

(2014) 03 BOM CK 0027

In the Bombay High Court

Case No : Notice of Motion No. 2853 of 2010 and Notice of Motion No. 3649 of 2010 in Admiralty Suit No. 19 of 2010

Navbharat International Ltd.

APPELLANT

Vs

Cargo Onboard m.v. Amitees (at Kandla)

RESPONDENT

Date of Decision : 19-03-2014

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 9
Civil Procedure Code, 1908 (CPC) — Section 129
Sales of Goods Act, 1930 — Section 25
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 22

Citation : (2014) 5 BomCR 119

Hon'ble Judges : K.R. Shriram, J

Bench : Single Bench

Advocate : Ashwin Shanker, Advocate for the Appellant; David Gomes and A.M. Vernekar, Advocate for the Respondent

Judgement

K.R. Shriram, J.—Notice of Motion No. 2853 of 2010 is taken out on behalf of defendant No. 2 and Notice of Motion No. 3649 of 2010 is taken out on behalf of defendant No. 3. Both the parties have taken out their respective Notices of Motion as parties to whom prejudice was caused by the ex parte order dated 12th January, 2010 obtained by the plaintiff for arrest of defendant No. 1 viz. 13,000/- MT of rice on board m.v. Amitees, when she was at Kandla. I have already held by a judgment pronounced on 20-2-2014 that the two notices of motion do not fall under the expression "Suit" occurring in sub-section (1) of section 22 of Sick Industrial Companies Act, 1985 (SICA).

2. To decide on the merits of the two notices of motion some facts have to be recalled. On 12th January, 2010, the plaintiff filed the above Admiralty Suit No. 19 of 2010 against the defendant No. 1 and also against the 2nd defendant. On the same date, based on the averments made by the plaintiff in the plaint, the plaintiff obtained from this Court an order of arrest against defendant No. 1. Consequently the cargo on board m.v. Amitees, i.e., defendant No. 1, was

arrested by the Sheriff of Mumbai. At the time of applying for the arrest of defendant No. 1 cargo, the plaintiff gave an undertaking in writing to the Hon''ble Court to pay such sum by way of damages as this Hon''ble Court may award as compensation in the event of a party affected sustaining prejudice by such exparte order of arrest. This undertaking by the plaintiff was given as required under Rule 941 of the Bombay High Court (O.S.) Rules, Part III - admiralty jurisdiction. The Rule expressly provides that a party applying for arrest of the property in a suit in rem shall give an undertaking in writing or through his Advocate to pay such sum by way of damages as the Court may award as compensation in the event of a party affected sustaining prejudice by such order. Rule 941 is as under:

"941. Application to arrest property in a Suit in rem.-

If the suit is in rem an application for the arrest of the property proceeded against shall be made to the Judge in Chambers and shall be supported by affidavit. The affidavit shall state the nature of the claim and that it has not been satisfied. It shall also state the nature of the property to be arrested and if the property is a ship, the name and nationality of the ship. There shall be annexed to the affidavit a certificate of the Prothonotary and Senior Master certifying that search has been made in the Caveat Warrant Book and that no caveat has been filed against the issue of warrant of the arrest of the said property.

A party applying under this rule shall give an undertaking in writing, or through his Advocate to pay such sum by way of damages as the Court may award as compensation in the event of a party affected sustaining prejudice by such order."

(emphasis supplied)

3. The plaintiff has given such an undertaking. Clause (3) of the undertaking reads as under:-

"3. The plaintiffs hereby give an undertaking to this Hon''ble Court to pay such sums by way of damages as this Hon''ble Court may award as compensation in the event of the defendants and/or any affected party sustaining prejudice pursuant to the order passed by this Hon''ble Court directing the arrest of the defendant cargo."

4. The defendant No. 3 took out a Notice of Motion No. 271 of 2010 praying that this Court should forthwith vacate the order of arrest of defendant No. 1 passed on 12th January, 2010 and discharge the warrant of arrest issued in furtherance thereto, by which the defendant No. 1 was arrested. The defendant No. 3 also prayed to allow them to reclaim its cargo on board the vessel m.v. Amitees at the earliest. It was the case of defendant No. 3 that the plaintiff obtained the order of arrest dated 12th January 2010 by suppressing relevant and material facts from the Court. It was the case of defendant No. 3 that the Plaint proceeds on the basis that defendant No. 1 belongs to defendant No. 2 whereas out of the quantity of 15,000 metric tons of the cargo of Basmati Rice that" was loaded in

the vessel m.v. Amitees at Kandla, 13,000 metric tons valued at USD 14.3 million belonged to defendant No. 3.

5. The learned Single Judge passed an ad interim order and while posting the notice of motion for hearing and final disposal directed the defendant No. 3 to furnish security to the extent of US\$ 7.52 million as a pre-condition for vacating the order of arrest of defendant No. 1. Against this order which was passed on 4th February 2010, the defendant No. 3 filed an appeal. The appeal was disposed of by a judgment pronounced on 23rd March 2010 vacating the said order of arrest by holding that the defendant No. 3 was entitled to the release of defendant No. 1 unconditionally and also that the plaintiffs claim in the suit was not within the purview of the admiralty jurisdiction of this Court and therefore, the plaintiff could not have sought the arrest of defendant No. 1 in the admiralty jurisdiction of this Court. The Division Bench also held that the plaintiffs suit did not involve a maritime claim and they could not have instituted the suit in the admiralty jurisdiction of this Court. The Court did not go into the other issues of title, passing of property etc. m. v. Amitees ultimately sailed from the Port of Kandla on 24th March, 2010 with the entire cargo. Due to this order of arrest, the vessel m.v. Amitees was detained between 12th January, 2010 to 23rd March, 2010, i.e., for 71 days.

6. For the purposes of this judgment, it is necessary to mention that the vessel m.v. Amitees was, in another Suit, under arrest from 6th January, 2010 to 5th February, 2010. That claim was totally unrelated to the present Suit. I am told that action was filed because the vessel on an earlier occasion had given delivery of cargo without original bill of lading to a receiver. Pertinently, the receiver in that case also was Mohsen Line General Trading LLC which is defendant No. 2 herein.

7. As mentioned earlier the Bombay High Court (Original Side) Rules requires that the plaintiff while obtaining an order of arrest shall give an undertaking in writing to pay such sum by way of damages as the Court may award as compensation in the event of a party affected sustaining prejudice by such order. The order is for the arrest of the property proceeded against. The undertaking given by the plaintiff is also very clear whereby the plaintiff had given an undertaking to the Court to pay such sums by way of damages as this Hon"ble Court may award as compensation in the event of the defendants and or any affected party sustaining prejudice pursuant to the order passed by the Court directing the arrest of the 1st defendant cargo.

8. The effect of rules made by Chartered High Courts is concluded by section 129 of the Code of Civil Procedure which reads as under:-

"129. Power of Chartered High Courts to make rules as to their original civil procedure.- Notwithstanding anything in this Code, any High Court not being the Court of a Judicial Commissioner may make such rules not inconsistent with the letters patent or order or other law establishing it, to regulate its own procedure

in the exercise of its Original Civil Jurisdiction as it shall think fit, and nothing herein contained shall affect the validity of any such Rules in force at the commencement of the Code."

In (M/s. Print Pack Machinery Limited v. Jaykay Paper Congeters), A.I.R. 1979 Delhi 219, the full bench observed -

".....it has been held that rules made by a High Court or the Supreme Court to regulate their procedure and practice are a "special law" as they deal with a particular subject."

9. The undertaking given by the plaintiff therefore, is in accordance with the rules which are a "special law". Rule 941 does not provide for any pre-condition. The rule is very clear that if any party sustaining prejudice pursuant to the order passed by this Court, the party obtaining the order shall pay such sum by way of damages as the Court may award as compensation. In effect it is a blank cheque which the plaintiff gives to the Court and what is required is only to write the date, the name of the payee and the amount. It is an unconditional, unqualified, irrevocable undertaking. The judgments relied upon by the plaintiff to submit that there was no malice and the Court can award damages only if there was malice or there was malafides in obtaining the order etc. are totally incorrect. None of the judgments deal with Rule 941 of the Bombay High Court (Original Side) Rules. None of the judgments also deal with a situation where an undertaking like the one given in this Suit has been given. Therefore, if the order has been obtained either without jurisdiction or if the order is held to be wrongful and the order of arrest is vacated, the liability under the undertaking is triggered. The next step, once liability is established, is to determine the quantum of damages to be awarded as compensation. Rule 941 provides "... such sum by way of damages as the Court may award as compensation...". Therefore, all these factors of no malice or no malafides or no gross negligence etc. come into play at this stage, i.e., the stage where the Court determines the quantum of damages to be awarded as compensation by exercising its judicial discretion.

10. The plaintiff first relied upon the judgment of (Evangelismos), 1858 P.C. 352. In the case of Evangelismos, a collision took place at sea. The vessel causing damage got away. From the appearance of a vessel in Port, which was Evangelismos, the owners of the damaged vessel, i.e., HIND caused her, i.e., Evangelismos to be arrested to answer an action for damages. It was the case of the HIND that Evangelismos was responsible for the damage. The vessel seized, Evangelismos, was a foreign vessel and in consequence of the owner having no funds in England, she was detained for some months before she was released on bail. The plaintiff failed in identifying the vessel seized as being the one causing the damage. The Admiralty Court dismissed the action with costs, refusing to award damages. The Appeal Court confirmed the decree on there being no evidence of malafides or crassa negligentia, which might imply malice, on the part of the plaintiff in arresting the ship, such arrestment being necessary and

the foundation of the action in the Admiralty Court, the proceedings being in rem. The Court did not award damages because the Court felt that the plaintiff had made a genuine mistake in assuming that Evangelismos was the vessel that caused the collision. The Court laid down the question to be answered before fixing the quantum of damages as to whether "is there or is there not, reason to say, that the action was so unwarrantably brought, or brought with so little colour, or so little foundation, that it rather implies malice on the part of plaintiff, or that gross negligence which is equivalent to it?"

In my view these are factors that have to be considered only while determining the quantum. In Evangelismos, no undertaking like in the present case was given. At the same time it has to be noted that even Evangelismos suggests that where the action brought is unwarrantable or is with so little colour or so little foundation, it implies malice or gross negligence on the part of the plaintiff.

11. The Counsel for the plaintiff also relied upon para 49 of M.V. Elisabeth and Others Vs. Harwan Investment and Trading Pvt. Ltd., Hanoekar House, Swatontapeth, Vasco-De-Gama, Goa, to suggest that damages can be awarded only in the event of it being found that, the arrest was wrongful and was sought and obtained maliciously or in bad faith. Para 49 reads as under:-

"A ship may be arrested (i) to acquire jurisdiction; or (ii) to obtain security for satisfaction of the claim when decreed; or (iii) in execution of a decree. In the first two cases, the Court has the discretion to insist upon security being furnished by the plaintiff to compensate the defendant in the event of it being found that the arrest was wrongful and was sought and obtained maliciously or in bad faith. The claimant is liable in damages for wrongful arrest. This practice of insisting upon security being furnished by the party seeking arrest of the ship is followed in the United States, Japan and other countries. The reason for the rule is that a wrongful arrest can cause irreparable loss and damages to the ship-owner; and he should in that event be compensated by the arresting party."

(emphasis supplied)

12. After reading para 49 of Elisabeth, the plaintiff's Counsel also relied upon (a) Sanjay Dutt Vs. State through C.B.I., Bombay, AND (b) The Oriental Insurance Company Limited Vs. Meena Variyal and Others, to forward the preposition that even the obiter dicta of Supreme Court is said to be binding upon other courts in the country and therefore, para 49 of the Elisabeth is a obiter dicta and is binding.

13. I do not agree with Mr. Shanker that para 49 of Elisabeth has any precedent or binding value. It is not correct to say that because in para 49 there is an observation as per emphasis supplied by me, defendant can be compensated only in the event of the ex parte order being sought and obtained maliciously or in bad faith. A judgment cannot be read in bits and pieces. Elisabeth has no connection with the facts in this case. Not even remotely connected. Even the observation in para 49 had no bearing on the actual issue in that case. In the

matter of State of Orissa and Others Vs. Md. Illiyas, the Apex Court held as under:-

"Reliance on the decision without looking into the factual background of the case before it is clearly impermissible. A decision is a precedent on its own facts. Each case presents its own features. It is not everything said by a Judge while giving judgment that constitutes a precedent. The only thing in a Judge's decision binding a party is the principle upon which the case is decided and for this reason it is important to analyse a decision and isolate from it the ratio decidendi. According to the well-settled theory of precedents, every decision contains three basic postulates (i) findings of material facts, direct and inferential. An inferential finding of facts is the inference which the Judge draws from the direct, or perceptible facts; (ii) statements of the principles of law applicable to the legal problems disclosed by the facts; and (iii) judgment based on the combined effect of the above. A decision is an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically flows from the various observations made in the judgment. The enunciation of the reason or principle on which a question before a Court has been decided is alone binding as a precedent. See : The State of Orissa Vs. Sudhansu Sekhar Misra and Others, and Union of India (UOI) and Others Vs. Dhanwanti Devi and Others, . A case is a precedent and binding for what it explicitly decides and no more,"

14. Counsel for the plaintiff also relied upon the judgment in the matter of Bomi Munchershaw Mistry Vs. Kesharwani Co-operation Housing Society Ltd. and Others, to submit that if the Court has made a mistake in giving the order of arrest and in its wisdom did not allow the application of the defendant for vacating the order of arrest though later the Appeal Court might have reversed that decision, the plaintiff cannot be blamed for any delay caused there by. He submitted that nobody knows better than Judges that mistake are often made by courts in deciding whether the grounds taken are, in fact, insufficient or not. If the mere fact that an Appellate Court has considered the grounds insufficient and has therefore, allowed the appeal and rejected the prayer for continuation of arrest, was to justify an order for compensation under the undertaking given to the Court, the position might very well arise when persons bona fide asking for compensation on grounds believed by them to be sufficient, might ultimately find that such grounds have been found to be insufficient and then will be mulcted for damages. He submitted that the plaintiff genuinely believed they had right in rem in admiralty jurisdiction and therefore, should not be directed to pay damages as compensation. For this theory he also relied upon Subodh Kumar Banerjee Vs. Soshi Kumar Banerjee and Others, . He also relied upon (Smith v. Day), 1882 C.A. 421.

15. None of the judgments relied upon by the plaintiff have dealt with Rule 941 or an undertaking, the wordings of which are as mentioned above. In my opinion, these judgments are only relevant to the extent that it tells you the

factors that are to be kept in mind while deciding the amount of compensation to be awarded. In other words, these judgments come into play only when deciding the quantum and not in deciding the liability.

16. I find support to my view that the undertaking gets triggered the moment the order of arrest is held to be wrongful and the order of arrest is vacated in three unreported judgments of this Court. The first one is of the Division Bench in Appeal No. 1151 of 1999 in ADMS/78/1999, in the matter of (Gem Star Trading v. A.R.A. 25 DE-mayo & anr.), in which the Appellant (original plaintiff) had filed an appeal against the order of the Single Judge declining arrest of the 1st respondent-vessel. The Division Bench had passed an order for arrest of the vessel upon the undertaking being given under Rule 941 and the order of arrest was continued from time to time until the appeal was disposed of. The appellant had claimed maritime lien against the vessel. While dismissing the appeal and vacating the order of arrest the Court directed the appellant to pay a sum of Rs. 25 lakhs as damages to the owners of the 1st respondent-vessel computed at Rs. 1 lakh for 25 days for which the order of arrest of the vessel was continued as against the claim of Rs. 2 lakhs per day made by the owners. The Court had awarded this sum as compensation summarily and without even going into the details. There was no malice or crassa negligentia alleged by any party. The Court purely went on the basis of the undertaking given.

17. Similarly, in another unreported judgment of a Single Judge of this Court in Notice of Motion No. 1302 of 2001 in Suit No. 14 of 2001 in the matter of (Communications and Commerce International Private Limited v. M.V. Saaba and another), the Court had awarded damages likewise. The relief that the defendants had claimed in the Notice of Motion was that the Suit should be dismissed in limine and the warrant of arrest for arrest of the 1st defendant-vessel should be vacated. The defendants had also prayed for direction to the plaintiff to pay a sum of Rs. 5 lakhs towards the loss or damage suffered because of the wrongful arrest of the defendant-vessel and for a further sum of Rs. 1 lakh per day for every subsequent day for continuance of order of arrest dated 19-5-2001.

18. The Court after observing that the lacuna that has been pointed out by the defendant in the case put up by the plaintiff is of a serious nature, the Court found that on record, there was document which shows that the plaintiff was paying Rs. 40,000/- per day to the Port Trust Authorities and directed the plaintiff to pay damages at the rate of Rs. 40,000/- per day from the date of arrest. But as regards the other claims, the Court did not award any damages because the defendants had not produced any documents in relation to the claim for damages suffered by the defendants and granted liberty to the defendants to take out appropriate proceedings for recovery of damages on other heads with appropriate documents and disposed of the Notice of Motion. Both these judgments do not support the theory that even to establish liability there has to be malice or crassa negligentia. In both these matters and the third unreported

matter Notice of Motion No. 1369 of 2012 in Admiralty Suit No. 27 of 2009, (Aquaroots Shipping Co. Ltd. v. M.V. Guang Hua Men & anr.), the Court has proceeded summarily. The undertaking given is binding and liability gets triggered the moment it is held the arrest was wrongful.

19. In every case the losing plaintiff will submit what Mr. Shanker has submitted that they genuinely believed that they had a good case. The Calcutta High Court in the Subodh Kumar Banerjee matter (supra) has also held that "there can be no doubt that in many cases it might well be held in spite of the fact that the trial Court had come to conclusion favourable to the applicants that the grounds were, in fact, insufficient-so very insufficient- that the applicant for injunction himself knew and believed them to be insufficient." In the present case I would say the plaintiff could not have believed they had a good case. Plaintiff took a chance or gambled. The plaintiff knew or ought to have known the reasons for obtaining an order of arrest were insufficient even assuming the plaintiff could have obtained an order of arrest under the admiralty jurisdiction of this Court. That is because the plaintiff averred in para 7 of the plaint that "The plaintiffs understand that the defendant No. 2 are owners of defendant No. 1." Even the plaintiff was not sure that defendant No. 2 was the owner of defendant No. 1. In such a situation the plaintiff has taken a gamble, given an undertaking under rule 941 and obtained an ex parte order. Though not sure, the plaintiff still opposed the application and submissions of defendant No. 3 that defendant No. 3 was the owner of defendant No. 1 and not defendant No. 2. The plaintiff when it felt that the appeal Court might hold against it, tried to obtain the same kind of order of arrest of defendant No. 1 in Gandhidham district Court and later in Ahmedabad High Court. And this was done when the Division Bench after hearing had reserved the matter for judgment. This in itself confirms that the plaintiff knew or is deemed to have known that the grounds were insufficient for arrest of defendant No. 1.

20. While determining the quantum, there can never be a straitjacket formula. Various factors come into play. They could be (a) Why did the plaintiff in the first place had to approach the Court?; (b) What were the effective remedies the plaintiff had?; (c) What was the action or omission of the defendant that prompted the plaintiff to approach the Court?; (d) Did the plaintiff know or were deemed to have known that the grounds were insufficient to obtain an order of arrest?;(e) Did the plaintiff suppress any material facts or mislead the Court while obtaining the ex parte order?; (f) During the course of hearing did the plaintiff come to know that its approach was incorrect?; (g) Did the defendant suppress any material facts or mislead the Court while opposing the continuance of the order of arrest?; (h) Would the Court have awarded damages for the claims made by the party that suffered prejudice, had he filed a suit - like remoteness or unforeseeable etc?; (i) Do the documents qualify to be accepted without having to be probed for its existence and contents?; etc. These factors are only indicative and not exhaustive. The decision of the Court is a judicial discretion and it will only be proper and reasonable for the Court to which such

an application as in this case is made to take into consideration all the circumstances of the case before it fixes the quantum of compensation. While determining the amount to be awarded as damages, the Court in my view has to take a holistic macro approach and it will vary from case to case. With this background we will have to consider as to whether the defendant Nos. 2 and 3 are entitled to the amounts claimed by them.

NOTICE OF MOTION No. 2853 OF 2010

21. It is the case of 2nd defendants that the 2nd defendants were the voyage charterers of the vessel m.v. Amitees as per the charter party dated 24th December, 2009 entered into between the defendant No. 2 and one Islamic Republic of Iran Shipping Lines, Tehran, Iran (IRISL). The defendant No. 1 cargo was loaded between 6th and 10th January, 2010 at Kandla. On 10th January, 2010, the vessel completed loading and the cargo inside the holds was fumigated. The vessel was moved to the anchorage on 11th January, 2010 and was set to sail from Kandla to Iran on 12th January, 2010 by which time the plaintiff obtained and executed the order of arrest against defendant No. 1. According to defendant No. 2, due to the arrest of defendant No. 1 by the plaintiff, the vessel m.v. Amitees also got detained and the vessel could not sail from the Port of Kandla with the arrested cargo on board.

22. It is the case of defendant No. 2 that the plaintiff not only obtained a wrongful order of arrest of defendant No. 1 but also did not take any steps to remove the arrested cargo from the vessel and store at a custom bonded warehouse at their own cost which would have let the vessel sail from Kandla Port. The defendant No. 2 states that the plaintiff should have, after obtaining the order of arrest of defendant No. 1, applied to the Court for permission to unload the cargo and store it at a custom bonded warehouse at the plaintiffs cost.

23. The Counsel for defendant No. 2 Mr. Gomes submitted that the plaintiffs Counsel writing e-mails to the owners of the vessel with copies to defendant No. 2 or defendant No. 3 is not sufficient to show its genuine intentions to unload the cargo. There was nothing for defendant No. 2 and 3 to do and the responsibility was that of the plaintiff to ensure that, for a claim that it has against the cargo, no third party should suffer any prejudice or loss. The plaintiff should have moved the Court after making arrangements to discharge and store the cargo and obtained an order and direction to the master of the vessel to permit removal of the cargo. The plaintiff should have deposited in the Court all cost and charges for unloading and storing and also the detention costs of the vessel. I totally agree with the submission of the Counsel for defendant No. 2.

24. Mr. Gomes further submitted that the action and intention of the plaintiff was malafide and this is further evident from their conduct. He stated this because during the pendency of this suit, the plaintiff filed an Arbitration Petition No. 5 of 2010 under section 9 of the Arbitration and Conciliation Act, 1996, in the District Court, Gandhidham, Gujarat, on 10th March, 2010 for the same relief that it had

obtained from the Single Judge here and when the Division Bench of our High Court after hearing had reserved the matter for judgment. As the Gandhidham Court did not grant injunction attaching the cargo on board, the plaintiff filed a first appeal in Gujarat High Court and the Gujarat High Court passed an order dated 16th March, 2010 on a Civil Application directing defendant No. 2 to furnish security in the sum of USD 7.5 million, if the ship had to sail away with the cargo on board out of Kandla Port. This order however, was vacated on 16th March, 2010. Subsequently, the Division Bench of this Court passed a judgment pronounced on 23rd March, 2010 and the vessel, in view thereof, sailed with the defendant No. 1.

25. The defendant No. 2 claims to have suffered prejudice by this act of the plaintiff and have prayed that this Court may order the plaintiff to pay a sum of US\$ 8,94,305.00 to the 2nd defendants or in the alternative a sum of US\$ 6,43,751.81 or such sum by way of damages as this Hon'ble Court may award as compensation to the defendant No. 2 in terms of the plaintiffs undertaking dated 12th January, 2010, given under Rule 941 of the High Court (O.S.) Rules.

26. The brake up for the amount of US\$ 8,94,305.00 is as under:-

"(a) Detention charges for 71 days from 12-1-2010, 00.00" hr. to 23-3-2010, 24:00 hrs. at the rate of US\$ 11,000/- per day/pro-rate which the 2nd defendants as the charterers had to pay and have already paid to the owners of the said vessel in terms of the charter party. = US\$ 7,81,000.00

(b) Additional port charges paid to Kandla Port Trust for the period 12-1-2010 to 23-3-2010 for 71 days which the said owners had to pay the Kandla Port Trust and which the 2nd defendants had to reimburse to the owners of the said vessel M.V. "AMITEES", Rs. 21,22,886.71 (US\$ 1=Rs. 48/-) = US\$ 44,226.81

(c) Legal costs being the fees and expenses paid by the Owners of the said vessel to their Lawyer, Mr. V. Subramaniam (Kumar) Advocate, High Court engaged by them to represent and protect the interests of the Owners of the vessel in view of the proceedings filed by the plaintiffs and which fees the Charterers had to reimburse to the owners of the vessel. = US\$ 38,220.00

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27. The brake up for the amount of US\$ 6,43,751.81 is as follows:-

"(a) Detention charges for 47 days from 5-2-2010 when the vessel M.V. "AMITEES" was released by this Hon'ble Court from arrest in the said Admiralty Suit No. 3 of 2010 to 23-3-2010, 24:00 hrs. at the rate of US\$ 11,000/- per day/pro-rate which the 2nd defendants as the charterers had to pay and have already paid to the owners of the said vessel in terms of the charter party. = US\$ 5,17,000.00

(b) Additional port charges paid to Kandla Port Trust for the period 12-01-2010 to 23-3-2010 for 71 days which the said owners had to pay the Kandla Port Trust

and which the 2nd defendants had to reimburse to the owners of the said vessel M.V. "AMITEES". Rs. 21,22,886.71 (US\$ 1 = Rs. 48/-) = US\$ 44,226.81

(c) Legal costs being the fees and expenses paid by the Owners of the said vessel to their Lawyer, Mr. V. Subramanian (Kumar) Advocate, High Court engaged by them to represent and protect the interests of the Owners of the vessel in view of the proceedings filed by the plaintiffs and which fees the Charterers had to reimburse to the owners of the vessel. = US\$ 38,220.00

(d) Legal costs being fees and expenses paid by the 2nd defendants to their own Advocate in the suit, in the Appeal and in the present Notice of Motion. = US\$ 44,305.00

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28. The difference between these two amounts only relating to the detention charges. The defendant No. 2 states that if the Court comes to a conclusion that the vessel m.v. Amitees was in any event arrested from 6th January, 2010 to 5th February, 2010 in another suit being ADMS/3/2010 and hence no detention should be paid for that period, then detention charges for 47 days as against 71 days should be paid.

29. For the sake of convenience, the plaintiffs submission against each heads of claim is given immediately after dealing with the claims made by the defendant No. 2. Detention charges at the rate of US\$ 11,000 per day for 71 days equals to US\$ 7,81,000 or in the alternative for 47 days equals to US\$ 5,17,000. During the course of arguments Mr. Gomes also submitted that if the Court comes to the conclusion that daily detention rate should be only US\$ 9,000/- then for 71 days it would be US\$ 6,39,000/- and for 47 days it would be US\$ 4,23,000/-.

30. Mr. Gomes submitted that that pursuant to an addendum dated 1st February, 2010 to the Charter Party dated 24th December, 2009, the defendant No. 2 had to pay the owners-IRISL a sum of US\$ 11,000 per day/pro-rata. Counsel submitted that though the demurrage agreed was US\$ 9,000 per day/pro-rata, the applicability of the demurrage rate came to an end on 10th January, 2010, when the vessel completed loading. He said defendant No. 2 had to agree to this US\$ 11,000 per day because of detention of the vessel which was not contemplated under the Charter Party. In support of his claim, the defendant No. 2 has filed the Charter Party duly attested by the Embassy of India in Tehran, the addendum letter dated 1st February, 2010, the debit note dated 14th April, 2010 for US\$ 7,81,000/- raised by IRISL on defendant No. 2 towards detention for 71 days at US\$ 11,000 per day and the receipt dated 11th May, 2010. The receipt covers other heads of claim as well.

31. In reply, the Counsel for the plaintiff submitted that the defendant No. 2 should not be heard at all because the defendant No. 2 had made a false statement in the affidavit-in-support. At para 6, the defendant No. 2 has stated that they have not paid any amount for the value of the said cargo whereas, as it

would appear later, they had in fact paid.

32. While considering the claim of the defendant No. 2, we have to also take into account the background of the matter and the reason why the plaintiff approached this Court. The claim of the plaintiff in the suit was that under 3 contracts the defendant No. 2 had agreed to purchase from the plaintiff 8,000 metric tons of rice at an average rate of US\$ 1600/- metric ton - FOB Kandla. Contracts also provides for arbitration under GAFTA Arbitration Terms. As against the 8,000 metric tons of cargo, the defendant No. 2 took only 600 metric tons and did not nominate the vessel for the balance cargo. Even the 600 metric tons was taken only after defendant No. 2 delayed for over a month placing the vessel to receive the cargo. The defendant No. 2 did not pay the agreed amount of 25% and did not open a letter of credit for the balance value of 75% to the plaintiff. Therefore, the remaining quantity of 7,400 metric tons got stuck in Kandla Port from around July/August, 2009 and as the defendant No. 2 did not take delivery of this balance cargo, the same had to be sold in the local market. At that time the price had also fallen by over 50%. Even for the 600 metric tons cargo that was loaded the defendant No. 2 made payment much later. The plaintiff claimed for a sum of US\$ 7.52 million as loss due to breach of contract by the defendant No. 2. The plaintiff through their Advocates in London invoked arbitration under GAFTA arbitration rules against defendant No. 2 on 07th January, 2010.

33. This Admiralty Suit was filed to obtain security from the defendant No. 2 for a sum of US\$ 7.52 million pending the hearing and final disposal of the GAFTA Arbitration. The plaintiff was successful in obtaining security from the Single Judge but the Division Bench held that the plaintiffs claim was not a maritime claim and hence the plaintiff could not invoke the admiralty jurisdiction. The Court however, did not go into the merits of the case. The admitted position is that the plaintiff has succeeded in its arbitration against the defendant No. 2. The defendant No. 2 challenged the award by filing appeal under the GAFTA rules which came to be rejected. The defendant No. 2 has not carried the matter further in appeal and therefore, the award has attained finality. The plaintiff has to recover the millions of dollars under the GAFTA award from the defendant No. 2. The defendant No. 2 has not honoured the award. This was the fear the plaintiff had and hence, had filed this suit to secure its claim in the Arbitration.

34. It is therefore, obvious that the plaintiff was pushed to a corner and driven up the wall by the conduct of defendant No. 2. The plaintiff had suffered losses and was desperate to get some security against a party like defendant No. 2 whose conduct has been far from honest and intentions questionable. The plaintiff was desperate and presumed that the title to/property in defendant No. 1, i.e., the cargo arrested had passed to defendant No. 2. The reason why I have observed that the conduct of defendant No. 2 has been far from honest is because the defendant No. 2 is yet to honour the award that the plaintiff has obtained against defendant No. 2. Moreover, the Counsel for defendant No. 3 had also submitted that the defendant No. 2 had, like in the case with the plaintiff,

agreed to purchase 16000 metric tons of Basmati Rice from defendant No. 3 at US\$ 1600/- per metric ton. Based on the agreement, the defendant No. 3 had carted the entire quantity of rice into the Port of Kandla during July/August, 2009. The defendant No. 2 which was to nominate the vessel and make the vessel available for loading did not do so. This was during the period of July/August, 2009. By then the price of rice started falling and defendant No. 2 took 13,000 metric tons (as against original 16000 metric tons) of rice from defendant No. 3 at a re-negotiated price of US\$ 1100/- per metric ton, which means a straight loss of US\$ 500 per metric ton to defendant No. 3. This is the background of defendant No. 2.

35. With this background of defendant No. 2 let us examine the documents filed by the defendant No. 2.

"(a) Detention charges for 71 days - US\$ 7.81,000.00

(i) In the Charter Party dated 24th December 2009 between IRISL which was the owner of the vessel m.v. Amitees and defendant No. 2, box 20 provides demurrage rate to be US\$ 9,000 per day/pro-rata HDWTS both ends. As against this, the defendant No. 2 has entered into an addendum dated 1st February, 2010 with IRISL agreeing to pay US\$ 11,000/- per day as detention charges and this is the rate at which the defendant No. 2 prays damages to be awarded against the plaintiff. There is no explanation why the rate was agreed at US\$ 11,000/- per day when demurrage rate was only US\$ 9,000/-. Even if the plaintiff had not obtained the order of arrest of defendant No. 1, the vessel would have still remained under arrest because of defaults by the defendant No. 2 earlier to a third party. The indisputable fact is that the plaintiff was pushed to taking such drastic steps in desperation due to the breach of contracts by the defendant No. 2. This has been confirmed by rejection of the appeal by defendant No. 2 in the GAFTA Arbitration. It is also the case of defendant No. 3 that they were compelled to sell at a lower rate of US\$ 1100/- per metric ton to defendant No. 2 because defendant No. 2 reneged from their commitment. In fact the affidavit of defendant No. 3 in support of its Notice of Motion states that defendant No. 3 in anticipation that the defendant No. 2 will stand by its commitment to purchase of cargo of rice even filed and processed shipping bills for 5,500 metric tons of rice in August, 2009 and were in the process of filing further shipping bills for export. But before that could be done, the defendant No. 2 reneged on their commitment consequent to which defendant No. 3 stopped filing further shipping bills for the export committed quantity. Taking advantage of this situation, the defendant No. 2 re-negotiated the price even with defendant No. 3 and hammered it down from agreed price of about US\$ 1600/- per metric ton to US\$ 1100/- per metric ton. Therefore, the situation would not have arisen but for the acts or conduct of the defendant No. 2. This is the character of defendant No. 2 - completely questionable, a party known not to honour its commitments. This will come out more when we deal with the claim of defendant No. 3. Moreover, it is correct that defendant No. 2 has in the affidavit in support

of this notice of motion has stated that it had not made any payment to defendant No. 3. This also, as it would appear later, was a false statement. Anyone approaching the Court must come clean and disclose the entire truth. This would be the position even if the facts that was not disclosed or misstated may not have any bearing on the issue or were such that, with full disclosure, it would not have mattered. Such parties who do not disclose or suppress or misstate, which amount to abuse of the process of the Court should be shown the door. It is settled law that it can be done at any stage of the proceedings. Courts have held that such a person may be refused a hearing on merits as well.

(ii) As regards the charter-party filed also, what the defendant No. 2 in effect is seeking is summary award. For this, in my opinion, the party should have filed a certified copy of the charter party that it or its agent or the owners had filed with the Income Tax authorities in India disclosing the freight that was being earned. It would also disclose the demurrage rate. That would have been acceptable. Hence, I am not inclined to accept the charter party, the invoice raised and the receipt issued by IRISL under this claim.

(iii) Therefore, I am not inclined to exercise my judicial discretion and award any damages to defendant No. 2, who is known not to honour its commitments and who makes false statements to the Court. My decision will still be the same even if the defendant No. 2 had filed documents which were more acceptable. I am not inclined to award damages to the defendant No. 2 under this head."

For reasons mentioned in Paragraph 36(a) (i) above, particularly in view of the false statement in the affidavit in support of this notice of motion, I am not inclined to award any sum as compensation to defendant No. 2. Nevertheless, I shall deal with the other documents filed under the respective heads of claim. Even these documents are not enough, assuming the defendant No. 2 was a person of virtue, to persuade me to award compensation summarily.

(b) Additional port charges paid to Kandla Port Trust - US\$ 44,226.81

(i) The defendant No. 2 has only furnished the statement and invoice received by defendant No. 2 from IRISL. There are no documents supporting the same. The marine bill from Kandla Port filed purportedly in support of this head of claim does not even tally with the statement which is annexed to the invoice. Hence cannot be paid.

(c) Legal costs being the fees and expenses paid by the Owners of the said vessel to their Lawyer, Mr. V. Subramaniam (Kumar) - US\$ 38,220.00.

(i) The amount of US\$ 38,220.00 allegedly paid as legal cost to one Advocate Mr. V. Subramaniam, who was apparently concerned for the owner of m.v. Amitees, is also not payable. The document relied upon by the defendant No. 2 is incomplete. What is annexed is only a letter dated 8th April, 2010 from Advocate Mr. V. Subramaniam addressed to IRISL. No invoice of Mr. V. Subramaniam or proof of payment is annexed. It is also necessary to mention that Mr.

Subramaniam was the Advocate who was concerned for IRISL in the other suit as well where m.v. Amitees was arrested.

(d) Legal costs being fees and expenses paid by defendant No. 2 to their own Advocate -US\$ 44,305.00

(i) Defendant No. 2 would not have incurred legal cost had the defendant No. 2 honoured its commitment under the 3 contracts that it had entered into with the plaintiff. The defendant No. 2 pushed the plaintiff to the corner and made him litigate. Hence this is not payable. On the contrary large sums are payable by the defendant No. 2 to the plaintiff.

36. In the circumstances, as mentioned earlier, the defendant No. 2 is not entitled to any compensation at all.

NOTICE OF MOTION No. 3649 OF 2010 filed by defendant No. 3

37. The defendant No. 3 is claiming a sum of Rs. 20,97,16,791.00. The brake up is as under:-

(a) Claim No. 1: Losses caused on account of quality discount - Rs. 9,56,80,000.00/-.

(i) It is the case of the defendant No. 3 that because the vessel was detained for 71 days due to the arrest of defendant No. 1 obtained by the plaintiff, the defendant No. 2 declined to take delivery of the cargo on the grounds that (a) arrival of the cargo was delayed by 71 days; (b) the defendant No. 2 did not have ready buyers for the same; and (c) that quality of the cargo might have deteriorated on account of prolonged storage in the holds of the vessel. It seems that the cargo after discharge was inspected and on ground of quality of rice having been badly affected, defendant No. 2 offered a price of US\$ 900/- per metric ton. After prolonged negotiation defendant No. 2 finally agreed to pay US\$ 940/- per metric ton to defendant No. 3. Therefore, there was a difference of US\$ 160 per metric ton which defendant No. 3 was forced to give to the defendant No. 2 on account of the delay in delivery of the cargo and deterioration in quality. Defendant No. 3 thereby realised only a sum of US\$ 12,220,000/- thereby incurring a loss of US\$ 2,080,000/- equivalent to Indian Rs. 9,56,80,000/-.

(ii) The fact is defendant No. 3 became a victim of desperation shown by the plaintiff due to the conduct of defendant No. 2. The defendant No. 2 first reneged on the contract and reduced the price from US\$ 1600/- to US\$ 1100/- per metric ton seeing the desperation of defendant No. 3 and further took advantage allegedly of desperation of defendant No. 3 by further reducing the price to US\$ 960/- per metric ton. Even at this rate, the amount was not paid as agreed to, but was paid only in installments by giving post dated cheques. The factor for the alleged renegotiation of rice was fallen quality due to delay. I find it very difficult to accept this stand of defendant No. 3 for various reasons. First of all as could be seen the shelf life of rice that is sold is shown as 2 years. Moreover, Clause

1.1 of the Revised Contract dated 9- 11-2009 relied upon by the defendant No. 3 shows that the quantity, quality and weight of the cargo, mentioned in part-I therein, shall be binding on both the buyer and the seller at the port of loading. Though not very happily worded what it means is that the quantity and quality and weight of the cargo as mentioned in the inspection certificate at the port of loading issued by SGS shall be binding on both the buyer and seller. This is because Clause 1.2 of Part-II of the said contract provides that "inspection certificate shall be issued by SGS, at the port of loading, on Seller's account". However no survey report of quality, quantity and weight issued at port of loading has been furnished by the defendant No. 3. Even report issued by one Aciter Inspection S.A. of Dubai dated 25-4-2010 for cargo inspected at destination does not show that the goods were in fact deteriorated. In the report, on the contrary, the condition of the goods is described as under-

"Condition of the Goods:

As per visual inspection prior to discharge, the goods in holds 1,2,3,4, & 5 were found apparently in sound and undamaged condition. During discharge operations the goods were continuously checked visually and found in sound condition."

(emphasis supplied)

This means the goods prior to and during discharge were found in apparent good order and condition.

(iii) Curiously, the Report also says "Packing Date: 3/2010" whereas the goods are claimed to have been packed and moved into Kandla Port in July/August, 2009. The Batch No. in the Survey Report is shown MD 09060550 whereas the Revised Contract requires batch number to be mentioned as MD 09161275.

(iv) Moreover, page 381 in the compilation of documents filed by defendant No. 3 contains a statement of payment of US\$ 12,220,000/- received by defendant No. 3. The 26 bills of lading relied upon by the defendant No. 3 refers to invoice number and date. Many of the invoice numbers mentioned in the bill of lading are not found mentioned at page 381. Defendant No. 3 has provided copies of 11 post dated cheques as against 26 cheques allegedly received from defendant No. 2. The cheques are issued in favour of one Pearl India General Trading LLC company based in Dubai and owned by defendant No. 3. The defendant No. 3 has also annexed the statement of account issued by the Bank of Pearl India General Trading LLC, viz. RAK Bank, for the period of 01-3- 2010 till 17-8-2010, defendant No. 3 also relied upon remittance advise issued by RAK Bank. There are certain payments made to one Heritage Infracon Pvt. Ltd. which is also supposed to be a sister company of defendant No. 3. The Counsel for the plaintiff has pointed out that there are other payments shown in the statement of RAK Bank being payments made to defendant No. 3 but those payments are not reflected in page 381. The Counsel for the defendant No. 3 states that those payments are relating to some other cargo and not the defendant No. 1

consignment.

(v) Mr. Shanker also submitted that in view of the discrepancies in the batch number mentioned in the bags or the packing date being different and that the date of shipment mentioned in the contract being 12th to 17th January, 2010 but bill of lading was dated 10th January, 2010, the defendant No. 3 might have given a discount for which the plaintiff cannot be made to pay.

(vi) Another very valid point which the plaintiff raised was that the shipping bills filed by the defendant No. 3 for the entire cargo shows that the payment terms was DA or against LC, whereas, the Revised Contract between defendant No. 2 and defendant No. 3 shows payment terms to be CAD (cash against document). The amendment to the shipping bills for the 5500 metric tons of cargo that was filed and processed in August 2009 shows the rate disclosed by defendant No. 3 to be US\$ 1050/- per metric ton and not US\$ 1100/- as claimed by the defendant No. 3. Though the Court is entitled to summarily award damages, the Court also has to take into account and satisfy itself as to whether the documents relied upon by the party claiming to have suffered prejudice are sufficient to summarily award compensation to the extent of amount claimed. I am not satisfied. Moreover, as explained below, defendant No. 3 had not been entirely truthful earlier. Therefore, the documents filed by the defendant No. 3 in support of this head of claim cannot be accepted.

(vii) The Counsel for the plaintiff invited my attention to the affidavits filed by defendant No. 2 and defendant No. 3, where both had taken a consistent stand that defendant No. 2 had made no payment to defendant No. 3 and hence the property in the goods remained with defendant No. 3. Even as per the certified copies of the proceedings in Gandhidham, the defendant No. 3 has filed an affidavit where they have affirmed that no payment has been received and as they were holding on to the documents and payment was on cash against documents basis, the defendant No. 2 was not a fool to make any payment. The fact, as per documents now relied upon by the defendant No. 3 in this notice of motion, is defendant No. 2 had paid US\$ 1 million on 7th January, 2010 to defendant No. 3. This, in my view, may not mean property or title had also passed upon shipment to defendant No. 2. But the fact remains that both defendant No. 2 and defendant No. 3 had made incorrect statements in affidavits filed not only in the proceedings in this Court but also in the Gandhidham proceedings. Mr. Shanker states this false statement was made only to hoodwink the courts into believing that tide was still with defendant No. 3 and defendant No. 2 and defendant No. 3 had colluded with each other and otherwise there was no reason to suppress this fact. I am not going into the issue on passing of property or title as it is not necessary in these applications. But I agree that defendant No. 2 and defendant No. 3 were in fact economical with truth. Anyone approaching the Court must come clean and disclose the entire truth. This would be the position even if the non-disclosure or misstatement may not have any bearing on the issue. It is rather possible that the title and property in the goods

remained with defendant No. 3. But still they ought to have disclosed that they received an advance of a million dollars. It is not a small sum that it could have been overlooked. A person is required to make honest disclosure of all relevant facts. Otherwise it would amount to an abuse of the process of the Court. Such a person should be shown the door and it can be done at any stage of the proceedings.

(viii) Hence I am not inclined to award any compensation to the extent claimed under this head.

For reasons mentioned in paragraph 38(a)(vii) above, particularly relating to false statements made to the Court, I am not inclined to award any sum as compensation to defendant No. 3. Nevertheless, in the case of defendant No. 3 also, I shall deal with the documents filed in reliance of the respective heads of claim. Barring one claim, for the rest, even the documents are not enough to persuade me to award any compensation summarily.

(b) Cost of US\$ 6500 paid to M/s. Aciter Inspection SA for surveying at discharge port-Rs. 2,93,118.00

Since the batch number and the packing date mentioned in the report do not tally with the other documents relied upon by the defendant No. 3, I am unable to accept this document as relating to defendant No. 1. Hence I am unable to award any amount under this head as well.

(c) Loss on account of loss of interest - US\$ 3.39,87,671/-

(i) The test that requires to be applied is that if the defendant No. 3 had filed an independent suit or a counter claim would this claim have succeeded or not. The defendant No. 3 has claimed at 18% p.a. and it is the case of defendant No. 3 that had the cargo in the normal situation not been arrested or detained by the plaintiff, the vessel would have arrived at discharge port on or about 17-1-2010 and against delivery of documents viz. the original 26 bills of lading of defendant No. 2, defendant No. 3 would have received the full remittance of the contracted price of US\$ 14,300,000. However, due to the delay in its ability to recover the amount from defendant No. 2, the defendant No. 3 had to pay interest to its suppliers from the market, interest at 18% p.a. or in excess of 18% p.a. Though the defendant No. 3 has produced various handwritten notes in its compilation of documents to support the head of claim, I am finding it difficult to accept the documents. More so because of the inconsistencies in the documents referred to under the 1st two heads of claim and this claim is directly related to claim No. 1. Hence I am not inclined to award any sum under this head.

(d) Litigation cost towards fees paid to the Advocate and Counsel including traveling and stay to Gandhidham Gujarat and Ahmedabad - Rs. 31.35.924/-.

(i) Of this Rs. 31,35,924/-, Rs. 29,35,736/- are direct expenses incurred as fees paid to the Advocates and Counsel engaged by defendant No. 3 in defending not only this Admiralty suit filed by the plaintiff but also Arbitration Petition filed

before the District Court at Gandhidham and the First Appeal and civil application filed at High Court of Gujarat and Ahmedabad.

(ii) Defendant No. 3 had to incur these costs as a fallout victim of a fight between plaintiff and defendant No. 2. The Division Bench of this Court has concluded that the Court had no jurisdiction and the plaintiff could not have obtained an order of arrest of the 1st defendant cargo. The Counsel for the plaintiff submitted that the defendant No. 3 need not have participated in the litigation and what it should have done is simply forward the documents to defendant No. 3 once loading was completed and collected its payment because the sale was on CAD basis. It is easy for the plaintiff to make this statement. The cargo had been loaded by defendant No. 3. The cargo has got arrested on an application of the plaintiff who is a third party so far as the defendant No. 3 was concerned. The defendant No. 3 has not had a happy experience with the defendant No. 2 earlier. If it had sent the documents for collection, the defendant No. 2 might not have paid. The defendant No. 3 in its wisdom thought it fit to hold on to the documents and ensure the arrest of defendant No. 1 is vacated so that it could mitigate its loss. Since the defendant No. 3 had reserved its right of disposal in the Bills of Lading, i.e., the consignee was to the order defendant No. 3, the Shipper, the defendant No. 3 could have sold the cargo to a third party as well. One can appreciate a party's predicament only when it steps into that party's shoes. Mr. Vernekar submitted that property in the goods was yet to pass to defendant No. 2 even if it had received the advance and that is the position in law. Mr. Vernekar relied upon a passage from Pollock & Mulla on The Sale of Goods Act, Sixth Edition dealing with section 25 of the Sale of Goods Act and in the matter of (1988)2 L.L.R. 208, (Ciudad de Pasto).

(iii) Mr. Vernekar also relied on (2003)2 L.L.R. 597 (Evergreen v. Aldgate Warehouse) and a passage from Carver on Bills of Lading, First Edition, in support of his submission that when the bill of lading is to order bill of lading the tide in the goods is retained by the shipper. I do not wish to go into the passing of property issue here as it is not relevant to this notice of motion.

(iv) Indisputably, due to the arrest etc. of defendant No. 1 the defendant No. 3 was justified in defending the action of the plaintiff. In my opinion, the defendant No. 3 is justified in claiming the amount of Rs. 29,35,736/- from the plaintiff. But to send a message that you cannot make an incorrect statement to or suppress material fact from the Court and thereby abuse the process of the Court and get away with that, I am not allowing any amount under this head as well.

(v) The remaining amount is for the traveling expenses and for the hotel stay and boarding expenses of the director of defendant No. 3 which also, in my opinion, is not payable for reasons mentioned above.

(e) Loss of profit on account of loss of business due to loss of reputation etc. - Rs. 7,66,20,078/-

In my view, this is a very remote claim and even in a regular suit could not be

awarded and hence cannot be given.

38. In the circumstances, the defendant No. 3 is also not entitled to any amount as compensation. Both the notices of motions are accordingly rejected with no order as to costs.