

(2014) 01 GUJ CK 0050
In the Gujarat High Court

Case No : Civil Application No. 29 of 2013 in Admiralty Suit No. 9 of 2009 and Admiralty Suit No. 9 of 2009

M.V. Vinalines Fortuna and 1 Another APPELLANT

Vs

Saurashtra Fuels Private Limited RESPONDENT

Date of Decision : 21-01-2014

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 2 2(b) 2(h) 34(2)(b)(i) 45
Civil Procedure Code, 1908 (CPC) — Order 2 Rule 1, Order 40 Rule 40, Order 7 Rule 1, Order 7 Rule 1(e), Order 7 Rule 11(a)

Citation : (2014) 01 GUJ CK 0050

Hon'ble Judges : K.M. Thaker, J

Bench : Single Bench

Advocate : Ramchandran and Ms. Paurami B. Sheth, Nos. 1-2, for the Appellant; Nankani, Hardik P. Modh, Advocate, for the Respondent

Judgement

K.M. Thaker, J.—The applicant No. 1 in present application is the original defendant No. 1 and applicant No. 2 is the original defendant No. 2 in the Admiralty Suit No. 9 of 2009. In present application, the applicants have prayed, inter alia, that:-

10. (a) The Admiralty Suit No. 9 of 2009 filed by the opponents in this Hon'ble Court be stayed in view of the binding arbitration agreement between the parties.

(b) The Letter of Undertaking dated 12th August, 2009 furnished by the London Steam-ship Owners' Mutual Insurance Association Ltd. in favour of the opponents to secure the release of the first applicant vessel be returned to the applicants duly discharged.

2. The original defendants i.e. present applicants have taken out present application in the pending Admiralty Suit filed by present opponent against present applicants wherein present opponent has, inter alia, prayed for arrest of the applicant No. 1 vessel and other relief including the request for order and decree in its favour and against present applicants in the sum of Rs.

15,43,78,835/-.

3. In the suit taken out by present opponent, the Court granted ex-parte order dated 29.7.2009 whereby direction for arrest of first applicant vessel was issued. Subsequently when the applicants" furnished security in form of bank guarantee in the sum of Rs. 1,54,37,883/- further order releasing the vessel was passed. Subsequently, present applicants had taken out application which was considered by the Court and vide order dated 3.8.2009 the Court modified the order and reduced the amount of security to the sum of Rs. 15,43,788/-.

4. The original plaintiff i.e. present opponent felt aggrieved by said order dated 3.8.2009 and preferred OJ Appeal being Appeal No. 44 of 2009. The opponent also preferred Civil Application No. 305 of 2009 in the said Appeal. After hearing parties to the said appeal, Division Bench vide order dated 10.8.2009 directed present applicants i.e. original defendants to furnish security in form of bank guarantee in the sum of Rs. 13 crores. In compliance of the said order the original defendants i.e. present applicants submitted a letter of undertaking dated 12.8.2009 issued, on behalf of the applicants, by their Protection and Indemnity Club viz. London Steam-ship Owners" Mutual Insurance Association Ltd. whereby Indemnity Club secured claim in sum of Rs. 13 Crores.

5. Thereafter, now the applicants have taken out subject application and prayed for the above quoted relief/s.

6. The facts in light of which the proceedings viz. Admiralty Suit and this application, have arisen are stated by the applicants thus:-

5. The applicants further submit that the opponents have approached this Hon"ble Court claiming that they are the holders of the Bills of Lading. These Bills of Lading have been issued and signed for on behalf of the master of vessel. On the face of all the 5 Bills of Lading it is printed thus:-

Freight payable as per charter-party dated...

On the reverse of each of these Bills of Lading the conditions of carriage has been printed and the first of such conditions states all terms and conditions, liberties and exceptions of the charter party as stated overleaf including law of Arbitration clause, are herewith incorporated

6. The applicants therefore state and submit that though the charter-party is not identified in the Bills of Lading the applicable charter-party is and could only be the Voyage charter party dated 9th May, 2008. In the box on the first page of the said charter-party it is written thus:

Clause 25-Law and Arbitration...

Arbitration/General Average London

English law to apply. See also clause 41

Clause 41-Arbitration

Arbitration in London.

Any dispute arising out of present contract shall be referred to Arbitration in London; the decision rendered according to rules of same shall be final and binding upon both the parties. The right of both the parties to refer any disputes to Arbitration ceases 12 months after date of completion of discharge or in any case of non-performance 3 months after the cancelling date as per clause No. 19 para No. 1 of this charter-party. When this provision is not complied with, the claim shall be waived and absolutely barred.

7. The applicants states that the contract contained in or evidenced by the 5 Bills of Lading was made with the second applicants being the owners of the vessel. The charter-party though not identified in the Bills of Lading, is the charter-party dated 9th May, 2008. The terms and conditions including the law and arbitration clause are incorporated in the 5 Bills of Lading. As would be noted, clause 41 of the said charter-party provides reference of disputes to Arbitration in London. All disputes arising under or in connection with the Bills of Lading are subject matter of arbitration. The applicants therefore state and submit that there is a valid and binding arbitration agreement between the applicants and the opponents. The applicants are therefore entitled to seek stay of the suit u/s 45 of the Arbitration and Conciliation Act, 1996 and refer the parties to Arbitration.

8. The applicants further submit that the second Applicants have already commenced arbitration against the opponents in relation to the applicants claim for General Average contribution against the opponents. The applicants have filed statement of claim and the opponents have filed their statement of defence before the Arbitral Tribunal. The applicants further submit that since the General Average claim is being contested by the opponents, one of the issues which might arise is the seaworthiness of the vessel. The finding of the Arbitral Tribunal on the seaworthiness or any matters related thereto including the cause of ingress of water into the holds would have a direct bearing on the issues raised by the opponents in the present suit in this Hon'ble Court. It may be mentioned herein that opponents in their plaint filed before this Hon'ble Court has alleged that due to the ingress of water into the holds their cargo being coal was damaged and incapable of being used.

9. The applicants therefore state and submit that apart from the fact that there is binding arbitration agreement between the applicants and the opponents and furthermore applicants claim towards General Average contribution against the opponents is pending before the Arbitral Tribunal in London. The applicants are therefore entitled to seek stay of the present suit u/s 45 of the Indian Arbitration and Conciliation Act, 1988.

7. In view of the fact that present application is taken out in pending Admiralty Suit No. 9 of 2009, it would be appropriate to also take into account the relief prayed for by the present opponent i.e. original plaintiff in the said Admiralty Suit. The original plaintiff has prayed, inter alia, that:-

22. (a) That the 1st Defendant vessel MV Vinalines Fortuna along with her hull, engines, tackle, machinery, boats, apparel and other paraphernalia at present lying in port and harbour of Dahej be ordered to be arrested.

(b) That the 1st Defendant vessel MV Vinalines Fortuna along with her hull, engines, tackle, machinery, boats, apparel and other paraphernalia at present expected in part and harbour of Dahej be detained, condemned and sold through the Sheriff of Mumbai under orders and directions of this Honourable Court and the sale proceeds thereof be applied towards the satisfaction of the plaintiffs claim in the suit;

(c) For an order and decree in favour of the plaintiffs and against the Defendants for a sum of Rs. 15,43,78,835/- together with further interest @ 12% pa from cause of action until payment/realization and all costs incurred in this recovery;

(d) Pending the hearing and final disposal of the suit, the 1st Defendant vessel MV Vinalines Fortuna together with her hull, tackle, machinery, bunkers, equipment, plant, machinery, apparel, fixtures and furniture, be arrested and detained under order of this Hon''ble Court and/or be restrained from sailing out of the port and harbour of Dahej till security towards the plaintiffs claim in the suit is furnished;

(e) That pending the hearing and final disposal of the suit, the 1st Defendant vessel MV Vinalines Fortuna be appraised by any suitable marine surveyors according to true value thereof and upon such value certified in writing by the said surveyor the Defendant No. 1 vessel be sold by public auction free and clear from all existing claims, liens, and/or any encumbrances for the highest price that can be obtained for the said vessel;

(f) That pending and final disposal of the suit, the Hon''ble Court be pleased to direct that the defendant No. 1 vessel be

(i) sold by public auction;

(ii) fix and expedient date for such public auction;

(iii) advertise in the public notice column of the Time of India and Bombay Samachar prior to the date fixed for the same.

(g) that immediately upon the sale of the vessel, to hold the net sale proceeds on behalf of the Admiralty Registrar to the credit of the plaintiffs after deducting all expenses incurred.

8. The facts which, according to the original plaintiff, necessitated the Admiralty Suit would be relevant so as to consider the issue raised by the applicants in present application and also to appreciate the facts which are in the background of the Admiralty Suit. The said facts stated in the suit read thus:-

4. The plaintiff entered into a contract dated 12 March 2008 with one M/s. Mechel Trading Ltd. (hereinafter referred to as the Supplier) for supply of coking

coal for Russian origin to be delivered at Mundra Port, Gujarat by a vessel to be chartered by the Supplier. Accordingly, the supplier shipped a total quantity of 23,050 mt of coal on board the Defendant No. 1 vessel loaded at Posyet, Russia. The defendants issued five Bills of Lading on 21 May 2008. The plaintiffs are the holders of the originals of these five Bills of Lading, and have paid the value of the same of US\$ 7,837,000 for 23050 mt coking coal in bulk of Russian original CFR Mundra Port, India. The defendant No. 1 sailed from the load port on 21 May 2009. However in 2008, the defendant No. 2 informed all parties concerned that there had been ingress of water in hold no. 1 and 4. They further informed that the cargo in hold no. 1 was liquefied and the cargo in hold no. 4 was wetted and therefore the master had decided to deviate the defendant No. 1 to a convenient place. The defendant no. 2 also informed that they were arranging for the defendant no. 1 to be anchored at Vung Tau and that the details of the General Adjuster would be communicated soon. The defendant no. 1 was subsequently informed to have arrived at the Vung Tau port on 31 May 2008 and samples were taken by the surveyors of the P and I club of defendant No. 2 from the effected cargo on 1 June 2008.

5. The plaintiff was informed on 10 June 2008 by the defendant no. 2 that while the cause of wetting of the cargo was still being investigated, they were contemplating discharging of the cargo to ensure safety. They also informed that once the survey reports are available, all concerned would be informed of the same. By an email dated 13 June 2008, the defendant no. 2 further informed that their surveyor had reported that no one was clear as to the next course of action and the status and condition of the cargo on board was unknown.

9. Given the circumstances as stated above, the plaintiff by its letter dated 18 July 2008 lodged a claim for loss suffered by it due to damage to its cargo on board Defendant No. 1. The plaintiff informed the owner that the extent of loss would be ascertained on arrival of the vessel at discharge port and communicated to the defendant No. 2. On arrival of the defendant No. 1 at discharge port, the plaintiff appointed surveyor M/s. SGS India Pvt. Ltd. (hereinafter SGS) issued a Notice of Apparent Discrepancy dated 23 July 2008 stating that their inspectors had observed that some foreign matter like iron rods and plastic was found at the time of coal discharge from hatch no. 1 and 4. Even the Mundra Port authorities by their letter dated 23 July 2008 informed the master of vessel that they had observed presence of foreign particles during discharge and notified them that they would be liable for any damage caused to their mechanical conveyor system. The plaintiff by their Protest Letter annexed to the Statement of Fact recorded that all extra costs incurred in discharge would be to the account of owners/vessels cost. The Statement of Facts also records that the total quantity of cargo discharged was 23050 mt. which is the same quantity as was loaded in Russia, despite the fact that 100 mt. of cargo could not be reloaded at Vietnam as its TML was exceeding safety limits.

11. The plaintiffs state that as per its contract with the supplier, it had paid for

the entire cargo through Letter of Credit as a sum of USD 3,812,648 was transmitted to the supplier as payment of the entire cargo. These payments were made through a letter of credit arrangement with PEC Ltd. Plaintiff further submits that due to the misconduct and/or want of skill of the master and/or crew of the defendant no. 1, the entire cargo of the plaintiff has been damaged and rendered incapable of being used. The plaintiff states that the plaintiff has suffered a total loss of Rs. 15,43,78,835/- which it is legally entitled to recover from the defendant no. 1 and/or the defendant no. 2. A detail of the claim is supplied hereto.

12. In view of the foregoing, the plaintiff respectfully submits that this Hon'ble Court is entitled to invoke and exercise its admiralty jurisdiction under the Admiralty Court Act(s) of 1840 and 1861 read with the Merchant Shipping Act, 1958 and the Arrest Convention, read with the various High Court and Supreme Court Judgments. This Hon'ble Court therefore has jurisdiction to entertain, try and dispose of the present suit.

9. In light of the said facts present opponent i.e. original plaintiff filed above mentioned Admiralty Suit which is presently pending and the earlier referred orders have been passed in connection with the said suit.

9.1 Now the original defendants (i.e. present applicants) want, for the reasons mentioned in the application, that the said suit may be stayed and the cargo of undertaking dated 12.8.2009 may be released and returned to the petitioners.

9.2 One of the main grounds on which the said requests are made is, according to the applicants, an Arbitration Agreement. According to the applicants there is a binding arbitration agreement between the applicants and the opponents and that therefore the suit proceedings should be stayed.

10. On the other hand the opponents i.e. original plaintiffs have vehemently disputed the said claim and submissions and have asserted that the plaintiff is not a party to any Arbitration Agreement with the applicants i.e. original defendants and that it has not signed any contract with arbitration clause with the applicants and that therefore there is no cause or justification to stay the proceedings of the said Admiralty Suit on the alleged ground that there is an arbitration agreement between the parties.

11. So as to highlight the factual aspects and to support the submission that there is arbitration agreement between the parties the petitioner submitted a statement in the nature of chronology of events. The relevant dates and events mentioned in the said statement read thus:-

12. Mr. Ramchandran, learned Counsel has appeared for Mrs. Sheth learned advocate for the applicants and Mr. Nankani, learned Counsel has appeared for Mr. Modh, learned advocate for the opponents i.e. original plaintiffs. Learned advocate for the applicants submitted that the plaintiffs entered into contract dated 12.3.2008 with one M/s. Mechel Trading Ltd. for supply of coking coal of

Russian origin to be delivered at Mundra Port and in furtherance of the said contract the said seller entered into charter party agreement with the applicants. Thereafter, on behalf of the applicants the master of the vessel executed Bills of Lading. Subsequently by raising claim as mentioned in the suit present opponent i.e. the plaintiff filed the Suit No. 9 of 2009 claiming, inter alia, that they are holders of original Bills of Lading issued by the applicants. Learned Counsel for applicants contended that the said Bills of Lading incorporate, by reference, arbitration clause of charter party and consequently there is binding arbitration agreement between the applicant and the opponent, though the charter party is not identified in the Bills of Lading but the facts establish that the charter party mentioned in the Bills of Lading could only be the charter party dated 9.5.2008. On such premise learned Counsel for applicant submitted that the suit may be stayed and security may be released. In support of the submissions learned counsel for the applicant relied on the contract dated 12.3.2008, the charter party agreement dated 9.5.2008 and the Bills of Lading dated 21.5.2008. He also relied on clause 41 of the charter party as well as clause 1 of the condition of carriage contained in the Bills of Lading. Learned counsel for the applicant also claimed that in respect of applicants claim for general average contribution against present opponent the applicants have already commenced arbitration proceedings wherein the opponent has entered appearance and filed reply.

13. Per contra learned Counsel for the opponent submitted that the opponent i.e. the plaintiff is not party to the charter party agreement and there is no privity of contract in any manner between it and the applicant, except the Bills of Lading wherein there is no arbitration clause. The learned counsel for opponent reiterated the details mentioned in the affidavit opposing the application. He, in particular referred to and relied on the details mentioned in paragraph No. 6 to 11 and para 15 and 17 of its affidavit dated 15.4.2013. The said paragraphs read thus:-

6. I say that the plaintiffs are admittedly not a party to the charter party and therefore the arbitration agreement said to be contained in charter party is not relevant.

7. I further say that in any event, as the applicant fairly admits, there is no reference to the Charter Party dated 09th May 2008 on the Bills of Lading. The applicant seeks this Hon"ble Court to infer such a reference. It is settled law that an arbitration agreement must be in writing and cannot be inferred as a preponderance of probabilities.

8. I say that even if, which is denied, the Bills of Lading contain the arbitration agreement as set out in the Charter Party, the same bind only the Owners and the Charterers and not the ultimate receiver of the cargo or the holder in due course of Bills of Lading such as the plaintiff. The dispute in relation to the damage to cargo caused by the applicant vessel cannot therefore to be the subject matter of determination in an arbitration.

9. I say that, even if, which is denied, there is an arbitration agreement as between the applicant and the plaintiff, it is well settled that the in rem jurisdiction of the Court in an admiralty action can be invoked to arrest a vessel and any security obtained therein can be continued even if the parties have agreed to submit their disputes to arbitration. This follows from the Full Bench judgment of the Hon''ble Bombay High Court in J.S. Ocean Liner LLC Vs. M.V. Golden Progress A foreign flag vessel, flying the flag of Mongolia and presently in port and harbour Bombay together with her hull, tackle, machinery, apparel and otherwise paraphernalia and Abhoul Marine LLC (FZCO), and the judgment of this Hon''ble Court in Gupta Global Exim Pvt. Ltd. v. M.V. Asean Express [Judgment dated 26.8.2004 in Admiralty Suit No. 23 of 2001], both of which are binding authorities that have not been disturbed.

10. I say that the applicant's claim in the arbitration is for General Average, which is distinct from the plaintiff's claim in the present suit. In fact, the two actions cannot in any event, result in contrary determination on the same subject. Even assuming the plaintiff is found liable to contribute to General Average in the arbitration, that by itself will not absolve the applicant of its liability for loss arising out of damage to cargo, which forms the subject matter of the present suit.

11. I say that the plaintiff has consciously defended the arbitration without prejudice to its claim in the present suit, by not having made a counterclaim in the arbitration. The plaintiff continues to prosecute its claims in the present suit. The applicant's allegation of the plaintiff having participated in the arbitration is, therefore, at the highest, a mere half-truth, and is mischievously intended to mislead this Hon''ble Court.

15. I say that there is no reference to the plaintiff's claim or the proceedings before this Hon''ble Court in the statement of claim filed by the applicant in the arbitration. Evidently, the applicant has consciously treated the two proceedings as being unconnected. It cannot be permitted to prevaricate and attempt to wriggle out of these proceedings on specious grounds.

16. I say that the applicants have wholly failed to make out any case for stay of the proceedings in the present suit.

17. I further say that without prejudice to the above, even if this Hon''ble Court is pleased to stay the proceedings in the present suit, the applicant is not entitled to a return or discharge of the security, either as alleged or at all. This Hon''ble Court having found that the applicant has caused damage to the plaintiff's cargo, ordered the conditional release of the applicant. The said order made by this Hon''ble Court has become final and binding inter partes. The applicant cannot now be heard to secure a release of the security for the plaintiff's claims on the basis of its having commenced an arbitration on an unconnected cause of action, where it has yet to make out even a prima facie case in this favour. The present application is utterly dishonest and mischievous and deserves to be

dismissed in limine, with exemplary costs in favour of the plaintiff.

13.1 According to the opponent the charter party would bind only the owners and the Charterer and not the ultimate receiver of the cargo or it will not bind the holder in due course of the Bills of Lading (i.e. the plaintiff in present case). Learned counsel for opponent emphasized the admission by the applicant in present application i.e. the details in paragraph No. 6 of the application where the applicant has stated that the charter party is not identified in the Bills of Lading. On the premise that there is no agreement between the applicant and itself which contains, either directly or by reference, any arbitration agreement, the opponent opposed the applicants demand in present application and contended that in absence of any contract between itself and applicant and more particularly in absence of a contract which contains arbitration clause there is no justification to stay the suit proceedings.

13.2 The learned counsel for the contesting parties relied on the following decisions:

- (1) Bangladesh Chemical Industries Corporation vs. Henry Stephens Shipping Co. Ltd. & Tex-Dilan Shipping Co. Ltd. [1981 LLR (2) 389]
- (2) Daval Aciers D'Usinor ET DE Sacilor vs. Armare S.R.L. [1996 LLR (1)].
- (3) Videsh Sanchar Nigam Ltd. Vs. M.V. Kapitan Kud and others,
- (4) The Owners and Parties Interested in the Vessel M.V. Baltic Confidence and Another Vs. State of Trading Corporation of India Ltd. and Another,
- (5) J.S. Ocean Liner LLC Vs. M.V. Golden Progress A foreign flag vessel, flying the flag of Mongolia and presently in port and harbour Bombay together with her hull, tackle, machinery, apparel and otherwise paraphernalia and Abhoul Marine LLC (FZCO),
- (6) Bharat Aluminium Company and Others Vs. Kaiser Aluminium Technical Service, Inc. and Others etc. etc.,
- (7) Chloro Controls (I) P. Ltd. Vs. Severn Trent Water Purification Inc. and Others,

14. I have heard learned Counsel for the contesting parties and I have also considered the material on record and the decisions referred to and relied on by learned Counsel.

14.1 At the outset it is necessary to note and keep in focus that this matter involves three documents/agreements viz.

(a) The main contract dated 12.3.2008 which was executed for purchase of coal of Russian Origin. The said contract was entered into & executed by and between one M/s. Mechel Trading Limited and the plaintiff. In the said contract dated 12.3.2008 said M/s. Mechel Trading Ltd. is described as seller and the plaintiff is described as buyer.

The said contract dated 12.3.2008 contains Arbitration Clause in form of clause 11 of said contract.

What is pertinent is the fact that present applicant is not signatory/party to the said contract dated 12.3.2008.

(b) The charter party dated 9.5.2008.

Under the said charter party voyage charter was entered into.

What is pertinent is the fact that the shipper as per the charter party is the seller (i.e. said M/s. Mechel Trading Limited) and the other side to the said charter party is applicant No. 1 vessel and the owner of the vessel (i.e. the applicant No. 2) whereas the opponent is not a party to the said contract i.e. charter party.

(c) Bills of Lading dated 21.5.2008.

The said Bills of Lading have been issued on behalf of master of vessel and it is claimed that the opponent in the application i.e. plaintiff is the holder of the said Bills of Lading.

According to the opponent the said Bills of Lading do not contain any arbitration agreement.

14.2 Consequently the situation which emerges is that in the contract which contains arbitration clause, either the applicant is not a party (to such agreement) or the opponent herein is not a party and the contract wherein present applicants and present opponent are party there is no arbitration clause inasmuch as in the contract dated 12.3.2008 (which contains arbitration clause) the opponent is a party but the applicant is not party to the said contract whereas in the charter party (which also contains arbitration clause) the applicant herein is party but the opponent herein is not a party to the said charter party.

14.3 The particular clauses of the said contract dated 12.3.2008 which are referred to read thus:-

Made March, 12, 2008, between Mechel Trading Ltd. and Saurashtra Fuels Pvt. Ltd. for the sale and purchase of coking coal named NERYUNGRINSKY COAL K9 (hereinafter referred to as The Cargo according to the following terms and condition:

1. Quantity

One (1) Cargo of abt 20,000 25,000 mt +/-10% in Seller's option.

Two (2) optional cargoes each of abt 20,000-25,000 mt +/-10% (shipment quantity in Seller's option). Buyer has the right to execute the option of the second and third shipment within 15 days of receipt of first vessel by the buyer as per terms and conditions of this contract.

5. Time of Delivery

Shipment to be effected at the time the first cargo...

Dates for the second and the third cargo...

The time of Delivery shall be the date of Bills of Lading (hereinafter as The shipment Date)

9. Shipping conditions

At discharging ports of Porbandar or Mundra, the buyer guarantees 1 safe berth with a maximum draft of 9.5 m swad and LOA restriction 200 mtr. and a discharge rate of 7,000 MT pwwd of 24 cons hrs shinc (excluding Super holidays). NOR at discharge port to be given by the vessel by Fax, Telex or Radio on arrival. Notice of readiness to be tendered by wipon, wibon wifpon, wiccion in writing or by cable in discharge port during hrs Monday to Friday 0900 hrs to 1700 hrs and 0900 hrs to 1300 hrs on Saturday...

9.1 NOMINATION OF VESSELS

Seller to nominate the performing vessel to buyer atleast 7 days prior to vessel eta at load port.

Buyer to reply within 24 hours intimating acceptance of the nominated vessel which cannot be unduly withheld by the buyer.

Seller will try outmost to nominate vessel which is vessel of Max 20 years of age classed 100 AI at lloyds or equivalent

but receivers try outmost to accept vessel which is over 25 yrs and not classed 100 ai at lloyds or equivalent.

All extra insurance due to vessel age above 25 years for sellers acct.

vessel should be singal deck bulk carrier having minimum 4 hatches and should have min 4 workable cranes with lifting capacity of 25 m.t. each and 4 grabs of 8 cbm minimum, length of boom should be min. 22 mtrs and out-reach of gears should be 9 meters from the vessel's railing. vessel should supply required power i.e., 73 amp/440 a.c. to each crane and each grab. vessel should be less than 20 years old.

9.2 Final settlement of demurrage or dispatch to be reached and paid not later than 30 days after discharging of cargo at discharge port.

9.3 In case the vessel arrives at discharge port before the original document are received by the buyer the seller shall take up with the vessel owner for release of cargo without the production of original b/l on receipt of the letter of indemnity (LOI) signed by the buyer a per the vessel owners standard proforma for letter of indemnity.

9.4 All supervision and fees or levies at the port of loading are for the sellers

account. and our representative can oversee the loading process of coal at load port.

11. Arbitration

Any dispute and discrepancies arising out of this contract or in connection herewith shall be settled among the parties by way of negotiations.

The contract including the arbitration clause shall be governed and construed in accordance with the laws of England and Wales, excluding the conflict of laws rules. Should the disputes, discrepancies or claims not be settled within sixty (60) calendar days of notification by one party to the other party, either party shall have the right to transfer such disputes, discrepancies or claims for the settlement to the London Court of International Arbitration.

Any dispute, difference or claim between the parties arising out of or in connection with this contract, including in respect of its existence, validity or termination, shall be referred to final and binding arbitration under the Rules of the LCIA effective as of the date of any arbitration (the Rules), and be resolved thereby, and the Rules shall be deemed to be incorporated in this clause by reference. The place of arbitration shall be London, England, and an award shall be deemed determined there. The Arbitral tribunal may hold hearings, meetings and conferences at any place it deems proper and related to circumstances of the arbitration. The arbitral tribunal shall consist of three arbitrators to be appointed by the LCIA in accordance with the Rules. The arbitral tribunal has no powers to act as amiable compositor. The language of the arbitration shall be English. The parties agree to exclude the Court's jurisdiction under Sections 45 and 69 of the UK Arbitration Act 1996.

The decision of the LCIA shall be final and binding for both parties.

15. The learned Counsel for applicants and opponent have relied on below mentioned parts/details of the Bills of Lading:-

Bills of Lading

TO BE USED WITH CHARTER-PARTIES

15.1 It is pertinent that in the said Bills of Lading the relevant details e.g. identity/name of the owners and the vessel, date of agreement etc. are left blank and not filled up.

16. In order to appreciate the rival contentions it is relevant and necessary to take into account some of the provisions under the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act) viz. Section 2(b) and Section 7. Section 2, which contains definition of diverse terms, inter alia, defines the term arbitration agreement u/s 2(b). The said provision reads thus:-

2(b) arbitration agreement means an agreement referred to in Section 7;

16.1 According to the said provision term arbitration agreement means

agreement referred to in section 7 of the Act. Thus, one has to turn to the provision u/s 7 so as to grasp the meaning and scope of the term arbitration agreement. The said Section 7 of the Act reads thus:-

7. Arbitration agreement.

1. In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

2. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

3. An arbitration agreement shall be in writing.

4. An arbitration agreement is in writing if it is contained in-

a. a document signed by the parties;

b. an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or

c. an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

5. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

16.2 The Act of 1996 amends and consolidates the law relating to Domestic Arbitration, International Commercial Arbitration and the provisions related to enforcement of Foreign Arbitral Awards.

17. On perusal of Section 7 it emerges that the said term, for the purpose of Act, means:-

(a) an agreement whereunder the parties agree to submit all or certain disputes which have arisen or may arise between the parties to such agreement, to arbitration; and

(b) such agreement may be in form of arbitration clause in the main/parent contract or in form of separate agreement; and

(c) such agreement should be in writing; and

(d) for the purpose of said section and for the purpose of the Act such agreement may be deemed to be in writing if a document to such effect is signed by the parties or letters, telex, telegrams or other means of telecommunication which is exchanged between the parties and provide record of such agreement.

According to Section 7 if the aforesaid ingredients exist it would suggest and

indicate that arbitration agreement exists/is entered into between the parties.

The facts of present case and the claim/request by the applicant are required to be considered in light of the above discussed provisions.

17.1 In present case it is not in dispute that various ingredients contemplated u/s 7(1) to section (4) do not exist inasmuch as in the Bills of Lading there is no arbitration clause and any separate agreement contemplating process of arbitration in event of dispute between the parties to the said Bills of Lading is not executed between present applicants & present opponent (i.e. original plaintiff).

17.2 Therefore the learned Counsel for the applicant contended that the arbitration agreement contained in the charter party agreement dated 9.5.2008 is incorporated in the Bills of Lading by reference of the arbitration clause in the said charter party agreement and that therefore there is a binding arbitration agreement between the parties in view of which the suit proceedings are not maintainable and deserves to be stayed.

18. In order to appreciate the request made by the applicant it is relevant and necessary to recall the fact that initially a contract for supply of coking coal of Russia origin was entered into between the opponent herein and one M/s. Mechel Trading Ltd. In the said agreement dated 12.3.2008 the opponent herein is described as buyer and said M/s. Mechel Trading Ltd. is described as supplier/seller.

18.1 So far as the provisions relevant for present case are concerned, arbitration clause/agreement is to be found in clause 11 of the said contract dated 12.3.2008, which is quoted hereinabove.

18.2 It is relevant to note that in the said contract dated 12.3.2008 the opponent herein i.e. original plaintiff is one of the parties thereto and the said contract also contains arbitration clause (clause 11 thereof).

18.3 However, present applicant Nos. 1 and 2 are not party to the said parent contract (which contains arbitration clause/agreement) dated 12.3.2008.

18.4 In light of the said provision it comes out that in the said contract dated 12.3.2008 between the buyer (i.e. present opponent) and the seller, arbitration clause/agreement is incorporated but the said arbitration clause/agreement is not between present applicants and present opponent.

18.5 It is true that the said charter party agreement dated 9.5.2008 also contains arbitration clause by way of clause no. 41 therein. The said clause 41 are charter party provides, inter alia, that:-

Clause 41-Arbitration

Arbitration in London.

Any dispute arising out of present contract shall be referred to Arbitration in

London; the decision rendered according to rules of same shall be final and binding upon both the parties. The right of both the parties to refer any disputes to Arbitration ceases 12 months after date of completion of discharge or in any case of non-performance 3 months after the cancelling date as per clause No. 19 para No. 1 of this charter-party. When this provision is not complied with, the claim shall be waived and absolutely barred.

18.6 The said charter party dated 9.5.2008 is entered into and executed by and between the seller (who is the shipper and charterer) on one hand and present applicants No. 1 and 2 on the other hand.

18.7 However, what is, again, more relevant and important is the fact that present opponent i.e. original plaintiff/buyer is not party to the said charter party.

18.8 The third document which is relevant is the Bills of Lading.

18.9 The opponent herein i.e. plaintiff claims that it is holder in due course of the Bills of Lading which are issued/executed by the master of vessel on behalf of the applicants.

18.10 The said Bills of Lading do not contain any arbitration clause.

18.11 However, in this context it is relevant to take into account that the Bills of Lading contains the conditions of carriage

18.12 The said conditions of carriage in the said Bills of Lading are part of Bills of Lading. The clause 1 of the said conditions of carriage reads, inter alia, thus:-

(1) all terms and condition liberties and exceptions of the charter party, dated as overleaf, including the law and arbitration clause are herewith incorporated

19. While it is also true that by virtue of said clause 1 of conditions of carriage the Bills of Lading also contain reference of charter party agreement, however, what is pertinent is the fact that in the Bills of Lading the charter party is not identified/named and even the date is not mentioned.

19.1 It is pertinent that in view of such facts, the applicants, so as to substantiate their contention about binding arbitration clause, have heavily relied on clause 1 of the condition of carriage and in light of the said provision the applicants have claimed that by virtue of the said provision the arbitration clause in the charter party agreement dated 9.5.2008 is incorporated.

20. On this count it is necessary to mention that according to the opponent original plaintiff even if it is so assumed then also the fact remains that it (i.e. the opponent herein) is not party to the said charter party agreement dated 9.5.2008 and the charter party is not identified in the Bills of Lading and even the date is not mentioned. 21.1 The said clause No. 1 under conditions of carriage specifically mentions that. The charter party, dated as overleaf, however at the relevant place the date of execution of charter party is not mentioned. The relevant portion of the charter party reads thus:-

20.2 Hence, the Court is called upon to assume that the charter party contemplated under the Bills of Lading could only be the charter party dtd. 9.5.2008 and that it cannot be any vessel/charter party agreement other than the said charter party agreement dated 9.5.2008.

20.3 On this count it is also relevant to note the objections of the original plaintiff i.e. present opponent in its reply affidavit the opponent i.e. the original plaintiff has contended that:-

6. I say that the plaintiffs are admittedly not a party to the charter party and therefore the arbitration agreement said to be contained in charter party is not relevant.

20.4 In this context it is also relevant to note that even the applicant has averred and admitted in its application that:

6. The applicants therefore state and submit that though the charter party is not identified in the Bills of Lading the applicable charter party is and could only be the voyage charter party dated 9.5.2008.

20.5 Furthermore, in para 7 of the application the applicant has averred and admitted that:

7. The applicants state that the contract contained in or evidenced by the five Bills of Lading was made with second applicant being the owners of the vessel. The charter party though not identified in the Bills of Lading is the charter party dated 9.5.2008.

20.6 With reference to the said averments in the application the opponent i.e. original plaintiff has, in its reply affidavit contended that:-

Para 7. I further say that in any event, as the applicant fairly admits, there is no reference to the Charter Party dated 09th May 2008 on the Bills of Lading. The applicant seeks this Hon''ble Court to infer such a reference. It is settled law that an arbitration agreement must be in writing and cannot be inferred as a preponderance of probabilities.

Para 8. I say that even if, which is denied, the Bills of Lading contain the arbitration agreement as set out in the Charter Party, the same bind only the Owners and the Charterers and not the ultimate receiver of the cargo or the holder in due course of Bills of Lading such as the plaintiff. The dispute in relation to the damage to cargo caused by the applicant vessel cannot therefore to be the subject matter of determination in an arbitration.

21. In view of such rival submissions it becomes necessary to ascertain whether arbitration clause is incorporated in the contract i.e. Bills of Lading or not and if it is incorporated by reference to a charter party agreement then from which charter party agreement.

21.1 Ordinarily, to ascertain as to whether arbitration clause in charter party is

incorporated by reference in Bills of Lading, the simple test is to examine the intention of the parties.

21.2 The term party is defined u/s 2(h) of the Act. According to the said provision the expression party means party to an arbitration agreement. Therefore, in present case the party has to be considered with reference to the Bills of Lading.

21.3 At this stage it is relevant to take into account observations by Hon'ble Apex Court in the case between Owners & Parties Interested in the vessel M.V. Baltic Confidence (supra) wherein Hon'ble Apex Court observed that:-

19. From the conspectus of the views expressed by courts in England and also in India, it is clear that in considering the question, whether the arbitration clause in a Charter Party Agreement was incorporated by reference in the Bills of Lading; the principal question is, what was the intention of the parties to the Bills of Lading? For this purpose the primary document is the Bills of Lading into which the arbitration clause in the Charter Party Agreement is to be read in the manner provided in the incorporation clause of the Bills of Lading. While ascertaining the intention of the parties attempt should be made to give meaning to the incorporation clause and to give effect to the same and not to invalidate or frustrate it giving a literal, pedantic and technical reading of the clause. If on a construction of the arbitration clause of the Charter Party Agreement as incorporated in the Bills of Lading it does not lead to inconsistency or insensibility or absurdity then effect should be given to the intention of the parties and the arbitration clause as agreed should be made binding on parties to the Bills of Lading. If the parties to the Bills of Lading being aware of the arbitration clause in the Charter Party Agreement have specifically incorporated the same in the conditions of the Bills of Lading then the intention of the parties to abide by the arbitration clause is clear. Whether a particular dispute arising between the parties comes within the purview of the arbitration clause as incorporated in the Bills of Lading is a matter to be decided by the arbitrator or the court. But that does not mean that despite incorporation of the arbitration clause in the Bills of Lading by specific reference the parties had not intended that the disputes arising on the Bills of Lading should be resolved by arbitrator.

21.4 Thus, as observed by Apex Court in the decision in case of M.V. Baltic Confidence intention of the parties is most relevant to ascertain as to whether arbitration clause is incorporated by reference and the primary document to be looked into is Bills of Lading and intention of those parties who are party to Bills of Lading is to be taken into consideration.

22. Under the circumstances for the purpose of determining and ascertaining the intention of the parties the primary and important document is the Bills of Lading and it is the intention of present applicants and opponent (who are parties to the Bills of Lading) that has to be gathered and examined to determine as to whether the said parties intended to resort to arbitration process and whether

the arbitration clause in the charter party agreement dated 9.5.2008 is, by reference, incorporated in the Bills of Lading or not.

23. In this backdrop it is time to also take into account some of the provisions of the said charter party agreement. Clause 4 of the charter party agreement (i.e. the clause which describes the name of the charterers) gives out the name of said seller i.e. Mechel Trading Limited as the charterer. Clause 2 thereof gives out that the said charter party was entered into on 9.5.2008. In clause 12 of the charter party it is mentioned, inter alia, that cargo is 24000 mt., 5% more or less in owners option of bulk coal listed in appendix-B. Clause 25 thereof give out, inter alia, that the details contained in clause 41 are to be taken into account. Clause 53 mentions the details about discharge port. Port Mundra is specified as the discharging port under said clause 53.

23.1 The applicant has heavily relied on clause 41 read with clause 25. According to the applicants by virtue of said clause No. 1 in the Bills of Lading under the title conditions of carriage, the arbitration clause (i.e. clause No. 41 in the charter party) is, by reference, incorporated in the Bills of Lading.

23.2 However, there is no dispute as regards the fact that present opponent i.e. the original plaintiff is not party to the charter party dated 9.5.2008 which contains said clause 41 and clause 25.

23.3 It is also not in dispute that when the Bills of Lading (which appear to have been issued/executed on 21.5.2008) are taken into account it emerges that the vessel/charter party are not identified in the said Bills of Lading either by name or even by date.

23.4 Thus, the opponent i.e. the original plaintiff would contend that even if the principle of incorporation by reference is invoked and applied in this case and applicants' submissions are taken into account, then also the clause which would get incorporated is the arbitration clause No. 41 of the charter party and the fact which would simultaneously, stare in the face is the fact that the opponent herein i.e. the buyer is not party to the said charter party agreement dated 9.5.2008.

23.5 When the court speaks about the intention of the parties then the reference to intention is restricted to the intention of the parties to resolve the dispute and differences through special mode of arbitration or to pursue ordinary civil remedy.

23.6 Once it becomes clear as to whether the parties to a contract intended to resolve dispute through arbitration, then everything else would fall in place because the scope and purview of arbitration and/or as to whether the particular dispute falls within the purview of the arbitration clause incorporated by reference or not and such other related or ancillary or collateral issues would be examined and decided by the arbitral tribunal.

23.7 The jurisdiction of the Court at this stage would be restricted to ascertaining, in light of intention of the parties, as to whether the parties intended to incorporate and whether they actually did, or did not incorporate, by

reference, arbitration clause in some other agreement, in the contract in question; and for that purpose it would be permissible to the Court, or rather necessary for the Court, to find out whether the parties intended to incorporate, by reference, a particular arbitration clause or not.

23.8 In this view of the matter when the Bills of Lading in question are examined it emerges that by virtue of clause 1 of the conditions of carriage (which are integral part of the Bills of Lading) all terms and condition, liberties and exceptions, including the law and arbitration clause, of the charter party are deemed to have been incorporated in the Bills of Lading.

23.9 Thus, on plain reading of the said clause 1 of the conditions of carriage it emerges that the parties to the Bills of Lading intended to resolve the disputes through arbitration instead of ordinary civil remedy or by way of special suits like admiralty suit.

23.10 At this stage it is also relevant to recall that the opponent i.e. original buyer is party to the parent contract dated 12.3.2008 and the said contract also contains arbitration clause (clause No. 11) which discloses and reflects the intention of the parties to the said contract dated 12.3.2008 (viz. the seller and the buyer i.e. present opponent) wherefrom it emerges that even at that stage the buyer i.e. present applicant had expressed and disclosed its intention to get the disputes (related to contract dated 12.3.2008) by arbitration process.

23.11 Of course, in view of the fact that the said clause 1 of conditions of carriage employ the phrase the charter party, dated as overleaf, which, in ordinary course, would indicate that the charter party is identified and specified either by name (of the owners/vessel) or by date of the charter party agreement and it would follow that the terms and conditions of the charter party agreement which is duly identified and specified are, by reference, incorporated. Whereas in present case the said identification is not made/is not complete and is missing.

23.12 However, the fact remains that the parties to the Bills of Lading have eloquently declared their intention which is made loud and clear by virtue of said clause 1 of Conditions of Carriage in the Bills of Lading wherein it is clearly mentioned that... all terms and conditions...including law and arbitration clause of the charter party are deemed to have been incorporated in the Bills of Lading which indicates that the intention of the parties to the Bills of Lading is to resolve the dispute and differences through arbitration process. Hence, the arbitration clause and the law applicable to arbitration proceedings which are mentioned in the charter party are deemed to have been incorporated in the Bills of Lading by reference.

23.13 When the parties to the agreement have in express terms (i.e. under clause 1 of the conditions of carriage or in the Bills of Lading) stipulated that all terms and conditions including the law and arbitration clause in the charter party is deemed to have been incorporated, then the parties to the Bills of Lading can be said to have expressly chosen to take recourse of arbitration proceedings.

The said expression in clause 1 of condition of carriage also indicates and clarifies the intention of the parties to the Bills of Lading.

23.14 Of course it is true that though in the said clause No. 1 of conditions of carriage there is reference of the charter party, the vessel (owners)/charter party is not identified either by name (of vessel/owners) or by date of the charter party agreement but so far as the intention of the parties to resolve the disputes, if any, by arbitration proceedings is concerned, the said intention is abundantly clear from the said clause 1 of conditions of carriage.

23.15 In view of the fact that the relevant details regarding charter party are not filled up, the question which would then survive is from which charter party agreement the arbitration clause is to be borrowed and to be incorporated i.e. arbitration clause contained in which charter party agreement is to be incorporated in the Bills of Lading in question.

23.16 The applicant wants that the Court should hold that the charter party agreement could not be any agreement other than the charter party dated 9.5.2008. So as to accept or reject the said submission it would be necessary, in light of the provision under clause 9.1 (which obliged the seller to nominate the performing vessel) read with clause 9.4 (which obliges the seller for all supervision of fees and levies at loading part) read with clause 9 of the parent contract dated 12.3.2008, to ascertain as to whether the seller had nominated any other vessel (i.e. whether the seller entered into and executed any charter party agreement other than the agreement dated 9.5.2008) for shipment of plaintiff's cargo and whether the cargo reached the discharge port by any other vessel under any other charter party agreement. The question which can be asked is whether there are any factors which would connect the contracts and/or clarify the intention of the parties.

23.17 In this context the relevant aspect which comes out from the maze of the facts is that the opponent i.e. the plaintiff has not produced and not brought to the notice of the Court any other charter party agreement or name and details of any other vessel by which it received the cargo/consignment for which it entered into the contract dated 12.3.2008.

23.18 It is relevant to note that according to the plaintiff/present opponent on receipt of the cargo/consignment the plaintiff noticed the moisture content of the cargo and according to the plaintiff the percentage of moisture in the cargo/consignment exceeded the agreed maximum limit i.e. the cargo received by it did not match the agreed specifications. The said allegation establishes that the plaintiff received the cargo.

23.19 Now, therefore, the question which would arise is whether the plaintiff received the cargo/consignment by any vessel other than the vessel named in the charter party dated 9.5.2008 and/or by any other charter party.

23.20 Had it been so the plaintiff would have immediately disclosed the said fact

and contended that it received the cargo by some other vessel/through some other charter party for which another agreement on some different date was entered into and executed by it (i.e. by the buyer i.e. present opponent or by the seller) and that therefore, it would not be unsafe to conclude that the plaintiff received the cargo by the charter party dated 9.5.2008.

23.21 In this view of the matter the objection that in the Bills of Lading charter party is not identified would, in view of the Court, pale into insignificance and it also becomes clear that neither the seller nor the buyer (i.e. the plaintiff) has, entered into any charter party agreement other than the charter party agreement dated 9.5.2008.

23.22 On examination of contracts the Court has noticed certain similarities which bring out and highlight intention of the parties.

At this stage some of the similarities between the said three contracts and the subject matter of said three contracts are required to be taken into account which, in view of this Court, would be of assistance in examining the applicant's submission that the charter party agreement referred to in the conditions of carriage in Bills of Lading could only be the charter party agreement dated 9.5.2008.

1. I wonder that should the Court, in this case, overlook and ignore so many similarities and could all the above mentioned similarities be mere co incidence.

2. Above discussed similarities in the charter party agreement and the parent contract coupled with the fact that the buyer i.e. present opponent is party to the Bills of Lading, leave little room for doubt that the charter party which has referred to/mentioned in the Bills of Lading could be the charter party dated 9.5.2008 and not any other charter party.

3. At this stage and in this context it is relevant to take into account the observations in the decision in case between Bangladesh Chemical Industries Corporation (supra) wherein it is observed thus:-

Drum place Ltd. were not the absolute owners of the vessel. They were only time charterers. They had time chartered the vessel from the Panamanian company. That was the Tex-Dilan Shipping Co. Ltd. which was incorporated in panama. The time charter was dated Dec. 8, 1979. There would be charter hire at so much a day under the charter.

When the goods were loaded on board, the master signed a Bills of Lading. He signed it on behalf of the ship-owners the Panamanian company. That is the document which has to be construed in this case. It says:

Shipped in good order and condition by the office cherifien des phosphates on the vessel SLS Everest... Now lying in the port of Casablanca... A cargo of natural phosphate of lime in bulk weighing 9,000 metric tonnes to be delivered in good order and condition at the port of Chittagong a order

It was endorsed in blank. The follows the important clause which has given rise to the argument here:

Freight and other conditions as per [-then there is a blank-] including the exoneration clause... The master acknowledges having received from the office cherifien des Phosphates...

On account of the freight a certain sum in advance. That was the Bills of Lading which was issued, evidencing not only the receipt of the goods on board: but also evidencing a contract between the ship-owners and the cargo-owners.

Freight and other conditions as per _____ including the exoneration clause.

This Court held that, on its true construction, the blanks could be filled in according to the terms of the charter in that case: following a passage from Scrutton on Charter parties at P.63

It is not infrequently happens that where a printed form of bill provides for the incorporation of the charterparty dated...the parties omit to fill in the blank. It is submitted that the effect is the same as if the reference were simply to the charterparty and that omission does not demonstrate an intent to negative the incorporation. It seems to me that that reasoning is applicable here. Even though our clause does not say the charter or the charter party, I should have thought it is quite obvious to anyone that the sentence should read: Freight and other conditions as per the charterparty including the exoneration clause. Unless the charter party was incorporated, all sorts of terms and arrangements would have to be implied or discovered in some other way in order to make the whole thing workable. But it works simply and completely by incorporating the terms of the charter that is, the terms of the voyage charter.

The charter here is the voyage charter. Therefore I would writ into the clause: Freight and other conditions as per the charterparty-that is, the charterparty of No. 29, 1979, between Drumplace Ltd. (the voyage charterers) and the Bangladeshi corporation. The printed form of voyage charterers So we then turn to the voyage charter party to see what the terms are. Clause 32 deals with arbitration. In its original printed form it said:

Arbitration Any disputes concerning the present charter to be settled by arbitration in Paris in the ordinary manner and in the case of disagreement, by the Tribunal di commerce de la Seine, Paris. It is agreed that in the case of disputes, the French text only will be valid, the English text of this charter being only for contractors" use and convenience.

That is how it stood originally in print. But it was altered in type. Paris was struck out. London was inserted. After the words in the ordinary manner was inserted receivers or Owners accordance arbitration act 1950 What is the effect of the typed version on the printed clause? It seems to me that here again the law is well settled. It is stated in Scrutton at p.21:

Questions of mistake in the expression of intention frequently arise in the case of charters effected by filing in printed forms, where parts of the printed form, left in by inadvertence, are in direct contradiction to clauses written, stamped on or typed in the form: in these cases the written, stamped on or typed clause should usually prevail, as clearly expressing the intention of the parties. It is unnecessary to find a meaning in the particular charter for every word of a common printed form, and it may be necessary, in order to give effect to the written words, actually to disregard printed words that are inconsistent. London Arbitrations

It seems to me as plain as can be that under the typed clause the arbitration was to be in London and arbitration is to be in accordance with the Arbitration Act, 1950: together with the usual consequence that it is to be governed by English law.

In the old days the law of the flag was the determining factor. Now there are so many flags of convenience all over the world that such has disappeared. Nowadays, the arbitration clause in the contract is of the very first importance. I have no doubt that the typed arbitration clause in this contract indicates that it is governed by English Law. This is a plain case for saying that the contract is governed by English law. Therefore the court does have jurisdiction to order that a writ may be served out of the jurisdiction.

4. When, in light of present opponents/original plaintiffs objection (to the effect that it is not party to the charter party and therefore it is not party to arbitration clause/agreement in the charter party consequently even if the said arbitration clause of charter party is read into, and even if by reference it is incorporated in the Bills of Lading, then also the said arbitration clause will not be binding to the plaintiff i.e. present opponent because it is not party to the charter party) are examined in light of the aforesaid aspects then it emerges that the charter party agreement referred to in the Bills of Lading could be only charter party dated 9.5.2008 more particularly in light of the above mentioned similarities and also because there is no charter party agreement entered into and executed between the parties (to the Bills of Lading and/or between the seller and the applicants and/or between the buyer i.e. present opponent and the applicants) other than the said charter party dated 9.5.2008.

5. Once the aforesaid conclusion is reached then the next question which arise is whether the suit, in light of the facts of the case and particularly in light of the arbitration clause would be maintainable and should it be entertained.

6. So as to substantiate its submission that in view of the arbitration agreement the proceeding of the suit may be stayed learned counsel for the applicant relied on the above mentioned decisions and submitted that the further proceedings of Admiralty Suit deserves to be stayed since the parties are obliged to prosecute the dispute by way of arbitration. Learned advocate for the applicant submitted that the Admiralty Suit which is essentially for injunction is not maintainable.

7. The said contention is opposed by learned advocate for the opponent who contended that even if it is held that there is arbitration agreement between the parties then also the admiralty suit being an action in rem for recovery of the claim and arrest of the vessel can be maintained. So as to support the said submission learned advocate Counsel for the opponent relied on the decision in case between J.S. Ocean Liner LIC vs. M.V. Golden Progress (supra).

8. Before proceeding further it would be appropriate to take into account the observations in the said decision wherein Bombay High Court has observed *inter alia*, that:-

1. The Single Judge of this Court in his detailed order of reference had doubted the correctness of the judgment of the Division Bench of this Court in the case of Islamic Republic of Iran Shipping Lines v. M.V. Mehrab and so also another Division Bench judgment in the case of Blue Diamond Freight Pvt. Ltd. v. M.V. Indurva Vally Appeal Lodging No. 503 of 2003 with regard to the question of maintainability of the suit for security of the award in the admiralty jurisdiction of this Court when there is an arbitration agreement between the parties though the arbitration proceedings have not commenced or when the arbitration is actually commenced. The Single Judge also doubted whether the court entertaining an application u/s 9 of the Arbitration and Conciliation Act, 1996 would have jurisdiction to treat the vessel as a "person" for the purpose of order of arrest and whether an application u/s 9 of the Arbitration and Conciliation Act, 1996 (for short "Act of 1996") can be filed when a suit for arrest of the vessel is not maintainable. In the opinion of the Single Judge, these issues frequently arise and need to be considered by the larger Bench and, consequently, he directed the office to place the papers before the Chief Justice for the constitution of the larger Bench. Accordingly, the Chief Justice constituted this Bench for consideration of the matter referred to by the Single Judge vide his order dated 20th July, 2006.

2. After hearing the counsel for the parties and upon perusal of the referral order dated 20th July, 2006, we indicated in our order dated 29th September, 2006 that the following questions arise for our consideration in the reference made by the Single Judge:

i) Whether an application u/s 9 of the Arbitration and Conciliation Act, 1996 is maintainable for the arrest of a vessel for obtaining the security of an Award that may be made in the arbitration proceeding?

ii) If the answer to the aforesaid question is in the negative, whether a suit only for arresting a ship by way of obtaining the security in the pending arbitration can be maintained or proceeded with?

3. Another facet to the aforesaid question No. (ii) that requires consideration is: in the admiralty jurisdiction where there is an arbitration agreement between the parties though arbitration proceedings have not yet commenced or when the arbitration is actually commenced, whether the suit for security simpliciter for

the award that may be made in the pending arbitration proceedings can be maintained and order of arrest made?

29. The conclusions drawn in *Bhatia International* by the Supreme Court and the law declared therein, in our view, does not lead to the conclusion that an application u/s 9 of the Act of 1996 is maintainable for the arrest of the vessel for obtaining security of an award that may enure for the benefit of the foreign award. The reason is not far to seek. Section 9 confers the jurisdiction in a District Court having jurisdiction to decide the question forming the subject matter of the arbitration if the same had been the subject matter of the suit. The definition of "court" does include the High Court in exercise of its ordinary original civil jurisdiction.

However, the principal civil court of original jurisdiction in district that is District Court is not empowered to exercise the admiralty jurisdiction. It cannot make any order for arrest of vessel. For any order u/s 9 of the Act of 1996, the court must have jurisdiction to decide the questions forming the subject matter of the arbitration if the same had been the subject matter of the suit.

30. The peculiarity of the admiralty action in rem is that the coastal authorities in respect of any maritime claim can assume jurisdiction by arrest of the ship, irrespective of the nationality of the ship or that of its owners, or place of business or dismissal or residence of its owners or the place where the cause of action arose wholly or in part. In admiralty, the vessel has a juridical personality. Admiralty law confers upon the claimant right in rem to proceed against the ship or cargo as distinguished from a right in personam to proceed against the owner. A ship may be arrested: (i) to acquire jurisdiction; (ii) to obtain security for satisfaction of the claim when decreed or (iii) in execution of the decree.

31. Section 9(ii)(b) of Act of 1996 cannot be construed so as to read into it in rem jurisdiction. This provision does not cover the arrest of the ship or the keeping of a ship under arrest in the exercise to the court jurisdiction in rem at all. What is provided by Section 9(ii)(b) is securing the amount in dispute in the arbitration by way of an interim measure which in our considered view does not include the arrest of vessel.

34. On thoughtful consideration and true construction of Section 9(ii)(b), we also take the view that Section 9(ii)(b) does not refer to the jurisdiction to issue a warrant of arrest. We find ourselves in respectful concurrence with the view of Lord Justice Robert Goff in *Tuyuti* which is also in line with the view of Lord Brandon in *Rena K* (1978) 1 Lloyd's Report 545 while dealing with Section 12(6) (f) of the English Arbitration Act, 1950; the said provision being quite similar to our provision 9(ii)(b).

36. In what we have discussed above, and upon taking into consideration all relevant aspects, we have no hesitation in holding that an application u/s 9 of the Arbitration and Conciliation Act, 1996 is not maintainable for the arrest of the vessel and that Section 9(ii)(b) "securing the amount in dispute in the

arbitration" cannot be held to be referable to the arrest of the ship. The view of the Division Bench in *M.V. Indurva Valley* to the effect: "The remedy of the appellants is to make an application for interim relief in terms of Section 9 of the Arbitration and Conciliation Act, 1996", is not correct view and is accordingly, overruled.

re: Question (ii)

77. We are of the view, absent explicit legislation providing that action in rem may be used to obtain and retain security even though the merits of the dispute are to be determined in the arbitration proceedings and that subject matter of the dispute falls within admiralty jurisdiction, some procedure which is not prohibited and that is also not inconsistent with the law be devised which helps in advancing the cause of justice in accord with Article VII of Arrest Convention, 1999.

78. We shall, accordingly, articulate our conclusions thus:

(i) An application u/s 9 of the Arbitration and Conciliation Act, 1996 is not maintainable for the arrest of the vessel for obtaining security of an Award that may be made in arbitration proceedings. The view to the contrary in *m.v. Indurva Valley*, to that extent is overruled.

(ii) An action in rem (in admiralty jurisdiction) for recovery of the claim and arrest of the vessel where the parties have agreed to submit the dispute to arbitration can be maintained and in such case if by way of an interim measure, the vessel is arrested or the security provided to obtain the release of the vessel, matter shall proceed in accord with Article VII of the International Convention on Arrest of Ships, 1999.

(iii) If the proceedings are brought within the time so ordered by the Court before the arbitral tribunal, any final decision resulting therefrom shall be recognised and given effect with respect to the arrested ship or to the security provided in order to obtain its release provided that the defendant has been given reasonable notice of such proceedings and a reasonable opportunity to present the case for defence and in accord with the provisions contained in Arbitration and Conciliation Act, 1996.

(iv) With regard to clauses (ii) and (iii), it is, however, clarified that retention of security shall remain a matter of discretion and it shall be for the court to pass appropriate order in that regard after taking into consideration all relevant circumstances.

Let the notices of motion No. 2780 of 2005 and 3287 of 2005 be posted before the Admiralty Judge for disposal in the light of our answer to the reference.

9. It emerges from the said decision that in admiralty jurisdiction an action in rem for recovery of the claim and for arrest of vessel can be maintained in those cases where the parties have agreed to submit the dispute to arbitration. In the

said decision Bombay High Court observed that in such cases if by way of interim measure the vessel is arrested then the matter shall proceed in accordance with international convention on arrest of ships and so far as the retention of security is concerned the said aspect shall remain a matter of discretion and it would be for the Court to pass appropriate order.

10. However, in view of the observations in the decision of Bombay High Court, it is also relevant to take into account the observations by Hon''ble Apex Court in subsequent decision in case between Bharat Aluminium Company and Others Vs. Kaiser Aluminium Technical Service, Inc. and Others etc. etc., and in the decision in case of Chloro Controls (I) P. Ltd. Vs. Severn Trent Water Purification Inc. and Others,

11. In Bharat Aluminium Company Hon''ble Apex Court has, inter alia, observed that:-

172. It appears to us that as a matter of law, an inter-partes suit simply for interim relief pending arbitrations, even if it be limited for the purpose of restraining dissipation of assets would not be maintainable. There would be number of hurdles which the plaintiff would have to cross, which may well prove to be insurmountable.

173. The Civil Courts in India, by virtue of Section 9 of the Code of Civil Procedure, 1908 (for short the CPC), have the jurisdiction to try all suits of a civil nature, excepting suits which are either expressly or impliedly barred. Fundamental to the maintainability of a civil suit is the existence of a cause of action in favour of the plaintiff. This is evident from the various provisions contained in the CPC. However, it would be appropriate to notice that Order 7 Rule 1 gives the list of the particulars which have to be mandatorily included in the plaint. Order 7 Rule 1(e) mandates the plaintiff to state the facts constituting the cause of action and when it arose. Order 7 Rule 11(a) provides that the plaint shall be rejected where it does not disclose a cause of action. A cause of action is the bundle of facts which are required to be proved for obtaining relief prayed for in the suit. The suit of the plaintiff has to be framed in accordance with Order 2. Order 2 Rule 1 provides that:

1. Frame of Suit.-Every suit shall as far as practicable be framed so as to afford ground for final decision upon the subjects in dispute and to prevent further litigation concerning them.

The aforesaid rule is required to be read along with Rule 2 which provides that

2. Suit to include the whole claim.-(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any court. The aforesaid provisions read together would lead to the firm conclusion that the existence of cause of action is a sine qua non for the maintainability of a civil suit.

174. The provisions with regard to the temporary injunction and interlocutory orders are contained in Order 39 and Order 40. In order to claim an injunction the existence of a pending suit is a pre-requisite. It is in this background that one has to examine as to whether an inter-parte suit for interim relief during the pendency of arbitration proceedings outside India would be maintainable.

175. In our opinion, pendency of the arbitration proceedings outside India would not provide a cause of action for a suit where the main prayer is for injunction. Mr. Sundaram has rightly pointed out that the entire suit would be based on the pendency of arbitration proceedings in a foreign country. Therefore, it would not be open to a party to file a suit touching on the merits of the arbitration. If such a suit was to be filed, it would in all probabilities be stayed in view of Sections 8 and 45 of the Arbitration Act, 1996. It must also be noticed that such a suit, if at all, can only be framed as a suit to inter alia restrain the defendant from parting with property. Now, if the right to such property could possibly arise, only if the future arbitration award could possibly be in favour of the plaintiff, no suit for a declaration could obviously be filed, based purely only on such a contingency. All that could then be filed would, therefore, be a bare suit for injunction restraining the other party from parting with property. The interlocutory relief would also be identical. In our view, such a suit would not be maintainable, because an interlocutory injunction can only be granted during the pendency of a civil suit claiming a relief which is likely to result in a final decision upon the subject in dispute. The suit would be maintainable only on the existence of a cause of action, which would entitle the plaintiff for the substantive relief claimed in the suit. The interim injunction itself must be a part of the substantive relief to which the plaintiffs cause of action entitled him. In our opinion, most of the aforesaid ingredients are missing in a suit claiming injunction restraining a party from dealing with the assets during the pendency of arbitration proceedings outside India. Since the dispute is to be decided by the Arbitrator, no substantive relief concerning the merits of the arbitration could be claimed in the suit. The only relief that could be asked for would be to safeguard the property which the plaintiff may or may not be entitled to proceed against. In fact the plaintiffs only claim would depend on the outcome of the arbitration proceeding in a foreign country over which the courts in India would have no jurisdiction. The cause of action would clearly be contingent/speculative. There would be no existing cause of action. The plaint itself would be liable to be rejected under Order VII Rule 11(a). In any event, as noticed above, no interim relief could be granted unless it is in aid of and ancillary to the main relief that may be available to a party on final determination of rights in a suit. This view will find support from a number of judgments of this Court.

12. In the aforesaid decision Hon''ble Apex Court has observed that an inter-parte suit simply for interim relief pending arbitrations, even if it is taken out and for the purpose of arresting loss or for arresting dissolution of asset would not be maintainable. In the said decision Hon''ble Apex Court has also held that pending of arbitration proceedings outside India would not provide cause of action for a

suit where main prayer is for injunction and that it is not open to the parties to arbitration agreement/proceedings to file a suit touching merits of arbitration.

13. However, so far as present arbitration suit is concerned any arbitration is not pending and it does not appear from record that any party to arbitration clause has issued Notice and demanded arbitration process/invoked the clause.

14. Secondly, the relief prayed for in the suit is for a decree in terms of money for alleged loss and damage to the tune of about Rs. 15,43,78,835/- with interest @ 12%.

15. Moreover admiralty jurisdiction is invoked on the ground of maritime claim/lien and on the premise that there is no arbitration agreement between the parties the cause of action is alleged damage to the cargo and liability to compensate the damage. The said facts distinguish present case from the cited decision.

16. Now so far as the decision in case of Chloro Controls India Pvt. Ltd. (supra) is concerned, in the said decision Hon''ble Apex Court has observed that:-

70. Normally, arbitration takes place between the persons who have, from the outset, been parties to both the arbitration agreement as well as the substantive contract underlining that agreement. But, it does occasionally happen that the claim is made against or by someone who is not originally named as a party. These may create some difficult situations, but certainly, they are not absolute obstructions to law/the arbitration agreement. Arbitration, thus, could be possible between a signatory to an arbitration agreement and a third party...

17. In the same para 70 of the decision, Hon''ble Apex Court has, further observed that:-

70. ...Of course, heavy onus lies on that party to show that, in fact and in law, it is claiming through or under the signatory party as contemplated u/s 45 of the 1996 Act...

18. From other observations by Hon''ble Apex Court in the said decision it also emerges that the observations are made with reference to group companies and composite transactions and multiple agreements and group companies doctrine. This aspect emerges from various observations e.g. in paragraph Nos. 71 to 78. In paragraph 76 it is observed that:-

76. The Court will have to examine such pleas with greater caution and by definite reference to the language of the contract and intention of the parties. In the case of composite transactions and multiple agreements, it may again be possible to invoke such principle in accepting the pleas of non-signatory parties for reference to arbitration. Where the agreements are consequential and in the nature of a follow-up to the principal or mother agreement, the latter containing the arbitration agreement and such agreements being so intrinsically intermingled or inter-dependent that it is their composite performance which shall

discharge the parties of their respective mutual obligations and performances, this would be a sufficient indicator of intent of the parties to refer signatory as well as non-signatory parties to arbitration. The principle of composite performance would have to be gathered from the conjoint reading of the principal and supplementary agreements on the one hand and the explicit intention of the parties and the attendant circumstances on the other.

19. In the said decision Apex Court has further observed that:-

73. A non-signatory or third party could be subjected to arbitration without their prior consent, but this would only be in exceptional cases. The Court will examine these exceptions from the touchstone of direct relationship to the party signatory to the arbitration agreement, direct commonality of the subject matter and the agreement between the parties being a composite transaction. The transaction should be of a composite nature where performance of mother agreement may not be feasible without aid, execution and performance of the supplementary or ancillary agreements, for achieving the common object and collectively having bearing on the dispute. Besides all this, the Court would have to examine whether a composite reference of such parties would serve the ends of justice...

20. In the said decision Hon"ble Apex Court has also observed that:-

77. ...Thus, the requirement that an arbitration agreement be in writing is an expression incapable of strict construction and requires to be construed liberally, as the words of this Article provide. Even in a given circumstance, it may be possible and permissible to construe the arbitration agreement with the aid and principle of incorporation by reference. Though the New York Convention is silent on this matter, in common practice, the main contractual document may refer to standard terms and conditions or other standard forms and documents which may contain an arbitration clause and, therefore, these terms would become part of the contract between the parties by reference. The solution to such issue should be case-specific...

21. In light of the facts of this case, observations in paragraph No. 78 to 82 and para 156 & 157 would be relevant. The observations read thus:-

78. In India, the law has been construed more liberally, towards accepting incorporation by reference. In the case of *The Owners and Parties Interested in the Vessel M.V. Baltic Confidence and Another Vs. State of Trading Corporation of India Ltd. and Another*, the Court was considering the question as to whether the arbitration clause in a Charter Party Agreement was incorporated by reference in the Bills of Lading and what the intention of the parties to the Bills of Lading was. The primary document was the Bill of Lading, which, if read in the manner provided in the incorporation clause thereof, would include the arbitration clause of the Charter Party Agreement. The Court observed that while ascertaining the intention of the parties, attempt should be made to give meaning and effect to the incorporation clause and not to invalidate or frustrate it by giving it a literal, pedantic and technical reading.

79. This Court, after considering the judgments of the courts in various other countries, held as under:

19. From the conspectus of the views expressed by courts in England and also in India, it is clear that in considering the question, whether the arbitration clause in a Charter Party Agreement was incorporated by reference in the Bills of Lading, the principal question is, what was the intention of the parties to the Bill of Lading? For this purpose the primary document is the Bill of Lading into which the arbitration clause in the Charter Party Agreement is to be read in the manner provided in the incorporation clause of the Bill of Lading. While ascertaining the intention of the parties, attempt should be made to give meaning to the incorporation clause and to give effect to the same and not to invalidate or frustrate it giving a literal, pedantic and technical reading of the clause. If on a construction of the arbitration clause of the Charter Party Agreement as incorporated in the Bill of Lading it does not lead to inconsistency or insensibility or absurdity then effect should be given to the intention of the parties and the arbitration clause as agreed should be made binding on parties to the Bill of Lading. If the parties to the Bill of Lading being aware of the arbitration clause in the Charter Party Agreement have specifically incorporated the same in the conditions of the Bills of Lading then the intention of the parties to abide by the arbitration clause is clear. Whether a particular dispute arising between the parties comes within the purview of the arbitration clause as incorporated in the Bills of Lading is a matter to be decided by the arbitrator or the court. But that does not mean that despite incorporation of the arbitration clause in the Bill of Lading by specific reference the parties had not intended that the disputes arising on the Bills of Lading should be resolved by an arbitrator.

80. Reference can also be made to the judgment of this Court in the case of Olympus Superstructures Pvt. Ltd. Vs. Meena Vijay Khetan and Others, where the parties had entered into a purchase agreement for the purchase of flats. The main agreement contained the arbitration clause (clause 39). The parties also entered into three different Interior Design Agreements, which also contained arbitration clauses. The main agreement was terminated due to disputes about payment and non-grant of possession. These disputes were referred to arbitration. A sole arbitrator was appointed to make awards in this respect. Inter alia, the question was raised as to whether the disputes under the Interior Design Agreements were subject to their independent arbitration clauses or whether one and the same reference was permissible under the main agreement. It was argued that the reference under clause 39 of the main agreement could not permit the arbitrator to deal with the disputes relating to Interior Design Agreements and the award was void. The Court, however, took the view that parties had entered into multiple agreements for a common object and the expression other matters connected with appearing in clause 39 would permit such a reference.

81. The Court held as under:

30. If there is a situation where there are disputes and differences in connection with the main agreement and also disputes in regard to other matters connected with the subject-matter of the main agreement then in such a situation, in our view, we are governed by the general arbitration clause 39 of the main agreement under which disputes under the main agreement and disputes connected therewith can be referred to the same arbitral tribunal. This clause 39 no doubt does not refer to any named arbitrators. So far as clause 5 of the Interior Design Agreement is concerned, it refers to disputes and differences arising from that agreement which can be referred to named arbitrators and the said clause 5, in our opinion, comes into play only in a situation where there are no disputes and differences in relation to the main agreement and the disputes and differences are solely confined to the Interior Design Agreement. That, in our view, is the true intention of the parties and that is the only way by which the general arbitration provision in clause 39 of the main agreement and the arbitration provision for a named arbitrator contained in clause 5 of the Interior Design Agreement can be harmonised or reconciled. Therefore, in a case like the present where the disputes and differences cover the main agreement as well as the Interior Design Agreement, (that there are disputes arising under the main agreement and the Interior Design Agreement is not in dispute) it is the general arbitration clause 39 in the main agreement that governs because the questions arise also in regard to disputes relating to the overlapping items in the schedule to the main agreement and the Interior Design Agreement, as detailed earlier. There cannot be conflicting awards in regard to items which overlap in the two agreements. Such a situation was never contemplated by the parties. The intention of the parties when they incorporated clause 39 in the main agreement and clause 5 in the Interior Design Agreement was that the former clause was to apply to situations when there were disputes arising under both agreements and the latter was to apply to a situation where there were no disputes or differences arising under the main contract but the disputes and differences were confined only to the Interior Design Agreement. A case containing two agreements with arbitration clauses arose before this Court in *Agarwal Engg. Co. v. Technoimpex Hungarian Machine Industries Foreign Trade Co.* There were arbitration clauses in two contracts, one for sale of two machines to the appellant and the other appointing the appellant as sales representative. On the facts of the case, it was held that both the clauses operated separately and this conclusion was based on the specific clause in the sale contract that it was the sole repository of the sale transaction of the two machines. Krishna Iyer, J. held that if that were so, then there was no jurisdiction for travelling beyond the sale contract. The language of the other agreement appointing the appellant as sales representative was prospective and related to a sales agency and later purchases, other than the purchases of these two machines. There was therefore no overlapping. The case before us and the above case exemplify contrary situations. In one case the disputes are connected and in the other they are distinct and not connected. Thus, in the present case, clause 39 of the main agreement applies. Points 1 and 2 are decided accordingly in favour of the respondents.

82. The Court also took the view that a dispute relating to specific performance of a contract in relation to immoveable property could be referred to arbitration and Section 34(2)(b)(i) of the 1996 Act was not attracted. This finding of the Court clearly supports the view that where the law does not prohibit the exercise of a particular power, either the Arbitral Tribunal or the Court could exercise such power. The Court, while taking this view, has obviously rejected the contention that a contract for specific performance was not capable of settlement by arbitration under the Indian law in view of the statutory provisions. Such contention having been rejected, supports the view that we have taken.

156. The provisions of Section 45 of the 1996 Act are to prevail over the provisions of the CPC and when the Court is satisfied that an agreement is enforceable, operative and is not null and void, it is obligatory upon the court to make a reference to arbitration and pass appropriate orders in relation to the legal proceedings before the court, in exercise of its inherent powers.

157. In the present case, the court can safely gather definite intention on behalf of the parties to have their disputes collectively resolved by the process of arbitration. Even if different forums are provided, recourse to one of them which is capable of resolving all their issues should be preferred over a refusal of reference to arbitration. There appears to be no uncertainty in the minds of the parties in that regard, rather the intention of the parties is fortified and clearly referable to the mother agreement.

22. From the foregoing discussion as regards the relevant provisions in 3 contracts and from the observations by Hon"ble Apex Court it emerges that intention of parties is very significant feature and depending on, as well as subject to, the clear intention of parties, in exceptional cases a non-signatory third party also could be subjected to arbitration without prior consent.

23. In that view of the matter and having regard to clause-1 under conditions of carriage in Bills of Lading read with the provisions in the charter party agreement dated 9.5.2008, the intention of the parties to take recourse of arbitration in the event of dispute has become clear and for that purpose the parties clearly appear to have agreed to incorporate arbitration clause of charter party and in light of the diverse similarities mentioned hereinabove earlier e.g. the shipper whose name is mentioned in the Bills of Lading is the seller of the cargo/consignment for which the plaintiff entered into contract dated 12.3.2008 and the description of cargo/consignment in the Bills of Lading is also the same cargo/consignment for which the contract dated 12.3.2008 is executed between the plaintiff and the shipper named in the Bills of Lading is the seller of the said cargo as per the contract dated 12.3.2008 and the port of discharge mentioned in the Bills of Lading is also the same port which is mentioned in clause 9 of the contract dated 12.3.2008 between the shipper and the plaintiff (i.e. present opponent/buyer) and the details mentioned in clause 8 of the contract dated 12.3.2008 contemplate four Bills of Lading for 5000 mt. each and one for balance quantity and the five Bills of Lading which are issued/executed are on same lines and both

i.e. the Bills of Lading as well as the charter party are executed/issued on 21.5.2008 and the charterer as well as the shipper as per the charter party and Bills of Lading respectively is the same party i.e. M/s. Mechel Trading Limited. Moreover, the load port as per clause 53 of the charter party and the Bills of Lading is also the same port i.e. port poyset, Russia and since the opponent has not entered into any charter party agreement other than the charter party dated 9.5.2008 for the cargo in question i.e. the cargo in relation to which dispute is raised and claim is made in the suit, the reference has to be of the charter party agreement dated 9.5.2008.

24. In light of the said decision and having regard to the aforesaid conclusions which this Court has, reached with regard to the arbitration agreement between the parties, this Court is of the view that so far as the request by the applicant to stay the proceedings of Admiralty Suit is concerned, the said request deserves to be accepted and granted. On this count the Court has noticed, on careful examination of the material on record, particularly on conjoint reading of the above mentioned three contracts, that the parties to the Bills of Lading intended to resolve the dispute/s, if any, by way of arbitration process. The Court has also noticed that the relevant place/column in the Bills of Lading are left blank and details are not filled-in, however, in view of the similarities (which are mentioned in detail hereinabove earlier) coupled with the fact that the opponent has not even claimed that any other charter party agreement was executed by it for shipment of the cargo in question and the fact that the parties have already entered into arbitration proceedings in respect of other issues/disputes, it is safe to conclude that the charter party referred to in clause 1 of conditions of carriage is the charter party dated 9.5.2008.

25. The Court, in view of such facts, has also found that in view of the arbitration clause, the dispute between the parties is required to be resolved through the arbitration.

26. Therefore, the Court is of the view that proceedings of the admiralty suit deserves to be stayed.

27. In that view of the matter, the proceedings of the Admiralty Suit No. 9 of 2009 are stayed. The said suit filed by present opponent is stayed and relief prayed for in paragraph No. 10(a) is granted.

28. So far as the request to release and return the security/letter of undertaking dated 12.8.2009 furnished by the London Steam-ship Owners' Mutual Insurance Association Ltd. in favour of the opponent and on behalf of the applicant is concerned, the said request, at this stage, is not granted however, it is clarified that it would be subject to the orders that may be passed by learned arbitral tribunal/learned arbitrator in arbitration proceedings that are commenced/may be commenced. Until then the said letter of undertaking/security shall be continued and shall be kept alive by the applicant.

With the aforesaid observations and clarifications, the captioned OJ. Civil

Application No. 29 of 2013 is party allowed and accordingly disposed of.

At this stage learned advocate for the respondent requested that the operation of this order may be stayed.

Having regard to the request made by learned advocate for the respondent who wants to challenge the order in Appeal, the operation of the order is stayed until 17.2.2014.