by the Ministry of Shipping, Government of India, in the Gazette of India dated 22.02.2018. Section 17(1) of the Act of 2017 states that the Admiralty Court Act, 1840; the Admiralty Court Act, 1861; the Colonial Courts of Admiralty Act, 1890; the Colonial Courts of Admiralty (India) Act, 1891; and the provisions of the Letters Patent, 1865, shall stand repealed in so far as their application in India is concerned. However, Section 17(2) of the Act of 2017 states that notwithstanding such repeal, all admiralty proceedings pending in any High Court immediately before the commencement of the Act of 2017 shall continue to be adjudicated by such Court in accordance with the provisions of the Act of 2017. In the light of this statutory provision, the validity of the arrest of the first defendant vessel necessarily has to be tested against the

requirements set out in Section 5 of the Act of 2017. We may also note that it was based upon such an analysis that the learned Judge came to the conclusion that the arrest of the first defendant vessel was wrongful.

In this regard, Sri V.K.Ramabhadran, learned senior counsel, would contend that the learned Judge ought not to have given conclusive findings on this aspect, unmindful of the fact that the suit trial is yet to commence and that any such findings may prejudice the plaintiff at a later stage in the suit. He would rely upon case law in support of his contention that when the suit trial is yet to commence, at the interlocutory stage, the Court ought not to go into the merits of the matter in such a decisive manner.

In *SOCAR TURKEY PETROL ENERJI DAGITIM SAV.VE.TI.C.A.S. V/ s. M.V.AMOY FORTUNE (IMO 9583639)*³, a learned Judge of the Bombay High Court, while dealing with a claim against a vessel for supplies of bunkers observed that a liability *in personam* would arise against the owner of the vessel only as a matter of a contract or a *quasi* contract or by way of tort or under a statute. On facts, the learned Judge found that it was not the case of the supplier that bunkers were provided at the request of the owner or under a contract with the owner or that the owner was liable *in personam* in respect of the claim. Simply put, his case was that he had supplied bunkers to the vessel and therefore, the vessel was liable as it consumed the bunkers. The learned Judge however held that the mere factum of supply of bunkers to the vessel would not make the owner of the vessel liable *in personam* unless it was the owner or the person having authority to bind the owner who had entered into the contract for supply of bunkers. Referring to Article 3 of the International Convention on the Arrest of Ships, 1999, the learned Judge observed that the said provision made it

³ Commercial Notice of Motion No.199 of 2017 in Commercial Admiralty Suit No.223 of 2017 dated 04.06.2018

clear that arrest of a ship would be permissible if the person who owned the ship at the time when the maritime claim arose was liable for the claim and was the owner of the ship when the arrest was effected and therefore, the liability of the owner of the ship is a prerequisite to commencing an action *in rem* for arrest of that ship. The learned Judge held that reading of the plaint and the documents produced by the plaintiff made it apparent that the supplier did not have a *prima facie* case for arrest of the vessel and his case, being hopelessly misconceived, could not be considered as even reasonably arguable. The learned Judge accordingly vacated the order of arrest and directed return of the security deposited by the owner of the vessel.

In appeal against this judgment of the learned Single Judge, a Division Bench of the Bombay High Court, in *SOCAR TURKEY PETROL ENERJI DAGITIM SAV.VE.TIC.A.S. V/ s. M.V. AMOY FORTUNE (IMO 9583639)*⁴, found merit in the contention urged by the supplier that at the interlocutory stage it was not appropriate to deal with the issue of privity of contract as the same should be dealt with only after leading of evidence. The Division Bench observed that merely based on the bunker invoice and delivery receipt, it would be difficult to form a conclusive opinion at an interlocutory stage that there was no privity of contract between the appellant and the respondent and there was no overwhelming material to reach such a conclusion. The Division Bench opined that the issue as to whether privity of contract could be presumed to be in existence and the issue relating to the maritime claim would have to be addressed at the trial of the suit. The Division Bench held that it would be appropriate to settle these issues after the trial of the suit and accordingly allowed the appeal.

⁴ 2018 SCC OnLine Bom 1999

Similar were the observations made by a Division Bench of the Bombay High Court in CHEMOIL ADANI PVT.LTD. V/ s. M.V.HANSA SONDERBURG⁵ and a Division Bench of the Gujarat High Court in M.V.SEA RENOWN V/ s. ENERGY NET LTD.⁶

It is no doubt true that the learned Judge, having made several incisive observations on the merits of the matter, did not choose to add the caveat that all such observations were being made only for the purpose of disposing of the interlocutory applications and that the same would not be binding on either the parties or upon the Court at a later stage in the suit. We therefore make it clear that the *prima facie* observations made in the order under appeal have to be limited to the disposal of the subject I.As. only and cannot be construed to be binding or constitute *res judicata* between the parties at a later stage in the suit.

The principal issue to be addressed in this appeal is whether the learned Judge was correct in directing refund of the security amount. In this context, an aspect which was not addressed at length before the learned Judge but has assumed great significance thereafter has to be given primacy and due weightage. The plaintiff mentioned in the plaint averments in the passing that it had already approached the Dubai Court in relation to its claim for the amount due for supply of bunkers to the first defendant vessel.

To elaborate, the plaintiff instituted a claim on 13.05.2017 before the Dubai Commercial Court which came to be numbered as Case No.1331/2017. Therein, the first defendant was Monford Management Limited, the owner of MV KIVELI, and the second defendant was Sagar Ship Management SDN PHD, its charterer. The plaintiff's prayer therein was to attach MV KIVELI, which was docked at Jebel Ali Port, UAE, for realizing the sum of

⁵ [2010(7) Mh.L.J. 660]

⁶ MANU/GJ/0322/2003

US\$ 913,554.22. This figure comprised the principal amount of US\$ 471,552.42 due for the bunker supplies along with the sum of US\$ 442,001.80 towards interest thereon, aggregating to US\$ 913,554.22. An order for arrest of the vessel was passed by the Dubai Court on 14.05.2017 for the principal amount of US\$ 471,552 claimed by the plaintiff. The vessel was released on 18.05.2017 upon the first defendant furnishing security for the said amount to the Dubai Court.

Eventually, the Dubai Court disposed of the suit, by judgment dated 30.10.2017. Monford Management Limited, the owner of MV KIVELI, the first defendant therein, had challenged the admissibility of the case before the Dubai Court for lack of capacity. Considering this to be a substantive plea, the Dubai Court observed that in the case of time charter of a vessel, the charterer shall retain the navigational management of the vessel and fit out and maintain the same and that in such a case, the charterer shall bear the costs thereof and in particular, he shall supply the vessel with fuel, oil, lubricants and drinking water. The Dubai Court therefore held that there was no liability on the part of the first defendant as it was the obligation of the second defendant-charterer before it to pay the amount for the fuel as per law. The Dubai Court pointed out that the contract for supply of fuel was made between the plaintiff and the second defendant-charterer and the contractual relationship arising thereunder did not impose any obligations on third parties to the contract and therefore, the plea of the first defendant was legally and factually valid. The Dubai Court therefore accepted the inadmissibility of the case for lack of capacity in respect of the first defendant. As regards the claim for legal interest, the Dubai Court held that the commercial obligation was for a sum of money which was known when the obligation arose and when the debtor delayed payment thereof, it was

bound to pay to the creditor as compensation for the delay, the interest at the rate fixed in the contract, within the limits of 12%. If such rate was not stated in the contract, *per* the Dubai Court, it had to be determined by the customary judicial practice of calculating the rate of interest at 9% per annum from the date of filing of the claim till full settlement as compensation. The plaintiff was accordingly held entitled to interest on the debt at 9% per annum from the date of the claim, 11.06.2017, till full settlement. The Dubai Court therefore adjudged on 30.10.2017, in the presence of the first defendant and by default, against the second defendant, as under:

‘First: not to accept the case for lack of capacity in respect of the 1st defendant.

Second: to compel the 2nd defendant to pay to the plaintiff US\$ 471,000 or its equivalent in UAE Dirhams, along with 9% interest p.a. from the date of claim on 11/6/2017, till the full settlement along with expenses and Dhs. 1,000 as legal attorney fees and reject other claims.’

Aggrieved by this judgment, the plaintiff filed Appeal No.2264 of 2017 Commercial. Thereupon, the Dubai Court of Appeal delivered judgment dated 25.04.2018. The Dubai Court of Appeal held thus: That the appellant-plaintiff had concluded a contract only with the charterer, the second appellee, to supply bunkers to the vessel which was carried out upon its request. The contract was therefore concluded between the appellant-plaintiff and the charterer, the second appellee. The owner of the vessel, the first appellee, had nothing to do with the contract and was deemed to be a third party. The contracting parties would be obliged by the contract that they had concluded. The owner of the vessel, the first appellee, had no capacity to have the claim filed against it. The Dubai Court of Appeal however held that the charterer was liable to pay the interest amount of

US\$ 442,001.80 and held the appellant-plaintiff entitled to interest @ 9% per annum on the entire amount from 25.09.2017 till payment.

It may be noted that the present suit was filed before this Court in October, 2017, by which time the Dubai Court had only secured the plaintiff's principal claim for US\$ 471,552.42 towards the price of the bunkers supplied. At that stage and even under the judgment dated 30.10.2017, the plaintiff's claim for interest was not granted by the Dubai Court as only the principal sum of US\$ 471,552.42 was secured. The present suit claim of US\$ 512,615.09 therefore comprised the claim of US\$ 492,615.09 towards the alleged interest due upon the principal sum of US\$ 471,552.42 payable towards the supply of bunkers along with further interest thereon. However, the Dubai Court of Appeal has now granted the claimed interest component of US\$ 442,001.80 also, holding the charterer alone liable therefor. The present suit claim for the interest component in its entirety would therefore include the awarded amount of US\$ 442,001.80 granted to the plaintiff by the Dubai Court of Appeal. It may also be noted that the Dubai Court of Appeal granted interest @ 9% per annum not only on the principal amount of US\$ 471,552.42 but also upon the interest component of US\$ 442,001.80. Therefore, the question that would invariably arise is as to what remains to be addressed in the present suit. This aspect of the matter would have to be looked into by the learned Judge when I.A.No.1 of 2018 filed by the first defendant vessel is taken up for hearing. At this stage, as pointed out *supra*, all that this Court is concerned with is the necessity of requiring the first defendant vessel to continue to maintain the security deposited by it for obtaining release of the vessel on 31.10.2017.

Given the aforestated new developments, which cast a different light altogether on the scope of this litigation, we are of the opinion that requiring

the first defendant vessel to continue to maintain such security would be contrary to the binding findings of the Dubai Courts, to the effect that it is only the third defendant-charterer who is responsible and liable for the principal sum as well as the interest due thereon for supply of the bunkers. We are informed that no appeal has been preferred by the plaintiff against the judgment of the Dubai Court of Appeal and the same has attained finality. Having suffered such adverse findings before a competent Court of Law in relation to the liability of the first defendant vessel and its owner, it may not be open to the plaintiff to argue to the contrary before this Court. This aspect would also have to be examined in the suit proceedings.

Sri V.K.Ramabhadran, learned senior counsel, would contend that the judgments of the Dubai Courts were not placed before the learned Judge and that, in any event, they would not be binding on this Court or be conclusive as to any issue to be adjudicated in the present suit. He would rely on Section 13 CPC, which reads as under:

‘13. When foreign judgment not conclusive.—A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except—

- (a) where it has not been pronounced by a Court of competent jurisdiction;
- (b) where it has not been given on the merits of the case;
- (c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognize the law of India in cases in which such law is applicable;
- (d) where the proceedings in which the judgment was obtained are opposed to natural justice;
- (e) where it has been obtained by fraud;
- (f) where it sustains a claim founded on a breach of any law in force in India.’

However, the learned senior counsel did not state as to which of the above exceptions, if at all, would have application to the Dubai Courts' judgments, whereby this Court would be at liberty to say that the said judgments are not conclusive and binding upon the parties. It may be noted that the plaintiff itself craved leave to refer to and rely upon the Dubai Court proceedings, as per the plaint averments. Having craved such leave it is not open to the plaintiff to now brush aside the judgments of the Dubai Courts. As matters stand, the said judgments stare the plaintiff in the face. Given the findings of the Dubai Courts which, *prima facie*, are binding upon the plaintiff, it is not open to the plaintiff to insist upon security being maintained with this Court by the first defendant vessel. The caveat spelt out in M.V. AMOY FORTUNE (IMO 9583639)⁴ that overwhelming material is required to justify inferences being drawn at the interlocutory stage is duly satisfied in the light of the judgments of the Dubai Courts.

This Court also finds merit in the submission of Sri Amitava Majumdar, learned counsel, that the plaint has been skilfully drafted in a delightfully vague manner so as to leave one guessing as to what exactly is the basis for the suit claim. There is no indication therein that the suit claim is wholly attributable to the interest component for the delayed payment for supply of bunkers. Further, not even an effort was made by the plaintiff to bring to the notice of the learned Judge the findings of the Dubai Court, *vide* its judgment dated 30.10.2017, to the effect that it is only the charterer who is responsible for the claim of the plaintiff for supply of bunkers. Therefore, this selective disclosure and suppression of facts by the plaintiff would also have to be considered when I.A.No.1 of 2018 in the suit is taken up for hearing.

On the above analysis, this Court finds that the learned Judge did not err in law in directing refund of the security amount furnished by the first

defendant vessel for securing its release. The findings rendered by the learned Judge, which are seemingly conclusive in nature, shall be limited to the disposal of the subject I.As. and shall not be construed to be binding or final at a later stage in the suit proceedings. However, given the various other issues which have arisen in the context of the Dubai Courts' judgments, it is for the learned Judge to address these aspects when I.A.No.1 of 2018 filed by the first defendant vessel is taken up for consideration on merits. In so far as I.A.No.3 of 2018 is concerned, as the plaintiff chose to file one single appeal against the common order passed in two I.As., the validity of the said order in so far as it pertains to I.A.No.3 of 2018 is left unanswered.

The appeal is therefore devoid of merit and is accordingly dismissed. Interim order dated 08.08.2018 shall stand vacated. Pending miscellaneous petitions shall also stand dismissed. No order as to costs.



SANJAY KUMAR, J

M.GANGA RAO, J

9th NOVEMBER, 2018

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