

(2003) 07 GUJ CK 0023

In the Gujarat High Court

Case No : O.J. Appeal No. 21 of 2003 in O.J. Civil Application No. 257 of 2001 in Admiralty Suit No. 19 of 2001 and O.J. Civil Application No. 62 of 2003

M.V. Sea Renown and Another

APPELLANT

Vs

Energy Net Ltd.

RESPONDENT

Date of Decision : 15-07-2003

Acts Referred:

Admiralty Courts Act, 1861 — Section 35, 5, 6
Civil Procedure Code, 1908 (CPC) — Order 7 Rule 11
Merchant Shipping Act, 1958 — Section 3(15)

Citation : (2003) 07 GUJ CK 0023

Hon'ble Judges : Sharad D. Dave, J;J.M. Panchal, J

Bench : Division Bench

Advocate : V.K. Ramabhadran and Paurami B. Sheth, in O.J. Appeal No. 21 of 2003, for the Appellant; Prashant Pratap and A.S. Vakil in O.J. Appeal No. 21 of 2003, for the Respondent

Final Decision : Dismissed

Judgement

J.M. Panchal, J.—Instant appeal is directed against judgment dated January 15, 2003 rendered by the learned Single Judge in O.J. Civil Application No. 257 of 2001 filed in Admiralty Suit No. 19 of 2001 by which two prayers made by the appellants, namely; (i) that the bank guarantee dated August 16, 2001 furnished by the appellants in favour of Registrar of the High Court in order to obtain release of the vessel of the appellants be returned duly discharged; and (ii) that the respondent be directed to pay to the appellants a sum of US\$ 1,43,230.28 as damages, are refused.

2. The respondent is a company organized under the laws of Liberia, and carries on business, inter alia, as supplier of bunkers to various vessels worldwide. The appellant No. 1 is a foreign-flag vessel. According to the respondent, it was contacted on or about July 24, 2000 by brokers acting on behalf of the owner of the appellant No. 1-vessel for supply of bunkers at Port Said Suez and, therefore, an order confirmation dated July 24, 2000 was issued by the respondent to the

owners of the said vessel confirming the order for supply of 530 MT IFO 180 CST and 80MT MGO at a price of US\$148.50 per MT for IFO and US\$325.00 per MT for MGO. The case of the respondent is that in the order confirmation, the buyers were mentioned to be the vessel `SEA RENOWN" and jointly and severally the Owners/Managing Owners/ Operators/Managers/Disponent Owners/Charterers, vessel in rem and Geepee Shipping & Trading Inc. What is asserted by the respondent is that the order confirmation stated that the receipt of the confirmation signified acceptance of responsibility for payment of bunker invoice by each and all of the buyers listed in the order confirmation and that the terms of the supply of bunkers required, inter alia, that payment should be made within thirty days from the date of delivery and interest on late payment would be charged at 2% per month. It is the case of respondent that in accordance with the order confirmation, bunkers were supplied to the said vessel at Port Said through local physical supplier MISR Petroleum Company on July 30, 2000, and the supplies were duly acknowledged by the Master and the Chief Engineer of the said vessel, who endorsed the bunker delivery receipts with their seal and signatures. It is also the case of the respondent that the receipts for bunkers duly acknowledged and endorsed by the Master and the Chief Engineer of the vessel stated that the bunkers delivered/received on board were for account of the Owners and/or Managing Owners and/or Managers of the vessel as well as any other vessel managed by the same Managers as appearing in Lloyd's Register of Shipping or Greek Shipping Directory. It is maintained by the respondent that upon delivery of bunkers being made, the local physical supplier, MISR Petroleum Company, was duly paid by it and the respondent-plaintiff, in terms, had raised invoice dated August 9, 2000 in respect of the said supplies on the Master and/or owners of the vessel requiring payment of the total amount of bunkers supplied aggregating to US\$104864.52 to be made within thirty days after delivery date. The grievance of the respondent is that the owners of the vessel did not make payment of the said amount despite telephonic requests and reminders from time to time although repeated promises of payment were made. The respondent has emphasised that bunkers are essential for the operation of the vessel and supply of bunkers to vessel constitutes necessities within the meaning of Section V. of the Admiralty Courts Act, 1861 ("the Act" for short), as a result of which, the respondent has a maritime claim against the appellant No. 1-vessel for bunkers supplied. It is further claimed by the respondent that the bunkers were supplied on the faith and credit of the said vessel and the respondent is entitled to look to the said vessel and its owners for recovery of its dues. After asserting that a maritime lien attaches to the vessel as on the date of supply and is not defeated by any subsequent change in ownership of the vessel, the respondent has maintained that it is entitled to pursue its claim against the appellant No. 1-vessel in rem, under the provisions of the Act. The respondent-plaintiff has, therefore, instituted Admiralty Suit No. 19 of 2001 in the High Court and claimed following reliefs in paragraph 17 of the plaint.

"17. The Plaintiff therefore prays:

A) That the Defendant vessel SEA RENOWN along with her hull, gear, engines, tackle, bunkers, machinery, plant, apparel, furniture and fixtures, equipments and all appurtenances be ordered to be arrested under a warrant of arrest of this Hon"ble Court;

B) That the Defendant vessel SEA RENOWN along with her hull, gear, engines, tackle, bunkers, machinery, plant, apparel, furnitures and fixtures, equipment and all appurtenance be detained, condemned and sold under the orders and directions of this Hon"ble Court and the net sale proceeds thereof be applied towards the satisfaction of the plaintiff's claim in the suit;

C) For a decree against the Defendant vessel SEA RENOWN in the sum of US\$ 128,032.40 (United States Dollars One Hundred and Twenty eight Thousand and Thirty-two and Forty cents) together with interest at the rate of 24% per annum from the date of filing of the suit till payment and/or realisation;

D) Pending the hearing and final disposal of the suit, the Defendant vessel SEA RENOWN along with her hull, gear, engines, tackle, bunkers, machinery, plant, apparel, furniture and fixtures, equipment and all appurtenances be arrested and/or detained under the orders of this Hon"ble court and/or be restrained by an order of injunction of this Hon"ble Court from sailing out of the port of Alang and/or moving in any manner from its present position at Alang anchorage and maintain status-quo in respect of the said vessel.

E) For ad-interim orders in terms of prayers (a), (b) and (d) above;

F) For costs of the suit; and

G) For such other and further reliefs as in the nature and circumstances of the case this Hon"ble Court may deem fit and proper.

3. The suit was listed for hearing before the learned Single Judge of this Court on August 3, 2001, and ad interim relief of warrant of arrest of the vessel in terms of paragraph 17(B) of the plaint, was granted on that day upon the respondent giving an undertaking in writing to the Registrar to pay such sums by way of damages as the Court may award as compensation in the event of the appellant No. 1 and/or any other affected party sustaining prejudice by the order. It was further stipulated in the said order that in the event of the defendant (Appellant No. 1) depositing in the Court a sum of US\$ 1,28,032.40 towards the satisfaction of the respondent's claim in the suit and costs of the suit and on payment of the poundage, if any, or furnishing security in the said sum of US\$ 1,28,032.40 towards the satisfaction of the respondent's claim in the suit together with interest at the rate of 24% per annum from the date of filing of the suit till payment and/or realisation to the satisfaction of the Registrar of the Court as security towards the satisfaction of the respondent's claim in the suit and for costs of the suit and for poundage, if any, the Warrant of Arrest shall not be executed against the vessel SEA RENOWN.

4. The appellant No. 1-vessel appeared through her Counsel on August 10, 2001

and tendered a fax copy of the letter of undertaking issued by U.K. Mutual Steam Ship Assurances (Bermuda) Limited dated August 8, 2001 securing the amount of the claim of the respondent in the suit, and further undertaking to the Court that they shall furnish bank guarantee of a nationalised bank in favour of the Registrar of the Court in terms of order dated August 3, 2001 within a period of two weeks from the date of execution of the letter of undertaking. In view of the representation made on behalf of the appellant No. 1, the Court passed an order dated August 10, 2001 releasing the appellant No. 1-vessel. The bank guarantee has been furnished pursuant to order dated August 10, 2001.

5. The appellants, without filing any written statement to the plaint, filed O.J. Civil Application No. 257 of 2001 mentioning, inter alia, that though the appellants had, through a letter of their advocate dated August 27, 2001, called upon the advocate of the respondent to furnish various documents including documents evidencing that the respondent was contacted by the brokers acting on behalf of the owners of the appellant No. 1-vessel on or about July 24, 2000 as alleged in the plaint, on the terms and conditions mentioning interest at the rate of 2% per month for delayed payments as well as particulars of reminders sent to the owners from time to time and E-mail dated August 3, 2000, no response was received from the advocate of the respondent, and after reminder dated August 31, 2001, the respondent vide its letter dated September 8, 2001 had not supplied necessary documents on specious plea that they were matters of evidence in trial. In the application, it was pleaded that by a charter-party dated July 11, 2000, the appellant No. 1-vessel was chartered by one M/s. Geepee Shipping & Trading Inc. on certain terms and conditions and Charter-party, inter alia, provided that charterers were to pay for all the fuel. It was stated in the application that "an on hire bunker survey" was conducted on or about July 15, 2000 at the time of the delivery in order to ascertain the quantity of fuel on board the said vessel and the Manager on behalf of charterers had instructed the Master to stem sufficient quantity on bunkers at Suez in order to redeliver the vessel with about the same quantity as on delivery. What was maintained in the application was that at the time when the vessel was re-delivered, another survey was conducted in order to ascertain the bunkers remaining on board the vessel and the brokers representing the charterers had thereafter sent a statement of account giving credit to the appellants in respect of the bunkers on board and crediting charterers' account in respect of the bunkers on board at the time of redelivery. It was further stated in the application that reliance placed by the respondent on the receipt signed by the Master of the vessel was totally misplaced inasmuch as a standard printed form had been furnished to the Master of the vessel, who had merely acknowledged the quantity of bunkers supplied by the supplier and that the Master of the vessel had merely filled up the quantity in various blanks in the said form and had signed at the bottom. Along with the application, the appellants produced E-mail message dated August 3, 2000, and asserted that the contents of the message make it clear that the order, if any, for bunkers was placed by the brokers for and

on behalf of G. Premjee, who was Manager to the Charterers of the vessel, and that this fact was suppressed by the respondent in the plaint while claiming arrest of the vessel. After asserting that the bunkers were ordered by M/s. Geepee Shipping & Trading Inc., Singapore, and the original invoice was drawn for account Geepee Shipping & Trading Inc., Singapore, and sent to them, it was stated in the application that the appellants had never any business dealing or contact with M/s. LQM Petroleum Service, Singapore, nor the order confirmation dated July 24, 2000 was issued by the respondent to the appellants and, therefore, the claim of the respondent against the appellants was without any basis. What was maintained in the application was that the message dated October 3, 2000 and the purported invoice proved beyond doubt that the order for bunkers was placed on behalf of G. Premjee, Managers of the charterers for the said vessel, and that printed form had been given to the Master of the said vessel, who had merely filled up blanks and, therefore, the suit was liable to be dismissed for want of cause of action against the vessel. It was mentioned in the application that the respondent was entitled to maintain action in rem only if there existed privities of contract between itself and the owners of the vessel and as there was no such contract between the respondent and the owners of the vessel, the suit is liable to be dismissed against the vessel. In the application, it was claimed that the respondent is not entitled to any rate of interest exceeding 5% per annum and that because of illegal arrest of the vessel obtained by the respondent, the appellants have suffered financial loss in the sum of US\$143230.28. By filing the application, the appellants prayed that the bank guarantee dated August 16, 2001 furnished in favour of the Registrar of the High Court in order to obtain release of the vessel be returned duly discharged and the respondent be directed to pay to the appellants a sum of US\$143,230.28 as damages.

6. The respondent-plaintiff filed affidavit-in-reply contending, inter alia, that the respondent has a maritime claim against the appellant No. 1-vessel for supply of bunkers as well as a maritime lien in respect of necessities supplied to the said vessel and as the vessel is treated as wrongdoer and liable to be proceeded against, the application should be dismissed. After referring to the decision of the Supreme Court in *M.V. Elisabeth and Others Vs. Harwan Investment and Trading Pvt. Ltd.*, Hanoekar House, Swatontapeth, Vasco-De-Gama, Goa, , it was asserted that the Court is entitled to proceed against the vessel for enforcement of maritime claim, and the contention raised in the application that there was no privity of contract with the owner of the vessel is irrelevant. It was further mentioned in the reply that it was made clear to the Master of the vessel at the time of supply of bunkers that delivery was for the account of the owner of the vessel and the owner was individually and jointly responsible for payment of bunkers supplied to the vessel without any protest and the relevant clause which appears on the face of bunker delivery receipt signed by the Master and/or Chief Engineer of the vessel, binds the owner of the vessel and holds the owner liable for payment of bunkers supplied. It was asserted in the reply that supply of the

bunkers was made by the respondent to the appellant No. 1-vessel on the terms and conditions for the sale of marine bunker fuel and lubricants referred to as the "Current Applicable Terms & Conditions of the Seller" in the order confirmation dated July 24, 2000 and Clause 10.3 of the said terms & conditions to the effect that "Deliveries of marine fuel hereunder are not only on the credit of the buyer but also on the faith and credit of the vessel which uses the marine fuel and it is agreed and the buyer warrants that the seller will have and may assert a lien against the receiving vessel for the amount of the purchase price of the said marine fuel" gives cause of action to maintain suit against the vessel for recovery of price of the bunkers supplied. After emphasising that the respondent had no knowledge of the arrangement between the Charterer and/or Manager of the vessel and the owners, it was stated that action in rem was available against the vessel in respect of maritime claim and/or maritime lien and, therefore, the reliefs claimed in the application should not be granted.

7. The appellants filed rejoinder to the affidavit-in-reply filed by the respondent confirming and reiterating what was stated in the application and prayed the Court to allow the application.

8. The respondent filed further affidavit on June 28, 2002 by way of reply to the rejoinder of the appellants mentioning, inter alia, that it is normal custom in the trade to place orders of supply of bunkers by brokers acting on behalf of the owners of the vessel and it was for this reason that it was mentioned in order confirmation dated July 24, 2000, that the buyer was the vessel and the owner of the vessel was also jointly and severally liable for supply of bunkers. In the said affidavit, it was emphasized that when the bunkers were physically delivered to the vessel, the Master of the vessel had accepted the supply for account of the owners of the bunkers as expressly stated in the bunker delivery receipts dated July 30, 2000 and, therefore, the owner was responsible for the payment of bunkers supplied to the vessel without protest. In the said affidavit, it was asserted that the respondent having made out a strong prima facie case on merits, the matter should be allowed to proceed to trial and the bank guarantee furnished by the appellants as security in respect of the respondent's claim should be continued to remain in operation until the hearing and final disposal of the suit.

9. After hearing the learned counsels of the parties at length, and considering the documents produced, the learned Single Judge held that the appellants have moved the application for return of the bank guarantee duly discharged and for raising an issue that since the plaint does not disclose any cause of action against the appellants-defendants, the suit is not maintainable, and it is liable to be rejected. The learned Judge did not accept the proposition put forward by the appellants that there was no privity of contract between the respondent-plaintiff who had supplied bunkers to the defendant-vessel (appellant No. 1) and the owners of the defendant vessel, and held that the plaintiff having supplied bunkers to the defendant-vessel, which are necessary for the operation of said

vessel, has a maritime claim against the defendant-vessel as well as maritime lien in respect of necessities supplied to the said vessel. After referring to well-established principle of law to the effect that the vessel is treated as a juridical entity with a corporate personality and is liable to be proceeded against in respect of a maritime claim, irrespective of the character or personality of its owners, the learned Judge held that there is nothing in the Act and the Brussels Convention, 1952, which has been applied by courts in India for the purpose of enforcing maritime claim, requiring privity of contract with the owner of the vessel before an action in rem can be commenced against the vessel. The learned Judge did not accept submission that at the time of supply of bunkers, the vessel was on the charter of Geepee Shipping & Trading Inc. Singapore, and the order was placed by the Manager of the said vessel and that charterer or manager of the vessel was liable and not the owner of the vessel, and held that the order was placed by the person who was duly authorised to act on behalf of the owner and consequently was binding on the vessel and its owner. The learned Judge accepted the plea raised by the respondent that the respondent was not having any knowledge of arrangement between the Charterer and/or Manager of the vessel or its owner and that bunkers were supplied on the faith and credit of the vessel and the vessel was liable to pay for the supply. The learned Judge deduced that it was not possible to conclude that the respondent-plaintiff had made false statement in the plaint and that bunkers having been received by the vessel, the respondent was entitled to look to the vessel for payment. On prima facie reading of the documents, the learned Judge expressed the view that it is customary in the shipping business that orders for supply of bunkers are placed by the brokers who are called "Bunker Brokers" and brokers have authority on behalf of the vessel to order supply and the bunkers having been expressly acknowledged by the Master, the vessel and its owner would be responsible for payment of the same. The learned Judge referred to the decisions cited at the Bar and held that the respondent is within its right to claim that necessities/bunkers were supplied at the instance/authority of the vessel/owners and that it would not be possible to hold, at this stage, that contract had not been entered into on behalf of the owners of the vessel. Dealing with the claim of damages advanced by the appellants, the learned Judge held that the question of awarding damages as well as interest would arise only if the Court comes to a conclusion that the claim made by the respondent in the suit is not sustainable and even if such a finding is recorded by the Court at the conclusion of the trial, the Court may or may not award damages and interest depending upon the facts found by the Court and, therefore, the claim for damages cannot be entertained. The learned Judge expressed the view that, at this stage, when the suit is still pending and evidence is yet to be adduced, the Court cannot accept the demand of appellants to get the bank guarantee duly discharged. In view of the abovereferred to conclusions, the learned Judge has rejected the application submitted by the appellants vide judgment dated January 15, 2003 giving rise to instant appeal.

10. Mr. V.K. Ramabhadran, learned Senior Counsel of the appellants, submitted that the learned Judge has committed an error in law in treating the application filed by the appellants as one having been filed under the provisions of Order VII, Rule 11 of the Code of Civil Procedure, 1908 ["the CPC" for short] and, therefore, the impugned order should be set aside. It was claimed that the document dated July 24, 2000 produced by the appellants indicates that the buyer of the bunkers was Geepee Shipping & Trading Inc., Singapore, and not the owner of the vessel, and this document having been suppressed by the respondent, the appellants were entitled to the reliefs claimed in the application whereas the suit filed by the respondent was liable to be dismissed in view of the decision of the Supreme Court in *S.P. Chengalvaraya Naidu (dead) by L.Rs. Vs. Jagannath (dead) by L.Rs. and others*, . The learned counsel brought to the notice of the Court the fact that no document was produced on record by the respondent showing that MISR Petroleum Company had confirmed that it had supplied bunkers on behalf of the respondent and as the receipt is not between the Master of the vessel and the respondent, the action instituted was not maintainable. It was contended that MISR Petroleum Company having supplied the bunkers, the cause of action, if at all, was available to MISR Petroleum Company but not the respondent and, therefore, reliefs claimed in the application should be granted by the Appellate Court. After laying great emphasis on E-mail dated August 3, 2000, it was argued that buyer of the bunkers was Geepee Shipping & Trading Inc., Singapore, and none else and, therefore, as the suit against the appellants is not maintainable, the reliefs claimed in the application should have been granted by the learned Judge. The learned counsel emphasised that in view of the decision of the Supreme Court in *Epoch Enterrepots v. M.V. Won Fu*, JT 2002 (8) SC 546, there is no maritime lien in respect of claim for necessities and, therefore, the claim of the respondent having no basis, the reliefs claimed in the application ought to have been granted by the learned Judge. What was asserted by the learned counsel of the appellants was that even if the correctness of the contents of three documents produced by the respondent along with plaint is not disputed, the same does not furnish a cause against the appellants and, therefore, the application filed by the appellants should have been allowed by the learned Judge. After referring to the invoice produced by the appellants with the plaint, it was pointed out that it categorically mentioned "Account Geepee Shipping & Trading Inc., Singapore" and, therefore, the learned Single Judge ought to have held that privity of contract, if any, was only between the respondent and Geepee Shipping & Trading Inc., Singapore, which is not owner of the vessel. After stressing that no documents have been produced by the respondent to indicate privity of the contract between the respondent and the appellant No. 2, it was asserted that principle of law namely that in the absence of privity of contract between the plaintiff and the defendant-vessel or its owner, the action must fail, as laid down by the Bombay High Court in *Raj Shipping Agencies v. M.V. Bunga Mas Tiga & Anr.* AIR 2001 (Bombay) 451, should have been followed and the application filed by the appellants should have been accepted. It was argued that no evidence having been produced in support of assertion made in the plaint to

the effect that the appellant-vessel did not make payment of the amount despite telephonic requests and reminders from time to time although repeated promises of payments were received from the owners of the vessel, it was emphatically argued that there was no privity of contract between the appellants and the respondent, and as the respondent is not entitled to reliefs claimed in the plaint, the application submitted by the appellants should have been accepted by the learned Single Judge. The learned counsel pointed out that bunker delivery receipt, if any, has been issued in favour of MISR Petroleum Company and not in favour of the respondent and, therefore, MISR Petroleum Company may be entitled to maintain an action for receiving the price of goods sold, but not the respondent and, therefore, the application should have been granted. It was urged that the conclusion reached by the learned Single Judge that the order for supply of bunkers was placed by a person who was duly authorized to act on behalf of the vessel and/or that it binds the vessel or its owner is erroneous inasmuch as document dated July 24, 2000 would conclusively prove that the contract, if any, was between Geepee Shipping & Trading Inc., Singapore and the respondent and, therefore, the impugned judgment should be set aside. It was also pleaded that a unilateral bunker receipt cannot bind the owner of the vessel inasmuch as the order for the bunkers was placed by Geepee Shipping & Trading Inc., which had chartered the vessel at the relevant time from the owners of the vessel and, therefore, it should have been held that the respondent was not entitled to any discretionary relief of arrest of the vessel whereas the appellants were entitled to reliefs claimed in the application. It was emphasised that finding recorded by the learned Single Judge that bunkers were supplied on the faith and credit of the vessel is erroneous inasmuch as no document is produced by the respondent in support of the said case except unilateral document and, therefore, the reliefs claimed in the application should be granted by this Court. After asserting that no triable issue with regard to privity of contract between the appellants and the respondent arises for determination in view of the document dated July 24, 2000 establishing conclusively that the contract is between the appellants and the Geepee Shipping, it was pleaded that the appellants are entitled to reliefs claimed in the application. The learned counsel of the appellants argued that principle laid down by the Bombay High Court in *M/s. Crescent Petroleum Limited v. M.V. "MONCHEGORSK"* & Anr. AIR 2000 Bombay 161, is not applicable to the facts of the present case inasmuch as there was no document similar to the fax message dated July 24, 2000 which makes crystal clear that privity of contract is only between the Geepee Shipping & Trading Inc., Singapore and the respondent and, therefore, the learned Single Judge was not justified in denying the reliefs claimed by the appellants in the application on the basis of the said decision. The learned counsel pointed out that even E-mail dated October 30, 2000 produced by the respondent shows that request for extension of time for making payment was made by M/s. Geepee Shipping & Trading Inc., Manager to the Charterer of the said vessel, and, therefore, the respondent had no cause of action against the appellants. The learned counsel emphasised that the judgment impugned is erroneous in law and, therefore, the

same should be set aside by allowing the appeal.

11. Mr. P.S. Pratap, learned Senior Counsel for the respondent, contended that in view of the provisions contained in the Act as well as Brussels Convention, 1952, the claim of the respondent being a maritime claim, is rightly entertained by the learned Single Judge and as there is no infirmity in the order impugned in the appeal, the same should be upheld by this Court. After referring to the averments made in the plaint and the documents produced along with plaint, it was pleaded that the respondent has, prima facie, established that bunkers were supplied to the owners and as triable issues arise for determination of the Court, the appeal should be dismissed. According to the learned counsel of the respondent, the two receipts dated July 30, 2000 signed by the Master of the vessel indicate that the deliveries of marine bunkers against receipt, delivered/received on board for use as bunkers were for account of the owners, and/or Managing Owners and/or Managers of vessel, and as cause of action is available to the respondent against the appellants, the order impugned should be confirmed by this Court. After emphasising that principles laid down in the decision rendered in *Raj Shipping Agencies (Supra)* and unreported judgment dated July 11, 2002 of the Bombay High Court in *Scandinavian Bunkering AS v. M.V. CHOPOL-II*, are not applicable to the facts of the present case, it was argued that the view which was taken by the Bombay High Court in *Crescent Petroleum Ltd. (Supra)* should be adopted, and the appeal should be dismissed. What was maintained by the learned Counsel for the respondent was that having regard to the contents of the Civil Application filed by the appellants for discharge of guarantee and different assertions made by the respondent, triable issues do arise for consideration of the Court and, therefore, the reliefs claimed by the appellants in the application should not be granted. So far as prayer for damages made by the appellants in the application is concerned, it was submitted by the learned Counsel for the respondent that the Court may consider the question of grant of damages at the conclusion of trial if it is found that the action initiated by the respondent was not well founded, but relief on the basis of some averments made in the application regarding damages should not be granted by this Court at this stage. The learned counsel of the respondent took pains to point out that the respondent has filed an undertaking as directed by this Court, and the said direction being in consonance with the Rules applicable, the respondent should not be called upon to furnish bank guarantee in order to secure the claim of damages as is pleaded by the learned counsel of the appellants. According to the learned counsel of the respondent, the appeal lacks substance and, therefore, the same should be dismissed.

12. We have heard the learned counsels of the parties at length and in detail, and considered the documents on record as well as decisions cited at the Bar.

13. The plea that the learned Single Judge has committed an error in treating the application filed by the appellants as an application filed under Order VII, Rule 11 of the CPC and, therefore, the impugned order should be set aside, cannot be

accepted. Three circumstances, namely; (a) that no written statement was filed till the date of filing application; (b) that averments have been made in the application demanding dismissal of the suit on the ground that no cause of action is available to the respondent against the appellants; and (c) damages have been claimed by the appellants in the application, may persuade a Court to treat the application as if filed under the provisions of Order VII, Rule 11 of the CPC. If the application is treated as one having been filed under the provisions of Order VII, Rule 11 of the CPC, then the Court will have to proceed on demurrer, and try to find out with reference to the averments made in the plaint and documents produced therewith, whether a cause of action is available to the respondent against the appellants. In paragraph 4 of the plaint, the respondent has made averments, inter alia, as under:

"In accordance with the order confirmation, bunkers were supplied to the said vessel at Port Said by the Plaintiff through local physical suppliers MISR Petroleum Company on 30th July 2000. The supplies were duly acknowledged by the Master and the Chief Engineer of the said vessel who endorsed the bunker delivery receipts with their seal and signature. The receipt for bunkers, duly acknowledged and endorsed by the Manager and the Chief Engineer of the Defendant vessel states that the bunkers delivered/received on board are for account of the Owners and/or Managing Owners and/or Managers of this vessel....."

In support of abovereferred to averments, the respondent has produced three documents, i.e.; (i) Order Confirmation dated July 24, 2000; (ii) Bunker Delivery Receipts dated July 30, 2000, which are two in number; and (iii) Invoice dated August 9, 2000. The order confirmation, inter alia, states that the buyer of the bunkers is "M.V. Sea Renown and jointly and severally Owners / Managing Owners / Operators / Managers / Disponent Owners/ Charterers and vessel in rem and Geepee Shipping & Trading Inc.. Mere receipt of this confirmation signifies acceptance of responsibility for payment of the bunker invoices by each and all of them."

Whereas Master of the vessel is said to have acknowledged that the bunkers were supplied on board for account of owners who are individually and jointly responsible for payment of bunkers supplied to the vessel without any protest and though the invoice dated August 9, 2000 is raised on account of Geepee Shipping, Master and/or Owners and/or Managing Owners and/or Operators of MISR Petroleum Company are also mentioned while mentioning that invoice is on account of Geepee Shipping, Singapore. On a fair reading of the three documents together with averments made in the plaint and more particularly paragraph 4 of the plaint, this Court is of the view that it is clearly made out by the respondent that cause of action is available to it against the vessel and the owners for payment of price of bunkers sold and delivered by the respondent. Therefore, the application, if treated as having been filed under Order VII, Rule 11 of the CPC, is liable to be dismissed.

14. However, from the impugned judgment, it is evident that the learned Judge has considered the application from both the view points that it was an application under Order VII, Rule 11 of the CPC as well as on the basis that the application was for discharge of bank guarantee. The case of the appellants is that the purported receipt issued by the Master of the vessels is in favour of MISR Petroleum Company and not in favour of the respondent and, therefore, whatever mentioned in the said receipt could never constitute privity of contract between the respondent and the appellants and, therefore, no cause of action is available to the respondent against the appellants. It is true that the receipt is in favour of the MISR Petroleum Company and not in favour of the respondent. However, the case of the respondent-plaintiff as pleaded in paragraph 4 of the plaint is that in accordance with the order confirmation, bunkers were supplied to the said vessel at Port Said by the Plaintiff through local physical suppliers MISR Petroleum Company on 30th July 2000 and the supplies were duly acknowledged by the Master and the Chief Engineer of the said vessel who endorsed the bunker delivery receipts with their seal and signatures and that the receipts for bunkers, duly acknowledged and endorsed by the Master and the Chief Engineer of the Defendant vessel state that the bunkers delivered/received on board were for account of the Owners and/or Managing Owners and/or Managers of the vessel, etc. Thus, what is claimed by the respondent is that MISR Petroleum Company was local physical supplier through whom the respondent had supplied the bunkers to the vessel. It is also the case of the respondent that upon delivery of bunkers being made, the local physical supplier, i.e. MISR Petroleum Company, was duly paid by the respondent, and the respondent, in turn, had raised its invoice in respect of supplies on the Master and/or owner of the appellant No. 1-vessel. The case of the respondent that the respondent was the owner of the bunkers, and had supplied the same through MISR Petroleum Company, does not get destroyed merely because the receipt is raised on account of MISR Petroleum Company and, therefore, it is not correct to say that the respondent has no cause available and that only MISR Petroleum Company would be entitled to sue and not the respondent. Similarly, case of the appellants that Geepee Shipping & Trading Inc., Singapore, is liable for the price of bunkers supplied to the appellant No. 1-vessel and not the appellants, cannot be accepted at this stage. The documents produced by the appellants along with application indicates that the vessel was chartered by Geepee Shipping & Trading Inc. under an agreement. Bunkers Stem Confirmation dated July 24, 2002 shows that buyer was Geepee Shipping & Trading Inc. It is an admitted position that Geepee Shipping & Trading Inc. was never the owner of the vessel, but charterer. The receipts issued by the Master of the vessel produced by the respondent along with the plaint would furnish a clear cause of action to the respondent to proceed against the appellants because it is not the case of the appellants that the Master was not authorised to state in the receipts that deliveries of marine bunkers against the receipt, delivered/received on board for use as bunkers were for account of owners and/or Managing owners etc. What is pleaded by the appellants is that the Master of M.V. Sea Renown had signed the receipt which was in prescribed

form. However, this question can be gone into only at the trial. In *Videsh Sanchar Nigam Ltd. Vs. M.V. Kapitan Kud and others*, , the Supreme Court has approved the principles laid down in *Moschanthy*, and held in paragraph 14 of the reported decision as under:

"14. In *Moschanthy*, The where the question was whether the admiralty action was vexatious, following the ratio of *Willmer, J. in St. Elefterio*, it was held that action could not be successful. It was held that courts should only stay the action on the ground when the hopelessness of the plaintiff's claim is beyond doubt. If it is not beyond doubt but on the contrary the plaintiff has an arguable, even though difficult, case even in law the action would be allowed to proceed to trial. The application for stay was accordingly rejected."

If the principles laid down by the Supreme Court in above quoted decisions are applied to the facts of the present case, it is difficult to come to the conclusion that hopelessness of the respondent's claim is beyond doubt. On the contrary, the respondent has a reasonably good arguable case and even if the case is difficult one, action should be allowed to proceed to trial. In view of the documents produced by the respondent along with the plaint and the appellants along with application, serious triable issues would arise for consideration of the Court, namely, whether the appellant No. 2 is liable for the price of bunkers sold and/or *Geepee Shipping & Trading Inc., Singapore*, is liable for the same. These are highly contested issues and cannot be determined at this stage and, therefore, the matter must proceed to trial. Further, the relief claimed in the application that the bank guarantee should be discharged, can be granted only if the Courts comes to a conclusion that the arrest of the appellant No. 1-vessel was not justified. Once such a finding in favour of the appellants is recorded, the Court would lose the jurisdiction to try the suit, which may have far reaching consequences. Under the circumstances, this Court is of the opinion that the plea that cause of action is not available to the respondent and, therefore, the bank guarantee should be discharged, cannot be accepted at this stage. For all these reasons, it cannot be said that the respondent had effected detention of the vessel without any basis or that the appellants are entitled to relief of discharge of guarantee.

15. The contention that there was no privity of contract between the appellants and the respondent and, therefore, the action in rem commenced against the vessel was not well founded, has no substance. It is conceded by the learned Counsel for the respondent that supply of the bunkers gives rise to maritime claim, but not a maritime lien. It is expressly stated in paragraph 7 of the plaint that supply of bunkers to a vessel constitutes necessities within the meaning of Section V. of the Act, and the respondent has a maritime claim against the appellant No. 1-vessel for the bunkers. Section XXXV of the Act provides that jurisdiction conferred by the Act on High Courts of admiralty may be exercised either by proceedings in rem or by proceedings in personam.

16. In *Epoch Enterrepots (supra)*, the Supreme Court in paragraph 15 has, inter

alia, explained that a ship may be arrested (i) to acquire jurisdiction; or (ii) to obtain security for satisfaction of the claim when decreed; or (iii) in execution of decree whereas in paragraph 21 has listed five heads of maritime liens. This decision of the Supreme Court may not affect the claim advanced by the respondent as it remains a maritime claim actionable u/s V. of the Act. However, at this stage, it would be instructive to refer to the decision of the Supreme Court in *M.V. Elisabeth & Ors.* (supra). Therein, the plaintiff-respondent had instituted a suit against the defendant No. 1-appellant which was a vessel of foreign nationality owned by a foreign company, i.e. the defendant No. 2 in Andhra Pradesh High Court invoking its admiralty jurisdiction by means of an action in rem. The case of the plaintiff was that the defendants had acted in 'breach of duty' by leaving the port of Marmagao on February 8, 1984 and delivering goods to the consignee in breach of plaintiff's direction to the contrary, thereby committing conversion of the goods entrusted with them. The vessel was arrested when it entered the Port of Vishakhapatnam on April 13, 1984 after returning from foreign ports. On the owner of the vessel entering appearance and providing security by a bank guarantee under protest, the vessel was released from detention. A preliminary objection was raised by the defendants that the plaintiff's suit against the foreign ship owned by a foreign company not having a place of residence or business in India, was not liable to be proceeded against on the admiralty side of the High Court by an action in rem in respect of a cause of action alleged to have arisen by reason of a tort or a breach of obligation arising from the carriage of goods from a port in India to a foreign port. It was contended 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 Act conferring admiralty jurisdiction on Indian High Courts confined it to 'claims for damages to cargo imported'. The preliminary objection raised by the defendants was overruled by the High Court. Before the Supreme Court, the crucial question was about the jurisdiction of the High Court. While dismissing the appeal, the Supreme Court has made following pertinent observations in paragraph 92 of the reported judgment.

"92. Once a foreign ship is arrested in Indian waters by an order of the High Court in exercise of the admiralty jurisdiction vested in it by statute, or inherent in it as a court of record, in respect of any maritime claim against its owner, wherever the cause of action may have arisen, and whether or not the ship is subsequently released by the owner furnishing security, proceedings must continue against the owner as in any other suit. The arrest of the vessel while in Indian waters by an order of the concerned High Court, as defined under the Merchant Shipping Act, 1958 (Section 3(15)) attracts the jurisdiction of the competent court to proceed with the trial as in the case of any other suit, as an action against the owner, and any decree obtained by the plaintiff is executable against any property of the owner available within jurisdiction, including the security furnished by him for release of the vessel."

The facts in *M.V. Elisabeth* makes it evident that the suit was based on tort, but it was an action against the vessel, i.e. suit, was in rem. However, the Supreme Court has held that arrest of the vessel, while in Indian Waters by an order of concerned High Court attracts jurisdiction of the competent Court to proceed with the trial as in case of any other suit as an action against the owner. Applying the principle laid down in the said decision to the facts of the present case, this Court is of the opinion that the suit can now certainly proceed against the appellant No. 2 also.

17. The plea that there is suppression of material facts by the respondent-plaintiff and, therefore, the reliefs claimed in the application should have been granted, is devoid of merits. What is claimed by the appellants is that the Bunker Stem Confirmation dated July 24, 2000 was not produced before the Court at the time of filing of the plaint nor anything was produced to indicate that the appellant No. 2, who is owner of the appellant No. 1-vessel, did not make payment of the amount due despite repeated telephonic requests and reminders from time to time although repeated promises of payments were received. According to the learned Counsel for the appellants, if the Bunker Stem Confirmation had been produced, the Court would have at once realised that buyer of the bunker being Geepee Shipping & Trading Inc., Singapore, no cause of action against the appellants was available to the respondent. On consideration of this, the Court finds that the Bunker Stem Confirmation dated July 24, 2000 cannot be read in isolation and has to be taken into consideration along with other documents on record. The case of the appellants is that the ship was chartered to Geepee Shipping & Trading Inc., Singapore, meaning thereby, that Geepee Shipping & Trading Inc. Singapore, was never the owner of the vessel. Further, as per the case of the respondent, the Master of the vessel has issued two receipts fastening liability on the owner of the vessel also. Therefore, though the Bunker Stem Confirmation is a relevant document, this Court is of the opinion that it would not have tilted the balance necessarily in favour of the appellants. Further, before passing the impugned order, all the documents were taken into consideration by the learned Single Judge. The learned Single Judge has not felt that by suppressing material facts, the order of the arrest of the appellant No. 1-vessel was obtained by the respondent, and this Court also concurs with the same. Fax dated July 24, 2000 from LQM Petroleum Services as well as terms and conditions of supply were subsequently produced on record of the case. Moreover, the case of the respondent is that supply was made by it on the basis of Order Confirmation and the said confirmation read with the receipts signed by the Master acknowledges owner's liability to pay and the invoice is sufficient to enable it to claim reliefs mentioned in the plaint. The learned Judge has considered the Fax dated July 24, 2000 as well as the submissions advanced on behalf of the appellants. Under the circumstances, this Court is of the view that the appellants would not be entitled to reliefs claimed in the application on the ground that material facts were suppressed by the respondent more particularly when the matter is at interim stage, and no written statement has

been filed by the appellants.

18. The second relief, which was claimed by the appellants, namely, to direct the respondent to pay a sum of US\$1,43,230.28 as damages cannot be entertained at this stage because this Court has come to the conclusion that the arrest of the appellant No. 1-vessel was not illegal or unjustified. As it is held that the arrest of the vessel is justified, there is no question of granting damages at this stage. Further, the extent of damages suffered will have to be proved by the appellants by leading cogent evidence, and the claim for damages by the appellants itself would merit trial of the case. Having regard to the totality of the facts emerging from the record of the case, this Court is of the view that the learned Judge did not commit any error in refusing the prayer made by the appellants to direct the respondent to pay damages as mentioned in paragraph 21(b) of the application. The finding recorded by the learned Single Judge on this point is, therefore, hereby upheld. The plea that the respondent should be called upon to furnish bank guarantee for securing the amount which is claimed by the appellants as damages, cannot be upheld because on behalf of the respondent-plaintiff its constituted power of attorney holder has filed necessary undertaking as directed by the Court vide order dated August 3, 2001. The undertaking, which is filed, is in consonance with the Rules applicable to an admiralty suit which may be instituted in this High Court. Moreover, calling upon the respondent to furnish bank guarantee for the claim of damages of the appellants may not be justified more particularly when the appellants have not filed written statement and made counter claim. On the facts and in the circumstances of the case, the prayer to direct the respondent to furnish bank guarantee for claim of damages mentioned in the application cannot be accepted, and is hereby rejected.

19. The contention that the reliefs claimed in the application should have been granted in view of the principles laid down by the Bombay High Court in (i) *Raj Shipping Agencies (supra)* & (ii) unreported decision dated July 11, 2002 in *Scandinavian Bunkering AS (supra)*, has no substance. In *Raj Shipping Agencies (supra)*, documents were placed on record by the plaintiffs namely, purchase order, invoices, etc. showing that M/s. North End Oil Private Limited was buyer of the oil from the plaintiffs and the oil was merely to be delivered to the first defendant vessel. Under the circumstances, the learned Single Judge of the Bombay High Court has taken the view that there was no privity of contract between the plaintiff and the first defendant-vessel. So far as the facts of the case on hand are concerned, it is the case of the respondent that acceptance of the bunkers by the Master shows that the bunkers were received on account of owner of the vessel and acceptance by the Master that the owners are liable to pay for bunkers clearly foists liability on the owners of the vessel to pay. Such a document was never placed for consideration of the learned Single Judge of the Bombay High Court. Therefore, the principle laid down in the said decision cannot be made applicable to the facts of the present case.

20. Again in an unreported judgment dated July 11, 2002 of the Bombay High

Court in Scandinavian Bunkering AS (supra), the decision of the learned Single Judge of the Bombay High Court in Raj Shipping Agencies (supra) has been followed. In the said case, an application was filed for rejecting the plaint under Order VII, Rule 11 of the CPC on the ground that it did not disclose cause of action against the owners. Paragraph 4 of the said judgment makes it more than clear that principle laid down in Raj Shipping Agencies (supra) has been followed. As a matter of fact, it was found that the order for bunkers to be supplied to the vessel was placed by M/s. Anderson Hughes & Co. Ltd., and bunkers were supplied on the basis of the said order. On reading of the plaint, it was found by the Court that M/s. Anderson Hughes & Co. Ltd. was not described as owner of the vessel whereas buyers were denoted as the vessel and/or owner and/or managers and/or operator and/or charterer and/or M/s. Eurasia Shipping Ltd. The Court, on construction of the plaint, deduced that the words "who had placed the order" were referable only to M/s. Anderson Hughes & Co. Ltd. and, thus, it was found that there was nothing to indicate that the supply of the bunkers was made at the instance of either the owner of the vessel or at the instance of the person authorized by the owner of the vessel. Under the circumstances, the plaint was rejected under the provisions of Order VII, Rule 11 of the CPC.

As observed earlier in this case, the respondent is relying upon the two receipts issued by the Master of the vessel wherein he has acknowledged the liability of the owner of the vessel to pay the price of bunkers supplied. Therefore, the decision in Scandinavian Bunkering AS (supra) also cannot be made applicable to the facts of the present case. In Crescent Petroleum Ltd. (supra), which is heavily relied upon by the learned Counsel for the respondent, the plaintiffs had supplied bunkers to a foreign ship and on the ship's failure to pay the price of the bunkers, got the ship arrested and filed suit for recovery of the amount. An application was filed by the defendants claiming that even if the averments made in the plaint were taken to be true, they did not disclose any cause of action and, therefore, the suit was liable to be dismissed. It was pleaded by the plaintiffs that the bunkers supplied to the vessel were in the nature of necessities and the delivery was effected at the request of the owner/charterer/operator/master of the vessel and, therefore the plaintiff had a cause of action u/s V. of the Admiralty Courts Act, 1861. After going through the averments made in the plaint and the documents on record, the learned Single Judge of the Bombay High Court expressed the view that the agreement was entered into expressly on the faith and credit of the vessel, and it was also agreed and acknowledged that the buyer, if not the owner of the vessel, warranted that he had the authority to pledge the vessel's credit. Under the circumstances, the Court refused to go into merits or evidentiary value of the documents, and held that the suit should proceed on merits of the case without deciding the question whether action in rem lies only if the owner is liable in personam. Here also, this Court finds that if the documents produced by the respondent along with the plaint and necessary averments made in the plaint are considered, it is the case of the respondent that by issuing receipts, the Master has acknowledged the liability of the

appellant No. 2 also. Under the circumstances, the reliefs claimed in the application cannot be granted, and the matter must be allowed to go to trial.

20. The net result of the above discussion is that this Court does not find any merit in the appeal, and the same is liable to be dismissed.

For the foregoing reasons, the appeal fails, and is hereby dismissed. Notice is discharged. There shall be no order as to costs.

21. As the appeal is dismissed, Civil Application for early hearing of the matter does not survive. Hence, it is dismissed.

22. The learned counsel for the respondent has drawn the attention of the Court to the fact that the period of bank guarantee furnished by the appellants is to expire shortly, and that appropriate directions should be given to renew the same on the original terms and conditions. Having regard to the facts of the case, the appellants are directed to renew the bank guarantee on original terms and conditions.