

(2018) 08 BOM CK 0020

In the Bombay High Court

Case No : Commercial Appeal Lodging No. 287 Of 2018 , Commercial Notice Of Motion No. 199 Of 2017, Commercial Admiralty Suit No. 223 Of 2017

Socar Turkey Petrol Enerji Dagitim San Ve Tic A.S.

APPELLANT

Vs

Mv Amoy Fortune (Imo 9583639)

RESPONDENT

Date of Decision : 02-08-2018

Acts Referred:

Constitution of India, 1950 — Article 215, 372
Admiralty Court Act, 1840 — Section 6
Admiralty Court Act, 1861 — Section 5
Senior Courts Act, 1981 — Section 20
Brussels Convention of 1952 — Article 1, 1(k), 2
International Convention on maritime liens and Mortgages, 1993 — Article 4

Citation : (2018) 08 BOM CK 0020

Hon'ble Judges : NARESH H. PATIL, J;G. S. KULKARNI, J

Bench : Division Bench

Advocate : Aspi Chinoy, V. K. Ramabhadran, Prashant Asher, Bulbul Singh Rajpurohit, Naishadh Bhatia, Prashant Pratap, Arjun Mittal, Ruchir Goenka,

Final Decision : Allowed

Judgement

Naresh H. Patil, J

1. Admit. Heard finally by consent of parties.

2. This appeal arises from an order dated 4 June 2018 passed by the learned Single Judge whereby a notice of motion filed by the respondent in the

admiralty suit in question wherein a prayer made by the respondent for setting aside of an exÂparte order of arrest of vessel dated 16 March 2017

and for return of security furnished by the respondent alongwith interest accrued thereon stands allowed.

2. Appellant is the original plaintiff. Respondent is the original defendant namely MV Amoy Fortune. The notice of motion in question was taken out

by the owners of the vessel.

3. Briefly stated facts are as under:Â?

The case of the appellant as set out in the plaint is that the appellant is a company incorporated under the laws of Turkey interÂalia engaged in the business of supplying bunkers to seaÂgoing vessels at various ports. The plaintiff operates in the field of fuel sales and is in business of supplying products to end users in the aviation and maritime segments. The respondent is a foreign, seaÂgoing vessel, flying the flag of Hong Kong, China as per the equasis report dated 14 March 2017.

4. The admiralty suit in question is instituted by the appellant seeking a judgment and decree against the respondent vessel and its arrest, sequestration, condemnation and sale for securing and/or satisfying the appellant's outstanding amount to US \$ 309,994.31. The principal amount being of US \$ 285,300 along with interest at the rate of 1% per month amounting to US \$ 12,694.31 as per the prayers made in the suit. The said amount was due and payable on account of appellant having supplied bunkers to the respondent, which was used and for which the vessel was benefited for prosecuting her voyages. The appellant having not been paid in respect of the said bunkers as supplied, the suit in question was filed.

5. The case as made out in the plaint and more particularly in paragraph 4 is that in usual course of business, one Force Twins Shipping (for short, 'Force') had approached the appellant for supply of fuel/bunkers to various vessels. If the supply was to be made to vessels undertaking cabotage voyages, Force requested the appellant to invoice the same to them directly. However, for vessel undertaking international voyages. â??In each supply, Force sent the orders with regards to invoicing. From time to time Force requested the appellant to raise invoice in the name of one Sentex LDX, an offshore company which was owned by Force.â?? On 21 September 2016, Force on behalf of respondent vessel and/or master and/or owners and/or managers and/or operators approached the appellant for supply of 1100 mts IFO 380 CST (for short, 'bunkers') to the respondent vessel at Istanbul Port on 27 September 2016 which was by the following eÂmail :Â?â??We kindly request two samples to be given to the vessel.â??

6. Pursuant to the said requisition as made by Force, the appellant on 4 October 2016 supplied 1100 mts of bunkers to the respondent vessel at the port

of Istanbul. The bunker delivery receipt bearing No.006834 dated 4 October 2016 was issued for the said supply. These bunkers were accepted

without raising any protest. The Master/Chief Engineer of the respondent vessel acknowledged receipt of bunkers by endorsing upon the bunker

delivery receipt. The endorsement is required to be noted which reads thus:Â?

â??We acknowledge receipt of the above product and confirm that samples were taken as per MARPOL Annex VI procedure at the vessel's

manifold, sealed and numbered as follows:

Yukarıda belirtilen yakitin teslim alındığını ve MARPOL Ek VI prosedürüne uygun olarak gemi manifoldundan numunelerin alınıp mühürlenildiğini ve

numaralandığını teyid ederiz

Â Signature / İmza : Â sd/Â?

Master/Chief Engineer

Kaptan / Bas Mühendis İmzası

Â Full name / İsim Â : Â Â Â Â Â Â Â Â Â
ZHANG Gr XAN

Â Block letter / Büyük harflerle

Vessel's stamp Â

Gemi mühuru â??

7. In regard to the above supply on 3 October 2016 at the request of Force, the appellant had issued an invoice bearing No.011172 on account of the

respondent vessel and/or master and/or owners and/or charterers and/or managers and/or operators and/or Sentex LDX for an amount of US \$

283,800. The invoice provided that payments made beyond the due date would be charged interest at the rate of 1% per month. Further an invoice

bearing No.011173 was issued for US \$ 1,500 towards barging charges.

8. Case of the appellant is also that the supplies made by the appellant are governed by terms of sale for marine fuels. As despite expiry of due date

of invoice Force has failed and neglected to make payment under the said invoices, the appellant had demanded payment from Force. The appellant

has averred that the appellant's claim was by reason of bunkers being supplied to the respondent vessel. The supply of these bunkers was essential for

the operation of the respondent/ vessel. It was the supply of goods or materials supplied to a ship for operation and maintenance and also constitutes

giving rise to and/or constituting a maritime claim/lien which can be enforced and/or crystallized for respondent vessel. The

appellant was therefore entitled to look to the respondent vessel for security and thus, was entitled to proceed in rem against the respondent vessel for

security for its claim for the cost of bunkers, supplied and delivered and was entitled to an order of arrest of the respondent vessel. In paragraph 5 of

the plaint, it was averred that in any event, the claim is in respect of disbursement on account of the respondent vessel.

9. In paragraph 6 of the plaint, the appellant averred that the claim is a recognized maritime claim/lien within the Admiralty Courts Act, 1861 and the

Administration of Justice Act, 1956 and the Supreme Court Act, 1981 and the various International Maritime Conventions. It is averred that the

Supreme Court of India has also recognized such a claim as constituting a valid maritime claim and thus, the appellant was entitled to proceed in rem.

10. The appellant moved the suit in question before the learned Single Judge on 16 March 2017 whereby the learned Single Judge observing that there

was no caveat against arrest filed by the respondent vessel and the appellant having made out a prima facie case for arrest of the respondent vessel

and as the appellant has a maritime claim against the respondent vessel for supply of necessities, in regard to the appellant's maritime claim against

the respondent for supply is necessary for order of the vessel. Immediately on the next day i.e. 17 March 2017, the respondent moved the learned

Single Judge seeking release of the respondent vessel by furnishing security. The learned Single Judge passed the following order:

P.C.

1. Mentioned. Not on board, taken on board.

2. Urgency is made out and therefore the matter is allowed to be moved.

3. The Defendant and their P&I Club, Gard P&I (Bermuda) Ltd., undertake to furnish either a Club Letter of Undertaking (LOU), on wordings to be

agreed upon between the Plaintiff and the Defendant or deposit cash security/ furnish a bank guarantee with this Court in respect of the Plaintiff's

claim in the sum of USD 309,994.31/Â, within 10 days from the date of this order. The advocate for the Defendant submits that such security is being

furnished without prejudice to their rights and contentions.

4. If the Defendant fails to honour the undertaking in terms of clause (3) as

aforsaid, the suit shall be decreed as prayed for by the Plaintiff.

5. Caveat against Release book has been produced. No caveat against release of the Defendant Vessel.

6. The Order of arrest dated 16th March, 2017, stands vacated and formal Instrument of Release is dispensed with. The Defendant Vessel stands released and may sail out.

7. The Parties are at liberty to serve the copy of the order through fax and email. All concerned authorities, including Port and Customs authorities to

act on a copy of the order duly authenticated by the Associate of this Court and Communicated to them by email/fax/courier/hand delivery.â??

11. Thereafter on 3 May 2017 the respondent filed the notice of motion in question before the learned Single Judge praying that the exÂparte order

dated 16 March 2017 passed by the learned Single Judge arresting the vessel be set aside and the security furnished by the respondent along with

interest accrued thereon be returned to the respondent.

12. The case of the respondent as set out in the affidavit in support of the notice of motion was principally that the appellant had no maritime claim

against the respondent vessel and its owners and thus, the suit was not maintainable in the Admiralty jurisdiction of this Court. The respondent entered

appearance for the limited purpose of vacating the order of arrest dated 16 March 2017 passed against the respondent vessel and for return of

security which was furnished without prejudice to the rights and contentions of the respondent. It was contended that there was no privity of contract

between the appellant and the owners of the respondent vessel. It was apparent from the claim that the order for supply of bunkers was placed on the

appellant by Force who asked for an invoice to be raised on their wholly owned offshore company Sentex LDX. Hence liability to make payment to

the appellant is that of Force. There was no personal liability on the part of the owner of the vessel Fortune Marine Lines Ltd. which was essential for

an action in rem to lie against the respondent vessel. There was neither a maritime claim nor a maritime lien against the respondent vessel and its

owners. The appellant was aware that the liability to pay for the bunkers was that of Force alone and it is for this reason that not a single demand has

been made by the appellant on the owner of the respondent vessel at any point of time and not even prior to the filing of the suit. This demonstrates

that the appellant never considered the owner of the respondent vessel as liable to pay for the bunkers. In fact, the appellant had suppressed the fact

that at the time the bunkers were supplied to the respondent vessel, the master of the respondent vessel had issued a bunkering statement dated 3

October 2016 to the appellant in which it was clearly stated that "as per instructions of charterers Transatlantica, vessel will take fuel ordered and

arranged by them at Istanbul. This is to inform you that the bunker supply is ordered and shall be paid by charterers, no lien or claim shall be raised

therefrom against the vessel / owners." The respondent contended that the bunkering statement was issued because the vessel was on time charter

to Transatlantica and it was the obligation of the said time charterers to provide and pay for the bunkers as is the case in all time charters. The said

bunkering statement was signed by the appellant. The signature on the bunkering statement is of the same person whose signature is appearing on

bunker delivery receipt produced by the appellant at Exhibit "C" to the plaint. This puts the matter beyond doubt that not only there was no privity

of contract and no personal liability of the owners of the respondent vessel but the appellant was aware of this position that the bunkers were to be

paid by the charterers and there shall be no lien or claim against the owners. It was contended that it was settled position of law that before an action

in rem to lie against the vessel, there was personal liability on the part of the owner and there was no liability in view of the charter party who was

liable to make payment. The respondent also contended that the respondent entered into a Time Charterparty dated 11 July 2016 with the time

charterers, Transatlantica Commodities S.A., for the charter of the respondent vessel, for a period of about 5 to 7 months. A copy of the Charterparty

dated 11 July 2016 was annexed to the affidavit in support of motion. As on the date of the filing of the suit, the Charterparty between the respondent

and Transatlantica had already come to an end and the respondent had already been redelivered by Transatlantica to the respondent on 25 November

2016. It was stated that the inquiries were made by the respondent and the inquiries revealed as averred in paragraphs 13 to 19 of the affidavit in

support of the motion which read thus : "That

"that

13. The Owners of the Defendant Vessel made inquiries with the time charterers

Transatlantica and have been advised by Transatlantica that they did not place any order for the Bunkers on the Plaintiff, but placed an order on their contractual supplier, Bunkernet Ltd. It appears that Bunkernet Ltd, in turn placed an order for the bunkers on one 'KPI Bridge Oil Ltd.', who in turn placed an order on Force Shipping. As appears from the plaint, Force Shipping placed an order on the Plaintiff who supplied the bunkers as the physical supplier. This is the contractual supply chain.

14. The Defendant Owner has also been advised by the said Transatlantica that payment for the bunkers being claimed by the Plaintiff has already been made by Transatlantica to Bunkernet and that such payment has been made by each party down the bunkering chain up to Sentex Ltd. who is the Plaintiff's contractual party. It appears that Sentex Ltd. has not paid the Plaintiff but this is of no concern to the Defendant vessel and its owners.

As can be seen from the above chain, the Plaintiff can have no claim against anybody except Force Shipping who had contracted with them for the supply. Annexed hereto and marked as Exhibit C is a copy of the bunker invoice raised on the time charterer Transatlantica Ltd. By Bunkernet Ltd.

This has been paid by Transatlantica Ltd. Annexed hereto and marked as Exhibit D is a copy of payment confirmation issued by Sentex Ltd.

confirming receipt of payment from KPI Bridge Oil Ltd.

15. Entirely without prejudice to the above, I say and submit that even if the time charterers Transatlantica had not paid for the bunkers supplied by the Plaintiff the owners are not liable as there is no privity of contract with the owner. It is settled law that in a time charter the bunkers are supplied by the charterer who pays for it.

16. I further say and submit that the Charterparty precluded Transatlantica from creating a lien against the Vessel, especially in respect of the supply of bunkers and its value, which costs, risks and expenses are always the obligation of Transatlantica to bear. In any event, under Indian law a contractual non possessory lien over a ship cannot be created by any party other than the owner of the vessel. Furthermore it is trite law that a bunker supplier does not have a maritime lien over the Vessel for bunkers supplied to the Vessel and that a maritime lien cannot be created by a contract and there is no maritime lien in respect of supply of necessities.

17. As the contract is between the Plaintiff and Force Shipping the terms of sale

of the Plaintiff are irrelevant and not binding on the owner of the

Defendant vessel who is not even aware of the same. The terms itself state that they apply to all sales by the Plaintiff and can only apply to the

person to whom the bunkers are sold and that is the contractual buyer Force Shipping.

18. The Plaintiff's claim if any, lies in personam against Force Shipping and / or Sentex Ltd. who is the Plaintiff's contractual counterparty and who is

solely liable for the Plaintiff's alleged claim. There is no privity of contract with the Applicant and no in personam liability of the Applicant for an action

in rem to lie against the Defendant Vessel. Hence the arrest order dated 16th March 2016 obtained by the Plaintiff is not sustainable and is required to

be vacated.

19. The Claim for Bunkers as 'necessaries' is not a maritime lien but only a maritime claim under the Arrest Convention. However, for a claim to be

maintainable against the Defendant Vessel in rem and the order of arrest to be granted there must be a liability in personam against the Registered

Owner. In the absence of privity of contract between the Registered Owners and the Plaintiff there can be no liability of the owners and consequently

no action in rem against the Defendant vessel.â??

13. Mr. Chinoy, the learned Senior Counsel appearing for the appellant, submitted that three documents annexed to the plaint clearly make out a case

for a maritime claim against the defendant vessel and its owners. Â The plaintiff in para 4(b) of the plaint clearly avers that Force shipping was acting

on behalf of defendant vessel, its master and owners approached the plaintiff for supply of bunkers to the defendant vessel. This averment was

adequate for claiming privity with the defendant vessel and its owners. It is submitted that the eâmail order dated 21/9/2016 received from Force

shipping to supply bunkers to the vessel does not in any way detract from the pleading contained in para 4(b) of the plaint or militate against the order

being placed by Force shipping on behalf of the vessel and its owners.

14. The learned counsel further submitted that the Bunker Delivery Receipt dated 4/10/2016 was signed by the Master / Chief Engineer and bears the

stamp of the vessel. It is settled legal position that the supply of necessaries supplied to a ship are prima facie presumed to have been supplied on the

credit of the ship. The learned counsel has further referred to averment made in

para 4(e) and para 8(a) of the plaint. The learned counsel submitted that at this interlocutory stage it cannot be said that the plaintiff's case based on the documents noted above is not even a reasonably arguable case. The counsel, therefore, submits that the defendant vessel was not on charter on the relevant date i.e. 21/9/2016 as the Time Charter Party allegedly dated 11/7/2016 is false and fabricated.

15. The learned counsel submitted that Exhibit 'D' to the plaint is the invoice raised by the plaintiff on M/s. Sentex for the bunkers / fuel supplied to the defendant vessel. It is submitted that addressing the invoice to Force shipping / Sentex: Force's associate company is consistent with the claim being made by the plaintiff supplier on Force shipping as an agent of a foreign principal i.e. the vessel and its owners.

16. Mr. Pratap, the learned Senior Counsel appearing for the respondent submitted that there is no privity of contract between plaintiff and the owners of the defendant vessel. Neither there is a personal liability on the part of Fortune Marine Lines Ltd., the owner of the defendant vessel. There is neither a maritime claim nor a maritime lien against defendant vessel and its owners. The plaintiff's contract is admittedly with Force shipping who raised the invoice on Sentex LDX on the instructions of Force shipping. No invoice has been raised on or sent to the owners of the defendant vessel.

It is submitted that not a single demand has been made by the plaintiff on the owner of the defendant vessel. It was submitted that the vessel M.V.

Amoy Fortune was under time charter to Transatlantica Commodities S.A. under a charter party dated 11/7/2016. But during the course of

submission, the learned counsel did not press the submission in respect of averment regarding subsisting charter party agreement at the relevant time.

The learned counsel referred to a Letter of Guarantee issued by Force shipping to the appellant pursuant to which Force shipping had unconditionally

and irreparably agreed to pay the debt which is not paid by Sentex LDX. In respect of basic principles of law, it was submitted in the written

submission notes as under :

19. The principles of the International Convention on the Arrest of Ships, 1999 are applicable in all matters involving arrest of ship in admiralty

jurisdiction for securing a maritime claim. The principles of the Brussel Arrest Convention, 1952 were held to apply in matters of arrest of ships by the

Honâ??ble Apex Court in the case of M.V. Elizabeth and Ord. V. Harwan Investment and Trading (MV Elizabeth). Subsequently, the principles

pursuant to arrest of ships set out in the 1999, Convention were held to be applicable to matters involving arrest of ships by the Honâ??ble Supreme

Court in the judgment Liverpool & London Steamship P & I Association v. M.V.

Sea Success. The later judgments of the Supreme court in Chrisomar Corporation v. MJR Steels Pvt. Ltd. (Chrisomar Corporation) as well as Sunil

B. Naik v. m.v. Geowave Commander (Geowave Commander) confirm this position. As matters stood when the Respondent vessel was arrested, the

principles of the 1999 Arrest Convention applied and the relevant article is Article 3(1)(a) which is as follows:Â?

â??ARTICLE 3: EXERCISE OF RIGHT OF ARREST

1. Arrest is permissible of any ship in respect of which a maritime claim is asserted if:

a) the person who owned the ship at the time when the maritime claim arose is liable for the claim and is owner of the ship when the arrest is

effected:â??

17. As regards the Bunker Delivery Receipt, it was submitted that the master has signed the Bunker Delivery Receipt. It is a mere receipt

acknowledging delivery to the vessel. It does not create privity or any liability or obligation to pay for the bunkers. Â The learned counsel submitted

that the view adopted by the learned Single Judge is reasonable and sound view and the discretionary one on facts of the case. Relying on the case of

Wander Ltd. & anr. Vs. Antox India P. Ltd., 1990 (Supp) Supreme Court 727, the learned counsel submits that no case is made out for causing

interference in the impugned order.

18. The learned Senior Counsel Mr. Chinoy has referred to following judgments :

(a) Chemoil Adani Pvt. Ltd. Vs. m.v. Hansa Sonderburg & Ors. [Notice of Motion No.739 of 2010 in Admiralty Suit (L) No.3263 of 2009 decided on 17/3/2010].

(b) M/s. Crescent Petroleum Ltd. Vs. m.v. MONCHEGORSK and anr. [AIR 2000 Bom 161].

(c) Gulf Petrochem Energy Pvt. Ltd. Vs. M.T. Valor [2015 SCC OnLine Bom 1367].

(d) Chemoil Andani Pvt. Ltd. Vs. m.v.HANSA SONERBURG and ors. [2010(7)

Mh.L.J. 660].

(a) The learned Single Judge of this Court (Coram: Anoop V. Mohta,J.) in para 23 of the order dated 17/3/2010 in Notice of Motion No. 739 of 2010

(Supra), observed as under:

“23. In the present case, the Plaintiffs were fully aware that they were dealt with the time charter Defendant No.3 and directly placed the order

for bunkers on the Plaintiff. There was no specific invoices in the name of Defendant No.1 and 2 in the present case. The same is the case with the

Judgment of Gujarat High Court of Adani Enterprises Vs.MT Maliau.”

(b) The learned Single Judge of this Court (Coram: S.S. Nijjar,J.) in the case of M/s. Crescent Petroleum Ltd. Vs. m.v. “MONCHEGORSK” and

anr. (Supra), in para 5, observed as under :

“5. It would also not be possible to accept the submission of Mr. Mukherjee to the effect that even prima facie it could not be held that the

necessaries were supplied on express/implied authority of the vessel. The circumstances in which the plaint can be struck out as disclosing no cause

of action has been considered by a Division Bench of this Court in the case of Bomi Munchershaw Mistry v. Kesharwani Co-Op. Housing Society

ltd. (1988) 3 Bom.C.R. 238. The ratio has been set out in paragraph 14 and 19 of the judgment which are as follows:

14. The bedrock upon which is founded the exercise of the right to strike of a pleading is stated succinctly by Fletcher Moulton Lord Justice in

Dyson v Attn Gen, (1911) 1 K.B. 419:

To my mind it is evident that our judicial system would never permit a plaintiff to be driven from the judgment seat in this way without any Court

having considered his right to be heard, except in cases where the cause of action was obviously bad and almost incontestably bad.

19. The above narration indicates that though the words “abuse of the process of the Court occurred for the first time on 1-2-1977 in Order 6, Rule

16 of the Code of Civil Procedure, this power was immanent in and arose from a High Court being a Court of Record under the Letters Patent as well

as Article 215 of the Constitution. Rege, J., as well as the two learned Judges of the Appeal Court refused to strike the plaint off the record on the

ground that it was an abuse of the process of the Court. This power of taking a plaint off the record of the Court as well as the allied power of

punishing for contempt which are the attributes of a Court of record, will have to be exercised with utmost caution and only when the Court is

absolutely sure that the plaintiff does not have an arguable case at all. The exercise of the power though arising in Civil Procedure, can be said to

belong to the realm of criminal jurisprudence and any benefit of the doubt must go to the alleged contemner of the plaintiff whose plaint is to be

branded as an abuse of the process of Court. That explains, why Tucker, L.J., in *Law v. Dearnlev* (1950 (1) ALL ER 124) (*supra*) felt reluctant to

strike the action off the record even though his view was shared by the majority.

Clause 21 of the contract for bunker supplies called ""General Terms and Conditions of Sale"" *prima facie*, shows that the plaintiff has acted on the

assurance given on behalf of the vessel. *Prima facie* therefore a rebuttable presumption would arise that the necessities have been supplied to the

vessel on the express or implied authority of the owner. In the case of *The Owner of the Steamship ""Heiwa Maru"" v. Bird & Co.*, (1926) I.L.R. (Vol.

4) Rangoon 78 the Court observed:

Necessaries supplied to a ship are of course *prima facie* presumed to have been supplied on the credit of the ship but there is a passage in the

judgment of Their Lordship of the Privy Council in the case of *Foong Tai v. Buchheister*, 1908 AC 458 which shows that presumption can be rebutted,

and in the case of *The Castlegate*, (1893) AC 38, Lord Herschell said that disbursements made by the master on account of the ship must be limited to

disbursements which he had a right to make on the credit of the owners of the ship and did not extend to disbursements made by him for purposes for

which the charterers ought to have made provision, even though in a sense they might be said to have been made account of the ship.

Thus it would appear that the defendants would be entitled to rebut this presumption by relying on Clause 2 of the Charter Party, which provides that

the charterer shall provide and pay for all the fuel except otherwise provided. But these are matters to be decided on appreciation of evidence and not

at an interlocutory stage. The plaintiff cannot be driven from the judgment seat merely on speculation. It is settled law that the plaint can be rejected

as disclosing no cause of action if the Court finds that it is plain and obvious that the case put forward is unarguable. In my view the phrase ""does not

disclose a cause of action"" has to be very narrowly construed. Rejection of the

plaint at the threshold entails very serious consequences for the plaintiff. This power has, therefore, to be used in exceptional circumstances. The Court has to be absolutely sure that on meaningful reading of the plaint it does not make out any case. The plaint can only be rejected where it does not disclose a cause of action or where the suit appears from the statements made in the plaint to be barred by any provision of the law. While exercising the power of rejecting the plaint, the Court has to act with utmost caution. This power ought to be used only when the Court is absolutely sure that the plaintiff does not have an arguable case at all. The exercise of this power though arising in Civil Procedure, can be said to belong to the realm of criminal jurisprudence and any benefit of the doubt must go to the plaintiff, whose plaint is to be branded as an abuse of the process of the Court. This jurisdiction ought to be very sparingly exercised and only in very exceptional cases. The exercise of this power would not be justified merely because the story told in the pleadings was highly improbable or which may be difficult to believe.

(c) In the case of Gulf Petrochem Energy Pvt. Ltd. Vs. M.T. Valor (Supra), the learned Single Judge (Coram: Gupte,J.), in paras 13, 17 and 18 observed as under:

13. In the first place, the cause of action is nonpayment for supply of bunkers and the only connection of the owners of the vessel to that cause of

action claimed in the plaint is that OW Bunker approached the Plaintiff via email and issued a Purchase Order Confirmation "on behalf of the

Defendant vessel". It is admitted that the Plaintiff's buyer was OW Bunker and it was OW Bunker to whom the Plaintiff looked for payment, but it is

claimed that the order confirmation issued by the Plaintiff included a term that marine fuel was delivered not only on the credit of the buyer, but also

on the credit of the vessel receiving the fuel. The relevant clause, Clause 3 (e), of the standard terms and conditions forming part of the Order

Confirmation is quoted below:

Clause 3(e) : Marine fuel is delivered hereunder not only on the credit of Buyer but also on credit of the vessel receiving delivery of marine fuel, and

it is agreed and Buyer warrants that Seller will have and may assert a maritime lien against the receiving vessel for the amount of the purchase price

of said marine fuel together with all delivery and other charges forming part of

the agreement of sale. All associated costs to recover the unpaid bills will be solely on the buyer ordering the fuel.

If one has regard to the documents produced by the Defendant, it was Bryggen, the time charter of the vessel (and not the owners), who had placed the order on Bergen, a non-physical bunker supplier, who in turn entered into a contract with OW Bunker, another nonphysical supplier, who then entered into a contract with the Plaintiff's group company based in Singapore. It was this group company, which, then, instructed the Plaintiff to supply bunkers to the vessel. This chain is not disputed by the Plaintiff, though the Plaintiff terms the same as irrelevant. What is relevant, according to the Plaintiff, is that the physical supply was made to the vessel by the Plaintiff at the instance of OW Bunker, who represented itself as acting on behalf of the vessel and agreed to various terms which had the effect of binding the vessel. This Court is at a complete loss to appreciate how a third party non-physical bunker supplier can at all make a representation to a physical supplier on behalf of the owners of the vessel (or even the time charters, for that matter) and seek to bind the vessel or deal with the physical supplier on the credit of the vessel. To show such entitlement, there must be at least an arguable case of the owners having authorized the third party non-physical supplier to do so. There is not even an allegation in the plaint, leave aside a reasonably arguable case, that OW Bunker had the requisite authority to bind the vessel or trade on its credit. All that the plaint states is that OW Bunker acted on behalf of the owners of the vessel. The plaint is silent on how OW Bunker gets the authority to do so. It is secondly alleged that the Chief Engineer of the Defendant vessel acknowledged receipt of bunkers, and the bunker delivery receipt bears the stamp of Valor Maritime Limited, the owners of the vessel. This acknowledgment does not take the Plaintiff's case any further. Acknowledging physical delivery is one thing and agreeing to be bound for payment therefor is quite another. Simply by reason of the Chief Engineer of the vessel having stamped the delivery note acknowledging the receipt of bunkers, the Plaintiff cannot claim privity of contract with the owners or their agents insofar as the supply contract is concerned.

17. The discussion of Federal Court of Appeal at Ottawa, Ontario, Canada in NORDEMS is quite apposite even in the facts of our case. There is

nothing on record that either Bryggen, Bergen or OW Bunker had any authority to bind the owners of the vessel; there is nothing to show that the

owners at any time led the Plaintiff into thinking that either of these parties had the authority of the owners to purchase bunkers on their behalf or to

bind them. The Plaintiff knew that OW Bunker, who was its contracting party, was not the owner of the vessel. The Plaintiff ought to have taken

steps to verify whether OW Bunker had the authority to bind the vessel. Not only is there no such fact alleged but the Plaintiff at all times dealt with

only OW Bunker. It even addressed a communication to Bryggen that the bunkers were supplied to the vessel 'A/C OW Bunker' and invoiced to OW

Bunker (invoice was of the Plaintiff's group company), and requested Bryggen not to make payment to OW Bunker for the subject supply, but instead

pay directly to the Plaintiff 'to avoid any unforeseen situation later on' (Email dated 10 November 2014). This email is not disputed by the Plaintiff.

This email makes two things clear. Firstly, it shows that it was always the plaintiff's case that the bunkers were supplied 'A/c OW Bunker', invoiced to

OW Bunker and payable by it. Secondly, it shows that even after OW Bunker's plight was known to the Plaintiff, the request for payment was made

to Bryggen (the time charterer) and not the owners of the vessel. On all these facts, there is not even a reasonably arguable case that there is any

privity of contract between the Plaintiff and the owners of the vessel.

18. The cases of Crescent Petroleum (supra) and Chemoil Adani (supra) relied upon by the Plaintiff are clearly distinguishable. In Crescent

Petroleum, the master of the vessel had acknowledged ""the liability of the owner of the vessel to pay the price of bunkers supplied"" and that is how the

facts of that case were distinguished by the Learned Single Judge from the facts of Raj Shipping Agencies and other cases. In Chemoil Adani, the

averment in the plaint was that the bunkers were supplied at the request of the master of the vessel. A copy of the Master's request was produced

with the plaint. In fact whilst distinguishing the judgment of the Learned Single Judge in Raj Shipping Agencies (supra) and another judgment of a

Learned Single Judge following it, the Division Bench in Chemoil Adani observed as follows:

52. As far as the judgment of other two learned Single Judges of this Court taking a view that the plaint in those cases does not disclose any cause of

action are concerned, there, on facts, it was found that the only ground on which the vessel was proceeded against was because the orders were

placed by it. The vessel was sought to be roped in without stating as to how it and its owner is liable. In fact, what was relied upon was only the

bunker confirmation and nothing more. In that case, the document was found to be completely self-serving and unilateral. The acceptance of the

consignment/bunkers therein was not attributed to the Master. It is in such circumstances and relying upon the paras of the plaint that the learned

Judge in m.v. Chopol^{II} rejected the plaint. That was a finding rendered on a meaningful reading of the plaint (See paras 6,7,8,9 and 13).

53. In Raj Shipping (supra) once again the learned Single Judge found, on facts, that the plaintiff has not shown that the supplies were made at the

instance of either the owner of the vessel or at the instance of the person authorized by the owner of the vessel. There were no clear averments that

the supplies were made at the instance of the owner of the vessel. In the present case, such averments are made throughout.

(d) The Division Bench of this court (Coram: Anil R. Dave,C.J. and S. C. Dharmadhikari,J.) in the case of Chemoil Adani Pvt. Ltd. Vs. m.v.

HANSA SONDERBURG and ors. (Supra), in paras 40, 47, 51 and 54, observed as under:

40. The learned Judge should have first seen the averments in the plaint. The averments are clear. The plaint proceeds to state that the suit is filed

against all defendants-respondents by the appellants-plaintiffs on account of the failure to pay the sum of US \$ 3,54,279.05 being the price of 799.22

MT of bunkers supplied to the respondent No.1 vessel. In para 1 of the plaint, it is stated that the bunkers were supplied at the request of the Master

of the first respondent vessel, yet, the learned Judge should have also perused the contract between the appellant and respondent No.3. That contract

states that the marine fuel is delivered not only on the credit of the buyer (respondent No.3) but also on the credit of the vessel receiving the delivery

of marine fuel and it is agreed and buyer warrants that seller (appellant) will have and may assert a maritime lien against the receiving vessel for the

amount of the purchase price of said marine fuel together with all delivery and other charges forming part of the agreement for sale. A Further clause

4 of the agreement is also clear.

Â 47. In fact, we are of the opinion that the learned Judge's finding even at this prima facie stage are contradictory. If there is no serious dispute about the proposition that supply of bunkers gives rise to maritime claim and there is a maritime claim, then, order of arrest could not have been vacated for want of privity of contract or specific contract as held in para 13 of the impugned order. In fact, the conclusions drawn in para 13 are contrary to what has been held in paras 10 and 11 of the impugned order. It is difficult to reconcile these conclusions and the final finding in para 17 of the impugned order. With great respect, there was no occasion to make any final comment on post contractual documents. Whether the documents are post contractual or post performance of the contract is something which should not have been decided at this stage. The parties have yet to lead evidence. Just because the documents form part of the record, does not mean that on their contents any conclusive finding can be arrived at in the facts of this case. The link between the stipulations below the bunker delivery note, the contract between appellant and respondent No.3 and the impact of these stipulations is something which must be decided after the evidence is led by parties. Further, whether the documents annexed to the plaint and signed by the Chief Engineer would bind respondent Nos.1 and 2 or not involve a question of authority to bind the vessel and its owner. That is something which should not have been gone into and decided by the learned Single Judge.

51. We do not know how this judgment could have been distinguished by the learned Single Judge in our case. The stage at which the matter stood before Honâble Justice Nijjar and in this case is interlocutory. No conclusive judgment or finding was warranted and necessary to be rendered. In these circumstances, the reliance on this judgment should have clinched the issue. To our mind, this judgment has been erroneously distinguished although it is binding.

54. Any larger controversy need not be gone into as both these decisions are distinguishable on facts. Therefore, it is not necessary to resolve any conflict. In the peculiar facts of this case, it is not necessary to find out whether conflicting judgments have been rendered by three learned Single Judges of our Court or not. Once the matter is in the realm of facts and in the plaint in the present case, it has been specifically alleged that the

bunkers were supplied at the request of the Master of the first respondent vessel. Further it being averred in paragraphs 4 to 6 that the supply of

bunkers was made which amounts to supply of necessities and nonpayment of price gives rise to maritime claim, and on the basis of the documents

annexed to the plaint, it is alleged that each of the defendants are liable and from the assertions of the respondent Nos.1 and 2, it is clear that this

aspect will have to be probed further, then, it is not possible to vacate the order of arrest.â??

19. The learned Senior Counsel appearing for the respondent, in support of his submission, placed reliance on the following judgments :

(a) M.V. Elisabeth and ors. Vs. Harwan Investment and Trading Pvt. Ltd. [1993 Supp (2) SCC 433]

(b) Liverpool & London S.P. & I Association Ltd. Vs. M.V. Sea Success and anr. [(2004) 9 SCC 512]

(c) Chrisomar Corporation vs. MJR Steels Private Limited [2007 SCC OnLine SC 1104]

(d) Sunil B. Naik vs. Geowave Commander [(2018) 5 SCC 505].

(e) The owners of the Streamship â??Heiwa Maruâ?? vs. Bird & Co. [1923 SCC OnLine Rang 115]

(f) Wander Ltd. And anr. Vs. Antox India P.Ltd. [1990 (Supp) SCC 727]

(a) In the case of M.V. Elisabeth and ors. Vs. Harwan Investment and Trading Pvt. Ltd. (Supra), the Apex Court in para 99 observed as under :

â??99. â??|...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. Applying this test the cause of action arose in Indian

territory and if the owner of the ship would have remained in this country a suit for breach of contract could have been filed.....â??

(b) In the case of Liverpool & London S.P. & I Association vs. M.V. Sea Success I

and anr. (Supra), the Apex Court in para 154 observed as under :

154. The approach of the High Court, in our considered opinion, is not correct. For the purpose of rejecting a plaint it is not necessary to consider

whether the averments made in the plaint prove the factum that the defendant No. 1 "Sea Success" is a sister ship of "Sea Glory" and "Sea Ranger

or the said two ships are beneficially owned by the defendant No. 2. The reasons which have been assigned in support of the said aforementioned

finding that the ship is a valuable commercial chattel and her arrest undeservingly prejudices third parties as well as affect the interest of owner and

others is a question which must be gone into when passing a final order as regard interim arrest of ship or otherwise. For the aforementioned purpose

the Vessel herein could file an application for vacation of stay. While considering such an application, the Court was entitled to consider not only a

prima facie case but also the elements of balance of convenience and irreparable injury involved in the matter. In such a situation and particularly

when both the parties disclose their documents which are in their possession, the Court would be in a position to ascertain even prima facie as to

whether the Club has been able to make out that "Sea Glory" and "Sea Ranger" are sister vessels of the "Vessel".

(c) In the case of Chrisomar Corporation Vs. MJR Steels Private Limited (Supra), the Apex Court in paras 20, 21 and 22 observed as under :—

20. In an illuminating judgment of the Calcutta High Court Justice Mrs. Ruma Pal, as she then was, dealt with an action in rem filed in the

admiralty court jurisdiction in Calcutta. With respect to the plaintiffs claim of the price of bunkers supplied to the ship owners, the Court held that the

supply of necessities to a vessel does not create a maritime lien. In Bailey Petroleum Company v. Owners and parties interested in the vessel M.V.

Dignity, (1993) 2 CHN 208 at 213—214, the learned Judge held:

16. It has been established by a wealth of decisions that the supply of necessities does not create a maritime lien. Indeed the point was conceded

by the counsel for the plaintiff at the hearing. It is only necessary to refer to two authorities on the point to emphasize the fact that this Court does not

base its conclusion on the concession of the plaintiff's counsel but on the authorities cited.

17. It is not disputed that the jurisdiction of this court is governed by the

Admiralty Court Act 1861 (Imp). Section 5 of the 1861 Act provides:

“5. The High Court of Admiralty shall have jurisdiction over any claim for necessities supplied to any ship elsewhere than in the port to which the ship belongs, unless it is shown to the satisfaction of the court that at the time of the institution of the cause any owner or part owner of the ship is domiciled in England or Wales: Provided always, that if in any such cause the plaintiff do not recover twenty pounds, he shall not be entitled to any costs, charges, or expenses incurred by him therein, unless the judge shall certify that the cause was a fit one to be tried in the said Court.”

18. In the case of *Laws and others and Smith: the “Rio Tinto”*: 9 PD 356, the plaintiff had supplied necessities to the vessel. The Trial Court held

that the necessities were supplied on the credit of the vessel and that the plaintiff had a right to a maritime lien and that, therefore, in spite of the fact

that the vessel had been transferred subsequent to the supply of necessities, the ship was liable. Sir James Hannen who delivered the opinion of the

Privy Council held that the phrase “the court shall have jurisdiction” simply gave the Court jurisdiction but did not create any lien. A distinction

was drawn between a provision for proceedings by arrest of the ship and the express creation of a lien. The Court held:

“The Admiralty Court Act, 1861 (24 Vict. c. 10) and the decisions upon it must next be considered. By the 5th section it is enacted that the High

Court shall have jurisdiction over a claim for necessities supplied to any ship elsewhere than in the port to which the ship belongs, unless it is shown to

the satisfaction of the court that, at the time of the institution of the cause, any owner or part owner of the ship is domiciled in England or Wales.

The words “the High Court of Admiralty shall have jurisdiction”, mean only what they purport to say, neither more nor less, that is, that the court

shall take judicial cognizance of the cases provided for.

The conclusion [is] that there is nothing from which it can be inferred that by the use of the words “the court shall have jurisdiction” the

Legislature intended to create a maritime lien with respect to necessities supplied within the possession.”

19. In *Shell Oil Co. v. The Ship “Lastrigoni”* 3 ALR399 the plaintiff had filed a suit for enforcement of the claim on the ground of bunkers

provided by the plaintiff under a contract between the plaintiff and the agents of

the time charterer. The contract provided that the sale and delivery of inter alia necessities would be made on the faith and credit of the vessel. The arguments before the Court were that the supply of fuel itself created maritime lien to which the ship was subject and which could be enforced by an action in rem in admiralty. The second was that, in the circumstances, an action in rem lay notwithstanding the absence of any contractual liability on the part of the owners to pay for the bunkers supplied and that this was so by virtue of section 6 of the Admiralty Court Act 1840 (Imp), and section 5 of the Admiralty Court Act 1861 (Imp), either with or without the aid of cl. 6.4 of the Bunker Fuel Oil Contract. *Menzies, J.* held:

“The matter was, I think, put at rest by the decision of the Privy Council in the *Rio Tinto* (1884) 9 App Cas 356, by which it was decided that no maritime lien attaches to a ship in respect of coals or other necessities supplied to it.”

21. In *Saba International Shipping and Project Investment Private Limited v. Owners and parties interested in the Vessel M.V. Brave Eagle*,

previously known as *M.V. Lima* (2002) 2 CHN 280 at 287-288 and 289-290, another single Judge of the same High Court differentiated between

a maritime claim and a maritime lien and held as follows:

“20. Now the issue is what is a maritime claim and what is a maritime lien. These questions are to be answered in this proceeding before

continuation of the interim order or passing any further interim order.

21. All cases of maritime lien are based on maritime claims but all maritime claims do not give rise to a maritime lien on the ship. Normally a lien in the

general law is a rather limited right over some one else’s property. It is a right to retain possession of that property usually to receive a claim. But

a maritime lien differs from other liens in one very important respect. Liens generally require possession of the res before they can come into

effect. As an example an innkeeper has a lien over his guest’s luggage against the payment of the bill, but if the guest is smart enough to remove

his luggage, the innkeeper is left without a lien. But a maritime lien does not require prior possession for its creation. In a fit and proper case a

claimant on the strength of his maritime lien can secure the arrest of a ship which then comes under the possession of the court and she cannot be

moved without the court’s order.

22. No Indian Statute defines a maritime claim is the clear finding of Supreme Court in *M.V. Elisabeth* (AIR 1993 SC 1014, para 85, page 1040). But our Supreme Court followed the provisions of the Supreme Court Act 1981 of England where maritime claims have been listed on the basis of Brussels Convention of 1952 on the Arrest of Sea Going Ships. Under Article 1 of the said Convention various maritime claims have been catalogued. Out of which 1(k) answers the description of the claims of the plaintiff in this proceeding. Article 1(k) reads "goods or materials whether supplied to a ship for her operation or maintenance". Even though India is not a signatory to the Brussels Convention, but the Supreme Court held that the provisions of these Conventions should be regarded as part of International Common Law and these provisions "supplement" and "complement" our maritime laws and fill up the lacunae in The Merchant Shipping Act.

23. But in *Elisabeth*, the Hon'ble Supreme Court did not notice any convention on maritime lien. However the Hon'ble Supreme Court

accepted in para 57 of *Elisabeth* the judicial determination of the concept of "maritime lien" by English courts and which I quote as follows:

"A maritime lien is a privileged claim against the ship or a right to a part of the property in the ship, and it 'travels' with the ship. Because the ship has to 'pay for the wrong it has done', it can be compelled to do so by a forced sale. (See *The Bold Buccleugh*, (1852) 7 Moo PC 267)."

24. A definition of maritime lien has also been given in Stroud's Judicial Dictionary, 5th Edition page 1466 to the following effect:

"A maritime lien may be defined as a right specifically binding a ship, her furniture, tackle, cargo, and freight, or any of them, for payment of a

claim founded upon the maritime law and entitling the claimant to take judicial proceedings against the property bound to enforce, or to ascertain and

enforce, satisfaction of his demand; thus, a salvor has a maritime lien on the property saved for such an amount as a court exercising admiralty

jurisdiction shall award. Maritime lien are distinguished from all other liens in these two chief particulars: (i) they are in no way founded on possession

or property in the claimant, (ii) they are exercised by taking proceedings against the property itself in a form of action styled an action in rem (The

Glasgow Packet, 2 Rob. W. 312; *The Repulse*, 4 Notes of Cas. 170), and, from this and their secret nature, they closely resemble the species of

security known to Roman law under the name of hypotheca (Dig. xiii). Interest, if any allowed, and the costs of enforcing a claim for which a

maritime lien exists, will be included in such lien (The Margaret, 3 Hagg. Adm. 240).â??

25. According to the well known treatise of Thomason maritime lien, the following claims may give rise to maritime lien namely:

â??(a) Damage done by a ship

(b) Salvage

(c) Seamenâ??s wages

(d) Masterâ??s wages and disbursements (e) Bottomry and respondentiaâ??.

26. The aforesaid passage from Thomas has been approved by the Division Bench of Calcutta High Court in Mohammed Saleh Behbehani &

Company v. Bhoja Trader, reported in (1983) 2 Calcutta Law Journal 334. At 344 of the report, the learned Judges of the Division Bench referred to

maritime liens as representing â??a small cluster of claimsâ?? and referred to the aforementioned passage from Thomas.

(27) and (28) xxx xxx xxx

29. Counsel for the respondent also relies on a passage from Roscoe on The Admiralty Jurisdiction and Practice, 5th Edition. While dealing with

necessaries, the learned author has stated as follows:

â??Persons who have supplied a ship, whether British or foreign, with necessaries have not a maritime lien upon her, and the vessel does not become

chargeable with the debt till the suit is actually instituted; consequently there can be no claim against a ship which has been sold, even with notice of

such a claim in respect of which an action has not been commenced, and a want of caution in supplying the necessaries may, it would seem, cause a

postponement of claims to others more carefully begun. The necessaries claimant is not a secured creditor until the moment of arrest.â??

30. There is a direct judgment on this point by a learned Judge of this court in Bailey Petroleum, referred to above

31. Relying on the judgment of the Privy Council in Rio Tinto, reported in 1884 (9) Appeal Cases 356 and the judgment in Shell Oil Co. v. The Ship

Lastrigoni, reported in 1974 (3) All England Reports 399, the learned single Judge held in Bailey Petroleum that a claim arising out of the supply of

necessaries may give rise to a statutory right of action in rem under section 5 of Admiralty Court Act, 1861 but it does not give rise to

maritime lien. Paragraphs 23 and 24 of the judgment in *Bailey Petroleum* make it clear and I quote them in extenso:

23. Whereas a maritime lien attaches to the res and travels with it and may be enforced against a subsequent purchaser of the res, a statutory right of action in rem is defeated by a change of ownership. This later principle follows from the nature of the right described in the preceding paragraph.

24. This view of the law is supported by a catena of decisions.

22. In fact, the International Convention on Maritime Lien and Mortgages, 1993 defines maritime liens in Article 4 as follows:

Article 4: Maritime liens

I. Each of the following claims against the owner, demise charterer, manager or operator of the vessel shall be secured by a maritime lien on the vessel:

(a) claims for wages and other sums due to the master, officers and other members of the vessel's complement in respect of their employment on the vessel, including costs of repatriation and social insurance contributions payable on their behalf;

(b) claims in respect of loss of life or personal injury occurring, whether on land or on water, in direct connection with the operation of the vessel;

(c) claims for reward for the salvage of the vessel;

(d) claims for port, canal, and other waterway dues and pilotage dues;

(e) claims based on tort arising out of physical loss or damage caused by the operation of the vessel other than loss of or damage to cargo, containers and passengers' effects carried on the vessel.

2. No maritime lien shall attach to a vessel to secure claims as set out in sub-paragraphs (b) and (e) of paragraph 1 which arise out of or result from:

(a) damage in connection with the carriage of oil or other hazardous or noxious substances by sea for which compensation is payable to the claimants

pursuant to international conventions or national law providing for strict liability and compulsory insurance or other means of securing the claims; or

(b) the radioactive properties or a combination of radioactive properties with

toxic, explosive or other hazardous properties of nuclear fuel or of radioactive products or waste.â??

(d) In the case of Sunil B. Naik vs. Geowave Commander (Supra), the Apex Court in paras 66 and 68 observed as under :

â??66. We may also note that in the 2017 Act in India Section 5(1)(b) states as under:

â??5. Arrest of vessel in rem.â?"(1) The High Court may order arrest of any vessel which is within its jurisdiction for the purpose of providing

security against a maritime claim which is the subject of an admiralty proceeding, where the court has reason to believe thatâ?

Â xxxx xxxx xxxx xxxx xxxx

(b) the demise charterer of the vessel at the time when the maritime claim arose is liable for the claim and is the demise charterer or the owner of the

vessel when the arrest is effected; orâ??

68. The appellants have neither any agreement with the owners of the respondent vessel nor any claim against the respondent vessel but their claim is on account of their own vessels hired by the charterer of the respondent vessel. There is no claim against the owners of the respondent vessel.

(e) In the case of The owners of the Steamship

â??Heiwa Maruâ?? vs. Bird & Co. (Supra), the Division Bench of Rangoon High Court, in para 45, observed as under :

â??45. It would seem therefore that though necessities supplied to a ship are prima facie presumed to have been supplied on the credit of the ship,

this prima facie presumption may be rebutted by evidence of facts going to show that the person who has supplied or paid for the necessities looked

for payment to the person at whose instance he furnished the supplies or advance monies, and not to the owner of the ship.â??

(f) In the case of Wander Ltd. And anr. Vs. Antox India P. Ltd. (Supra), the Apex Court in para 14 observed as under:

â??14. The appeals before the Division Bench were against the exercise of discretion by the Single Judge. In such appeals, the Appellate Court will

not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown

to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal

of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate Court will not reassess the material

and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the

material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it

had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the Trial Court

reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial

court's exercise of discretion. After referring to these principles Gajendragadkar, J. in *Printers (Mysore) Private Ltd. v. Pothan Joseph*: (SCR 721):

... These principles are well established, but as has been observed by Viscount Simon in *Charles Oseption & Co. v. Johnston* the law as to the

reversal by a court of appeal of an order made by a judge below in the exercise of his discretion is well established, and any difficulty that arises is due

only to the application of well settled principles in an individual case.

The appellate judgment does not seem to defer to this principle.

20. The Apex Court in the case of *Chrisomar Corporation vs. MJR Steels Private Limited* (Supra) referred to the legislative history of admiralty claim

and admiralty jurisdiction in paras 11 and 12 as under:

11. Admiralty law in England, as was held by Lord Halsbury in *Currie v. Mâ?? Knight* 1897 AC 97, is derived from the laws of Oleron¹ and other

ancient maritime codes like the Rhodian Sea Law, the Basilika, the Assizes of Jerusalem, the Baltic Laws of Wisbuy and the Hanseatic Code. In

England, the common law courts could not give effective redress to cases which arose in admiralty, which were then left to the jurisdiction of

specialist admiralty Judges. By the 18th Century, the admiralty jurisdiction had fallen into â??a feeble and neglected condition, and for long its

proceedings excited no attentionâ??. The Admiralty Court Act, 1840 was the first of a series of statutes extending and defining the jurisdiction of the

High Court of Admiralty in England. This was followed by the 1861 Admiralty Court Act and various subsequent enactments which were consolidated

by the Supreme Court of Judicature (Consolidation) Act, 1925. By the Administration of Justice Act of 1956, the admiralty jurisdiction of the High

Court was further widened and the Supreme Court Act of 1981 now defines what the admiralty jurisdiction of the High Court in England is.

12. Insofar as our law is concerned, the admiralty law of the chartered High Courts has historically been traced to the charters of 1774 and 1798 as

subsequently extended and clarified by the Letters Patents of 1823, 1862 and 1865. The Admiralty Court Act, 1840 and 1861, and the Colonial Courts

of Admiralty Act, 1890 and 1891 essentially stated what the admiralty law in this country is, and these enactments continued as existing laws under

Article 372 of the Constitution of India. Some of the relevant provisions of these Acts are set out herein below:

Admiralty Court Act, 1840

6. The court in certain cases may adjudicate, etc." The High Court of Admiralty shall have jurisdiction to decide all claims and demands whatsoever

in the nature of salvage for services rendered to or damage received by any ship or seagoing vessel or in the nature of towage, or for necessities

supplied to any foreign ship or seagoing vessel, and to enforce the payment thereof, whether such ship or vessel may have been within the body of a

country, or upon the high seas, at the time when the services were rendered or damage received, or necessities furnished, in respect of which such

claim is made.

Admiralty Court Act, 1861

5. As to claims for necessities."The High Court of Admiralty shall have jurisdiction over any claim for necessities supplied to any ship elsewhere

than in the port to which the ship belongs, unless it is shown to the satisfaction of the court that at the time of the institution of the cause any owner or

part owner of the ship is domiciled in England or Wales: Provided always, that if in any such cause the plaintiff do not recover twenty pounds, he

shall not be entitled to any costs, charges, or expenses incurred by him therein, unless the judge shall certify that the cause was a fit one to be tried in

the said Court. Colonial Courts of Admiralty Act, 1890

2. Colonial Courts of Admiralty."(1) Every court of law in a British possession, which is for the time being declared in pursuance of this Act to be a

Court of Admiralty, or which, if no such declaration is in force in the possession, has therein original unlimited civil jurisdiction, shall be a Court of

Admiralty, with the jurisdiction in this Act mentioned, and may for the purpose of

that jurisdiction, exercise all the powers which it possesses for the purpose of its other civil jurisdiction and such Court in reference to the jurisdiction conferred by this Act is in this Act referred to as a Colonial Court of Admiralty.â?|

(2) The jurisdiction of a Colonial Court of Admiralty shall, subject to the provisions of this Act, be over the like places, persons, matters, and things, as the admiralty jurisdiction of the High Court in England, whether existing by virtue of any statute or otherwise and the Colonial Court of Admiralty may exercise such jurisdiction in like manner and to as full an extent as the High Court in England, and shall have the same regard as that Court to international law and the comity of nations.

Colonial Courts of Admiralty (India) Act, 1891

2. Appointment of Colonial Courts of Admiralty.â?" The following courts of unlimited civil jurisdiction are hereby declared to be Colonial Courts of Admiralty, namely:

- (1) the High Court of Judicature at Fort William in Bengal,
- (2) the High Court of Judicature at Madras, and
- (3) the High Court of Judicature at Bombay.â??

21. No Indian statute defines a maritime claim as has been clarified in the finding of the Apex Court in the case of M.V. Elisabeth & Ors. Vs.

Harwan Investment & Trading (Supra). The Court followed the provisions of Supreme Court Act 1981 England where maritime claims have been

listed on the basis of Brussels Convention of 1952 on the Arrest of Sea Going Ships. Under Article 1 of the said Convention various maritime claims

have been catalogued.Â The Apex Court in the case of Chrisomar Corporation vs. MJR Steels Private Limited (Supra) accepted the principle of

judicial determination of the concept of â??maritime lienâ? by English courts. The definition of â??maritime lienâ? has been dealt with by the Apex

Court in para 21 of the judgment cited supra, which reads as under:

Â â??21. â?|â?|.

Â â??A maritime lien may be defined as a right specifically binding a ship, her furniture, tackle, cargo, and reight, or any of them, for payment of a

claim founded upon the maritime law and entitling the claimant to take judicial proceedings against the property bound to enforce, or to ascertain and

enforce, satisfaction of his demand; thus, a salvor has a maritime lien on the property saved for such an amount as a court exercising admiralty

jurisdiction shall award. Maritime lien are distinguished from all other liens in these two chief particulars: (i) they are in no way founded on possession

or property in the claimant, (ii) they are exercised by taking proceedings against the property itself in a form of action styled an action in rem (The

Glasgow Packet, 2 Rob. W. 312; The Repulse, 4 Notes of Cas. 170), and, from this and their secret nature, they closely resemble the species of

security known to Roman law under the name of hypotheca (Dig. xiii).

Interest, if any allowed, and the costs of enforcing a claim for which a maritime lien exists, will be included in such lien (The Margaret, 3 Hagg. Adm.

240).â??

22. In the facts of the present case, the plaintiff â?" appellant averred that one Force Twins Shipping (â??Force shipping) approached the plaintiff for

supply of fuel/bunkers to various vessels. Â The supply was made on request made by Force shipping to the plaintiff. The Sentex LDX is an offshore

company which is wholly owned by Force shipping. It is averred that on 21/9/2016, Force shipping on behalf of the defendant vessel and/or Master

and/or owner and/or Managers and/or Operators approached the plaintiff for supply of bunkers to the defendant vessel at Istanbul Port on 27/9/2016.

On 4/10/2016, the plaintiff supplied 1100 mts of bunkers to the defendant vessel at Port of Istanbul. The Bunker Delivery Receipt dated 4/10/2016

was issued for the said supply. It is specifically averred that the bunkers were accepted without raising any protest and/or demur. The Master / Chief

Engineer of the defendant vessel acknowledged receipt of bunkers by endorsing upon the Bunker Delivery Receipt. The receipt is placed on record.

On 3/10/2016, on request of Force shipping, the plaintiff issued an invoice bearing No. 011172 on account of the defendant vessel for an amount of

USD 283,800. Â It is the specific contention of the plaintiff that the products supplied in each transaction were sold and effected on the credit of the

receiving vessel as well as on the promise of the buyer to pay. All sales were made to the registered owner of the vessel. Plaintiff pleaded that despite

expiry of the due date of invoice, Force shipping, on behalf of the defendant vessel, failed and neglected to make payment. In para 5 of the plaint, it is

averred that the plaintiff's claim arises by reason of bunkers supplied to the

defendant vessel. The supply of bunkers by plaintiff was not gratuitous. It was to the faith and credit of the defendant vessel.

23. The learned Senior Counsel appearing for the appellant submitted that privity of contract is presumed to have been established between the bunker supplier and the defendant vessel. Even if it is submitted on behalf of the respondent that at the behest of Force shipping / Sentex LDX, the bunkers supplied to the defendant vessel, the liability of the defendant vessel in rem and in personam cannot be denied towards the amount due against the bunkers supplied. In the facts, the presumption arises and in case such a presumption is to be rebutted, then it was open to the defendant to place such material so that the presumption is rebutted. The defendant had failed to bring any such material at this interlocutory stage of the suit. Thus, merely on the three documents it cannot be presumed that the defendant is not liable to pay the amounts to the appellant " plaintiff. Thus in such situation the appellant is entitled for the trial of the suit.

24. The learned Senior Counsel appearing for the respondent has disputed the proposition that privity of contract gets established between bunker supplier and the defendant vessel in absence of there being any order placed by the Master/Chief Engineer on behalf of the defendant vessel. It is submitted that no invoice is raised, neither any order is placed on behalf of the defendant vessel. The claim, if any, in respect of the amount which is claimed by the plaintiff could be against the Force shipping or Sentex LDX at whose instance and request the bunkers were supplied to the defendant vessel. The invoices were raised by the supplier on Force shipping / Sentex LDX. Therefore, neither any maritime claim arises much less any maritime lien on the defendant vessel. This, in fact, is the substance of the submissions of the contesting parties.

25. We have examined the documents placed on record. Prima facie we have noticed that although there is no document placed on record to suggest that order was placed directly on behalf of the defendant vessel by the Master or Chief Engineer of the vessel, however, there is a Bunker Delivery Receipt which has been signed by the Master / Chief Engineer of the defendant vessel. Supply of bunkers by the appellant for the respondent vessel has not been denied. There is a document placed on record raising invoice by the appellant against Force shipping in respect of the bunkers supplied to

them. Based on this document, the submission was advanced that no privity of contract is established between appellant and respondent. Heavy reliance is placed on the judgment of the learned Single Judge of this Court (Coram: S.C. Gupte,J.) in the case of Gulf Petrochem Energy Pvt. Ltd. (Supra).

26. We have perused the record placed before us, considered the submissions advanced and the judgments cited supra.

27. Little research we could make on the material available to us in respect of maritime claim and the admiralty jurisdiction exercised in various countries, which could be briefly summarized as under :Â?

Indian statute does not define the maritime claim. The Indian courts follow provisions of Supreme Court Act 1981 England where the Arrest of Sea

Going Ships under Article 1 of the Brussels Convention of 1952 various maritime claims have been catalogued. The maritime claim has been defined

in Article 1(k) and 2 of the 1952 Brussels Convention which reads as under:

â??1. â??Maritime Claimâ?? means a claim arising out of one or more of the following:

(k) Goods or materials wherever supplied to a ship for her operation or maintenance.â??

International Convention on maritime liens and Mortgages, 1993 defines maritime liens in Article 4 as follows:

(a) claims for wages and other sums due to the master, officers and other members of the vesselâ??s complement in respect of their employment on

the vessel, including costs of repatriation and social insurance contributions payable on their behalf;

(b) claims in respect of loss of life or personal injury occurring, whether on land or on water, in direct connection with the operation of the vessel;

(c) claims for reward for the salvage of the vessel;

(d) claims for port, canal, and other waterway dues and pilotâ??age dues;

(e) claims based on tort arising out of physical loss or damage caused by the operation of the vessel other than loss of or damage to cargo, containers

and passengersâ?? effects carried on the vessel.

Â 28. A large number of countries have ratified the 1952 Arrest Convention, which defines claims related to bunker supplies as â??maritime

claimsâ???. Bunker supplies are necessities for a ship or necessities for its voyage.

England â?" The admiralty jurisdiction in English Court is set out in Section 20 of the Senior Courts Act 1981. While maritime lien gives rise to a right

to arrest ship regardless of ownership. There are restrictions before an action in rem can arise, which provides only where (a) the claim arises in

connection with a ship; and (b) the person who would be liable on the claim in an action in personam (â??the relevant personâ?) was, when the cause

of action arose, the owner or charterer of, or in possession or in control of, the ship.

An action in rem can be brought in the High Court against, (i) that ship, if at the time when the action is brought the relevant person is either the

beneficial owner of that ship as respects all the shares in it or the charterer of it under a charter by demise; or (ii) any other ship of which, at the time

when the action is brought, the relevant person is the beneficial owner as respects all the shares in it.

Hong Kong â?" The law and practice relating to arrest of ships in Hong Kong is very similar to that in England, Singapore and other common law

jurisdictions.

Singapore Â The position in Singapore is similar to the position in England and other common law jurisdictions. In the case of any such claim as is

mentioned in section 3(1)(d) to (q), which includes the right to arrest for the supply of bunkers, where: Â (i) the claim arises in connection with a ship;

and (ii) the person who would be liable on the claim in an action in personam was, when the cause of action arose, the owner or charterer of, or in

possession or in control of, the ship.

USA Â Â Under U.S. maritime law, unlike the law of many other jurisdictions, the act of supplying bunkers or other necessities to a vessel on the

order of the owner (or an authorized agent of the owner, including potentially a charterer of the vessel) often results in the creation of a maritime lien

against the vessel to which these necessities were supplied. The assessment of supplierâ??s maritime lien will depend on a factual analysis that may

be applied differently among the U.S. courts, depending on the location of the arrest within the geographic confines of a particular U.S. federal circuit.

JAPAN Â? Â It is possible to arrest a ship in Japan for unpaid bunkers supplied to

the ship.

CHINA – Ship arrest in China is a procedural remedy to obtain security, in favour of the substantive proceedings and the arrest order can be obtained

on the ex parte application, when the requirements for ship arrest are satisfied.

AUSTRALIA – It is possible under Australian law to arrest a ship for unpaid bunkers under the Admiralty Act 1988. A person must have a

recognized general maritime claim prior to arresting a ship.

SOUTH AFRICA – In South Africa claims can be enforced in admiralty if the claims are maritime claims. The Admiralty Jurisdiction Regulation Act

(105 of 1983) includes in its definition of maritime claims, any claim for, arising out of or relating to the supplying of goods for the employment and

maintenance of the ship.

29. Bunker oil is – necessary goods and supplies for ship. It is conclusively shown that necessities supplied or services rendered to any ship are

prima facie – necessities and are within the category of necessities.

30. The learned Single Judge placed reliance on the judgment in the case of Gulf Petrochem Energy Pvt. Ltd. Vs. M.T. Valor (Supra). The learned

Single Judge has distinguished on facts the judgment of a Division Bench of this court in the case Chemoil Adani Pvt. Ltd. Vs. M. V. Hansa

Sonderburg. – In the case of Gulf Petrochem Energy Pvt. Ltd., plaintiff supplied bunkers against a Bunker Delivery Receipt under which Chief

Engineer of the vessel acknowledged receipt of bunkers. The plaintiff thereafter learnt that OW Bunker's parent company had become insolvent.

Thereafter the plaintiff cancelled all credit provided to OW Bunker and issued demand notice to the owners of the vessel. The plaintiff asserts that the

claim for bunkers supplied to the vessel is a maritime claim, which can be enforced against the vessel in rem. The learned Single Judge had compared

the facts in the Gulf Petrochem Energy Pvt. Ltd.'s case with the facts in the case of Raj Shipping Agencies vs. BUNGA MAS TIGA and while

distinguishing the facts, the court observed as under : –

–. On the other hand, unlike in the case in Raj Shipping Agencies (supra), where the order was actually placed by the owners of the vessel with

M/s. North End Oil, in our case it was the time charterer, Bryggen, who placed the initial order. It is common knowledge that in a time charterer, the

bunker is supplied by the charterer. It is the charterer who pays for it?|â??

While dealing with the judgment in the case of Chemoil Adani Pvt. Ltd. vs. M. V. Hansa Sondenburg (Supra), the learned Single Judge in para 23

observed as under :Â?

â??23. In Chemoil Adani Pvt. Ltd. vs. M. V. Hansa Sondenburg (Supra) there was a requisition by the Master and the Bunker Delivery Note

contained an express legend that the marine fuel as described in the Bunker Delivery Note is delivered in accordance with the standard terms and

conditions of sale, copy of which has been provided to the Buyer on delivery and â??on credit of the vesselâ?. It further stated that any restrictions as

to the authority of the ship's officer signing this note to bind the vessel and her owner are null and void. This puts matters beyond doubt that there was

a prima facie case that the ship's officer, whether it be the Master or Chief Engineer, who has signed the note has act acknowledged that the bunkers

have been delivered on the credit of the vessel as provided on the face of the Bunker Delivery Note. Thus a prima facie case of liability of the owner

in personam was made out.â??

31. At this stage itself we may refer to the view expressed on the principle by the Division Bench of this court in the case of Chemoil Adani Pvt. Ltd.

(Supra). In the said case, the plaintiff had filed the admiralty suit for an order and decree in the sum of US \$ 3,54,279.05 against the first defendant

vessel together with interest at 12% per annum. The plaintiff stated that the bunkers were supplied at the request of the Master of the first respondent

â?" vessel, to which an agreement was referred, wherein it was stated that the Master had made request to the appellant/plaintiff for the supply of

800 MT of bunkers to the first respondent vessel for the purpose of its onward journey to Eden. The Master and the Chief Engineer had also made a

requisition for supply of 800 MT of bunkers and the bunkers were supplied under a delivery note. While dealing with the rival submissions of the

contesting parties and after scrutiny of case law cited before the Division Bench, it was observed by the Division Bench that,

â??If there is no serious dispute about the proposition that supply of bunkers gives rise to maritime claim and there is a maritime claim, then, order of

arrest could not have been vacated for want of privity of contract or specific contract as held in para 13 of the impugned orderâ??

The Division Bench while appreciating and after analysis of the case law, observed in para 54 as under;

54. Once the matter is in the realm of facts and in the present case, it has been specifically alleged that the bunkers were supplied at the request of the Master of the first respondent vessel. Further it being averred in paragraphs 4 to 6 that the supply of bunkers was made which amounts to supply of necessities and nonpayment of price gives rise to maritime claim, and on the basis of the documents annexed to the plaint, it is alleged that each of the defendants are liable and from the assertions of the respondent Nos.1 and 2, it is clear that this aspect will have to be probed further, then, it is not possible to vacate the order of arrest.

32. The learned Senior Counsel Mr. Chinoy, in the facts of the case, rightly submitted that as supply of bunkers to the vessel is not a disputed fact and as plaintiff did not receive the payment agreed against such supply, maritime claim arises in rem and in personam. A case is then made out for maritime lien. A privity of contract shall have to be presumed even if the bunkers were not supplied against clear and specific order placed by the Master or Chief Engineer of the vessel. In other words, even if in the facts the order was placed by Force shipping or Sentex LDX, a subsidiary of Force shipping, to the vessel, the plaintiff's doors cannot be shut on the principle of lack of privity of contract between plaintiff and the present defendant.

33. In the facts of the case and considering the law cited, we find substance in the submissions advanced by the learned Senior Counsel Mr. Chinoy that at an interlocutory stage it would not be appropriate to deal with the issue of privity of contract. It can only be dealt with after leading evidence. We are of the view that merely based on the bunker invoice and delivery receipt, it would be difficult to form a conclusive opinion at an interlocutory stage that there was no privity of contract between the appellant and the respondent. There is no such overwhelming material to reach to such conclusion. The issue in this case is that whether privity of contract is presumed to be in existence. Such issue relating to the maritime claim in question would thus be required to be addressed at the trial of the suit. It is an admitted position that the Master / Chief Engineer of the vessel had acknowledged the receipt of bunkers supplied to the vessel.

34. We further find substance in the submissions advanced by the learned Senior Counsel Mr. Chinoy that even if bunkers were supplied at the

instance of Force shipping / Sentex LDX, the liability of the vessel to pay for the bunkers supplied does not get diminished on the plea of lack of privity

of contract.

35. Nobody can dispute that contractual fairness and faith is the very basis of international trade and commerce. The parties are therefore required to

be forthright in their pleas when before the court. It would be the obligation of the court to pass orders as were prayed by the respondent / defendant

only on being unhesitatingly convinced that the respondent/defendant had no liability towards the appellant / plaintiff. We are however not persuaded

to accept the respondent's case at this interim stage of the proceedings. As to whether the order was placed on the instructions given by the Master or

the Chief Engineer to the Force shipping / Sentex LDX., whether the defendant had paid the amount towards the supplies to Force shipping is a matter

which needs to be contested at the time of trial and not at an interlocutory stage.

36. The learned Senior Counsel Mr. Pratap submits that Force shipping had guaranteed payment to the appellant herein by clearly stating that no claim

of lien should be raised against the vessel would exclude the defendant from the plaintiff's claim is not an acceptable proposition at an

interlocutory stage. On examination of the said documents, prima facie, we notice that the proposition cannot be accepted at its face value unless

these documents are tested during the trial in the suit. Each case, therefore, needs to be appreciated and considered in the peculiar fact situation of its

own.

37. The learned Single Judge in para 30 referred to the non-disclosure of guarantee by Force shipping to plaintiff. Based on which it was observed that

the guarantee defeats the case of the plaintiff and the proposition of the same puts the plaintiff in clear breach of its obligation to make full and frank

disclosure whilst making an ex parte application for arrest of the ship. We are afraid as to how this conclusion can be reached at the Motion hearing

without the parties being granted an opportunity to lead evidence. Merely because document of guarantee was not placed before the court, the

plaintiff's case could not be brushed aside. At the stage of trial, the court would be in a better position to examine each of the rival contentions of the

parties and address the issue of the privity of contract, the applicability of the general guarantee document and other relevant material placed before the court.

38. In para 27, the learned Single Judge while dealing with the Gulf Petrochem Energy Pvt. Ltd.'s case (Supra), observed as under :Â?

â??27. In the case of M.T. Valor (Supra), however, there was neither any order placed by the Master nor any order confirmation issued by the

bunker supplier, nor any clause on the Bunker Delivery Note/Receipt imposing a liability on the vessel/its owner nor is the invoice raised on Owners

and/or Master of the vessel nor are the terms and conditions of supply incorporated in the order confirmation or Bunker Delivery Receipt or invoice.

The bunker supplier's terms and conditions are incorporated in the order confirmation issued by the bunker supplier to the party placing the order (OW

Bunkers). Even then the Court held that this was not sufficient to impose liability in personam on the owner, unless it is shown that the party placing

the order had authority to bind the vessel or trade on its credit.â??

39. In view of the observations made in the case of Chemoil Adani Pvt. Ltd. (Supra) and the facts we are of the view that the reliance placed by the

learned Single Judge on the judgment in the case of Gulf Petrochem Energy Pvt. Ltd. is not correct and not in consonance with the principles, as laid

down, for ascertaining the issue of privity of contract. In the facts, prima facie, a presumption of contract arises when the bunkers are supplied to the

subject vessel. We, therefore, find that it would be appropriate in the facts to settle these issues during the trial of the suit. Â

40. It is informed that the vessel has been already released and the respondent â?" defendant had furnished the security as directed by the court

which the respondent now claims to get it released.

41. For the reasons stated above, we find that the impugned Â order is required to be set aside.

42. The appeal is allowed. The impugned order dated 4th June 2018 passed by the learned Single Judge in Commercial Notice of Motion No. 199 of

2017 in Commercial Admiralty Suit No. 223 of 2017 is set aside. The contesting parties are at liberty to raise appropriate issues in the proceedings of

the Suit. No order as to costs.

43. Consequently, the cost of Rs.5,00,000/Â, as imposed by the learned Single

Judge and deposited by the appellant in this court be refunded to the appellant with accrued interest, if any.

44. It is clarified that the observations made by us are of prima facie in nature and same shall not affect the final adjudication of the issues in the Suit.