
(1999) 09 BOM CK 0040

In the Bombay High Court

Case No : Notice of Motion No. 2317 of 1999 in Admiralty Suit No. 45 of 1996

M/s. Crescent Petroleum Ltd.

APPELLANT

Vs

m.v. "MONCHEGORSK" and another

RESPONDENT

Date of Decision : 23-09-1999

Acts Referred:

Admiralty Courts Act, 1861 — Section 35, 5
Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2, Order 39 Rule 1, Order 39 Rule 2,
Order 6 Rule 16, Order 7 Rule 11
Constitution of India, 1950 — Article 21, 215, 372

Citation : AIR 2000 Bom 161 : (2000) 3 ALLMR 714 : (2000) 1 BomCR 645 :
(2000) 1 BOMLR 297

Hon'ble Judges : S.S. Nijjar, J

Bench : Single Bench

Advocate : P.S. Pratap and Madhu M. instructed by V. Subramaniam, for the Appellant; S.K. Mukherjee and Ms. F. Sethna, instructed by Dunmorr Sett, for the Respondent

Judgement

S.S. Nijjar, J.—This Notice of Motion has been taken out by the defendants for dismissal of the suit and for directing the plaintiffs to pay to the defendants sum of U.S.\$ 349,518,56 towards the defendants claim for wrongful arrest and detention of the first defendant vessel. Alternatively it is prayed that pending the hearing and final disposal of the suit, the plaintiffs be directed to furnish a Bank Guarantee of a Nationalised Bank in favour of the Prothonotary and Senior Master, High Court, Bombay, in the sum of the defendants claim of U.S.\$ 349,518,56.

2. The defendants claim the dismissal of the suit on three grounds. These are:

- (i) That the suit in rem is without jurisdiction and not maintainable against the defendant vessel;
- (ii) That even on the plaintiffs reasonably best arguable case the suit as framed is not maintainable;

(iii) That the suit as framed and on the basis of which the Warrant of Arrest has been obtained is vitiated by material misrepresentation or by suppression of material facts.

In support of the first ground, it is submitted by Mr. Mukherjee, learned Counsel appearing on behalf of first defendant, that the present application proceeds as on a demurrer, that is, accepting the truth of the statements contained in the plaint and seeking a decision on the issue as a bare question of law. It is submitted that the suit is patently bad in that on the basis of the plaintiff's case, as pleaded, no case is made out asserting any personal cause of action against the owner of the vessel, N.B. Shipping Limited. The only contractual nexus that is pleaded is the contract concluded between the plaintiffs and Project Asia Line, hereinafter referred to as "PAL". According to Mr. Mukherjee, the foundation for plea of jurisdiction is pleaded in paragraph 13 merely on the supply of bunkers. The learned Counsel has pointed out that in para 10 of the plaint, the plaintiffs have merely stated that "they have a cause of action u/s 5 of the Admiralty Courts Act, 1861, for necessities supplied to the first defendant vessel". In paragraph 3 of the plaint it is merely pleaded that "On 24th July, 1995 a contract was concluded between the plaintiffs and one M/s. Project Asia Line, the owners/ charterers/operators of the first defendant vessel for supply of fuel oil and marine diesel oil to the first defendant vessel. The plaintiffs crave leave to refer to and rely upon the confirmation dated 24-7-1995 from the plaintiffs to M/s. Project Asia Line and the General Terms and Conditions of Sale when produced." Thus, according to Mr. Mukherjee, it becomes obvious that no averment is made of any contract having been entered into between the plaintiffs and the owners i.e. N.B. Shipping Limited. The plaintiffs have merely impleaded the defendant No. 1 vessel by name m.v. MONCHEGORSK. The defendant No. 2 are merely described as owners, charterers, operators of the defendant vessel. This description is wholly vague and shows that the plaintiffs have no idea of the relationship of defendant No. 2 to defendant No. 1. According to Mr. Mukherjee the plaint proceeds on the assumption that it does not matter whether PAL are owners or charterers. It is further submitted that an action in rem against the vessel would lie only if the owner is personally liable for the suit claim. He submits that save in exceptional cases i.e. action for wages, bottomry and maritime salvage, an action in rem is dependent on the personal liability of the owner or the person in possession of the vessel i.e. demised charterer. For this proposition, the learned Counsel relies on a judgment of the House of Lords in the case of *David Morgan v. The Steamship "Castlegate"*, reported in 1893 Appeal Cases 38. He submits that in the present case the supplies of necessities have been made not at the instance of the owner. Pleadings do not reflect any contract with the owner. The contract pleaded is with PAL. The registered owner of the vessel is N.B. Shipping Ltd. This is evident from the certificate issued by Cyprus Registry which is attached as Exhibit-3 to the affidavit in rejoinder. Even in the certificate of insurance (Exhibit-4 to the affidavit in rejoinder) PAL is not mentioned in any of the capacities of owner/manager/operator or technical crew

manager. At the relevant time the vessel was on time charter with PAL (Exhibit-5 to the affidavit in rejoinder). Clause 2 of the Charter Party clearly stipulated that the charterers shall provide and pay for all the fuel except as otherwise agreed. Therefore, by no stretch of imagination can it be said that the owners were liable for the supply of necessaries. Knowing this fully well, the plaintiffs could not and did not assert that PAL was the owner of the vessel. In view of the above, the suit has to be dismissed as not disclosing a cause of action in rem against the owners.

3. In reply it is submitted by Mr. Pratap, learned Counsel for the plaintiffs, that the reliance on the judgment in *Castlegate* by the defendants is wholly misconceived. According to the learned Counsel, the law in India does not require that an action in rem would lie only if the owner is also liable in personam. This, according to the learned Counsel, has been settled by the Supreme Court in the case of *M.V. Elisabeth and Others Vs. Harwan Investment and Trading Pvt. Ltd., Hanoekar House, Swatontapeth, Vasco-De-Gama, Goa*, . It is the submission of Mr. Pratap that the plaintiffs are relying on principles of English law which are contrary to the position of law under the Admiralty Courts Act, 1861 and the Brussels Convention of 1952, the principles of which form a part of the common Law of India. He submits that the scope and ambit of the Admiralty jurisdiction of the courts in India has been set out elaborately by the Supreme Court in the case of *Elisabeth* (supra). He relies on the following paragraphs.

"17. It is true that the Colonial statutes continue to remain in force by reason of Article 372 of the Constitution of India, but that does not stultify the growth of law or blinker its vision or fetter its arms. Legislation has always marched behind time, but it is the duty of the Court to expound and fashion the law for the present and the future to meet the ends of justice.

30. The Exchequer Court of Canada was established by The Admiralty Act R.S. Canada, 1906, c.141, as a Colonial Court of Admiralty. It is not clear whether that Court was in its jurisdiction comparable to the Indian High Courts. Assuming that it was comparable at the relevant time, and whatever be the relevance of *Yuri Maru* to courts like the Exchequer Court of Canada, we see no reason why the jurisdiction of the Indian High Courts, governed as they now are by the Constitution of India, should in any way be subjected to the jurisdictional fetters imposed by the Privy Council in that decision. Legal history is good guidance for the future, but to surrender to the former is to lose the latter.

65. 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

High Court concerned. This power of the Court to render justice must necessarily include the power to make interlocutory orders for arrest and attachment before judgment.

66. The High Courts in India are superior courts of record. They have original and appellate jurisdiction. They have inherent and plenary powers. Unless expressly or impliedly barred and subject to the appellate or discretionary jurisdiction of this Court, the High Courts have unlimited jurisdiction, including the jurisdiction to determine their own powers (See *Naresh Shridhar Mirajkar v. State of Maharashtra*). As stated in Halsbury's Laws of England, 4th Edn. Vol. 10 para 713:

"Prime facie, no matter is deemed to be beyond the jurisdiction of a superior Court unless it is expressly shown to be so, while nothing is within the jurisdiction of an inferior Court unless it is expressly shown on the face of the proceedings that the particular matter is within the cognisance of the particular Court."

Mr. Pratap submits that the aforesaid passages clearly establish that the High Courts have plenary and unlimited jurisdiction, unless it is expressly or by necessary implication curtailed. He submits that examined in this light a bare perusal of sections 5 and 35 of the Admiralty Courts Act, 1861, makes it clear that (a) the High Court has jurisdiction to entertain any claims for necessities supplied to any ship; and (b) such a claim may be made by an action in rem and/or by proceedings in personam. This apart, the Brussels Convention of 1952 provides that a vessel is liable to arrest on the basis of a maritime claim. The learned Counsel on the basis of the observation made by the Supreme Court in paragraph 76 of *Elisabeth's* case submits that the provisions of and principles underlying the 1952 Convention are part of the Common Law of India and applicable for the enforcement of maritime claims against foreign ships. Thus it is not necessary to establish that before a ship can be arrested, for supply of necessities to the ship that the owner is liable in personam. On facts it is submitted by Mr. Pratap that the plaintiffs are the suppliers of bunkers which were supplied to the first defendant vessel. The receipt of the bunker was acknowledged by the Chief Engineer of the vessel on behalf of the vessel and the bunker delivery receipt bear the signature of Chief Engineer and the seal of the vessel. An invoice in the amount of U.S.\$ 137,275- for the bunkers, delivered to the vessel was raised by the plaintiffs on PAL and/or Master and/or owners and/or operators and/or charterers of m.v. *Monchegorsk*. The bunker supply contract was entered into with PAL. Since invoice amount was not paid and no amounts were received by the plaintiffs in respect of the supply of the bunkers an action in rem against the vessel was instituted by the plaintiffs on 24th April, 1996. It is submitted by the learned Counsel that the bunkers supplied to the first defendant vessel are in the nature of necessities supplied to the first defendant vessel at the request of the owner/charterer/operator/master of the vessel. Therefore the first defendant vessel is bound and liable to pay the amount. Thus

the plaintiffs have a cause of action u/s 5 of the Admiralty Courts Act, 1861.

4. I have considered the submissions made by the learned Counsel for the parties on this issue. Although not pleaded in so many words, the case put forward seems to be that the plaint ought to be rejected on the ground that "it discloses no cause of action". The Court has the power under Order 7, Rule 11(a) of the CPC to reject the plaint at the threshold. But in this case the Court would reject the plaint only if it comes to the conclusion that necessary averments and material has not been placed before the Court to show, at least prima facie, that PAL had entered into the contract for bunkers at the instance, authority or faith of the vessel or its owners. In the event the Court comes to the conclusion that necessary averments have been made to disclose a cause of action in personam against the owner of the vessel, then it would not be necessary to decide the question of law raised by Mr. Mukherjee viz. for an action in rem to lie it is essential that the owner of the vessel is liable in personam. It would be necessary to decide this question only if the Court comes to the conclusion that necessary averments have not been made to disclose a cause of action in personam against the owner. Having perused the plaint and the documents which are made available, I am prima facie of the opinion that the necessary averments have been made by the plaintiffs to raise a triable issue with regard to the bunkers being supplied to the owners. Therefore, it would not be necessary to decide the question of law at this stage. I am, prima facie, satisfied that this is not the kind of case where the Court can come to the conclusion, at this interlocutory stage, that there are no averments showing that the bunkers have been supplied to the ship on the alleged authority of the owner. In paragraph 2 of the plaint, it is clearly stated as follows:

"2. The first defendant is a motor vessel flying the Cypriot flag and is presently lying berthed and/or at stream at the port and harbour of Kandla, within the Admiralty and Vice Admiralty Jurisdiction of this Hon"ble Court. The second defendants are the owners of the first defendant vessel and all other interested persons in the first defendant vessel."

This is immediately followed by the averments in paragraph 3 which are as follows:

"3. On 24th July, 1995 a contract was concluded between the plaintiffs and one M/s. Project Asia Line, the owners/charterers/operators of the first defendant vessel for supply of fuel oil and marine diesel oil to the first defendant vessel. The plaintiffs crave leave to refer to and rely upon the confirmation dated 24-7-1995 from the plaintiffs to M/s. Project Asia Line and the General Terms and conditions of sale when produced."

Paragraph 3 specifically refers to General Terms and Conditions of Sale. A perusal of this contract dated 24th July, 1995 shows that the nomination was confirmed in the following terms.

"BUYER; PROJECT ASIA LINE A/O, MASTER, A/OWNERS, A/O CHARTERERS, A/O

OPERATORS. VESSEL; MONCHEGORSK.

This nomination is subject to our General Terms and Conditions of Sale (section 8) a copy of which is available on request."

Paragraph 21 of the General Terms is as under:

"21. LIEN. Where product is supplied to a vessel, in addition to any other security, this Agreement is entered into and product is supplied expressly on the faith and credit of the vessel. It is agreed and acknowledged that a lien on the vessel is thereby created for the price of the product and other charges agreed to by the Buyer in this agreement, and the seller in agreeing to deliver the product to the vessel does so relying on the faith and credit of the vessel. The Buyer, if not the owner of the vessel, hereby warrants that he has the authority of the owner to pledge the vessel's credit and that he has or will give notice of the provisions of this Clause to the owner. Seller shall not be bound by any attempt by any person to restrict, limit or prohibit its lien or liens attaching to a vessel that has been supplied."

A perusal of Clause 21 of the contract shows that the agreement is entered into expressly on the faith and credit of the vessel. It is agreed and acknowledged that a lien on the vessel is thereby created. It is also agreed that the buyer, if not the owner of the vessel, warrants that he has the authority of the owner to pledge the vessel's credit. It also states that he will give notice of the provisions of this Clause to the owner. Prima facie, without going into the merits or evidentiary value of the documents. I am satisfied that the plaintiffs are perfectly within their right to claim on the basis of the combined reading of confirmation of nomination together with paragraph 21 of the General Terms and Conditions of Sale that the necessities/bunkers were supplied at the instance/authority of the vessel/owners. Thus, at this stage it would not be possible to hold that the contract has not been entered into by PAL on behalf of the owners of the vessel. In my view, this issue will have to be finally decided on the basis of the evidence which will be adduced at the final hearing of the case. Reading the aforesaid averments together it cannot be said that the plaintiffs have not stated that the supply of necessities were not made to the owners of the vessel. So, even if the Court proceeds on the basis that action in rem lies only if the owner is liable in personam, the defendant cannot succeed at this stage. Thus I am unable to accept the submission of Mr. Mukherjee that the suit ought to be dismissed at this stage on the ground that it is not maintainable.

5. It would also not be possible to accept the submission of Mr. Mukherjee to the effect that even prima facie it could not be held that the necessities were supplied on express/implied authority of the vessel. The circumstances in which the plaint can be struck out as disclosing no cause of action has been considered by a Division Bench of this Court in the case of Bomi Munchershaw Mistry Vs. Kesharwani Co-operation Housing Society Ltd. and Others, . The ratio has been set out in paragraph 14 and 19 of the judgment which are as follows:

14. The bed-rock upon which is founded the exercise of the right to strike of a pleading is stated succinctly by Fletcher Moulton Lord Justice in *Dyson v Attn Gen*, 1911(1) K.B. 419:

"To my mind it is evident that our judicial system would never permit a plaintiff to be driven from the judgment seat in this way without any Court having considered his right to be heard, except in cases where the cause of action was obviously bad and almost incontestably bad."

19. The above narration indicates that though the words "abuse of the process of the Court occurred for the first time on 1-2-1977 in Order 6, Rule 16 of the Code of Civil Procedure, this power was immanent in and arose from a High Court being a Court of Record under the Letters Patent as well as Article 215 of the Constitution. Rege, J., as well as the two learned Judges of the Appeal Court refused to strike the plaint off the record on the ground that it was an abuse of the process of the Court. This power of taking a plaint off the record of the Court as well as the allied power of punishing for contempt which are the attributes of a Court of record, will have to be exercised with utmost caution and only when the Court is absolutely sure that the plaintiff does not have an arguable case at all. The exercise of the power though arising in Civil Procedure, can be said to belong to the realm of criminal jurisprudence and any benefit of the doubt must go to the alleged contemner of the plaintiff whose plaint is to be branded as an abuse of the process of the Court. That explains, why Tucker, L.J., in *Law v. Dearnlev* (supra) felt reluctant to strike the action off the record even though his view was shared by the majority."

Clause 21 of the contract for bunker supplies called "General Terms and Conditions of Sale" prima facie, shows that the plaintiff has acted on the assurance given on behalf of the vessel. Prima facie therefore a rebuttable presumption would arise that the necessities have been supplied to the vessel on the express or implied authority of the owner. In the case of *The Owner of the Steamship "Heiwa Maru" v. Bird & Co.*, ILR 4 Ran S 78 the Court observed:

"Necessaries supplied to a ship are of course prima facie presumed to have been supplied on the credit of the ship but there is a passage in the judgment of Their Lordship of the Privy Council in the case of *Foong Tai v. Buchheister*, Law Reports, Appeal Cases 1908 p. 458 which shows that presumption can be rebutted, and in the case of *The Castlegate*, Law Reports, Appeal Cases 1893 p. 38, Lord Herschell said that disbursements made by the master on account of the ship must be limited to disbursements which he had a right to make on the credit of the owners of the ship and did not extend to disbursements made by him for purposes for which the charterers ought to have made provision, even though in a sense they might be said to have been made on account of the ship."

Thus it would appear that the defendants would be entitled to rebut this presumption by relying on Clause 2 of the Charter Party, which provides that the charterer shall provide and pay for all the fuel except otherwise provided. But

these are matters to be decided on appreciation of evidence and not at an interlocutory stage. The plaintiff cannot be driven from the judgment seat merely on speculation. It is settled law that the plaint can be rejected as disclosing no cause of action if the Court finds that it is plain and obvious that the case put forward is unarguable. In my view the phrase "does not disclose a cause of action" has to be very narrowly construed. Rejection of the plaint at the threshold entails very serious consequences for the plaintiff. This power has, therefore, to be used in exceptional circumstances. The Court has to be absolutely sure that on meaningful reading of the plaint it does not make out any case. The plaint can only be rejected where it does not disclose a cause of action or where the suit appears from the statements made in the plaint to be barred by any provision of the law. While exercising the power of rejecting the plaint, the Court has to act with utmost caution. This power ought to be used only when the Court is absolutely sure that the plaintiff does not have an arguable case at all. The exercise of this power though arising in Civil Procedure, can be said to belong to the realm of criminal jurisprudence and any benefit of the doubt must go to the plaintiff, whose plaint is to be branded as an abuse of the process of the Court. This jurisdiction ought to be very sparingly exercised and only in very exceptional cases. The exercise of this power would not be justified merely because the story told in the pleadings was highly improbable or which may be difficult to believe.

6. It was then submitted by Mr. Mukherjee that the warrant of arrest having been obtained by fraud the plaintiffs are not entitled to any equitable relief. The ground of fraud is said to be established on the basis that plaintiffs had in fact received the consideration which is the subject matter of this suit in another suit filed by the plaintiffs against PAL in the New York. It has now become apparent that the plaintiffs have obtained a final order/judgment in proceedings instituted in New York. The total claim filed against the defendants in the present suit is U.S. \$ 1,37,000/-, of which a total sum of U.S. \$ 70,000 was paid on 27th and 28th February, 1996, the balance sum of U.S. \$ 66,000 was recovered pursuant to an attachment of PAL's account on 4th April, 1996. These facts came to the knowledge of the defendants only when interrogatories were served on the plaintiffs. Although the plaintiffs gave replies to the interrogatories, they did not supply the necessary documents till a very late stage. It was from the perusal of these documents that the defendants have come to know that the entire amount due for the supplies of necessities to the vessel m.v. Monchegorsk had already been cleared. Therefore, the action in rem has not been brought in good faith. Had these facts been disclosed at the initial stage, it is possible that the ship would not have been arrested. The plaintiffs have clearly played fraud on the Court. Thus the suit deserves to be dismissed for abuse of the process of Court. In the alternative, the warrant of arrest is liable to be set aside. He submits that defendants are entitled to the refund of the money deposited in Court.

7. On the other hand it is submitted by Mr. Pratap that the plaint was instituted on 24th April, 1996. On that very day the Court passed an ex parte order of

arrest of the defendant vessel in order to secure the plaintiffs claim. A warrant of arrest was issued pursuant to the order of arrest and the warrant was executed by service on the vessel on 25th April, 1996. Even according to the defendants themselves, they had information on 6th May, 1996 that an amount of U.S. \$ 70,000 and an amount of U.S.\$ 66,000 had been paid to the plaintiffs by PAL towards the outstanding against the vessel m.v. Monchegorsk. Yet the defendants did not act on this information or take any steps to apply for setting aside the warrant of arrest. On the contrary, they appeared in Court on 9th May, 1996 and agreed to furnish security in full for release of the vessel by depositing a cheque in the amount of Rs. 57,27,653.61 with a request that the same may not be encashed until 13th May, 1996. This request was made as they intended to deposit equivalent amount in cash. The vessel was, therefore, released on 9th May, 1996. Thereafter also the defendants did not contest the arrest on jurisdiction or merits. They unconditionally submitted to the jurisdiction of this Court by filling a written statement on 26th June, 1996. The very grounds which are taken in the Notice of Motion were taken in the written statement as well i.e. (a) the personal liability of the owner of the ship is essential to create liability in rem in respect of the ship and in the present case there is no personal liability of the ship owner and (b) that an amount of U.S.\$ 70,000 together with a further amount of U.S.\$ 66,000,00 has been paid towards the plaintiffs claim in the suit and this has been suppressed by the plaintiffs. On 22nd January, 1999 the defendants took out a Chamber Summons for leave to deliver interrogatories to the plaintiffs. The plaintiffs had no objection to the Chamber Summons being made absolute. Replies to the interrogatories were given on or about 15th February, 1999. In reply to the interrogatories it was specifically denied that an amount of U.S.\$ 70,000/- and 66,699/- received by the plaintiffs were towards the outstanding dues in respect of bunkers supplied to the first defendant vessel. Thereafter on 22nd June, 1999 this Court has further directed discovery and inspection to be completed and affidavit of documents to be filed. The suit was to be posted for framing of issues on 24th August, 1999. It was only after this order was passed on 22nd June, 1999 that the defendants took out the present Notice of Motion on 23rd July, 1999. In view of the above it is submitted by Mr. Pratap that the defendants themselves are not absolutely confident of the defence put forward. If the defendants had been certain of their claim for dismissal an application ought to have been filed immediately on the warrant of arrest of the ship being issued. In any event, the learned Counsel submits that there is no material concealment of facts before this Court. He relies on section 35 of the Admiralty Courts Act, 1861 which clearly provides that action in rem is independent of the action in personam. In any event, the plaintiffs are entitled to maintain action in personam and action in rem simultaneously in different jurisdictions. Action in rem is against the vessel whereas action in personam is against the contracting party. In the present case the plaintiffs filed an action in personam against PAL who are not the owners of the vessel. This action was filed in New York on 27-2-1996 in respect of outstandings due from PAL for bunkers supplied to four different vessels including the defendant vessel. The claim in the

New York proceedings also included the claim for interest on unpaid invoices as also for legal costs, attorneys fees etc. The amount claimed was U.S.\$ 391,414,02. PAL entered into a stipulation dated 28-2-96 with the plaintiffs to pay the amount admitting liability in full. Under this stipulation the plaintiffs acknowledged the receipt of U.S.\$ 70,000/- towards their claim. Learned Counsel emphasises that this amount was not appropriated towards the plaintiffs claim in respect of the outstandings towards the vessel Monchegorsk. After giving credit for U.S.\$ 70,000/- an amount of U.S. \$. 321,414,02 was still outstanding against PAL. PAL agreed to pay these amounts in installments commencing March 4, 1996. They, however, defaulted in payment. This judgment was entered by the New York Court on 12th March, 1996. No payment was received and there seems to be no scope for recovery of the judgment amount. Therefore, the plaintiffs were constrained to file the action in rem in the present suit. Apart from this, it is submitted that judgment in personam does not have the effect of a merger into it of an action in rem. As long as the claim of the plaintiffs was not satisfied in personam they were entitled to bring an action in rem.

8. In my view, the objection taken by Mr. Mukherjee *prima facie* is not tenable. It is no doubt true that the High Court has inherent powers by virtue of section 151 of the Code of Civil Procedure, 1908, Letters Patent and Article 215 of the Constitution of India to prevent the abuse of its process. It is axiomatic that greater the power, greater the caution in exercise thereof. This power has been specifically incorporated in Order 6, Rule 16 (c) of the CPC after 1-2-1977. It has been exercised on very rare occasions. It is an abuse of the process when facts germane to the issue are either not disclosed to the Court or are misstated. However, all inaccuracies will not lead to the dismissal of the cause. The inaccurate facts must enable the plaintiff to obtain relief which they would not have obtained if they had stated the correct facts. In the present case it has to be seen whether nondisclosure of the action in personam filed by plaintiffs against PAL, has any effect on this action in rem against the owners. I am of the considered opinion that there has been no material misstatement which would affect the merits of the action in rem. When the plea has been emphatically taken that the amount of U.S. \$ 70,000/- and 66,000/- have not been adjusted against the claim of m.v. Monchegorsk it cannot be held that it is such a concealment which would entail the dismissal of the suit. Mr. Mukherjee had also referred to various documents on the record to demonstrate that the entire amount has been settled. However, in my view, perusal of the same, *prima facie*, would not lead to such an unequivocal conclusion, as put forward by Mr. Mukherjee. Different interpretations can be placed on all the documents which had been relied upon by either side. The plaintiffs are aware from the fax message, Exhibit-6 to the rejoinder, that it was almost impossible to obtain any information from PAL due to the fact that their Houston office is closed and New York is not staffed by any officers with access to correct documentation. How much reliance can be placed on these documents can only be decided when the evidence is led. In such circumstances it would not be possible to hold at this

interlocutory stage that the plaintiffs have received satisfaction of their claim and have yet continued with the present action in rem. The plaintiffs could only have been non-suited if the non-disclosure would have materially affected the merits of the action in rem or the suppression had enabled the plaintiffs to obtain a relief which they would not have otherwise obtained. Section XXXV of the Admiralty Courts Act read as under:-

"XXXV. The jurisdiction conferred by this Act on the High Court of Admiralty may be exercised either by proceedings in rem or by proceedings in personam".

A perusal of the same would clearly show that this Court exercises jurisdiction in rem independently of the proceedings which may be taken out against the persons liable in personam. In fact the point raised by Mr. Mukherjee is squarely covered by the judgment of the English Court in the case of *The Nordglimt*, 1987(2) LLR 470, Hobhouse, J., observes as follows:

"Unless and until anyone appears to defend an action in rem the action proceeds solely as an action in rem and any judgment given is solely a judgment given against the res. It is determinative and conclusive as against all the world in respect of the rights in the res but does not create any rights that are enforceable in personam. An action in rem may be defended by anyone who has a legitimate interest in resisting the plaintiffs claim on the res. Such a person may be the owner of the res but equally it may be someone who has a different interest in the res which does not amount to ownership, or again it may be simply someone who also has a claim in rem against the res and is competing with the plaintiff for a right to the security of a res of an inadequate value to satisfy all the claims that are being made upon it. It will also be appreciated both from what I have said and from a general understanding of the law of maritime liens that the owner or other person defending the action may be under no personal liability to the plaintiff.

In the present case it is alleged that the owners of the *Nordglimt* are under a personal liability to the plaintiffs, but that is not part of the essential character of an action in rem as such. Unless and until a person liable in personam chooses to defend an action in rem the action in rem will not give rise to any determination as against such person of any personal liability on his part, nor will it give rise to any judgment which is enforceable in personam against any such person."

"But that an action in rem does raise considerations which take it outside an unqualified application of Article 21 is perhaps most simply illustrated by a quotation from one of the authorities to which Mr. Justice Brandon must have been referring: In *(The Cella)*, 1888(13) P.O. 82, Sir James Hannen said:

An unsatisfied judgment in personam is no bar to proceedings in rem.

It is of the character of proceedings in rem that they are not alternative to proceedings in personam; they are cumulative. The cause of action in rem does not merge with a judgment in personam given in respect of a cause of action in

personam arising from the same facts. As is also made clear by the 1952 Convention, an action in rem is not a form of execution. If an action in rem would be still open to a claimant after having recovered a judgment in personam (but without having obtained full monetary satisfaction), then how much more clearly must it be open to him to commence the action in rem whilst the action in personam is still pending and has not yet proceeded to judgment."

I am in respectful agreement with the observations made above, and would adopt the same. Undoubtedly bringing successive actions on the same cause of action constitute abuse of the process of the Court. But keeping in view the distinction between the action in personam and the action in rem, in the present case the above principle would be inapplicable. The views expressed by Hobhouse, J., are a complete answer to the points raised by Mr. Mukherjee. Therefore, at best it could be said that the plaintiffs ought to have mentioned the proceedings which they have taken out against PAL in personam in New York. However, at the same time the plaintiffs would be entitled to state by way of explanation that in spite of those proceedings the plaintiffs are entitled to proceed with the present action in rem as the same is wholly independent of the action taken in New York. If the aforesaid averments had been made, in my view, no material prejudice would have been caused to the case of the plaintiffs. The ship would still be liable to be arrested for non-payment of supplies of necessities to the ship. Thus it will have to be held that the plaintiffs have not obtained any advantage by not disclosing the action in personam. In the facts and circumstances of this case, prima facie, I am unable to hold that there has been such a material suppression of facts or misrepresentation which would make the plaint liable to be rejected.

9. Before parting with this order, in fairness to Mr. Mukherjee, I will also deal with the point raised in passing to the effect that the action in rem has been initiated in bad faith. This argument was based on the fact that defendant No. 2 has been merely impleaded as the "Owners, Charterers, Operators, and all persons/others interested in the first defendant vessel". It was argued that the plaintiffs were not even aware that N.B. Shipping Limited were the owners of the vessel. The suit has been filed only when the plaintiffs realised that no recoveries are forthcoming from PAL. In my view, this point has also been decided against the defendants in "THE NORDGLIMT" (supra). At page 481 Hobhouse, J., inter alia observes:-

"In England, since the Judicature Acts, the means by which the judicial arrest of a ship has been obtained is by the commencing of an action in rem and the issue by the Court in that action, of a warrant of arrest. Therefore as a matter of England procedure there has to be an action before there can be an arrest and, subject now to section 26 of the 1982 Act, the arrest has to be in aid of a judgment capable of being obtained in that action. The form of the writ in an Admiralty action in rem is one which describes the action as an action in rem against the ship but which also refers to parties as plaintiffs and defendants. No

problem arises about the identity of the plaintiffs which equates with the "Claimant" in the 1952 Convention and is, in essence, the same as a plaintiff in an action in personam. But the defendants are customarily described as "the owners of the ship" and the writ is addressed to "the defendants and other persons interested in the ship."

I believe the same practice of describing the owner as the "owner" has continued in Bombay High Court. Thus I find no ambiguity in the cause title of the plaint.

10. Thus the matter would have to be permitted to go to trial. Even otherwise the courts are very reluctant to dismiss a plaint at the threshold unless the plaint is plainly and obviously devoid of any cause of action. This can only be when the plaintiff does not even have an arguable case. Such is not the situation in the present case. In my view, the plaintiffs have made out a prima facie arguable case. In view of the fact that I have, prima facie, come to the conclusion that the arrest of the vessel was justified, no relief of damages or for provision of security as claimed in prayer Clauses (b) and (c) of the Notice of Motion could be granted to the defendants. Therefore, I am of the opinion that there is no merit in the Notice of Motion. The same is hereby dismissed with no order as to costs.

Certified copy expedited.

Private Secretary is permitted to issue an ordinary copy of this order to the parties.