

(2003) 01 GUJ CK 0044
In the Gujarat High Court

Case No : Civil Application No. 257 of 2001 in Admiralty Suit No. 19 of 2001

M.V. Sea Renown

APPELLANT

Vs

Energy Net Ltd.

RESPONDENT

Date of Decision : 01-01-2003

Acts Referred:

Admiralty Courts Act, 1861 — Section 5
Civil Procedure Code, 1908 (CPC) — Order 33 Rule 5, Order 7 Rule 11

Citation : (2003) 01 GUJ CK 0044

Hon'ble Judges : K.A. Puj, J

Bench : Single Bench

Advocate : V.K. Rambhadran and Paulami B. Sheth, for the Appellant; P.S. Pratap and A.S. Vakil, for the Respondent

Final Decision : Dismissed

Judgement

K.A. Puj, J.—The Applicant has filed this application before this Court on 5th December 2001 seeking relief to the effect that the Bank Guarantee dated 16th August 2001 furnished by them in favour of the Registrar of this Court in order to obtain release of the applicant's vessel be returned duly discharged and that for an order directing the opponents to pay to the applicant a sum of 143230.28 US Dollars.

2. For the purpose of considering this application and granting or not granting the reliefs claimed therein, some bare facts are required to be looked into as well as they are to be appreciated in the light of legal position on the subject. These bare facts are briefly stated as under:

2.1. The opponent, who is the original plaintiff (hereinafter be referred to as "the plaintiff" for the sake of convenience), is a company organised under the laws of Liberia and carries on business, inter alia, as suppliers of bunkers to various vessels worldwide. The applicant No. 1, who is the original-defendant (hereinafter be referred to as the "defendant" for the sake of convenience) is a foreign-flag vessel to which bunkers were supplied by the plaintiff. The applicant

No. 2 is stated to be the owner of the applicant No. 1 vessel.

2.2. The plaintiff has filed the Admiralty Suit No. 19 of 2001 in this Court against the defendant vessel

"SEA-RENOWN" seeking her arrest under the warrant of arrest and that the net sale proceeds thereof be applied towards the satisfaction of the plaintiff's claim in the suit and also for a decree against the defendant vessel in the sum of 128032.40 US Dollars together with interest at the rate of 24% p.a. from the date of filing of the suit till payment and/or realisation. By way of an interim injunction, the plaintiff has also claimed that the defendant-vessel be arrested and/or detained and/or be restrained by an order of injunction from sailing out of the port of Alang and/or moving in any manner from her present position at Alang and anchorage and maintain status-quo in respect of the vessel.

2.3. The plaintiff has stated in the plaint that on or about 24th July 2000 the plaintiff was contacted by brokers acting on behalf of the owners of the defendant-vessel for supply of bunkers to the said vessel at Port Said, Suez. It was further stated that an order confirmation dated 24th July 2000 was issued by the plaintiff to the owners of the said vessel confirming for the order of supply of 530 MT IFO 180 CST and M 80 MT MGO at a price of 148.50 US Dollars per MT for IFO and 325.00 US Dollars per MT for MGO. In the order confirmation the buyers were stated to be the vessel SEA-RENOWN and jointly and severally the owners/managing owners/operators/managers/disponent owners/charterers and vessel in rem. The order confirmation further stated that the receipt of the confirmation signifies the acceptance of responsibility for payment of the bunker invoice by each and all of the buyers listed in the order confirmation. The terms of the supply of bunkers require, inter alia, for payment to be made within 30 days from the date of delivery and interest on late payment to be charged at 2% per month.

2.4. It was further stated 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. The supplies were 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 Master 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 the said vessel as well as of any other vessels managed by the same managers as appearing in Lloyds Register of Shipping or Greater Shipping Directory or any other Shipping Directors and/or for account Charterers and any of the abovementioned concerned are individually and/or jointly responsible for payment of the bunkers supplied to the vessel without any protest.

2.5. It was further stated that upon the said delivery being made, the local physical suppliers MISR Petroleum Company were duly paid by the plaintiff and

the plaintiff in turn raised their invoice in respect of the said supplies on the Master and/or owners of the defendant-vessel. The invoice dated 9th August 2000 required payment of the total amount of the bunkers supplied aggregating to 104864.52 US Dollars to be within 30 days of the delivery date. The due date of payment was accordingly 30th August 2000.

2.6. It was further stated that the owners of the defendant-vessel did not make payment of the said amount despite repeated telephonic requests and reminders from time to time although repeated promises of payment were received. The intervening brokers by their E-mail dated 3rd August 2000 informed the plaintiff that the management had requested for extension of time for making the payment as they were making arrangements to remit the funds. On 2nd October 2000, the plaintiff was informed by the brokers that payment would be received from next day. It was also alleged that despite these assurances, no payment was received and that the plaintiff was misled by the owners, through their brokers from time to time and given false assurance of payment in order to induce the plaintiff not to take legal action for recovery.

2.7. It was further stated that bunkers are essential for the operation of the vessel and supply of bunkers to a vessel constitutes necessities within the meaning of Section 5 of the Admiralty Courts Act, 1861. It was therefore averred that the plaintiff had a maritime claim against the defendant vessel for bunkers supplied. As stated earlier, the order confirmation issued by the plaintiff confirmed the buyers to be the owners of the said vessel who was otherwise individually and jointly liable to make payment. The bunker delivery receipt signed by the Master and the Chief Engineer of the vessel also stated that the bunkers have been received on Board for account of the owners who are individually and/or jointly responsible for payment without any protest. It was stated that the bunkers have been supplied on the faith and credit of the said vessel and the plaintiff was entitled to look to the said vessel and its owners for recovery of its dues. The plaintiff was, therefore, said to have been entitled to proceed in rem against the defendant vessel for recovery of the cost of the bunkers supplied and was also entitled to an order of arrest of the said vessel.

2.8. It was further stated that the plaintiff had also a maritime lien in respect of its claims for "necessaries" supplied to the defendant vessel. A maritime lien attaches to the vessel as on the date of the supply and is not defeated by any subsequent ownership of the vessel. The plaintiff was therefore said to have been entitled to pursue its claim against the defendant vessel in rem notwithstanding any change in ownership of the vessel after the date of the supply.

2.9. The Admiralty Suit No. 19 of 2001 filed by the plaintiff came to be heard for the first time by this Court on 3.8.2001 and this Court, after hearing the Id. advocate, Mr. AS Vakil appearing for the plaintiff as well as after going through the averment made in the plaint and the affidavit in support thereof and also after considering the documents produced, granted ad-interim relief in terms of Para 17-B of the plaint and also ordered to issue a warrant for the arrest of the

defendant-vessel. It was further ordered by this Court that in the event of the defendant depositing in this Court a sum of 128032.40 US Dollars towards the satisfaction of the plaintiff's claim in the suit and cost of the suit and on payment of the poundage, if any, or furnishing security in the said sum of 128032.40 US Dollars towards the satisfaction of the plaintiff's claim in the suit together with interest at the rate of 24% p.a. from the date of filing of the suit till payment and/or realisation to the satisfaction of the Registrar of this Court as security, the said warrant of arrest would not be executed against the vessel SEA-RENOWN.

2.10. On 10th August 2001, Mrs. Paulami Sheth, learned advocate has filed her appearance on behalf of the defendant-vessel and also tendered a fax copy of the letter of undertaking issued by U.K. Mutual Steam Ship Assurances (Bermuda) Ltd dated 8th August 2001 securing the amount of the claim of the plaintiff in the suit and further undertaking to the court that they shall furnish a bank guarantee of a nationalised bank in favour of the Registrar of the court in terms of the order dated 3rd August 2001 within a period of 2 weeks from the date of execution of the letter of undertaking. On this basis, this court has passed an order on 10th August 2001 releasing the defendant vessel. The bank guarantee was accordingly filed before this court pursuant to the order dated 10.8.2001.

3. The defendant has not filed any written statement to the suit, however the aforesaid Civil Application was moved before this Court on 5th December 2001. It was stated, inter alia, in the said application that by a Chartered Party dated 11th July 2000 the defendant-vessel was chartered by one M/s. Geepee Shipping & Trading Inc. on certain terms and conditions. The Chartered Party, inter alia, provided that the Charterers shall pay for all the fuel. An on hire bunker survey was conducted on or about 15th July 2000 at the time of the delivery in order to ascertain the quantity of fuel on board the vessel. It was further stated that the Managers on behalf of the Charterers had instructed the Master that they intended to steam the sufficient quantity of bunkers at Suez in order to redeliver the vessel with about the same quantity as on delivery. It was further stated that at the time when the vessel was being redelivered another survey was conducted in order to ascertain the bunkers remaining on board the vessel at the time of re-delivery. The brokers representing the Charterers had thereafter sent a statement of account giving credit to the defendants in respect of the bunkers on board the vessel at the time of taking delivery and crediting Charterer's account in respect of the bunkers on board at the time of redelivery.

3.1. The defendant has further stated in the application that by a fax message dated 10th October 2000 the brokers representing the Charterers pointed out that the Charterers regretted the delay in settlement and would revert with the arrangement at the earliest. Ultimately, on or about 12th October 2000 the brokers representing the Charterers informed the defendants that G. Premjee Trading, Singapore, has been placed under interim judicial management. It was the say of the defendant that these facts were placed on record to confirm the

contractual relationship between the defendant and the Charterers who had chartered the said vessel.

3.2. The defendant has further stated in the application that the reliance placed by the plaintiff on the receipt signed by the Master of the vessel was totally misplaced inasmuch as a standard printed form has been furnished to the Master of the vessel who had merely acknowledged the quantity of the bunkers supplied by the supplier. It was further stated that the plaintiff had made false statements on oath alleging that they were contacted by the brokers acting on behalf of the owners of the defendant-vessel. The defendant has further stated that they were not having any business dealing or contact with the plaintiff either directly or through any brokers.

3.3. It was further stated by the defendant that the plaintiff had deliberately and knowing fully well that the Geepee Shipping had gone into liquidation and was now attempting to recover the alleged claim from the defendant who were not responsible for any payment in respect of the purported invoices towards alleged supply of bunkers to the defendant-vessel. It was further stated that the contract if any for supply of bunkers was made on behalf of the Charterers and/or their Managers of the said vessel and the party who will be liable if at all was the Charterers and not the vessel. The defendant therefore submitted that the suit was liable to be dismissed for want of cause of action against the vessel. It was further stated that the plaintiff was entitled to maintain an action in rem only if there exists a privity of contract between themselves and the owners of the vessel. There was no such contract between the plaintiff and the owners and the suit was therefore liable to be dismissed against the vessel. The defendant has therefore claimed that they are entitled to unconditional discharge of the bank guarantee furnished in favour of the Registrar of this Court.

3.4. The defendant has further submitted that they have suffered enormous financial loss as a result of the order of arrest of the vessel passed by this Court at the instance of the plaintiff. In this connection, reliance was placed by the defendant on a memorandum of agreement dated 5th July 2001 whereby the defendant had agreed to sell and deliver the vessel to one M/s. Angsley Investments Ltd., on or before 15th August 2001. In terms of Clause 15 of the said MOA, the defendant had given notice of readiness at all times and last of such notice was given on or before 6th August 2001. The buyers rejected the said notice on the ground that the vessel was already under an order of arrest dated 3rd August 2001 passed by this Court. The buyers have pointed out that the defendants have committed a breach of clause 1 of the MOA wherein the defendants have agreed to sell free of all liens and encumbrances. The defendant had agreed to sell the said vessel for a sum of 1140704 US Dollars. The buyers had through their brokers by e-Mail dated 7th August 2001 terminated the contract and called upon the defendant to refund the deposit lying in Escrow account. Finally by an order addendum dated 11th August 2001 the defendant had reduced the sale price of the vessel at the rate of 162 US Dollars for long

Ton aggregating to 66320 US Dollars. The defendant had to incur an operating cost at the rate of 3500 US Dollars per day aggregating to 59500 US \$. The defendant had to incur a sum of Rs. 3,86,800 equivalent to 8247.33 US \$ towards supply of L.D.O., Port Barge charges and Port Sundries during the period when the vessel was held up. The defendant had also to incur a sum of 9162.95 US Dollars towards the bank charges for arranging the necessary bank guarantee. Thus, according to the defendant they have suffered financial losses in the sum of 143230.28 US Dollars and the same was claimed by way of damages from the plaintiff.

4. The plaintiff objected to the said application and affidavit-in-reply was filed on 15th January 2002. With regard to the defendant's contention about privity of contract, it was stated by the plaintiff that the plaintiff has supplied bunkers to the defendant-vessel which are necessities for operation of the said vessel. Consequently, the plaintiff has a maritime claim against the defendant vessel as well as the maritime lien in respect of the necessities supplied to the said vessel. It was further stated that in admiralty the vessel is treated as a juridical entity with corporate personality and is liable to be proceeded against in respect of a maritime claim, irrespective of the character or personality of the owners. The vessel is treated as the wrongdoer and liable to be proceeded against. It was further stated that there is nothing in the Admiralty Courts Act, 1861 which is the applicable statute and in the Brussels Convention, 1952 which has been applied to the courts in India for the purpose of enforcing maritime claims, which requires a privity of contract with the owners of vessel before an action in rem can be commenced against the vessel. It was further stated that the defendant cannot avoid its liability in the face of the clear terms appearing in the delivery receipt which has been signed and acknowledged by the Master of the vessel on behalf of the owners. The plaintiff further relied on the general terms and conditions for the sake of marine bunker fuel and on these basis it was submitted that it is an enforcement of its maritime lien that the plaintiff was entitled to an order of arrest and detention of the defendant vessel to which the plaintiff looked for the purpose of satisfying its claim apart from any other contractual remedy that the plaintiff may have.

4.1. It was further stated that an action in rem and an action in personal are two distinct and separate remedies provided under the Admiralty Courts Act, 1861. The essence of an action in rem is that it is only available against a vessel in respect of a maritime claim and/or a maritime lien.

4.2. With regard to the defendant's claim about damages, the plaintiff has totally denied the said claim and emphatically stated that it is absolutely baseless and without any foundation. It was stated that the order of arrest of the vessel was communicated to the vessel on or about 3rd August 2001 and it was open to the owners of the said vessel to furnish security or to settle the plaintiff's claim. The plaintiff had denied that the vessel was held up due to arrest for a period of 17 days and could be delivered only on 23rd August 2001 as alleged by the

defendant. It was further stated that the purported losses alleged to have been incurred by the defendant was a result of their own breach and default in failing to make the payment of the price of bunkers supplied. The plaintiff therefore submitted that the defendant was not entitled to unconditional release of the bank guarantee nor the defendant was entitled to an order directing the plaintiff to pay a sum of 143230.28 US \$ or any other amount whatsoever towards alleged losses sustained by the defendant as a result of the order of arrest. The plaintiff therefore submitted that the Civil Application filed by the defendant was liable to be dismissed with costs.

5. At the time when the above application had come up for hearing before this Court, a preliminary objection was raised by Mr. PS Pratap, Id. advocate appearing for the plaintiff to the effect that the period of bank guarantee was already expired and the same was not renewed and hence the defendant was not entitled to any relief for unconditional discharge of the said bank guarantee. He has further submitted that the plaintiff has already moved an application before this Court for an order directing Kaiser Shipping Ltd., and Union Bank of India, Industrial Finance Branch, Ahmedabad, to forthwith pay to the Registrar sum of 128328.40 US \$ together with interest at the rate of 24% p.a. on the ground that the bank guarantee has expired on 9th August 2002 and has not been renewed thereafter. However, Mr. Rambhadran, Id. advocate appearing for the defendant along with Ms. Paulami Sheth, submits that the same has already been renewed and the period of bank guarantee was extended for a further period of one year, i.e. from 10th August 2002 to 15th August 2003. He has placed the original document dated 19th December 2002 written by Union Bank of India to the Registrar, High Court of Gujarat, Ahmedabad, extending the period of bank guarantee. In this view of the matter, the preliminary objection raised by Mr. Pratap is not sustainable.

6. Mr. Rambhadran, learned advocate appearing for the defendant has strongly contended that the plaint of the suit does not disclose any privity of contract between the plaintiff and the defendant. The defendant has not placed any order for bunkers. The plaintiff's claim can neither be considered as a maritime claim nor can it be accepted as a maritime lien. In support of his contention, he has relied on the decision of the Bombay High Court in the case of Raj Shipping Agencies v. M.V. Bunga Mas Tiga & Anr. - 2001 103(4) Bom. L.R. 124, wherein it is held as under:

"The documents which have been placed on record by the Plaintiffs namely purchase order, invoices etc. show that so far as the Plaintiffs are concerned, M/s. North End Oil Pvt. Ltd. was buyer of the oil from the Plaintiffs. The oil was merely to be delivered to the first Defendant vessel. It is, thus, clear that so far as the substantive law is concerned, there is no privity of contract between the plaintiffs and the first Defendant vessel or its owner.

Even for maritime lien there has to be an enforceable rights in the plaintiffs against the owner of the vessel. That right is enforceable against the vessel. But

existence of a right in the plaintiffs against the owner of the vessel, is a must. Insofar as the present case is concerned, averments in the plaint do not disclose any existing right in the Plaintiffs against the owner of the vessel.

Insofar as, the purchase of oil by the owner of the Defendant No. 1/Vessel is concerned, there is no privity of contract between the Plaintiffs and the owner of the Defendants No. 1/vessel.

In these circumstances, therefore, it is clear that the Plaintiffs do not have a cause of action against the Defendant No. 1. The cause of action for recovery of price of the oil is against M/s. North End Oil Pvt. Ltd. and therefore as the plaint does not disclose any cause of action against the Defendant No. 1/vessel or its owner, the plaint is liable to be rejected."

7. Mr. Rambhadran has further submitted that the above referred judgment was followed by the Bombay High Court in its recent judgement dated 11th July 2002 in the case of Scandinavian Bunkering AS v. M.V. CHOPAL-2 in a Notice of Motion No. 69 of 2002 in Admiralty Suit No. 69 of 2001 wherein it is held that the plaint averments do not show that the supplies were made at the instance of either the owner of the vessel or at the instance of the person authorised by the owner of the vessel. The averments in that regard are clearly based on the fact that acceptance of bunkers by the vessel itself created a contract between the plaintiff and the owner. These averments do not disclose a contract between the owners and the plaintiff. There was no allegation to the effect that the owners had appointed Anderson Hughes & Co. Ltd. as their agents and that the agents acting on behalf of the owners placed an order for supply of bunkers. The court therefore took the view that the plaint does not disclose any cause of action against owner and was liable to be rejected.

8. Mr. Rambhadran has further relied on the decision of the Hon"ble Supreme Court of Epoch Enterrepots v. M.V. Won Fu - JT 2002 (8) SC 546, wherein it is held that there was no sufficient evidence available as regards the action in rem making the vessel liable under the contract said to have been entered into as the claim in the present case arises out of contract de hors a maritime lien and hence no action in rem is permissible.

9. With regard to the ex parte relief obtained by the plaintiff by suppressing the relevant documents and by making false claims before the Court, Mr. Rambhadran has submitted that not only the interim relief granted by the Court is required to be vacated and the bank guarantee should immediately be discharged but the plaintiff should also be asked to pay the damages as claimed by the defendant. In this connection, he relied on the decision of the Hon"ble Supreme Court in the case of S.P. Chengalvaraya Naidu (dead) by L.Rs. Vs. Jagannath (dead) by L.Rs. and others, , wherein it is held as under:

"The courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean hands. It can be said without hesitation that a person whose case is based on falsehood has no right to

approach the Court. He can be summarily thrown out at any stage of the litigation. A litigant, who approaches the court, is bound to produce all the documents executed by him which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side then he would be guilty of playing fraud on the court as well as on the opposite party."

10. Mr. Rambhadran has further relied on the decision of the Bombay High Court in the case of *W.S.G. Cricket Pte. Ltd. v. Modi Entertainment Network & Anr.* 2002 104 Bom.L.R. 798, wherein it is held as under:

"The plaintiffs have deliberately suppressed letters dated 18th December 2000 and 5th January 2001. The Court of Law exercising discretionary powers in such matters, rightly insists on a party approaching the Court with clean hands.

Non-production of the letters dated 18th December, 2000 and 5th January, 2001, is not a bona fide mistake and indeed this High Court would have been justified in vacating ad interim injunction on this count. However, since plaintiffs are not entitled to any interlocutory injunction, no final opinion can be expressed on this aspect."

11. On the basis of the facts stated in the application as well as on the basis of the authorities cited and relied upon by him, Mr. Rambhadran has strongly urged that the plaintiff has no case and the plaintiff has obtained ex parte ad-interim relief by suppressing the relevant documents and materials and by not placing the proper facts before this Court and hence the reliefs claimed by the Defendant in the present application should be granted by this Court.

12. Mr. Pratap, Id. advocate appearing for the respondent/plaintiff has urged that there is no substance in the application moved by the defendant as plaintiff itself discloses the relevant materials which would show that the defendant vessel is liable to pay to the plaintiff the price of the bunkers supplied to the vessel. He has further submitted that on the basis of the provisions contained in Admiralty Courts Act, 1861, as well as on the basis of Brussels Convention, the plaintiff's claim can certainly be considered as maritime claim and the plaintiff was also having maritime lien over the vessel and hence there is no infirmity in the order passed by this Court for arrest of the vessel and releasing the same on the condition to give bank guarantee as security protecting the claim of the plaintiff. In support of submissions, he has relied on the decisions of the Andhra Pradesh High Court in the case of *Owners of Ship Tiong Yung v. M/s. Shaw Wallace and Co. Ltd.*, and another AIR 1988 Andhra Pradesh 331, wherein it is held as under;

"A foreign owner or charterer of a ship, who has brought passengers or freight to India, is liable to pay Income Tax on the freight payable to it for the said trip. Unless the amount due towards the Income Tax is paid, the ship will not be given clearance to leave the port. Such a payment of Income Tax by plaintiff as agent of the owner or charterer can be covered by him in an action in Admiralty jurisdiction as it is akin to the supply of necessities to keep the ship afloat and moving. It will be unjust to deny the inclusion of such a claim in a suit under

Admiralty jurisdiction. Otherwise, the plaintiff will be left without an effective remedy against the foreign owners or charterers of the ships."

Mr. Pratap has further relied on the decision of the Bombay High Court in the case of M/s. Crescent Petroleum Ltd. v. M.V. "MONCHEGORSK" and another - AIR 2000 Bombay 161 wherein it is held as under:

"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. The defendants filed an interim application claiming that even if the averments in the plaint are taken to be true, they did not disclose any cause of action and therefore the suit was liable to be dismissed. The plaintiffs pleaded 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 under S. 5 of the Admiralty Courts Act, 1861.

Held the Court has the power under O.7 R. 11(a) of the Civil P.C. 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 the contract for bunkers was entered into 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 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, the Court in the instant case prima facie found 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 whether the action in rem would lie at this stage of deciding interim application. 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.

The averments in the plaint and the documents on record showed that the agreement was entered into expressly on the faith and credit of the vessel. It was agreed and acknowledged that a lien on the vessel was thereby created. It was 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, it is established that the Plaintiffs are perfectly within their right to claim that the

necessaries/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 on behalf of the owners of the vessel. 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 necessaries 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 the suit could not be dismissed at this interlocutory stage on the ground that it is not maintainable for lack of cause of action."

13. Mr. Pratap therefore submitted that looking to the averments made in the plaint as well as looking to the reply filed by the plaintiff to the Civil Application moved by the plaintiff as well as looking to the authorities cited by him, this Court should reject the application moved by the defendant with costs as all the ingredients which are required for the purpose of claiming the relief under the Admiralty Suit are in existence in the present case and since there is maritime claim as well as maritime lien, the action in rem can certainly be taken by the plaintiff against the defendant vessel and hence the suit be decreed in favour of the plaintiff.

14. Mr. Pratap has further submitted that though the defendant has moved the present application for return of the bank guarantee furnished by the defendant in favour of the Registrar of this Court in order to obtain release of the applicant's vessel duly discharged, the said application is in effect moved for dismissal of the suit on the ground that no cause of action arose against the defendant. An attempt is made indirectly to seek rejection of the plaint under Order 7 Rule 11 of the Civil Procedure Code. In this connection, Mr. Pratap has submitted that there are enough averments in the plaint which would show that the suit filed by the plaintiff against the defendant is sustainable and the defendant is liable to satisfy the dues of the plaintiff. He has further submitted that the legal position is also well-settled so far as this aspect is concerned and the plaint cannot be rejected by considering the defence of the defendant. Whether the plaint disclosed the cause of action or the suit is maintainable can be decided after undertaking full-fledged trial and at the initial stage the defence of the defendant cannot be considered for rejection of the plaint. In this regard, he has relied on the decision of the Hon'ble Supreme Court in the case of Vijay Pratap Singh Vs. Dukh Haran Nath Singh and Another, , wherein it is held as under;

"By the express terms of O. 33 R. 5 cl.(d), the court is concerned to ascertain whether the allegations made in the petition show a cause of action. The court has not to see whether the claim made by the petitioner is likely to succeed; it has merely to satisfy itself that the allegations made in the petition, if accepted as true, would entitle the petitioner to the relief he claims. If accepting those

allegations as true no case is made out for granting relief no cause of action would be shown & the petition must be rejected. But in ascertaining whether the petition shows a cause of action the court does not enter upon a trial of the issues affecting the merits of the claim made by the petitioner. It cannot take into consideration the defences which the defendant may raise upon the merits; nor is the court competent to make an elaborate enquiry into doubtful or complicated questions of law or fact. If the allegations in the petition, prima facie, show a cause of action, the court cannot embark upon an enquiry whether the allegations are true in fact, or whether the petitioner will succeed in the claims made by him. By the statute, the jurisdiction of the court is restricted to ascertaining whether on the allegations a cause of action is shown; the jurisdiction does not extend to trial of issues which must fairly be left for decision at the hearing of the suit."

15. Mr. Pratap has further relied on the Hon'ble Supreme Court's judgment in the case of Mohan Rawale Vs. Damodar Tatyaba alias Dadasaheb and Others, wherein it is held as under:

"A reasonable cause of action is said to mean a cause of action with some chances of success when only the allegations in the pleading are considered. But so long as the claim discloses some cause of action or raises some questions fit to be decided by a Judge, the mere fact that the case is weak and not likely to succeed is no ground for striking it out. The implications of the liability of the pleadings to be struck out on the ground that it discloses no reasonable cause of action are quite often more known than clearly understood. It does introduce another special demurrer in a new shape. The failure of the pleadings to disclose a reasonable cause of action is distinct from the absence of full particulars. "

16. Mr. Pratap has further relied on the Division Bench Judgement of this Court in the case of Yuvraj Prithvirajsinhji v. Maharani Rajendrakunverba and Ors. 1996 (2) G.L.H. 393, wherein it is held as under;

"If the plaint is to be evaluated pursuant to O.VII. R. 11 particularly with reference to the contention raised namely that it is barred by law and that it does not disclose any cause of action, the plaint, as it was filed before the trial court, alone has to be seen. This would necessarily include the documents which are referred to in the plaint and particularly those that came to be filed along with the plaint and were to be relied upon by the plaintiff for the purpose.

The implication is that the challenge to the plaint and its affirmation by the defendant, who contests the claim, is to be kept apart because that would be a case put forth by a contesting defendant in his defence. In other words, what can be a defence to the plaint cannot be taken into consideration for deciding whether the plaint should be rejected or not under O. VII R. 11."

Lastly, Mr. Pratap has relied on the judgment of the Hon'ble Supreme Court in the case of D. Ramachandran Vs. R.V. Janakiraman and Others, , wherein it is held as under;

"In all cases of preliminary objection, the test is to see whether any of the reliefs prayed for could be granted to the appellant if the averments made in the petition are provided to be true. For the purpose of considering a preliminary objection, the averments in the petition should be assumed to be true and the court has to find out whether those averments disclose a cause of action or a triable issue as such. The court cannot probe into the facts on the basis of the controversy raised in the counter."

17. I have heard the Id. advocates appearing for the respective parties and I have also gone through the plaint, the Civil Application moved by the plaintiff, affidavit-in-reply filed by the plaintiff and the affidavit-in-rejoinder filed by the defendant. I have also perused the documents attached with all these pleadings. It is an admitted position that the defendant has not filed any written statement till this date and before filing the written statement, the defendant has moved the abovereferred Civil 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 defendant the suit is not maintainable and it is liable to be rejected. The defendant has further raised an issue that the plaintiff has suppressed material facts from this Court and hence the plaintiff is not entitled to claim any relief against the defendant. It is also the defendant's case on merits that the plaintiff's case cannot be considered a maritime claim or it cannot be treated as a maritime lien so far as the impugned vessel is concerned. Thus, both on facts as well as on law, the defendant has made the submission that the suit of the plaintiff should not be entertained by this Court. It is also the case of the defendant that though the plaintiff did not have any legitimate claim against the defendant, the plaintiff has wrongly obtained the order from this Court with regard to the arrest of the vessel and the defendant had to furnish the bank guarantee for release of the vessel. In that process the defendant has incurred huge losses and the plaintiff is liable to recompensate the defendant to the extent of the losses suffered by the defendant. The plaintiff has also claimed the interest on the amount of loss suffered by the defendant. The question of awarding damages as well as interest would arise only when this Court comes to the conclusion that the claim made by the plaintiff in the suit is not sustainable. Even if this Court comes to the conclusion that the claim made by the plaintiff in the suit is not sustainable, the Court may or may not award the damages and interest, depending upon the facts evaluated by the court and conclusion derived there from. 18. While considering the facts in the proper perspective and appreciating the documents produced before the Court, the Court is not prima facie inclined to accept the proposition put-forward by the defendant that there is no privity of contract between the plaintiff who has supplied bunkers to the defendant vessel and the owners of the defendant vessel. As a matter of fact, while moving the present Civil Application, the defendant has proceeded on the premises that it is necessary for the owner of the defendant vessel to be liable in personam in respect of any claim against the defendant vessel. However, both these propositions are misconceived and unacceptable in law as the plaintiff has

supplied bunkers to the defendant vessel which are necessities for the operation of the said vessel. Consequently, the plaintiff has a maritime claim against the defendant vessel as well as the maritime lien in respect of the necessities supplied to the said vessel. It is an established position in law that in admiralty, 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 vessel is treated as a wrongdoer and liable to be proceeded against. The Court found substance in the submission of the plaintiff that there is nothing in the Admiralty Courts Act, 1861 which is the applicable statute and the Brussels Convention, 1952 which has been applied by Courts in India for the purpose of enforcing maritime claims, that requires privity of contract with the owner of the vessel before an action in rem can be commenced against the vessel. On the contrary, it is held by the Hon'ble Supreme Court in the case of *M.V. Elisabeth & Ors v. Harwan Investment & Trading Pvt.Ltd* 1992 (1) SCALE 490 wherein it is held that the powers of the High Court are plenary and unlimited and in the absence of any fetters imposed by a statute, the Court is entitled to proceed against the vessel for the enforcement of the maritime claims.

19. The submission of the defendant to the effect that the defendant was not aware of the terms and conditions of the supply of the bunkers and the same were not binding on the defendant, does not also seem to be convincing as it was made clear to the Master of the vessel at the time of supply of the bunkers that the delivery is for the account of the owner of the vessel and the owner is individually and jointly responsible for the payment of the bunkers supplied to the vessel without any protest. The clause which appears on the face of the Bunker Delivery Receipt and which is signed by the Master and/or Chief Engineer of the vessel binds the owner of the vessel and holds the owner liable for the payment of the bunkers supplied which were delivered expressly on the condition that they were for the account of the owner of the vessel.

20. The Court further found sufficient force in the contention of the plaintiff that the supply of bunkers was made by the plaintiff to the defendant vessel on the terms and conditions for the sale of marine bunker fuel and lubricants - referred to as the "current applicable terms and conditions of the seller" in the order confirmation dated 24th July 2000. Clause 10.3 of the said terms and conditions states that deliveries of marine fuel 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. On this basis, the plaintiff asserted that bunkers were supplied on the faith and credit of the vessel and it was open to the plaintiff to proceed against the vessel for recovery of the price of the bunkers supplied. It was also clear from the said clause 10.3 that the plaintiff was entitled to assert a lien against the defendant vessel for the amount of the purchased price which was in enforcement of the maritime lien that the plaintiff was entitled to an order of

arrest and detention of the defendant vessel to which the plaintiff looked for the purpose of satisfying its claim apart from any other contractual remedy that the plaintiff may have.

21. The Court is also not inclined to accept the submission made by the defendant to the effect that at the time of supply of bunkers, the vessel was on the Charterer of Geepee Shipping and Trading Inc., and the order was placed by the Manager of the said vessel and that the Charterer or Manager of the vessel was liable and not the owner of the vessel. It appears from the record that the order was placed by a person who was duly authorised to act on behalf of the vessel and consequently bind the vessel and its owner. The plaintiff was not having any knowledge of the arrangement between the Charterer and/or Manager of the vessel or its owner. As far as the plaintiff is concerned, the bunkers were supplied to the vessel and on the faith and credit of the vessel and the vessel was liable to pay for the supply.

22. With regard to the other arguments canvassed by the defendant, the Court could not find any force therein so as to reject the plaint at the very threshold. Those arguments in any way, before their acceptance, require evidence and full-fledged trial. At this stage, it cannot be said that the Master of the vessel has merely filled-up quantity in various blanks and signed at the bottom as alleged by the defendant. It is also not possible to jump to the conclusion that the plaintiff has made false statements in the plaint. Whether G. Premjee Trading were acting as Managers to Charterers of the vessel or whether the Geepee Shipping & Trading Inc., has gone into liquidation do not assume much significance in view of the fact that the bunkers were received by the Master of the vessel on behalf of the vessel and the plaintiff was entitled to look to the defendant vessel for payment. On prima facie reading of the documents, it flows that the Master of the vessel has accepted the liability on behalf of the owner of the vessel. The plaintiff has emphatically stated that and it is weighed with the Court that it is customary in the shipping business that orders for supply of bunkers are also placed by the brokers who are called "Bunker Brokers". The broker has authority on behalf of the vessel to order supply. The bunkers are supplied by the seller on the faith and credit of the vessel. The bunkers are expressly acknowledged by the Master as having been received on behalf of the Vessel and its owners who are responsible for the payment of the same. Thus, in any case, the vessel is liable to be proceeded against in event the price of the bunkers supplied is not received by the seller.

23. As far as the legal authorities cited by the learned advocates appearing on behalf of the respective parties are concerned, this Court is of the view that two Bombay decisions cited by the Id. advocate appearing for the defendant are not applicable to the facts of the present case and they are distinguishable. As a matter of fact, in the case of Raj Shipping Agencies (Supra), the Bombay High Court has come to the conclusion that the documents which have been placed on record by the plaintiffs namely, purchase order, invoices etc., show that as far as

the plaintiffs are concerned, M/s. North End Oil Pvt. Ltd., was buyer of the oil from the plaintiffs. The oil was merely to be delivered to the 1st defendant vessel. It is on these facts, the Court has come to the conclusion that there is no privity of contract between the plaintiffs and the 1st defendant vessel or its owner and hence there was no cause of action against the vessel. The Court therefore has held that the plaint was liable to be rejected. In the case of Scandinavian Bunkering AS (Supra), the Bombay High Court has simply relied on its earlier decision in the case of Raj Shipping Agencies (Supra). However, in both the decisions, the earlier judgement of the Bombay High Court in the case of M/s. Crescent Petroleum Ltd., (Supra) was neither cited nor referred to, wherein the Court has come to the conclusion that the averments in the plaint and the documents on record showed that the agreement was entered into expressly on the faith and credit of the vessel. The Court has further held that the plaintiffs are perfectly within their right to claim 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 on behalf of the owners of the vessel. 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. The Court has further held that 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, the suit could not be dismissed at this interlocutory stage on the ground that it is not maintainable for lack of cause of action. This Court is in respectful agreement with the reasoning given by the Bombay High Court in the case of M/s. Crescent Petroleum Ltd (Supra). This Court is, therefore, of the view that at this stage, when the suit is still pending and evidence is yet to be taken, the Court cannot accept the demand of the defendant to get back the bank guarantee duly discharged. Since this Court is not inclined to accept the claim of the defendant at this stage, this Court does not go into the aspect of damages, interest etc. Likewise, this Court has also not considered the claim of the plaintiff with regard to the interest on the alleged price of the bunkers supplied to the defendant vessel. At this interlocutory stage, these questions are not to be considered and in this view of the matter, the Civil Application moved by the defendant is liable to be rejected and it is accordingly rejected with no order as to costs.