
(2014) 12 BOM CK 0043

In the Bombay High Court

Case No : Notice of Motion No. 385 of 2014 in Admiralty Suit No. 85 of 2013

Peninsula Petroleum Ltd.

APPELLANT

Vs

Bunkers on Board the Vessel, M.V. Geowave Commander

RESPONDENT

Date of Decision : 17-12-2014

Acts Referred:

Citation : (2016) 1 ALLMR 625 : (2015) 3 BomCR 693

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

Bench : Single Bench

Advocate : S. Priya, Abhimanyu Singh and Abhishek Kumar, Advocate for the Appellant; Prashant Pratap, Senior Advocate and Trupti Agarwal, Advocate for the Respondent

Judgement

K.R. Shriram, J.—The Plaintiff's claim in the suit is that of unpaid seller. The Plaintiff claims to have supplied bunkers to the 2nd defendant vessel at the instance of and pursuant to a Purchase Order dated 14th November, 2012 issued by Defendant No. 3. The counsel for the Plaintiff submitted that an oral order for the supplies was placed by Defendant No. 3. At that time Defendant No. 3 was the Bareboat charterer of the 2nd defendant vessel. The Bareboat Charter Party dated 29th June, 2012 was entered into between the Defendant No. 3 and the owners of Defendant No. 2 vessel, viz., Master & Commander AS, Norway. The counsel also submitted that Defendant No. 3 was located in the same office building as the Plaintiff and they had past dealings. The oral order which was given on 12th November, 2012 was confirmed subsequently in writing.

2. Based on this requisition, on or about 14th November, 2012, the Plaintiff supplied 669.416 M.T. of MGO (bunkers) to the 2nd defendant vessel when she was at Singapore. The Master of the 2nd defendant vessel acknowledged receipt of the bunkers on board by endorsing the bunker delivery note. The Defendant No. 3 however, did not pay for the bunkers supplied and therefore, as agreed with the Plaintiff on 21st December, 2012 arranged to remove the bunkers from the vessel at Outside Port Limits (OPL), Singapore. This was however, not carried

out. Of course, it is the Plaintiff's case that the Defendant No. 3 purportedly informed the Plaintiff that under its charter party with the Applicant herein, it was required to take Applicant's permission for debunkering and that the Applicant was not according the permission.

3. As the payment was not coming forth, the Plaintiff commenced proceedings in Singapore for recovery of its claim and obtained a warrant of arrest of the 2nd defendant vessel. The counsel for the Plaintiff submitted that when the Plaintiff took litigation/winding up search in Singapore on Defendant No. 3, it came to light for the first time that winding up proceedings have been pending against Defendant No. 3 in Singapore since September, 2012. It should be noted that the date of supply is 14th November, 2012, i.e., about two months after the winding up proceedings began. Therefore, the Plaintiff fearing that they will not recover any money filed proceedings in South Africa and obtained a warrant of arrest of a vessel, viz., m.v. Reflect Scorpio that was owned by Defendant No. 3. The Plaintiff then applied for default judgment but do not expect to recover any amount as the vessel m.v. Reflect Scorpio was subject to another claim made by a South African Shipyard. Looking at the quantum of the claim of the South African Shipyard, according to the Plaintiff, they are unlikely to recover any amount.

4. In the meanwhile, on or about 15th April, 2013, the Bareboat Charter with Defendant N.3 admittedly was terminated by the owners of the 2nd defendant vessel. The termination was for non-payment of charter hire, etc., but it is not necessary to go into that. The owners of Defendant No. 2, it is alleged, have a claim of around US\$ 900,000/- or so against Defendant No. 3. The Plaintiff is aware that the vessel was no more in charter and the supply was made at the Bareboat charterers behest and hence, the Plaintiff do not have a maritime claim against the 2nd defendant vessel.

5. Therefore, the Plaintiff after filing this suit applied, on or about 23rd April, 2013, for arrest of the bunkers on board the 2nd defendant vessel when she arrived at Port and Harbour of Mumbai. The Plaintiff was directed to give notice to Defendant No. 2 and at the hearing of the application for arrest, the Defendant No. 2, without prejudice to the rights and contentions, agreed to furnish security for the value of bunkers on board the vessel and the consent order dated 30th April, 2013 was passed. The counsel for the Plaintiff very fairly submitted that the Plaintiff has no privity of contract with Defendant No. 2 or her owners and the claim was against Defendant No. 3.

6. It is the case of the Plaintiff that under the bunker supply contract between the Plaintiff and Defendant No. 3, the risk in the bunkers would pass on to Defendant No. 3 on the bunkers being delivered to the vessel but the title was to pass only upon payment for the value of the bunkers delivered. Therefore, the Plaintiff contractually was entitled to exercise their lien on the title in the bunkers until they received payment for the same. The Plaintiff also submitted that until payment was made, the property in the goods, viz., the bunkers, did not pass on

to the buyer, viz., Defendant No. 3 until the conditions imposed by the Plaintiff-seller, are fulfilled. Therefore, even if the owners of Defendant No. 2 have not paid any bareboat charter hire, still they cannot hold on to the bunkers or appropriate the bunkers which in effect belonged to the Plaintiff. The counsel submitted that the Court permitted that it would amount to permitting the Defendant No. 2 to unjustly enrich itself and having consumed the bunkers, the Applicant should pay to the Plaintiff the value of the bunkers consumed.

7. The issue in this Notice of Motion which requires to be decided is whether bunkers on board a vessel can be arrested without any claim against the vessel and independent of the vessel. Naturally it is the Plaintiff's case that the Court should allow and it is the Defendants' case that the Court should not.

The Plaintiff's submission primarily was that this Court in exercise of its admiralty jurisdiction must adopt a liberal interpretation of the expression property which can be arrested in exercise of its jurisdiction. The counsel also submitted that the Court must exercise its jurisdiction in equity and law, unless expressly curtailed or barred and as there is no express curtailment and/or bar on arrest of bunkers, this Court must exercise jurisdiction to arrest bunkers.

8. The Plaintiff's counsel further submitted that the jurisdiction of this Court to arrest the bunkers is carved out from the Letters Patent, 1823 read with Letters Patent, 1865 and the Bombay High Court (O.S.) Rules.

I do not agree with the counsel for the Plaintiff. Letters Patent nowhere provides that bunkers can be arrested without any claim against the vessel and independent of the vessel. This Court in the matter of Rushab Ship International LLC vs. The bunkers 1 onboard the Ship M.V. African Eagle and others (African Eagle) and in the matter of M/s. Greenwich Meridian Logistics (India) Pvt. Ltd. vs. M/s. Sapphire Kitchenware Pvt. Ltd. 2 has held "the Letters Patent is a procedural law to facilitate exercise of jurisdiction in aid of a substantive law". No procedural law can vest jurisdiction which is not provided under substantive law. Para 29 and 30 of M/s. Greenwich Meridian matter (supra) reads as under:-

"29. I am afraid this cannot be accepted. Neither clause 53 of Letters Patent, 1823 nor clause 31 of Letters patent 1862 lay down the parameters of the Admiralty and vice Admiralty jurisdiction of the Court. Nor do the Letters Patent provide that the jurisdiction of the Admiralty and vice Admiralty Court can be exercised de hors the existence of a maritime claim against a vessel. The Letters Patent is a procedural law to facilitate exercise of jurisdiction in aid of a substantive law. Even the words in the clauses can be read to mean as being related to the nature of claim and not the property to be proceeded against. All that Letters Patent 1823 and Letters Patent 1862 do, is to confer jurisdiction on the admiralty courts to take cognizance of, examine, try and determine certain types of maritime claims. This does not mean that these claims can be entertained contrary to the limited jurisdiction vested in the Admiralty Court by substantive law. The plaintiff's submission on the Letters Patent cannot be

accepted.

30. Mr. Shankar, in his written submission also gave various examples or situations. None of them are relevant."

9. Though bunkers could be termed necessities supplied to the vessel, the question herein is not claim against the vessel but it is the claim against the bunker on board with no claim against the vessel and independent of the vessel. Therefore, even if the bunkers supplied are necessities and for a claim of necessities, a vessel could be arrested, the same principle cannot be applied to arrest only the bunkers when there is no claim against the vessel and independent of the vessel.

10. The counsel for the Plaintiff also submitted that the Admiralty Rules in Part III of the Bombay High Court (O.S.) Rules, 1980, in many rules has used the expression any property as opposed to simply the ship. The counsel for the Plaintiff submitted that where the rules are intended to restrict the application to ships and not to any other property, the rules have set it out specifically. For example, the counsel submitted that Rule 941 provides that in a suit in rem an application for the arrest of the property proceeded against shall be supported by affidavit and the affidavit shall state the nature of the claim and the nature of the property to be arrested because where it is intended that only ships can be arrested it is specifically mentioned. The use of the word "property" in certain rules means that anything other than a ship can also be arrested. The counsel also submitted that Rule 946 deals with how the warrant of arrest or writ of summons on a arrested property has to be served. The rule provides as to how the service shall be affected on a ship or cargo or freight and if no property other than a ship, cargo or freight could be arrested, the rules would have said so.

11. The Plaintiffs reliance on the High Court (O.S.) Rules, 1980 as vesting jurisdiction in this court to arrest bunkers is misconceived. The rules do not provide for arrest of bunkers. The rules do not provide for the manner in which the writ of summons or warrant of arrest is to be served in case of arrest of bunkers. Rule 946 on the contrary sets out the manner in which the warrant of arrest or writ of summons shall be served on the property against which the suit is brought. Rule 946(2) deals with a situation where the property against which the suit is brought is ship or cargo on board. Rule 946(3) refers to property against which the suit is brought is cargo which has been landed or transshipped. It also deals with a case where the cargo is in the custody of a person who will not permit access to it. Rule 946(4) deals with a situation where the property against which the suit is brought is freight.

12. If bunkers were property against which the suit could be brought in rem, then the manner of service of writ of summons or warrant of arrest of bunkers would also have been specifically provided not like what the Plaintiff's counsel submitted that if no property other than a ship, cargo or freight could be arrested, the rules would have said so expressly. The rules indicate which are the

only properties against which a suit in rem can be brought and bunker is not one of the property.

13. In my view, even the arrest of the cargo or freight can be only to the limited extent of the amount payable on the cargo or freight to the owner. In common law the freight is deemed earned only upon completion of voyage. Therefore, the owner of the cargo would pay for freight only when the cargo arrives at destination. In a situation where a person who has a claim against the owner of the ship brings an action in rem, he would also apply for and obtain the arrest of the cargo on board so that when the owner of the cargo comes to take delivery of the cargo, he would deposit the freight payable to the credit of the suit. Otherwise the owner of the ship would appropriate the freight. Similarly, if the freight is yet to be paid to the owner of the vessel against whom the claim is made, to that extent the freight could be arrested. Nothing more than that. I gather support on this from *The Flora*. 1866 A & ELR 450 The Court held, "It is beyond all question that the cargo on board a ship which does damage to another ship in collision is in no respect responsible for the damage. It is equally clear that the freight due, the property of the owners of the ship doing the damage is attachable to make good that damage; and, in ordinary cases, the cargo is arrested for the purpose of making the owners of the cargo, who at that time owe the freight to the shipowners, pay into court to answer the damage which the latter are bound to make good. But the cargo is liable to arrest for no other purpose whatever". In the said decision the Court also held that it is only that cargo on which freight is in presenti due that can be proceeded against."

In *African Eagle* (supra), this Court, while considering the case of *M.V. Kaletan* 1914 TLR 30, observed as under:-

"In this case four questions arose for the consideration of the Court: (i) Was the Writ good, that was to say, could the owners of the freight be sued apart from the owners of the ship or cargo?; (ii) Could a warrant of arrest be issued against freight without a warrant of arrest against the ship and/or the cargo?; (iii) Was the service of the warrant of arrest properly effected?; (iv) Was the service of the writ properly affected? The first question was kept open. With respect to the second question, the Court held that freight could not be arrested unless it could be said to be the res and the freight collected and paid into the Bank had ceased to be the res. The court further held that freight if it has been earned, the cargo is held so long as it remains unpaid. With respect to the third question, the Court held that freight could not be arrested without arrest of the cargo. With respect to the fourth question, the court held that freight could not be arrested unless there was access to cargo. It is submitted by the Plaintiff herein that in *Kaletan*, the Court inter alia concluded that (i) a warrant to arrest for freight could not be issued against the freight separate from the ship and cargo or the ship or cargo; and (ii) the warrant could not be issued against freight already paid. As submitted by Defendant No. 3 in the case of *Kaletan*, the English Court has in fact followed the decision in *Castlegate* and considered the issue of the Court's

power to arrest freight. The Court concluded that warrant against freight cannot be issued separate from ship and cargo or ship or cargo. The Court followed the principle laid down in *Castlegate* and stated that no warrant of arrest for cargo so as to get at freight had ever been granted apart and separate from the warrant for the corpus of the ship. The attachment of the ship was an essential preliminary to the proper exercise by the Court, on the lien on freight. Hence, if there is no entitlement to arrest the ship, no action against her freight can lie."

Ofcourse, in the present day scenario of contracts of carriage, i.e., Bill of Lading, provides for clauses like "freight deemed earned-cargo loss or not lost", "freight deemed earned within five days of the vessel sailing" or "freight deemed earned upon issuance of bill of lading-cargo lost or not", etc. Moreover, the freight is also paid by tele-remittance or RTGS from one bank account to another bank account and therefore, the scenario in which a freight or cargo on board a ship or landed or freight to be paid to a ship can be arrested is as good as nil.

14. The High Court (O.S.) Rules have been framed for regulating the procedure and practice in cases brought before the High Court under the Colonial Courts of Admiralty Act, 1890. The 1890 Act declared that the Colonial Courts of admiralty can exercise the same jurisdiction as the High Court of admiralty in England. The counsel for the Plaintiff has not been able to show a single case where the English Court's have exercised admiralty jurisdiction for arrest of bunkers on board a ship independently of a ship and with no claim against the ship. The only place where bunkers are being arrested and stored is in South Africa where jurisdiction to arrest bunkers is confirmed by statute.

15. Ms. Priya, the learned counsel for the Plaintiff also relied upon the judgment of the Apex Court in the matter of *M.V. Elisabeth and Others Vs. Harwan Investment and Trading Pvt. Ltd., Hanoekar House, Swatontapeth, Vasco-De-Gama, Goa*, to submit that legislation has always marched behind time, but it is the duty of the Court to expound and fashion the law for the present and the future to meet the ends of justice. The counsel also submitted that where statutes are silent and remedy has to be sought by recourse to basic principles, it is the duty of the Court to devise procedural rules by analogy and expediency. The High Court in India being superior Courts of record they have inherent and plenary powers unless expressly or impliedly barred and hence this Court should exercise jurisdiction. The counsel in particular relied upon paragraph 14, 17, 32, 33, 34, 64, 66, 68, 69, 89, 98 and 99. For the purpose of this judgment we need to reproduced only paragraph 17, 64, 66, 68 and 99:-

"17. Legislation has always marched behind time, but it is the duty of the Court to expound and fashion the law for the present and the future to meet the ends of justice.

64. Where statutes are silent and remedy has to be sought by recourse to basic principles, it is the duty of the court to devise procedural rules by analogy and expediency. Actions in rem, as seen above, were resorted to by courts as a

devise to overcome the difficulty of personal service on the defendant by compelling him to enter appearance and accept service of summons with a view to furnishing security for the release of the res; or, in his absence, proceed against the res itself, by attributing to it a personality for the purpose of entering a decree and executing the same by sale of the res. This is a practical procedural device developed by the courts with a view to rendering justice in accordance with substantive law not only in cases of collision and salvage, but also in cases of other maritime liens and claims arising by reason of breach of contract for the hire of vessels or the carriage of goods or other maritime transactions, or tortious acts, such as conversion or negligence occurring in connection with the carriage of goods. Where substantive law demands justice for the party aggrieved, and the statute has not provided the remedy, it is the duty of the court to devise procedure by drawing analogy from other systems of law and practice.....

66. The High Courts in India are superior courts of record. They have original and appellate jurisdiction. They have inherent and plenary powers Unless expressly or impliedly barred, and subject to the appellate or discretionary jurisdiction of this Court, the High Courts have unlimited jurisdiction, including the jurisdiction to determine their own powers.

68. In decisions such as *Jayaswal Shipping Company Vs. The owners and parties interested in Steamship "S.S. Leelavati"*, ; *Kamalakar Mahadev Bhagat Vs. Scindia Steam Navigation Co. Ltd.*, ; *Rungta Sons Private Ltd. v. S.S. "Edison Mariner"* (1962) 66 Cal WN 1083; *National Co. Ltd. v. Asia Mariner*, (1968) 72 Cal WN 635; *Sahida Ismail Vs. Petko R. Salvejkov and Others*, and *Smt. Reena Padhi and Others Vs. Owners and parties, interested, in the motor vessel "Jagdhir"* No. 1623 registered at the Bombay Port of Registry, India and Another, , the High Courts took an unduly restrictive view of the courts' admiralty jurisdiction by limiting it to what was permitted by the Admiralty Court Act, 1861 and the Colonial Courts of Admiralty Act, 1890. This was, in our view, an unjustified abdication of jurisdiction and a self-assumed fetter on competence to render justice.

99. Basis of Maritime Law has been necessity to provide remedy for wrong done on high seas. Inclusion or expansion of jurisdiction was in relation to any cause which could have been cognisable under ordinary law. Bottomry, salvage, seaman wages or towage are all causes for which action could be brought in court of law but their enforcement was rendered illusory with disappearance of the person beyond territorial waters. To overcome this difficulty this jurisdiction was created making it actionable against person and finally the res itself. What was basic was the existence of cause of action, arising out of tort or contract in relation to the master or owner of the ship..... Legislation may create a right or it may recognize one founded on custom or practice...."

The counsel submitted that in the past there were claims of respondentia and bottomry which is not there anymore. The counsel submitted that in the olden

days the vessel owner managed the vessel, decided the operation, the route, the cargo to be carried, etc., but today the ships are owned by one given on bareboat charter to another who in turn time charters to another to be given again on voyage charter, vessels are managed by crewing managers who have no say in the trading patterns of the vessel which are determined by either the charterers or commercial managers of the vessel, etc. Therefore, as times have changed the shipping industry has changed the way of shipping business, its conduct has changed and therefore, this Court also should expand the scope of arrest.

The counsel also relied on a judgment of the English Court in the matter of *The Saint Anna* 1980 LLR (1) page 180 to submit that it was a charterer who had supplied the bunkers to the vessel and following the judicial sale of the vessel the Court held that the interveners charterers were the owners of the fuel on board the vessel and therefore, the same was not the property of the owners of the vessel. I am afraid, the judgment in *The Saint Anna* (supra) has no applicability to the present case. In *The Saint Anna* (supra), the mortgagees of the ship obtained an order of arrest of the ship which at that point of time was on time charter to another company who had supplied and paid for the bunkers on board. The vessel was sold pursuant to the mortgagees' arrest and the Court held that the bunkers belonged to the time charterer and were not available to the mortgagee. So also in the case of *m.v. Span* (1984) 1 L.L.R. 119 Terza No. 2. This judgment in *The Saint Anna* (supra), neither deals with arrest of bunkers nor were bunkers arrested independently of the ship. The said judgment only says that bunkers were the property of the time charterer and not part of the mortgage security.

Ms. Priya, also submitted that the Apex Court has held in the matter of *Liverpool and London S.P. and I Asson. Ltd. Vs. M.V. Sea Success I and Another*, that with the change of time, from narrow and pedantic approach, the Court may resort to broad and liberal interpretation. The counsel emphasized on paragraph 65 of the said judgment which reads as under:-

"It is true that this Court is not bound by the American decisions. The American decisions have merely a persuasive value but this Court would not hesitate in borrowing the principles if the same is in consonance with the scheme of Indian law keeping in view the changing global scenario. Global changes and outlook in trade and commerce could be a relevant factor. With the change of time; from narrow and pedantic approach, the Court may resort to broad and liberal interpretation. What was not considered to be a necessity a century back, may be held to be so now."

16. The foundation of an action in rem has been extensively dealt with by the Apex Court in the matter of *m.v. Elisabeth* (supra). Both these judgments of the Apex Court in the matter of *m.v. Elisabeth* (supra) and *m.v. Sea Success* (supra) do not help the cause of the Plaintiff. The observations in the matter of *m.v. Elisabeth* (supra) make it clear that the admiralty jurisdiction of the High Court is

founded on the arrest of the ship and is directed against the ship. The judgment also makes it clear that the foundation of an action in rem is a maritime lien or claim imposing a personal liability upon the owner of the vessel. Infact in paragraph 46, 55 and 82 of m.v. Elisabeth, the Apex Court observed as under:-

"46. The foundation of an action in rem, which is a peculiarity of the Anglo-American Law, arises from a maritime lien or claim imposing a personal liability upon the owner of the vessel. A defendant in an admiralty action in personam is liable for the full amount of the plaintiff's established claim. Likewise, a defendant acknowledging service in an action in rem is liable to be saddled with full liability even when the amount of the judgment exceeds the value of the res or of the bail provided. An action in rem lies in the English High Court in respect of matters regulated by the Supreme Court Act, 1981, and in relation to a number of claims the jurisdiction can be invoked not only against the offending ship in question but also against a "sistership" i.e., a ship in the same beneficial ownership as the ship in regard to which the claim arose.

"The vessel which commits the aggression is treated as the offender, as the guilty instrument or thing to which the forfeiture attaches, without any reference whatsoever to the character or conduct of the owner... (Per Justice Story, The United States vs. The Big Malek Adhel).

55. An action in rem is directed against the ship itself to satisfy the claim of the Plaintiff out of the res. The ship is for this purpose treated as a person. Such an action may constitute an inducement to the owner to submit to the jurisdiction of the court, thereby making himself liable to be proceeded against by the plaintiff in personam. It is, however, imperative in an action in rem that the ship should be within jurisdiction at the time the proceedings are started. A decree of the court in such an action binds not merely the parties to the writ but everybody in the world who might dispute the plaintiff's claim.

82. The admiralty jurisdiction of the High court is dependent on the presence of the foreign ship in Indian waters and founded on the arrest of that ship. This jurisdiction can be assumed by the concerned High Court, whether or not the defendant resides or carries on business, or the cause of action arose wholly or in part, within the local limits of its jurisdiction. Once a foreign ship is arrested within the local limits of the jurisdiction of the High Court, and the owner of the ship has entered appearance and furnished security to the satisfaction of the High Court for the release of the ship, the proceedings continue as a personal action."

(emphasis supplied)

17. Therefore, unless and until the owner of the ship is liable for the claim, the admiralty jurisdiction of this Court cannot be invoked. In the matters of m.v. Elisabeth (supra) and m.v. Sea Success (supra), the Apex Court only expanded the types of maritime claims for which an action in rem for arrest of a ship can be filed. The judgments did not deal with the issue as to whether any property

other than a ship can be arrested or not. The judgments also did not expand or even suggest that the scope of property against which action in rem can be maintained has to be extended.

18. This Court in the matter of Best Foods International Private Limited vs. Navbharat International Limited and others (Best Foods) 3 has held that the res is the ship. The Division Bench of this Court while referring to the judgment in m.v. Elisabeth (supra) referred to admiralty jurisdiction conferring a right in rem against the ship or cargo, the admiralty jurisdiction of the High Court is founded on the arrest of the ship, etc. Reading the said judgment with m.v. Elisabeth (supra) it is quite clear that there can be no action in rem without arrest of the ship because that is the foundation of the admiralty jurisdiction. Infact this Court in the matter of M/s. Greenwich Meridian Logistics (India) Pvt. Ltd. (supra) has also held that an action in rem is directed against the ship itself to satisfy the claim of the Plaintiff out of the res. Infact in the Best Foods matter (supra) this Court had rejected the submission that so long as the case before the High Court pertains to a claim which has a maritime flavour or which was recognized as falling within the Admiralty jurisdiction, jurisdiction can be exercised over any property and the same was not restricted to a ship. Infact the Apex Court in the matter of O. Konavalov Vs. Commander, Coast Guard Region and Others, has observed that "one of the distinctive features of Admiralty practice is proceedings in rem which are against maritime property, i.e., the vessel, cargo or freight as the case may be."

19. I also find support for the view against jurisdiction to arrest bunkers in African Eagle (supra). In that case, the Plaintiff sought arrest of freight and bunkers and the same was opposed by the Defendants on the ground that there is no jurisdiction to arrest freight and bunkers by way of proceedings in rem filed in the Admiralty Jurisdiction of this Court. The judgment in The African Eagle considers various statues, letters patent, High Court Rules, various judgments of the Apex Court (m.v. Elisabeth and m.v. Sea Success) as well as of this Hon''ble Court m.v. Mariner IV, a Foreign Flag Vessel and another Vs. Videsh Sanchar Nigam Ltd., and English law. The Court held the freight independently of vessel cannot be arrested. The arrest of bunker issue was left open as the Defendants had agreed to secure the claim upto the value of the bunker then available on board on without prejudice basis. The suit later was dismissed on other grounds. This judgment it was submitted on behalf of Defendant No. 2 that there is no in rem jurisdiction to arrest bunkers. Although the judgment decided only the issue of arrest of freight, in my view it applies in equal measure to arrest of bunkers. Bunkers cannot be arrested independently of or with the ship as separate maritime property.

20. It is not open to the Plaintiff to argue that bunkers can be separated from the ship and treated as independent property capable of arrest even though the vessel itself cannot be proceeded against and arrested by the Plaintiff in respect of its claim against Defendant No. 3.

21. Therefore, whilst freight and cargo are considered as maritime property, bunkers are not and hence arrest of bunkers is not permissible irrespective of whether there is a maritime claim or lien against the vessel. Bunkers cannot be considered as maritime property independent of the ship. Bunkers are part of the ship and not capable of independent arrest. In the event the bunkers belong to the charterer against whom the Plaintiff has a maritime claim, the Plaintiff has no remedy by way of arrest of bunkers and the Plaintiff must pursue its claim against the charterer by adopting such other remedies as are available in law. Any alleged lien over the bunkers as provided in the bunker sales contract is of no consequence. It is a contractual lien at best and does not bind a person who is not a party to the contract. This does not give the Plaintiff any right to arrest the bunkers on board the vessel nor does it entitle the Plaintiff to proceed in rem against the bunkers.

22. Moreover, there is no averment in the plaint as to how this Hon"ble Court has jurisdiction to arrest bunkers or the source for this Hon"ble Court to derive such jurisdiction. Mr. Priya submitted that the changing global scenario should be kept in mind where there will be so many parties involved in connection with a transaction and hence this Court should extend the scope of arrest to bunkers on board. I am afraid such a sweeping position cannot be taken. In fact in the unreported judgment of this Court in the matter of Ishwar Overseas FZE vs. The Bunkers on board the m.v. Yin Ning (Admiralty Suit lodging No. 2489 of 2009) dated 29th August, 2009, gives an indication that this court would not have jurisdiction to arrest bunkers. At paragraph 11, the Court has observed as under:-

"11. However, the plaint allegations if read as a whole, present a misleading picture and to say the least, complete chain which would demonstrate how the Plaintiffs' rights are vitally affect is not complete. There are several matters which have not been brought to the notice of this Court, including the fact that this Court would not have jurisdiction to arrest the bunkers....."

23. The two orders of the Hon"ble High court of Calcutta relied upon by the counsel for the Plaintiff do not lend any assistance because both were ex parte orders and the issue of jurisdiction was neither raised nor debated nor a finding rendered. In the case of Proud Parents Investments Company vs. vessel m.v. Kea APOT No. 243 of 2011 dated 8.6.2011c, the arrest order was granted simply on the basis of the statements and averments made in the Plaint and the Hon"ble Court observed that "as at the moment, in admiralty action one has to go by statements and averments of the plaint and the petition...". In the case of Ray Metal (Asia) Pte. Ltd. vs. m.v. DD Vigor 4, which was also an ex parte order, Rules 1, 9 and 21 of the Admiralty Rules of the Hon"ble High Court of Calcutta are referred to as permitting arrest of bunkers. On a plain reading of the said Rules, it is clear that they do not even refer to bunkers, much less permit arrest of bunkers. Consequently, the said judgments are of no assistance of the Plaintiff.

24. Arrest of bunkers effectively results in arrest of the ship although there is no claim against the shipowner. Thus the ship owner, who is a third party, is

seriously prejudiced and would suffer substantial loss. Ordinarily Courts do not make an order that causes serious prejudice to a third party. In such a situation, the interests of the third party far outweigh the interests of a Plaintiff who is seeking to secure its claim against the buyer of the bunkers. It is also no answer for the Plaintiff's counsel to say in such a situation that it will provide appropriate undertakings to compensate the ship owner for detention of its vessel or that it is open to the ship owner to recover charter hire from the charterer for the period the vessel is detained due to an order of arrest of bunkers. The English Court of Appeal in the judgment of *Galaxia Maritime S.A. vs. Mineral Import Export and Ocean Blue Compania Naviera* (1982) 1 ALL ER 796 S.A. *Galaxia Maritime S.A.* has also dealt with this argument including the submission that the ship owner may well recover charter hire from the time charterer whose bunkers are sought to be detained. On this, *Eveleigh, L.J.* And *Kerr, L.J.*, at page 799 and 800 said as under:-

"*Eveleigh L.J.*-But not only is the trading activity of the third party interfered with in this case, but one does not know what arrangements could be made by the members of the crew, and perhaps others, for their own movements after this vessel completes its voyage. At this time of the year it is particularly relevant, it seems to me, that this order may have the effect of interfering with the Christmas of every single person on board and with all their private arrangements.

I regard it as absolutely intolerable that the fact that one person has a claim for a debt against another, that third parties should be inconvenienced in this way, not only to affect their freedom of trading but their freedom of action generally speaking.

Kerr L.J.-But where the effect of service must lead to interference with the performance of a contract between the third party and the Defendant which relates specifically to the assets in question, the right of the third party in relation to his contract must clearly prevail over the Plaintiff's desire to secure the Defendant's assets for himself against the day of judgment.

However, even in cases of time charters, disputes might well arise as to whether or not the vessel remained on hire during the consequent delay. A Plaintiff is not entitled, in my judgment to expose the third party to the risk of such disputes merely by the offer of an indemnity. He cannot, merely in order to secure a benefit for himself, coerce the third party into a serious risk of litigation or arbitration with the Defendant, and thereafter possibly also with himself under the terms of the proffered indemnity.

Where the effect of service of the injunction on the third party substantially interferes with the third party's business the rights of the third party must in my view always prevail over the desire of the Plaintiff to secure the ultimate recovery of debts or damages from the Defendant with which the third party is in no way concerned."

In a similar case the New Zealand Court in the case of Gilfoyle Shipping Services Ltd. vs. Binosi Pty Ltd. decided on 19th December, 1983 by Barker, J. observed as under:-

"..... In my view, there would be an intolerable burden on the owners; whilst one has every sympathy for the Plaintiff which has given a lot of credit to a Defendant which apparently does not intend to pay, that sympathy must be outweighed by the inconvenience to the third party."

25. A Court would certainly weigh the practical effects of implementation of any order it makes particularly the difficulty encountered in the realm of enforcement. An order of arrest of bunkers can cause serious difficulty in implementation. Such an order would require bunkers to be off-loaded from the vessel at the port where the vessel is lying. Many vessels may not have facilities to pump out bunkers. Many ports may not have fully fitted and equipped barges available into which the bunkers can be discharged and stored. The barges would have to be equipped with fire-fighting equipment in view of the hazardous nature of the bunkers. There would be risk of oil pollution during discharge operations.

26. Discharge, storage and transportation of bunkers would require appropriate permissions, licences and approvals under the Petroleum Act, 1976 and the rules framed thereunder. The Plaintiff's counsel in fairness agreed that the Customs permission would be required and a special receiver of the bunkers would have to be appointed for storage pending sale. As these are imported goods, customs permissions would also be required for discharge and storage under customs bond.

27. There are 13 major ports and over 50 active minor ports in India engaged in commercial shipping activity and many of these may not have facilities for discharge and storage of bunkers. Many of these do not have the facility to provide bunkers to ships and this would cause serious difficulty if bunkers are arrested and unloaded from a ship. Such ships would effectively become dead ships and cause serious threat to navigation in the port, apart from the difficulties the Master and crew on board the same may face in the absence of fuel to run the generators. If there is cargo on board, it would also be exposed to serious risks of damage and deterioration depending on the nature of the cargo. All these impediments also make it clear that an order of arrest of bunkers would face serious difficulties in enforcement in Ports in India.

28. On the Plaintiff's submission of equity and justice, the Plaintiff to seek such discretionary relief first has to establish that this Court has jurisdiction to arrest bunkers on board a ship in which the Plaintiff has failed. In my view, this Court does not have in rem jurisdiction to arrest bunkers independent of ship.

29. Notice of Motion allowed in terms of prayer clause-(a) with cost. The Plaintiff's to pay a sum of Rs. 1,00,000/- as cost for this Notice of Motion to the Defendant No. 2 within four weeks.

30. At this stage, the counsel for the Plaintiff requests for stay of the order. When this Court has held that it has no jurisdiction, the question of granting any stay does not arise.

1 Delivered on 4th February, 2014 in Notice of Motion (Lodg.) No. 59 of 2013 in Admiralty Suit No. 42 of 2013 2 Delivered on 17th April, 2014 in Admiralty Suit No. 31 of 2008 3 Appeal No. 92 of 2010 in Notice of Motion No. 271 of 2010 in Admiralty Suit (Lodg.) No. 87 of 2010 delivered on 23rd March, 2010 4 GA No. 3041 of 2011 & AS No. 11 of 2011 dated 28.9.2011