

(2003) 07 MAD CK 0222

In the Madras High Court

Case No : Appln. No's. 2221, 2396 and 2397 of 2003 In C.S. No. 371 of 2003

Mayar (HK) Limited and Another

APPELLANT

Vs

Owners and Parties Interested in the Vessel MV Neetu

RESPONDENT

Date of Decision : 18-07-2003

Acts Referred:

Colonial Courts of Admiralty (India) Act, 1891 — Section 2
Merchant Shipping Act, 1958 — Section 2(15), 443

Citation : AIR 2003 Mad 422

Hon'ble Judges : Prabha Sridevan, J

Bench : Single Bench

Advocate : S. Vasu Devan and K. Krishnaswamy, for the Appellant; R. Srinivas and Mythili Srinivas, for the Respondent

Judgement

Prabha Sridevan, J.—The vessel M.V. Neetu was arrested pursuant to the order, in application No. 2221 of 2003, and is now detained in the territorial waters of India at the port of Vishakapattinam. It has been there since 20-5-2003 and now the respondents have filed application Nos. 2396 and 2397 of 2003, for vacating the order of arrest and for directions to provide security to meet, the expenses of the vessel at the port of Vishakapattinam respectively.

2. On 23-2-2003, a charter party Agreement was entered into between the respondents on the one hand and the applicants on the other. The cargo meant to be transported was 1100/1200 HT Myanmar Round Timber Logs per voyage on consecutive voyage basis, The duration of the, contract was three months, extendable at the charterer's option the charterer being the first applicant. After the expiry of the first three months' period, the charterer was bound to advice his intention to extend the arrangement. The charterers were also bound to ensure that a minimum of 1100 HT is loaded on the vessel failing which the respondents would have the right to claim dead freight. Load Port was Yangon and discharge, port was to be fixed at the charterer's option. One of the ports named in the Agreement is Vishakappattinam, and the Agreement was that after

the cargo was discharged the vessel would sail back to Yangon after taking ballast only. For the first voyage, the lay can period was from 25th to 31st March, 2003. Lay time was 5, full weather working days. The freight payment was to be paid into the respondents' nominated account within three full banking days after, completion of loading and signing, releasing of bills of lading. If cargo and/or cargo documents are not ready at load/discharge port which may affect berthing of vessel the detention of US\$ 1100 per day will be payable by the first applicant to the respondent after completion of discharge and submission of the relevant documents. The Master was to issue notice of arrival at the load port, which is Yangon. The legal Jurisdiction was intended to be with the Courts at Chennai. The other terms was as per GENCON charter party.

3. The vessel carried the cargo from Yangon to Vishakappattinam, discharged the load and on 26th April, 2003 the respondents terminated the Agreement. On 5-5-2003, the Writ of arrest was issued and on 20-5-2003 it was arrested. These facts are not disputed.

4. The main point of contention between the two parties is regarding the Jurisdiction of this Court to order arrest, whether the vessel can be, ordered to be arrested even before it entered the, territorial waters of India, who committed the breach of contract, who is liable to pay the other and if so what amount?

5. The counsel referred to various documents made their oral submissions and also filed written submissions. According to the learned counsel for the respondent, the averments in the plaint and the allegation in the affidavit that the vessel was working in the Indian waters were incorrect since the vessel was in the port of Yangon till 11-5-2003 and entered the Vishakappattinam port limits only on 20-5-2003. According to the learned counsel this was abuse of process of Court since the ship was not in Indian waters when the order was passed. Reliance was placed on *M.V. Elisabeth and Others Vs. Harwan Investment and Trading Pvt. Ltd., Hanoekar House, Swatontapeth, Vasco-De-Gama, Goa*, to point out that the competence of a coastal State to assume jurisdiction over a foreign ship entering its waters is recognised by major systems of law and the following paragraphs are relevant:

"8. Mr. G.L. Sanghi, appearing for the respondent-plaintiff, on the other hand submits that the impugned judgment of the High Court is sound and correct and requires no, interference by this Court because what the High Court has stated is based on a realistic appreciation of the need for liberal construction of the statutes so as to support assumption of jurisdiction to render justice where justice is required to be done rather than resorting to a technical or narrow or pedantic construction resulting in a state of helplessness. Counsel says that every person has a right to approach the Court of the land for appropriate remedy in respect of claims against a foreign ship and its owner, and to deny him that right and to compel him to pursue remedy in a foreign country according to an unfamiliar system of law and practice in strange and uncertain conditions, and consequently incurring high expenses, with, all the uncertainties of such a

pursuit, is unjust and uncalled for. All major systems of law the world over recognise the competence of the coastal State to assume jurisdiction over a foreign ship entering its waters in respect of certain well recognised claims, irrespective of where the cause of action arose or where the defendant has his place of residence or business. The reason for this wide exercise of Jurisdiction is that the foreign owner being not available within jurisdiction, and the stay of the foreign ship in the waters of the coastal State being necessarily brief, jurisdiction over the ship has to be exercised by its arrest and detention by means of an action in rem. Counsel submits that the High Court being a Court, of record with unlimited jurisdiction, it was never intended by the British Parliament that the admiralty power conferred on certain High Courts should remain frozen as on the date of the passing of the Admiralty Court Act, 1861 and the subsequent changes in the law of Great Britain should not widen the jurisdiction of the Indian High Courts. In any case, counsel submits, the colonial statutes should not be so construed as to stand in the way of the Indian High Courts exercising unlimited jurisdiction except where the jurisdiction is barred, expressly or by necessary implication. In the absence of any such bar, the powers of the High Court are unlimited and there is no merit in the preliminary objection to the jurisdiction of the High Court.

.56. 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. Such an action may constitute an inducement to the owner to submit to the jurisdiction of the Court, thereby making himself liable to be proceeded against by the plaintiff in personam. It is however, imperative in an action in rem that the ship should be within jurisdiction at the time the proceedings are started. A decree, of the Court in such an action binds not merely the parties in the writ but everybody in the world who might dispute the plaintiff's claim.

..... . . .59. The real purpose of arrest in both the English and the Civil Law systems is to obtain security as a guarantee for satisfaction of the decree although arrest in England is the basis of assumption of jurisdiction, unless the owner has submitted to Jurisdiction. In any event, once the arrest is made and the owner has entered appearance, the proceedings continue in personam. All actions in the civil law -- whether maritime or not -- are in personam, and arrest of a vessel is permitted, even in respect of non-maritime claims, and the vessel is treated as any other property of the owner, and its very presence within jurisdiction is sufficient to clothe the Competent tribunal with jurisdiction over the owner in respect of any claim. See D.C. Jackson, Enforcement of Maritime Claims, (1985) Appendix 5). Admiralty actions in, England, on the other hand, whether in rem or in personam, are confined to well defined maritime liens or claims and directed against the res (ship, cargo and freight) which is the subject matter of the dispute or any other ship in the same beneficial ownership as the res in question.

.... 82. The Merchant Shipping Act empowers the concerned High Court to arrest

a ship in respect of a substantive right. A right conferred by the Indian Carriage of Goods by Sea Act, 1925 in respect of outward cargo is one of those rights which can be enforced by arrest and detention of the foreign ship in order to found jurisdiction over the vessel and its owners, just as it can be done in respect of inward cargo by reason of the substantive rights conferred by the Admiralty Court Act, 1861 read with the Colonial Courts of Admiralty Act, 1890, and other rules of law. The same principle must hold good for carriage under a charter party. These and other laws, such as the law of contract, tort, prime, mortgage, marine insurance, customs, port operations, etc., and the Civil and Criminal Procedure Codes as well as, the relevant rules of Court regulating procedure and practice together constitute the body of substantive and procedural laws governing claims relating to inward and outward cargo and such claims are enforceable against foreign ships by recourse to arrest and detention when found within jurisdiction. Viewed in this light, and by this reasoning, the Andhra Pradesh High Court, as a successor to the Madras High Court, does not lack admiralty Jurisdiction in respect of claims relating to outward cargo.

.... .83. The admiralty Jurisdiction of the High Court is dependent on the presence of the foreign ship in Indian waters and founded on the arrest of that ship. This jurisdiction can be assumed by the concerned High Court, whether or not the defendant resides or carries on business, or the cause of action arose wholly or in part, within the local limits of its jurisdiction. Once a foreign ship is arrested within the local limits of the jurisdiction of the High Court, and the owner of the ship has entered appearance and furnished security to the satisfaction of the High Court for the release of the ship, the proceedings continue as a personal action.

.... .89. Admiralty jurisdiction is an essential aspect of judicial sovereignty which under the Constitution and the laws is exercised by the High Court as a superior Court of record administering justice in relation to persons and things within its jurisdiction. Power to enforce claims against foreign ships is an essential attribute of admiralty jurisdiction and it is assumed over such ships while they are within the jurisdiction of the High Court by arresting and detaining them."

The purpose of arrest of a ship is inter alia to obtain security for satisfaction of the decree. The Supreme Court held that the admiralty jurisdiction is dependent on the presence of the foreign ship in Indian waters and founded on the arrest of the ship and it can be assumed whether or not the defendant resides or carries on business or the cause of action arises wholly or in part within the limits of its jurisdiction.

6. Reference was also made to *M.V. Al Quamar Vs. Tsavliris Salvage (International) Ltd. and Others*, where the Supreme Court observed that the decree was in personam because when the suit was filed in England the res viz., *M.V. A1 Tabish* was not within the territorial waters of the English Admiralty Court and that it was axiomatic that if the res was available within the territorial water it would have also become co-dependent. The learned counsel also referred to

various Acts which list the Courts which have cause of action and it was submitted that even though these Acts may apply to the Courts before which actions can be instituted in general, a suit in rem can be filed only if the ship is found within the territorial waters of the State.

7. The learned counsel for the applicant submitted that even the decisions referred to by the learned counsel would not bar an order of arrest being obtained before the ship entered the territorial waters. The learned counsel pointed out to the fact that the booking note did not disclose any port of destination and the plaint was verified on the basis of information received that the vessel had entered into the international waters of India for discharging cargo at the port of Vishakapattinam. The notice of readiness issued by the respondents to the applicant was kept blank rendering it difficult for the plaintiff to keep track of the movement of the vessel. When Order XLII, Rule 4 of the Original Side Rules provides that particulars in the affidavit can be waived there is no need for the plaintiff to await the entry for effecting the order of arrest.

8. Reference was made to Johnny Two's case, reported in 1992 II LLR 257 decided by the Queen's Bench Division, to show that an order of arrest can be obtained before the vessel sails in. In the Johnny Two's case a writ in rem was issued on 3 7th May, 1990 against the vessel Johnny Two. This order was valid after a period of one year though the vessel visited the relevant port Felixstowe on five occasions the arrest was not effected. Then on the last date of validity of the writ the applicant applied for renewal and the Admiralty Registrar renewed it. This extension of the validity of the writ was attacked. The learned Judge on facts held that there was nothing to prevent or nothing that rendered impossible the arrest of the vessel on each of the five visits and there were no time constraints which rendered it impossible. The applicant in that case employed a tracker service to track the vessel. The learned Judge therefore, observed that if after one year the tracker service could be employed there is nothing to show why this tracker service could not have been employed earlier. On this ground, the order extending the validity was discharged. What is relevant in this judgment is the short-note that the learned Judge gives upon the procedures for the arrest of the ship, which runs thus:

"If a ship is expected to arrive at a known port a warrant of arrest should be issued. . . .The ship will then be arrested on arrival by the "Note of Action". In this way a ship may be arrested on a date when the Court Offices are closed. These procedures enable the solicitors to arrest the ship with very short notice, particularly when they have taken the precaution of issuing a warrant of arrest in advance."

So it was held that it was perfectly acceptable to obtain a warrant of arrest before the ship arrives at the known port.

9. M.V. Elisabeth and Others Vs. Harwan Investment and Trading Pvt. Ltd., Hanoekar House, Swatontapeth, Vasco-De-Gama, Goa, , deals with almost all

questions that may arise regarding admiralty jurisdiction. The history of admiralty jurisdiction has been traced in this case. Some crucial observations of the Supreme Court are relevant, which can be appreciated better if the background of that case is known. There, the plaintiff was a Private Limited Company having its registered office in Goa. The vessel left the Port of Marmagao without issuing bills of lading as required by the plaintiff. Subsequently, the goods were discharged and handed Over to the consignee at a foreign port in spite of the directions of the plaintiff to the contrary. The suit was instituted in Andhra Pradesh and the vessel was arrested when it entered the port of Vishakappattinam. The question of jurisdiction was raised on the ground that neither the Court in Andhra Pradesh nor any other State in India can proceed in rem against the ship on the alleged cause of action concerning carriage of goods from an Indian Port to a foreign port. The Supreme Court held that by virtue of the States Reorganization Act, 1956, the Andhra Pradesh High Court had, over the Port of Vishakappattinam, the same jurisdiction that was vested in the Madras High Court. The argument that the admiralty jurisdiction is a special jurisdiction and cannot entertain a controversy that does not come within the specific jurisdiction was rejected. The Supreme Court held that such a restrictive construction was not warranted by the provisions of the Constitution and the judicial sovereignty of this country is manifested in the jurisdiction vested in the High Court as Superior Courts. The Supreme Court also held that the colonial statutes which continue to remain in force by reason of Article 372 of the Constitution of India that does not stultify the growth of law or blinker its vision or fetter its arms. The Supreme Court refused to adopt a narrow view on the source and ambit of admiralty jurisdiction, the Admiralty Act, 1840 and 1861, the Administration of Justice Act, 1928 and the Supreme Court of Judicature Act, 1873. The Supreme Court felt that a short account of the relevant statutes would help in understanding the nature and extent of the admiralty jurisdiction of our Courts. This paragraph is very important:

"48. Merchant ships of different nationalities travel from port to port carrying goods or passengers. They incur liabilities in the course of their voyage and they subject themselves to the jurisdiction of foreign States when they enter the waters of those States. They are liable to be arrested for the enforcement of maritime claims, or seized in execution or satisfaction of Judgments in legal actions arising out of collisions, salvage, loss of or damage to goods and the like. They are liable to be detained or confiscated by the authorities of foreign States for violating their customs, regulations, safety measures, rules of the road, health regulations, and for other causes. The coastal, State may exercise its criminal jurisdiction on board the vessel for the purpose of arrest or investigation in connection with certain serious crimes. In the course of an international voyage, a vessel thus subjects itself, to the public and private laws of various countries. A ship travelling from port to port stays very briefly in any one port. A plaintiff, seeking to enforce his maritime claim against a foreign ship has no effective remedy once it has sailed away and if the foreign owner has neither

property nor residence within jurisdiction. The plaintiff may therefore detain the ship by obtaining an order of attachment whenever it is feared that the ship is likely to slip out of jurisdiction, thus leaving the plaintiff without any security."

Therefore, this can only be understood as upholding the jurisdiction of the High Court when the vessel subjects itself to the jurisdiction of the State whose territorial waters it enters. The Supreme Court also said that a ship may be arrested (1) to acquire jurisdiction; or (2) to obtain security for satisfaction of the claim when decreed; or (3) in execution of a decree. An action in rem is directed against the ship itself to satisfy the claim of the plaintiff out of the res and for this purpose the ship is treated as a person. The Supreme Court also observed that when the statutes are silent then remedy is to be sought by recourse to basic principles, and that it is the duty of the Court to devise procedural rules by analogy and expediency. The action in rem is a practical procedural device for rendering justice in cases of maritime liens and claims arising by reason of breach of contract for the hire of vessels or the carriage of goods.

"66. It is likewise within the competence of the appropriate Indian Courts to deal, in accordance with the general principles of maritime law and the applicable provisions of statutory law, with all persons and things found within their jurisdiction. The power of the Court is plenary and unlimited unless it is expressly or by necessary Implication curtailed. Absent such curtailment of jurisdiction, all remedies which are available to the Courts to administer justice are available to a claimant against a foreign ship and its owner found within the jurisdiction of the concerned High Court. This power of the Court to render justice must necessarily include the power to make interlocutory orders for arrest and attachment before judgment.

. . . .78. The Merchant Shipping Act, 1958 contains various provisions to enforce territorial Jurisdiction, The Act being essentially regulatory in character, the various authorities, tribunals and Courts entrusted with the administration and enforcement of its provisions are specifically stated. The High Court is defined u/s 3(15) as follows :

"3(15). "High Court", in relation to a vessel, means the High Court within the limits of whose appellate jurisdiction-

- (a) the port of registry of the vessel is situate;
- (b) the vessel is for the time being; or
- (c) the cause of action wholly or in part arises."

Accordingly, a foreign ship falls within the jurisdiction of the High Court where the vessel happens to be at the relevant time i.e., at the time when the jurisdiction of the High Court is invoked, or, where the cause of action wholly or in part arises,

.... .83. The admiralty jurisdiction of the High Court is dependent on the presence of the foreign ship in Indian waters and founded on the arrest of that ship. This jurisdiction can be assumed by the concerned High Court, whether or not the defendant resides or carries on business, or the cause of action arose wholly or in part, within the local limits of its Jurisdiction. Once a foreign ship is arrested within the local limits of the jurisdiction of the High Court, and the owner of the ship has entered appearance and furnished security to the satisfaction of the High Court for the release of the ship, the proceedings continue as a personal action.

.... .94. All foreign ships entering Indian waters are presumed to know that they fall within the jurisdiction of this country during their stay here. The vessel in question was lying in the Port of Vishakapatnam when she was arrested in respect of a cause of action relating to cargo. The sole contention of the defendants as regards jurisdiction was that no High Court in India was invested with admiralty jurisdiction to order the arrest of the vessel in respect of a cause of action relating to outward cargo because Section 6 of the Admiralty Court Act, 1861 (read with the Colonial Courts of Admiralty Act, 1890) conferring admiralty jurisdiction on Indian High Courts confined it to "claims for damage to cargo imported", This contention, for the reasons we have stated, has no merits. The High Court, in our view, rightly assumed jurisdiction by the arrest of the vessel while it was lying in the port of Vishakapatnam."

10. It was urged on behalf of the respondent that in that case the vessel was carrying outward cargo but the following paragraph of the same judgment makes it clear that the Supreme Court held that the jurisdiction exists alike over claims relating to inward and outward cargo. Finally:

"Since the jurisdiction to entertain a suit on tort or contract in relation to cargo going out of the country in a ship is found to exist under 1890 Act the High Court of Andhra Pradesh was competent to direct arrest of the foreign ship when it appeared in Indian waters. The High Court, therefore, rightly negated the objection to issue direction to arrest the ship."

11. Again in *M.V. Al Quamar Vs. Tsavlis Salvage (International) Ltd. and Others*, , the Supreme Court dealt with the exercise of Mareva jurisdiction. It was held that the Court needs to approach modern problems with the flexibility of the modern business and while in former times, it would have been more difficult for the foreign creditors to take its money from one country to another. Today vast sums of money can be transferred from any one country to another in a matter of seconds. The learned Judges of the New Zealand Supreme Court observed that the sheer number of Mareva injunctions granted in London indicates that the Jurisdiction is fulfilling a need. In this case also the Supreme Court refused to agree with the contention that the law is that a ship can be arrested only for securing a maritime claim,

12. In *Sigma Coatings BV Vs. "Agios Nikolaos" and another*, , the learned single

Judge of the Bombay High Court referring to *M.V. Elisabeth and Others Vs. Harwan Investment and Trading Pvt. Ltd.*, Hanoekar House, Swatontapeth, Vasco-De-Gama, Goa, held that admiralty jurisdiction of the Courts is not restricted to entertain claims based on maritime liens and that the arrest of a ship may be ordered in a claim for supply of necessities even if the claim is not based on maritime lien.

13. The learned counsel for the applicant also fairly pointed out *Seawaves Shipping Services v. Adriatic Tankers Shipping Co.* (1996) 1 MLW 182 where a Division Bench of this Court held that the plea that admiralty jurisdiction of the Madras High Court exists over the territorial waters at any Indian Port and over any ship berth to Indian waters to arrest the same under admiralty jurisdiction was rejected. But in that case, the plaintiff was a foreign company and no part of the cause of action had arisen within the Jurisdiction of the Madras High Court. This is not so in the instant case since the charter party Agreement declares that the jurisdiction would be with the Madras High Court, the brokers who are the second applicant are located within the appellate jurisdiction of the Madras High Court and therefore, part of the cause of action did arise within the jurisdiction of this Court.

14. For the above reasons, I am of the opinion that the Madras High Court have the jurisdiction to arrest the ship and considering the paragraph extracted above which refers to merchant ships moving from one port to another and considering the procedure referred to by the learned Judge in *Johnny Two's case* 1992 (II) LLR 157 I hold that a ship which had committed the breach of the Agreement could be arrested when it entered the territorial waters more specifically the port of Vishakapattinam.

15. The next objection raised by the respondent is with regard to the frame of suit. According to the respondent since the ship owners and ship managers, who are Kulwant Shipping Corporation and Marakesh Shipping Corporation are not impleaded, the suit is bad in law.

16. Reference was also made to *Epoch Enterrepots Vs. M.V. WON FU*, . In that case, the Supreme Court held that unless sufficient evidence is laid that the charter was by demise, whereby the possession and control of the vessel was given to the disponent owner, the question of pursuing the cause of action against the vessel would not arise. The Supreme Court said that the charter parties are of three kinds; (a) demise charter; (b) voyage charter; and (c) Lime charter and since in that case the damages for the alleged breach of contract by vessel arose out of a contract dehors the maritime lien it was held no action in rem would be permissible. This objection relating to frame of suit is also rejected. This will decision (2003 ISCO 305) : *Epoch Enterrepots Vs. M.V. WON FU*, will not apply here in view of the finding in *M.V. Elisabeth and Others Vs. Harwan Investment and Trading Pvt. Ltd.*, Hanoekar House, Swatontapeth, Vasco-De-Gama, Goa, , where the Supreme Court held that,

"The expression "damage" done by any ship is not necessarily confine to physical damage and it could be applied to cases of damage arising by reason of loss by what is done by the ship or by the breach, negligence or misdeeds of those in charge of the ship."

17. Relying on this the Delhi High Court in AIR 1997 Del 31 held that when a foreign ship fails to berth and discharge cargo at the port of destination in contravention of the legal and binding obligations created and existing between the owner or consignee of the cargo on the one hand and the owner, Master or consignee of the vessel on the other then the High Court Could order arrest or detention of the ship when the same is found in the Indian Jurisdiction.

18. In the present case the damage is alleged to have arisen by breach of contract by the owners of the vessel, M.V. Neetu. Therefore, the High Court within whose jurisdiction the cause of action has wholly or in part arisen, which in the instant case, is this Court, can order arrest of the ship. Therefore, the applicant was entitled to initiate the action in rem, showing as the defendants owners and parties interested in the vessel. The applicant seeks a relief in rem. According to him, the owners of the ship and therefore, the ship committed the breach and must be arrested. Therefore, the frame of suit is correct.

19. Next we take up the question of breach of contract. According to the respondent, the defendant is not guilty of breach of contract and had discharged all its obligations. It was contended that once the lay can period is fixed for a vessel and if the ship does not arrive in the lay can, the charter has the right to refuse the ship if the ship is berthed after the lay can period, then no further complaint can be lodged.

According to the applicant, the ship could not be berthed, only because shipping instruction from the charterers had not been received, According to the respondent though the plaintiff had five full weather working days to load the ship it was detained from 1-4-2003 to 12-4-2003 and therefore, the ship suffered demurrage for five days and eighteen hours at Yangon. The delay in loading according to the respondent was only because of the applicant. According to the respondent, the loading was not done properly by the applicant. The applicant had to ensure that a minimum 1100 HT of cargo is loaded on the vessel failing which the respondents could claim dead freight. In spite of this the applicants did not load the vessel fully and sent a letter on 10-4-2003 stating that they are not responsible for dead freight and the Agreement will have to be amended. According to the respondent, the applicants had themselves given a go-by to the Agreement and found it unworkable and therefore, the initial breach was on the part of the applicant and not the respondent. According to the respondent, predated and fabricated bills of lading had been filed by the applicants and this also amounted to breach of contract. Therefore, the applicant was within its right to terminate the shipping Agreement by the letter dated 26-4-2003. The applicant also had not produced any documents to show that the goods had suffered deterioration. The documents produced do not appear to be

the opinion of an expert. The tenor of the opinion is not specific or clear and therefore, it has clearly been produced for the purpose of the case. The respondents submitted that the case that the logs would suffer deterioration if left exposed in the port, is clearly false since the cargo plan shows that at least 208 HT of log would be exposed to the open on the shipping first voyage and therefore, it follows exposure does not damage the logs. According to the respondent, the purchase contracts cannot be relied on because they refer to logs other than gurjan logs.

20. The learned Counsel for the applicant on the other hand would submit that if the applicants had accepted the belated arrival of the ship it is because they have already kept the cargo loaded and could not afford to refuse the ship. The learned Counsel for the applicant referred to the fact that in Myanmar the loading of timber is done only through State agents, which is the Shipping Agency Department and unless a declaration is made by the ship owner berthing is not permitted. The respondent sent this declaration only on 3-4-2003 and therefore, the vessel was berthed on 4-4-2003. Therefore, the delay if any was caused because of the respondent, The learned Counsel for the applicant pointed out to documents to show that even before the vessel arrived they reminded the respondents' agent to issue the booking note since the ensuing days were holidays and documentation would require four to five days. This was also not done by the respondent. As regards the right to collect dead freight the learned Counsel for the applicant referred to an e-mail sent by the Captain of the vessel dated 10-4-2003 stating that the vessel could not load more than 1050 HT because the stability of the vessel is affected. There are documents produced which shows that even as early as 10-4-2003 the applicant had informed the respondent that,

"our cargo will be shut out due to lack of space in the vessel in spite of loading her to full capacity."

The e-mail from the Captain of M.V. Neetu is as follows :

"as per stability vessel can receive another 32th on deck, due to nature of cargo n stability of vessel, v cannot load more than 1050ht."

21. The respondent has not produced any documents to show that this contention is not borne out on facts. The only response that the respondent makes is that the applicant would have to pay dead freight. On 12-4-2003, the second applicant has informed by e-mail that dead freight can be paid only if charterers could not provide sufficient cargo but in this case the vessel was unable to load more than 1050.98HTs.

22. The learned Counsel for the respondent and the applicant pointed out to the various documents which are exchange of correspondence between them. It is not possible to assess the evidentiary value of the documents at this interlocutory stage. What has to be decided now is whether the applicant as observed by the Supreme Court in *Videsh Sanchar Nigam Ltd. Vs. M.V. Kapitan*

Kud and others, , has a strong triable case. The question of who was responsible for the delay in berthing and or loading may be decided at the time of trial. But the applicant has produced some documents which would indicate that the vessel could not be loaded to full capacity because the Captain felt that to load more than 1050 HT would jeopardise the stability of the vessel. Therefore, prima facie it appears that the respondent cannot insist on dead freight from the applicant.

23. As regards the demurrage and detention claimed by the respondent it is seen from the documents that the applicant had paid it on demand by the respondent. They had done this, in spite of the fact that the Agreement provides for such payment only after completion of discharge and submission of the relevant documents. The learned Counsel for the applicant would submit that reliance cannot be totally, placed on that clause, to foreclose the right of the ship owner from claiming any payment in advance if the situation so warranted. While granting that the ship owner may demand some payment in advance in view of the financial exigencies: what strikes the eye is that the applicant had agreed to pay the sum in advance without insisting on its right to make such payment only at the end. This would show that notwithstanding the clause to the contrary the applicant was willing to co-operate with the respondent so that the cargo could be shipped and transported to India. Another Important clause of the Agreement was that after discharge the vessel should return with ballast only. Documents have been produced to show that the vessel returned carrying steel cargo. This was contrary to the Agreement. It is the contention of the applicant that since they had terminated the contract on 26-4-2003 they could carry the steel cargo on their return to Yangon. It is relevant to note that the Statement of Facts relating to the vessel shows that the loading of steel wire rods on M.V. Neetu commenced on 22-4-2003, the termination of contract is on 26-4-2003. It is prima facie clear that even before the respondent terminated the contract they had started loading the steel. It is needless to say that the contract for carrying steel would not have been entered into, only on 22-4-2003 when the loading began. It must have been even prior to that. Therefore, it is evident that the respondent had prepared the vessel to carry steel cargo even during the currency of the Agreement, whereas they were bound to return ballast only. The Agreement itself provides for an initial three months" period. It is only the renewal which is kept open-ended. That too, the renewal is at the, option of, the, applicant and not the respondent. The Agreement was entered into on 23-2-2003. So the Agreement ought to have been in vogue till 23-5-2003. The termination on 25-4-2003 and the unauthorised loading of steel cargo even, prior to that appears unwarranted. 24. There are exchanges of e-mail correspondence in which the applicant had agreed to remit 6125 USS demanded by the respondents to the respondents account on 25-4-2003 and in the same e-mail the applicant had given the details of the cargo kept, ready for the next voyage. The following clause in the Agreement is important,

"for other ports of discharge the vessel) will sail back to Yangon after, taking ballast only." The only port that is excluded from this condition as per the

Agreement was Mangalore in which case the parties agreed that the owners could carry other cargo on their, return voyage. It is, futile to contend that because the applicant had indicated that the Agreement would have to be revised that the first breach was committed only by the applicant. The applicant found that as per, the clause of the Agreement unless a minimum of 110 HT of cargo is loaded the owners will have the right to claim dead freight. This did not take into account the contingencies where the owners or on their behalf the Captain prevents the loading to the full capacity on the ground of risk to stability. It is in this context the applicant's suggestion of revising the Agreement should be viewed. The respondent, who had committed breach by carrying steel cargo even before cancelling the Agreement cannot take advantage of this statement to accuse the applicant of committing the breach.. These are the materials that prima facie satisfy the requirements for continuance of the arrest and for release subject to certain conditions.

25. In *Videsh Sanchar Nigam Ltd. Vs. M.V. Kapitan Kud and others*, the Supreme Court considered the crucial question whether the appellant had made a prima facie case. They quoted from Halsbury's Laws of England to state that,

"the usual step.... as for the owner of the property arrested to procure its release by giving security for the plaintiffs claim."

The question here as in that case was whether the applicant has a reasonable, arguable best case in a admiralty action. There was a contract and the contract bound the parties for a three months" period. The respondent terminated the contract before the three months came to an end. The applicant, has prima facie shown that all along they had co-operated with all the demands made by the respondent. Even if there was any dispute that could be quantified in monetary terms it could have been settled between the parties and recovered from the applicant since the applicant had already got ready the next consignment of cargo to be loaded on the vessel. By breaching the contract without justification, and by carrying steel cargo when it should have sailed ballast only the vessel is deemed to have committed a wrong and is liable to be arrested. In the above case, the Supreme Court quoted from *M.V. Elisabeth and Others Vs. Harwan Investment and Trading Pvt. Ltd., Hanoekar House, Swatontapeth, Vasco-De-Gama, Goa*, to show that the power of the Court ;is plenary and unlimited. The High Court assumes jurisdiction once the ship is arrested within the local limits but independent of that the High Court concerned has Jurisdiction where the cause of action arises within the local limits of its appellate jurisdiction. In this case the charter party itself provides for the disputes to be tried in the Madras High Court. Therefore, this Court has both jurisdiction to order arrest and to arrest the ship when it enters the territorial waters. These questions are answered in favour of the applicant.

26. Now, we come to the amount, that has to be deposited as pre-condition for release of the ship. The applicant has claimed amounts under various heads :

a) Damages claimed by the plaintiffs buyers for 1100 Hts at US\$ per HT.

: 44,000.00

(b) loss on account of quality down grading due to excessive storage @ USS 20 per HT on 6600 Hts

: 1,32,000.00

(c) loss on account of difference in price in the market @ US\$10 per HT on 6600 Hts.

: 66,000.00

Total : 2,42,000.00

equivalent to Rs.1,14,95,000.00

According to the applicant, 6600 HTs of suit cargo were downgraded in quality due to excessive storage and the downgraded resulted in loss up to US \$40 per HT in the market price. For this they relied on a certificate given by the Myanmar Forest Products and Timber Merchants Association. The other document that is produced by the applicant is the letter from one Suprna International Agencies who are alleged to have made a claim at the rate of US \$ 40 per HT on the quantity of 1100 HTs. The applicant has calculated their loss by fixing the logs to be loaded at 6600 HTs. At this stage, it is not possible to accept that the applicant had made ready 6600 HTs of timber. It appears that in one round voyage, the applicant can transport only 1100 HTs and in a three months" period three such trips can be made. This is seen from the plaint in which it is stated that the basis for taking 6600 HTs is that a average turn around period is 22 days per voyage and in a six months" period there might be six voyages. We do not know whether the applicant had exercised his right or advised the respondent that he is intended to extend the Agreement for another three months" period. In fact, only one voyage had been completed and before the next voyage could commence the respondent had terminated the contract. So the respondent cannot be asked to furnish security by calculating at the rate of 6600 HTs of logs. There is no evidence for that now. The applicant has however produced some documents to show that they had kept the cargo ready for the next voyage.

27. A load of 1100 HTs had been kept ready by the applicant for the next voyage and they had also intimated the same to the respondent that they suffered damage because the vessel did not load their cargo but the rival"s cargo. So the loss suffered by the applicant can be fixed only with this 1100 HTs of cargo as basis. At this stage it is also not possible to accept the claim made by the applicant for loss on account of the quality downgrading for 6600 HTs. Again at this stage, the loss on account of difference in price for 6600 HTs could also not be accepted. But definitely the applicant has suffered by the respondent leaving the cargo high and dry during the currency of the contract.

28. Taking into account, the injuries suffered by the applicant because of the premature termination of contract and the undisputable fact that the second cargo could not be loaded on schedule because of the termination the applicant is entitled to some security before the ship could be released.

29. In view of the claim made by the applicant with regard to 6600 HT and on a prima facie consideration of the documents especially the letter given by the purchasers and the certificate given by the Myanmar Forest Products and Timber Merchant Association, the security to be furnished is fixed at US \$ 40 per HT for 1150 HT. The quantity of logs is fixed at 1150 HT by adding 1100 HT which were kept ready for the second voyage and the 50HT that Were left behind in the first voyage because of risk of vessel's stability. The vessel shall be released on condition the respondent furnishes security for the Rupee equivalent of US \$ 46000.00 in the form of bank guarantee or cash security. The applications are ordered as above.