IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
ORIGINAL SIDE
(Commercial Division)

BEFORE:
The Hon'ble Justice Soumen Sen
and
The Hon'ble Justice Biswaroop Chowdhury

AO- COM 31 of 2024
With
I.A No. (COM) G.A no.1 of 2024
A.S. (COM) 3 of 2024

FACTION CO. LTD
VS.
THE CHARTERERS PARTIES INTERESTED IN THE VESSEL M.T BD 51 (IMO NO.9505003)

For the Appellant	:	Mr. Ratnanko Banerji, Sr. Adv. Mr. K.R. Thaker, Sr. Adv. Mr. Kuldip Mullick, Adv. Mr. Rohit Mukherji, Adv. Mr. Satyaki Mitra, Adv.
For the respondent no.2	:	Mr. Siddhartha Mitra, Sr. Adv. Mr. Debajyoti Datta, Sr. Adv. Mr. Jayanta Samanta, Adv. Mr. Dip Jyoti Chakraborty, Adv. Mr. Susanta Datta, Adv. Ms. Anand Singh, Adv.
Hearing concluded on	:	16th December, 2024
Judgment on	:	19th December, 2024

SoumenSen, J.:-

1. The appeal is arising out of an order dated 15th July, 2024 in an admiralty suit instituted in the Commercial Division in respect of the vessel M.T. BD 51 (IMO No.9505003). In view of the extreme urgency pleaded and

urgent relief claimed the learned Single Judge granted leave to institute the suit dispensing with requirement of Section 12A of the Commercial Courts Act, 2015. The appellant (petitionertherein) is the owner of the said vessel. The appellant, inter alia, prayed for arrest of the aforesaid vessel.

2. The learned Single Judge refused to grant any interim relief since it appeared to the court that the contract was terminated after receiving almost 39 crores and only for default of Rs.1.2crores(approximately) towards hire charges. The learned Single Judge had accepted the submission on behalf of the respondent No.2 that it has not ceased to exist and the reference to Clause 28 and 29 of the Bare Boat Charter (BBC) between the appellant and the respondent No.2 could not have been invoked to repossess the vessel. The learned Trial Judge has taken into consideration that the respondent No.2 had intimated in the year 2022 itself regarding the change of name and had clarified unambiguously that such change of name was only for the purpose of hire payment. The learned Single Judge had relied upon the invoices raised by the appellant on the basis of the aforesaid arrangement till April, 2024 and payments received towards hire charges. The learned Single Judge had relied upon a document produced by the respondent No.2 which prima facie indicates that there is a subsisting business licence issued at least by one of the principalities of the United Arab Emirates being Ajman in favour of the respondent No.2. The name of the respondent No.2 in the BBC and the company name in the business licence produced by the respondent No.2 appear to be identical. The learned Single Judge was satisfied that the respondent No.2 has a substantial defence in so far as the appellant not

being able to clarify in its pleadings as to how the appellant all of a sudden came to know about the purported cancellation of business licence of the respondent No.2. In view thereof the ad-interim prayer of arrest made by the appellant was refused.

3. The appellant is aggrieved by the said order of refusal.

4. Before we advert to the submissions made on behalf of the parties, we briefly narrate the facts as emanated from the pleadings and a short affidavit filed by the respondent No.2 in terms of the direction of the of the court.

5. The appellant,Faction Co. Ltd. is a company incorporated under the laws of Panama and is engaged in the business of shipping and ownership of ocean-going ships. The respondent no. 1 (defendant no. 1 therein), M.T. BD 51 is an ocean-going vessel (IMO No. 9505003) registered in the Republic of Panama and presently anchored at Haldia within the admiralty jurisdiction of this Hon'ble Court. The respondent no. 2 (defendant no. 2 therein), JCBN Surveying & Chartering FZE, is a company incorporated and registered under the Sharjah Airport International Free Zone Authority (SAIF) of the Government of Sharjah in the United Arab Emirates (UAE). The appellant being the sole registered owner of the Vessel had entered into a Bareboat Charter Party Contract with the respondent no. 2 dated 29th July, 2021.

6. The BBC clearly indicates that the respondent No.2 is the Bareboat Charterer. It appears to be a time charter for a period of three years, commencing from 29th July, 2021. The additional clause as agreed by and between the parties inter alia include the following clauses:-

> *"<u>47. Additional Clauses as agreed:</u>*
> *"CREW/Technical/ISM Managers to be appointed by the Charterers. All costs including operational costs, insurance etc. will be on charterers account upon taking over the vessel.*
> *<u>After completion of 3 years, vessel will be registered to charterers company or nominee company by the charterers as registered owners.</u>" (*emphasis supplied*)*

7. During the subsistence of the BBC on 7th March, 2022 the respondent No.2 informed the appellant regarding change of the name of the company to United Maritime Services LLC for sixth hire payment temporarily for reason of facing bank issues with its current banker and the respondent No.2 was in the process of changing banks. Subsequently on 23rd June, 2022 the appellant was given a notice of temporary change of name of company to Spring Ship Management FZE, SAIF Zone, Sharjah, UAEfor the tenth hire remittance temporarily for facing bank issues. In both the letters the respondent No.2 had given an undertaking to take all risks and/or to indemnifythe owner of any claim that might arise with regard to such hire payment.

8. The appellant continued to accept the hire payment from Spring Ship Management FZE, SAIF Zone, Sharjah, UAE till they issued the termination notice dated May, 21 2024. The charter party was terminated under Clause 28(d) due to cancellation of business registration of the respondent No.2. In the notice the appellant acknowledged that the respondent No. 2 had requested the appellant that the company name be

changed to United Maritime Services LLC on 3rd July 2022 andSpring Ship Management FZE on June 23, 2022 for the payment of the charter hire due to bank issue. However, it was alleged that the respondent No. 2 did not however provide any formal notification of the business registration cancellation. The appellant exercised its right under Clause 29 of the BBC agreement and reiterated that it has the right to repossess the vessel from respondent no. 2 at her current or next port of call or at a port or place of convenience without hindrance or interference by respondent no. 2.

9. The respondent no. 2 in reply to the said notice had referred to Clause 21 and 47 of the BBC and reminded the appellant that upon the completion of the three year period the vessel was to be registered in the name of the charterer company or nominee company designated by the charterers. Respondent no. 2, JCBN Surveying and Chartering FZE had temporarily changed their name to Spring Ship Management FZE, SAIF Zone, Sharjah, UAE due to banking issues and were in the process of transitioning to a new bank. The appellant was notified about the issuance of tenth hire payment to Spring Ship Management FZE by a letter dated 23rd June, 2022. The said letter was sent via e-mail on 27th June 2022. Following this correspondence the appellant accepted the change and willingly continued to issue invoices to Spring Ship Management FZE for all subsequent payments uptil the 32nd hire payment. All invoices issued to Spring Ship Management FZE were duly paid by respondent no. 2 in accordance with the BBC agreement.

10. The ownership of the vessel of the owner was changed on 5th April, 2023 but the respondent no.2 was informed only on 28th June, 2023

which was almost after three months. It was categorically stated that there has been no dissolution of business and the plea that JCBN did not provide any formal notification of the business registration cancellation is a clear afterthought.In course of hearing before Justice Sabyasachi Bhattacharyya the respondent no.2 produced one certificate issued by the Free Zones Authority, Government of Ajman to demonstrate that the respondent no.2 was operating under a business licence issued by the said authority on 17th March, 2022 and it is valid till 16th March, 2025. In course of hearing on11th December, 2024we directed an affidavit to be filed on behalf of the respondent no.2 disclosing its assets and any other relevant details that the respondent no.2 is willing to disclose. The affidavit was affirmed by one Chiranjeev Kumar Singh on 12th December, 2024. He claimed himself to be the director/owner of the respondent no.2 having its office at Sharjah, PO Box 123254, United Arab Emirates. He is also the signatory to the charter party agreement. It is stated that the respondent no.2 in terms of the charter party agreement duly paid the fees and security deposits to the appellant from September 20, 2021 till 16th March, 2022. However, at that time the respondent no.2 was having issues with their current bank and was holding discussions with other banks to open a new account. Since opening a new account in UAE could takearound two or three months, the respondent no.2 by a letter dated 3rd March, 2022 informed the appellant through its broker MC Quilling (Hellas) Ltd. that the payment for the month of March, 2022 would be in the name of United Maritime Services Limited LLC. Thereafter, by another letter dated 23rd June, 2022 the respondent no.2 had also informed the appellant that Spring Ship Management FZE, SAIF Zone, Sharjah, UAE shall make the payment for the 10th hire payment charges and as such the charterer name should be changed to Spring Ship Management FZE, SAIF Zone, Sharjah, UAE in place of the respondent no.2. Accordingly payments for the months of March, April, May and June 2022 were made by United Maritime Services Limited LLC and payments from July, 2022 till April, 2024 were made by Spring Ship Management FZE on behalf of the respondent no.2. The appellant was receiving installments all along from March, 2022 from Spring Ship Management FZE without any demand and had received so far a sum of Rs.39 crores from the respondent no.2 as hire purchase charges. In the affidavit it is admitted that the last hire charges of Rs.1.2 crores approximately is due and the said respondent no.2 is willing to pay this amount to the appellant or deposit the same by way of demand drafts to the Registrar, Original Side at Calcutta High Court.

11. The respondent no.2 company is inactive presently and the respondent no.2 has applied to licensing/lease/finance department of Sharjah Airport International Free Zone, SAIF Zone UAE for changing the status to active and to renew the trade licence also. A letter dated 2nd September, 2024 issued by the respondent no.2 to the concerned department of Sharjah, UAE has been disclosed in the said affidavit. Subsequent thereto an e-mail on 11th September, 2024 was received from the department concern, of Sharjah Airport International Free Zone, UAE directing the respondent no.2 to submit certain documents for renewal of the business licence. Thereafter documents were duly submitted to the Sharjah Airport International Free Zone, UAE. The list of documents submitted for reinstatement has been disclosed in the affidavit. After

submission of the said documents the Head of the Leasing Department Sharjah Airport International Free Zone, UAE had sent an email dated 13th November, 2024 stating that the issue is pending with the management and they shall revert as soon as they received feedback. The said letter has also been disclosed. It is categorically stated that although the respondent no.2 is currently inactive it is operating through its technical/commercial manager Spring Ship Management FZE. The letter of appointment of Spring Ship Management dated 15th March, 2022 as the technical manager of respondent no.2 has been disclosed. In the said affidavit the deponent has also disclosed immovable property situated in India to allay any fear of its absconsion or the true identity of the director who had affirmed the said affidavit on behalf of the respondent no.2.

12. Mr. Ratnanko Banerji, learned Senior Counsel appearing on behalf of the appellantsubmits that the respondent no. 2 being the bareboat charterer of the Vessel is presently not in existence and ceased to operate and accordingly the appellant in terms of Clause 28 read with Clause 29 of BBC is entitled to re-possess the Vessel. The Respondent no. 2 has lost its registration and corporate existence and as such the Bare Boat Charter party can no longer be performed by it.

13. It is submitted that at the hearing of the arrest application on 15th July, 2024, the counsel appearing on behalf of the respondent no. 2 had submitted before Justice Bhattacharyya that the respondent no. 2 had not ceased to exist but had merely shifted its office from Sharjah to Ajman in the UAE and handed over a copy of the purported business licence issued by the Government of Ajman. The learned judge relying on the said

document had held that there was only a change of address and the respondent no. 2 had not ceased to exist.

14. The learned senior counsel strenuously argued that the respondent no. 2 incorporated in Sharjah and the entity incorporated in Ajman are separate and independent juristic entities which have been registered and are governed by different laws and regulations of Sharjah and Ajman respectively. It was not legally or even otherwise possible for respondent no. 2 to have relocated or re-domiciled to Ajman.

15. The contention of the Ajman entity which had entered appearance in the proceedings in the guise of respondent no. 2, that the appellant was aware of the purported change in name and had also accepted payment from it in substituted performance of the charter party agreement was wholly false.

16. There has been no change of name of respondent no. 2 of Sharjah/SAIF to the purported Ajman entity but an altogether change of constitution and entity.

17. The respondent No.2 has not intimated about such change of name or constitution and entity.

18. The respondent no. 2 only sought change of corporate name in the Charter Hire invoices to enable Spring Ship Management FZE, SAIF and United Maritime Services LLC, Dubai (and not the Ajman entity) to make payment of Charter Hire alleging that it was facing issues with its bankers. However, respondent no. 2 agreed to undertake all risks and remain liable for payment to Appellant in this regard. Thus, there was no change of contracting party / charterer in the charter party agreement.

19. The Ajman entity was incorporated on March 17, 2022 when respondent no. 2 was still in existence under the Laws of Sharjah/SAIF.

20. The Ajman entity had never made any payment of Charter Hire to the Appellant, and payment of Charter Hire post March 2022 were made by United Maritime Services LLC and Spring Ship Management FZE as the nominees, and on behalf of, respondent no. 2.

21. It was also submitted on behalf of the appellant that presently it has also transpired that the respondent no. 2 had wound up its business as the promoter and person in control of respondent no. 2 being Mr. Chiranjeev Kumar has been named in the Specially Designated Nationals (SDN) Sanction List issued by the Office of Foreign Assets Control (OAFC) of the United States government for violating sanctions. Hence, the new entity in Ajman had been incorporated and registered on 17th March 2022 with a different person and promoter in control being Navita Kumar Yogendra Prasad Singh but the same trading name as that of the respondent no. 2. It is contended that the aforesaid fact makes its manifestly clear that the banking issues alleged by respondent no. 2 in 2022 were a consequence of the abovenamed Mr. Chiranjeev Kumar Singh being blacklisted and put on the SDN Sanction lost.

22. Apart from the aforesaid, during subsistence of the contract, the respondent no. 2 had allegedly committed several breaches of the contract inter alia:

(i) The appellant obtaining information that the registration of the respondent no.2 had been cancelled in and around 29th

September, 2022 constituting a ground for termination of contract under Clause 28(d);

(ii) The respondent no. 2 being unable to legally discharge its functions under the contract in its own capacity apparent from the email dated 3rd March, 2022 wherein it was informed that the respondent no. 2 was unable to operate their current bank account and had sought issuance of invoice for charter hire payments in the name of unconnected third parties;

(iii) The respondent no. 2 which was obligated to keep the Vessel's Class fully up to date with the Classification Society, failing to undertake the Docking Survey, Boiler Survey and occasional survey within the stipulated time resulting in the suspension of Class from 18th March 2022 to 20th April, 2022 and such never being intimated to the appellant. This constituted a breach of Clause 10 (a)(i) of the contract and hence the contract was terminable under Clause 28 (a)(iii) of the contract.

(iv) The respondent no. 2 being under an obligation to keep the Vessel insured at its own expense during the charter period but failing to sending any insurance policies or intimating the appellant of an accident involving the vessel in violation of Clauses 13(a) and 33(b) of the contract.

(v) Sailing the vessel in territories subject to US, EU and UN sanctions Box 20 of the CPA read with Clause 6 and further read with Clause 28 (a) (ii) (1) thereof;

(vi) Not keeping the Vessel insured and under P&I cover and recording the Appellant as an Assured Clause 13 (a) of the CPA read with Clause 28 (a) (ii) (2) thereof.

23. The learned senior counsel also submitted that after the appellant called upon the respondent to provide proof that respondent no. 2 and the Ajman entity were one and the same no further steps had been taken and no arbitration proceeding was pending as on this date as only the respondent no. 2 was entitled to invoke arbitration being a party to the charter party agreement.

24. Mr. Banerji has also argued that the Ajman entity is not entitled to possession of the Vessel or any other right of the respondent no. 2 as envisaged in the agreement as it is a stranger with no privity of contract with the appellant and an interloper not party to the present proceedings.

25. It is also submitted that although the Vessel is valued at Rs.37 crores as per the order dated 4th September, 2024, the security amount was reduced to Rs.20 crores as a *pro tem* solution. Since no security had been furnished till date, the arrest of the vessel should be made absolute and the Vessel should not be permitted to sail without an interested party putting in security before the Hon'ble Court for the full value of the Vessel lest the decree in the present suit is rendered a mere paper decree when the Vessel is allowed to be taken away without furnishing security.

26. Per contra, Mr. Siddharth Mitra, the learned senior counsel for the respondent no. 2 herein submits that the respondent no. 2 had paid all the installments under Clause 32 of the charter party contract excepting the last one. Initially all the hire charges were borne by the respondent no. 2 but

owing to banking problems the respondent no. 2 had to make payments through United Maritime Services Limited LLC from March 2022 to June 2022 and the Vessel's technical manager, Spring Ship Management FZE, SAIF Zone, Sharjah, UAE from July 2022 till April 2024, without any objection being raised by the appellant.

27. Admittedly the respondent no. 2 had already paid 35 out of 36 installments and could not pay the last hire installment as the last invoice had not been raised by the appellant. However, it was ready and willing to pay the last installment as and when directed by the Hon'ble Court. Mr. Mitra submits that the appellant had received a sum of approximately Rs.39 crores from the respondent no. 2 and had suddenly raised such issues when the last hire charges of approximately Rs.1.2 crores were due and refused to issue an invoice for the same.

28. Contrary to the appellant's contention that the licence of the respondent no. 2 had been cancelled and this being the primary ground for termination of the charter party agreement, the licence of the respondent no. 2 is valid till 16th March 2025 (being voyage licence No. 30970 under the trade name JCBN Surveying and Chartering F.Z.E) which has been grossly suppressed by the appellant.

29. It was further argued that arbitration proceedings had already commenced by invoking Clause 30 of the said agreement and the appellant had submitted to such arbitral proceedings by way of letter dated 30th July, 2024.

30. It was also submitted that as on date the respondent no. 2 still exists in one of the Emirates of the UAE in Ajman and as such Clause 28(d)

of the contract cannot be invoked by the appellant and the question of termination of the said agreement has to be decided in the arbitration proceedings.

31. As for the other allegations of breach of contract and the termination notice the learned senior counsel has argued that the appellant was duly intimated with respect to issuance of invoices to Spring Ship Management in June 2022 and also vide a letter notifying the change regarding the party to whom the invoices were to be issued and the appellant had accepted the same and willingly issued invoices to the abovenamed which were duly paid by the respondent no. 2.

32. With respect to Clause 10 (a)(i), the respondent no. 2 was in regular communication with the class and the requisite flag authorizations pertaining to extension of the survey by the class were also secured. The respondent no. 2 carried out the requisite works as soon as was practically possible in consonance with its obligations under Clause 28 of the contract.

33. The information regarding the alleged accident was provided in July 2023. Further the allegations with respect to alleged lapse in Vessel's insurance are absurd in as much as it is impossible to conduct international trade through a Vessel that is not properly insured and further all relevant insurance policies had been provided to the appellant.

34. Every invoice raised by the appellant had been cleared in due regard to its obligations under the contract as far as hire, maintenance and operation of the Vessel is concerned. The termination notice was a half-baked attempt to stall the completion of the contract and transfer the

ownership in favour of the respondent no. 2 hour of sheer greed of the appellants.

35. In the aforesaid background, the order of the learned Single Judge needs to be considered.

36. The arrest of a vessel is an action in rem. In fact the jurisdiction is assumed by arresting the ship. In an admiralty jurisdiction the court ordinarily favours the owner of the vessel if the court is *prima facie*, satisfied that there is a maritime claim and unless the said vessel is arrested there is every possibility that, if ultimately the court decides in favour of the owner and lets the vessel to sail in the meantime, the decree that may be passed would be rendered infructuous.

37. The owner has allowed the respondent charterer, to have possession and control of the ship (or res), the liability of the charterer, which is often described as charterer by demise or Bare Boat Charter, would suffice for the purpose of an action in rem. The present action is an action in rem in which the plaintiff claims its right over the ship. The plaintiff alleges that it has an actionable demand.

38. The nature of this jurisdiction in respect of claims for possession has been described:

> *"The jurisdiction to entertain claims for possession is derived from the inherent jurisdiction of the Admiralty Court to take ships or vessels out of the hands of wrongdoers and restore them to the owners, and to dispossess masters who ought to be removed. Jurisdiction was originally limited to disputes as to possession alone, for the common law courts declared that where any bona fide claim of ownership was set up as defence, the Admiralty Court has no jurisdiction to deal with the question*

> *of title. To remedy this limitation a statutory jurisdiction was conferred in 1840 upon the Admiralty Court to decide any question of title to the subject matter of claims for possession. (See. Halsbury's Laws of England, A 4th Edn.(Re-issue), Vol. 1(1), para 314, p. 432.)*

39. The purpose of the arrest is to acquire jurisdiction, to obtain security for satisfaction of the claim when decreed, and to put pressure on the owner, charterer or other person responsible to appear and answer for the claim.

40. In ***M.V Elisabeth v. Harwan Investment and Trading Pvt. Ltd.,***[1] the Hon'ble Supreme Court has put the matter cautiously:

> *"An action in rem is directed against the ship itself to satisfy the claim of the plaintiff out of the res. The ship is for this purpose treated as a person."* (emphasis supplied)

41. The essence of the action in rem in procedure is that 'res' itself becomes, as one might say, the defendant, and ultimately the 'res' the ship may be arrested by legal process and sold by the Court to meet the plaintiff's claim. The primary object, therefore, of the action in rem is to satisfy the claimant out of the 'res' [*See.* ***Maritime Law by Christopher Hill***].

42. The purpose of an arrest is well served if the defendant or his solicitor/advocate agrees to accept service and undertakes to provide security, in which case no warrant of arrest may be issued.

[1]**AIR 1993 SC 1014**

43. In admiralty jurisdiction the court very often passed an injunction restraining the vessel from being removed from its territorial jurisdiction water since by removal of assets of the defendant from jurisdiction or by some other dealing with such asset the judgments in favour of the plaintiff likely to be passed would be rendered infructuous. It has often suggested that a more accurate expression would be Mareva type asset preservation order than a Mareva injunction. The order of the court is not to seize any asset, as in the case of the attachment before judgment by the common-law or equity courts, but to restrain the owner or person/entity in possession from dealing with asset or assets in certain ways.

44. The Mareva injunction thus is considered to be of wider scope, more flexible and more efficacious than arrest, provided the owner of the asset is easily amenable to contempt proceedings in the event of violation of the injunction. The conditions for grant of Mareva injunction are that there should be a strong *prima facie* case as opposed to a mere prima facie case, that the plaintiff is entitled to damages and that there is a real risk of the judgment in favour of the plaintiff being frustrated. [See. ***A/S D/S Svendborg v. Wansa (trding as Melbourne Enterprise***)][2].

45. Moreover, the balance of convenience must be in favour of grant of injunction. Often an undertaking in damages is also taken from the claimant.

46. In the instant case, we are of the *prima facie* view that any order restraining the movement of the vessel would likely to work injustice and

[2](**1996) 2 Lloyd's Rep. 559(567**)

undue hardship having regard to the fact that excepting the last charter hire payment all payments have been received and acknowledged by the plaintiff.

47. The object of an order of arrest is to preserve and secure a maritime claim.'Arrest' as defined in Section 2(c) of the Admiralty(Jurisdiction and Settlement of Maritime Claims) Act, 2017 means:

> *"Arrest" means detention or restriction for removal of a vessel by order of a High Court to secure a maritime claim including seizure of a vessel in execution or satisfaction of a judgment or order."*

48. What would happen if the admiralty court is seized with the problem of an owner approaching the admiralty jurisdiction with a claim of this nature where only for the failure to pay last charter hire payment the contract could be terminated?The present termination is not for non-payment of any hire charges but on the happening of events contemplated in Clause 28(d) of BBC one of which iscessation of business of the respondent No.2. Is this a subterfuge to deny the ownership of the vessel to the respondent upon expiry of the period of three years as indisputably there has not been a single default on the part of the respondent No.2 in payment of the charter hire payments in terms of the BBC agreement?

49. The BBC appears to be a charter by demise- the charterer becomes the owner of the vessel upon payment of all the charter hire payments. Where the charterer parted with the whole possession and control of the ship, to this extent, the owner has given to the charterer a power and right independent of him, and without reference to him, to do what he pleases with regard to the captain, crew, the management and

employment of the ship which is often termed as letting or demise of the ship.

50. The concept of Bareboat Charter has been discussed in some detail in ***Sunil B. Naik v. Geowave Commander***[3]**,** in paragraph 13 which is reproduced below:

> *"13. The charter party is defined as a contract by which an entire ship, or some principal part thereof, is let by the owner to another person for a specified time or use. The Charter can be of two kinds - (i) Charter of demise; and (ii) Contract of affreightment. In the present case, we are concerned with the charter of demise by which the whole vessel is let to the charterer with the transfer to him of its entire command and possession and consequent control over its navigation. Such a charter is called a bareboat charter. It would be apposite at this stage to refer to the Mark Davis' Commentary on "Bareboat Charters" 2nd Edition where the nature and character of demised charters has been explained as follows:*
>
> > *"A fundamental distinction is drawn under English law between charter parties which amount to a demise or lease of a ship, and those which do not. The former category, known as charters by demise, operate as a lease of the ship pursuant to which possession and control passes from the owners to the charterers whilst the latter, primarily comprising time and voyage charters, are in essence contracts for the provision of services, including the use of the chartered ship. Under a lease, it is usual for the owners to supply their vessel "bare" of officers and crew, in which case the arrangement may correctly be termed a "bareboat" charter. The charterers become for the duration of the charter the de facto "owners" of the vessel, the*

[3]**2018 (5) SCC 505**

master and crew act under their orders, and through them they have possession of the ship.

A statement of the hallmarks of a demise charter can be found in the judgment of Evans LJ in The Giuseppe di Vittorio [1998] 1 Lloyd's Rep 136 at p. 156:

'What then is the demise charter? Its hallmarks, as it seems to me, are that the legal owner gives the charterer sufficient of the rights of possession and control which enable the transaction to be regarded as a letting - a lease, or demise, in real property terms - of the ship. Closely allied to this is the fact that the charterer becomes the employer of the master and crew. Both aspects are combined in the common description of a 'bareboat' lease or hire arrangement.'

As indicated, charter parties which do not amount to a demise or lease of a ship (Including time charters and voyage charters) are classified in English law as contracts of affreightment, pursuant to which the owners agree to carry goods by sea in return for a sum of money. Although the charterers have a right as against the owners to have their goods carried on the vessel, the ownership and the possession of the ship remains with the owners through the master and crew who remain their servants.

Whether or not a charter party amounts to a demise charter depends in every case upon the precise terms of the charter, taking the instrument as a whole. The test has been summarized as follows:

"The question depends, where other things are not in the way, upon this: whether the owner has by the charter, where there is a charter, parted with the whole possession and control of the ship, and to this extent, that he has given to the charterer a power and right independent of him, and without reference to him to do what he pleases with regard to the captain, the crew,

> *and the management and employment of the ship. That has been called a letter or demise of the ship. The right expression is that it is a parting with the whole possession and control of the ship."*

Thus, although time charters almost always contain words such as "let", "hire", "delivery" and "redelivery", the use of such words are inapt in such a context, and are not in any sense to be regarded as conclusive, when determining the nature of the charter.

In Sea and Land Securities v. William Dickinson MacKinnon LJ traced the origin of these words to demise charters, and at page 163 emphasised the difference between demise and time charters thus:

> *"there is all the difference between hiring a boat in which to row yourself about, in which case the boat is handed over to you, and contracting with a man on the beach that he shall take you for a row, in which case he merely renders services in rowing you about."*

51. It appears, *prima facie*, that in order to renege from Clause 47 of the BBC by which after completion of three years, the vessel will be registered to the charterer company or nominee company of the charterer as registered owners,recourse was taken to the said Clause 28 and to exercise the power under Clause 29 of the BBC agreement. The appellant without seeking any explanation or clarification has hurriedly terminated the contract and claimed repossession. This drastic action has to be viewed in the context of due performance of the contract by the respondent. The correspondence to which we have referred to earlier and on which the parties have also relied upon and argued,*prima facie,* it appears that the appellant had accepted a substituted performance on the request made by

the respondent No.2 urging bank issues. The appellant has disclosed a document issued by the United Arab Emirates (UAE) Ministry of Economy to show that licence No.12629 of the respondent No.2 was cancelled on 29th September, 2022. However, prior to such cancellation, request was made for change of name in so far as the charterer is concerned initially in favour of United Maritime Services Limited LLC and thereafter in favour of Spring Ship Management FZE. It cannot be disputed that all these requests were made prior to the cancellation of the licence as alleged by the appellant. Moreover, the licence claimed to have been cancelled is not the licence to which a prayer for renewal has been made by the respondent No.2 as would be evident from the short affidavit filed on behalf of respondent No.2. It appears from the set of documents disclosed in the affidavit that a request was made for renewal of trade licence No.12628 and all necessary documents are under consideration by the authorities concerned.

52. Mr. Ratnanko Banerji, the learned Senior Counsel was critical in submitting that the learned Single Judge has overlooked that Clause 28(d) also includes cessation of business and is not restricted to winding up,dissolution or liquidation.For the purpose of convenience the said clause is reproduced below:

> *"28 (d) Either party shall be entitled to terminate this Charter with immediate effect by written notice to the other party in the event of an order being made or resolution passed for the winding up, dissolution, liquidation or bankruptcy of the other party (otherwise than for the purpose of reconstruction or amalgamation) or if a receiver is appointed, or if it suspends payment, ceases to carry on business or makes any special arrangements or composition with its creditors"*

53. Along with the said clause, Clause 29 and Additional Clause 47are also reproduced below:

"Clause 29

In the event of the termination of this Charter in accordance with the applicable provisions of Clause 28 the Owners shall have the right to repossess the Vessel from the Charterers at her current or next port of call, or at a port or place convenient to them without hindrance or Interference by the Charterers, courts or local authorities. Pending physical repossession of the Vessel In accordance with this Clause 29, the Charterers shall hold the Vessel as gratuitous bailee only to the Owners. The Owners shall arrange for an authorized representative to board the Vessel as soon as reasonably practicable following the termination of the Charter. The Vessel shall be deemed to be repossessed by the Owners from the Charterers upon the boarding of the Vessel by the Owners' representative. All arrangements and expenses relating to the settling of wages, disembarkation and repatriation of the Charterers' Master, officers and crew shall be the sole responsibility of the Chartarers."

"Additional Clause 47

Additional Clauses As Agreed:

Laycan: Charts Require Roughly 45 Days Fixing Vessel (Basis Subs Lifted By Charts Late July/Early August, Vessel Delivery Would Be Mid/Late September AGW)

Subject To Inspection Of Vessel From Charters.

Charterers To Pay Only Unused/Unsealed Lubes (Not For Lubes Already Inside Tank).

Owners Declare, There Is No Liability From Any Parts Which Can Lead To Any Arrest Detention Of The Vessel If Any Liabilities Towards This Vessel, To Be Declared To BBC And To Be Dealt With Prior To Delivery Of The Vessel To BBC.

Crew/Technical/ISM Managers To Be Appointed By The Charterers. All Costs Including Operational Costs, Insurance Etc. Will Be On Charterers Account Upon Taking Over The Vessel.

After Completion Of 3 Years, Vessel Will Be Registered To Charterers Company Or Nominee Company By The Charterers As Registered Owners."

Charters Will Have Option To Change Name/Class/Flag Of The Vessel. It's Entirely Discretion Of The Charterers.

Owners To Clear Below Recommendation Of Class Before Delivery:

No.2. 1. The Abnormal Alarm In The Engine Control Room Ams For Thermal Oil Boiler Is To Be Permanently Repaired As Soon As Possible But Not Later Than 7 October 2021.

2. The Abnormal Fire Alarm System Is To Be Permanently Repaired As Soon As Possible But Not Later Than 7th October 2021.

3. The Abnormal Bilge Alarm System Is To Be Permanently Repaired As Soon As Possible But Not Later Than 7th October 20221.

4. The Oil Level Alarm For Steering Gear Is To Be Permanently Repaired As Soon As Possible But Not Later Than 7 October 2021."

54. In the conspectus of the facts narrated above it cannot be said that the respondent No.2 has lost its juristic entity. This has been the

observation of the learned Single Judge as well. However, what needs to be seen is whether the respondent No.2 has ceased to carry on business. Evenif it is assumed that the document disclosed by the appellant shows that the licence was cancelled on 29th September, 2022 the subsequent correspondence makes it clear that the appellant has proceeded to accept payments of the entities named by the respondent No.2 and all these requests were made when, if it is assumed that the licence to which the appellant has referred to was the operational licence, the respondent No.2 had the required licence to carry on his business and accordingly the explanation offered by them for change of name of the charterer cannot be considered to be mala fide at this stage.

55. The communications for change of name initially in favour of United Maritime Services LLC and later Spring Ship Management FZE are dated 7th March, 2022 and 23rd June, 2022 when the licence alleged to be cancelled was valid and alive. The appellant continued to accept the performance by the entities named in the said communications and all invoices were raised in the name of such entities.This change of entity was acknowledged by the appellant. When the contract, if performed fully,would give ownership to the charterer or its nominee and there does not appear to be a default on the part of the charterer and the charterer had made payments of the amount payable under BBC and expressed its willingnessto pay the last installment,should the court construe the contract in a manner that would give an unfair advantage to the owner? Any other construction of the BBC will cause undue hardship and be unjust in the context of the present case. Moreover, parties have nominated their respective arbitrators.

56. It has been the specific case of the respondent no.2 that the appellant has accepted performance by substitution to the context indicated and it would be evident from the course of conduct, dealings and transactions between the parties. The issue as to whether the respondent No.2 is the same company as registered in Ajman having the same name can be decided only upon affidavits. Cancellation of the licence does not mean that the company is wound up. Moreover, the plea of cancellation as a justification for the termination has to be viewed from the facts narrated above. A Co-ordinate bench on 2nd September, 2024 while admitting the appeal directed the vessel to remain docked in Haldia till 4th September, 2024 in order to enable the court to hear out the appeal and the stay application on 4th September, 2024. On 4th September, 2024 the Coordinate Bench *inter alia,* passed the following order:

> *"The case of the appellant/appellant is that the name of the bareboat charterer is retained. The ownership and control has vested in a third party, the original charterer having ceased to do business. The appellant/appellant as the owner of the vessel has terminated the agreement although the respondent no.2 is in possession and control of it which is berthed at Haldia Dock now.*
>
> *The charter party was executed in 2021 for three years expiring in or about September of this year. One of the terms of the charter party was that on expiry of the charter the vessel would vest in the charterer. Admittedly, the respondent no.2 has paid almost the entire charter hire due till date.*
>
> *The appellant/appellant claims possession of the vessel on termination of the contract.*

Taking all the facts into consideration including the depreciation of the vessel, we estimate on the basis of the terms and conditions of the charter that the value of the vessel would be around Rs.20 crores today. We make it clear that this is not to be taken as any valuation of the vessel but only provisional assessment.

Upon furnishing a bank guarantee for Rs.20 crores issued by a nationalised bank in favour of the Registrar, High Court, Original Side by the respondent no.2 as security, they would be at liberty to sail away with the vessel, on a certificate issued by the Registrar Original Side that such security has been furnished to the Marshall who in turn shall communicate it to the port and other statutory authorities.

In default, our interim order of 3 September 2024 restraining movement of the vessel shall continue until further orders"

57. The Coordinate Bench however did not arrest the vessel and as such, as on date the vessel is not under arrest.

58. The respondent No.2 has not furnished the bank guarantee. The respondent No.2 however, has filed an affidavit disclosing few assets in India. The value of such securities would be roughly over three crores. The only charter hire payment that has remained unpaid is approximately Rs.1.20 crores.

59. We may also have to consider that in the event, ultimately the suit is decreed,willthe appellantbe able to execute the decree. The interlocutory application is required to be heard on merits.

60. Under such circumstances, we direct the respondent No.2 to furnish security for a sum of Rs.6 crores to the satisfaction of the Registrar, Original Side, High Court upon intimation to the advocate-on-record for the

plaintiff and to pay a sum of Rs.1.20 crores to the appellant and without prejudice to the rights and contentions of the appellant, subject to any order that may be passed at the time of disposal of the interlocutory application. In addition to the aforesaid the respondent No.2 shall file an affidavit of undertaking to bring the vessel within the territorial jurisdiction of this court and produce the vessel before the marshal as and when directed and shall not deal with the vessel till the disposal of the interlocutory application. Any breach of such undertaking should be viewed seriously and would be an act of contempt.

61. The original title-deeds along with the valuation reports are returned to Mr. Jayanta Samanta, learned advocate in Court today. Ms. Shabana Hassin, advocate-on-record for the respondent no.2, on instruction of the respondent no.2, has waived service of the writ of summons upon the said respondent no.2. However, in view of various defects pointed out by the learned Master in the plaint, we direct the plaintiff to remove the defects on or before 6th January, 2025. In default, the suit shall be placed in the warning list of cases for non-removal of the defects. After the defects are removed, a copy of the writ of summons along with the plaint shall be served upon Ms. Shabana Hassin within a week thereafter and she shall accept the said writ of summons on behalf of respondent no.2 and thereafter shall enter appearance in the suit. The time to file written statement shall commence only after the said summons along with the plaint (as corrected) are served upon Ms. Hassain, the advocate on record for the respondent no.2.

62. On compliance of the aforesaid formalities the vessel shall be allowed to sail on a certificate issued by the Registrar, Original Side that such security has been furnished to the Marshall who in turn shall communicate it to the port and other statutory authorities.In default the interim order of 3 September, 2024 restraining movement of the vessel shall continue till the disposal of the interlocutory application.

63. The respondent shall file an affidavit-in-opposition on or before 10th January, 2025, reply thereto, if any, shall be filed by 17thJanuary, 2025. In the event no affidavit-in-opposition is filed, the interlocutory application may be heard as an unopposed application.

64. In the event of any cash deposit is made towards security, the Registrar, Original Side shall invest the said amount in a fixed deposit account with any nationalized bank yielding highest return and shall keep the said fixed deposit renewed until further orders. In case of Bank Guarantee, it should be unconditional and valid at least for one year with renewal clause.

65. Liberty to mention before the appropriate court for early hearing of the interlocutory application.

66. The appeal and the application are disposed of.

67. There shall be no order as to costs.

68. A prayer for stay of operation of this order is made on behalf of the appellant. The same is considered and rejected.

I agree **(Soumen Sen, J.)**

(Biswaroop Chowdhury, J.)