IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ADMIRALTY AND VICE ADMIRALTY JURISDICTION
IN ITS COMMERCIAL DIVISION

INTERIM APPLICATION (L) NO.17189 OF 2021
IN
COMMERCIAL ADMIRALTY SUIT (L) NO.13462 OF 2021

OSV Crest Mercury 1 (IMO 9724398) ...Applicant/
Ori. Defendant

In the matter between

Vision Projects Technologies Private Limited ...Respondent/
Ori. Plaintiff

vs.

OSV Crest Mercury 1 (IMO 9724398) ...Defendant

Mr. Ashwin Shanker, for the Applicant/Ori. Defendant.
Mr. Prathmesh Kamat i/b. Ms. Priyanka Patel, for the Respondent/ Ori. Plaintiff.

CORAM : N.J. JAMADAR, J.
RESERVED ON : 1st APRIL, 2022
PRONOUNCED ON : 26th JULY, 2022

JUDGMENT :

1. OSV Crest Mercury/the defendant vessel and her registered owner Continental Radiance Offshore Private Limited (Continental Radiance) have taken out this application purportedly under order 39 Rule 4 of the Code of Civil Procedure, 1908 (the Code) for vacating the order of arrest of the defendant vessel dated 21st June, 2021, unconditionally, or in the alternative reducing the security to be provided for the release of the defendant vessel to USD 18415

and also for a direction to provide a counter security in the sum of USD 4885024.74.

2. The background facts leading to this application can be summarized as under:-

a] Vision Projects Technologies Private Limited (Vision Projects) instituted a Commercial Admiralty Suit praying, inter alia, an order and decree directing the defendant vessel to pay to the plaintiff a sum of Rs. USD 1,873,082.32 along with further interest @ 18% p.a. and for the arrest and sale of the defendant vessel and the application of the sale proceeds towards the claim of the plaintiff.

b] Vision Projects asserted that the defendant vessel is a tug/ offshore supply vessel having IMO 9724398. It is an Indian flag vessel. On the date of the institution of the suit, it was lying at port and harbor at Mumbai port in Indian territorial waters. Continental Radiance is the registered owner of the defendant vessel. A Bareboat Charterparty BARECON 2001 was executed between Vision Projects and Continental Radiance on 19th October, 2015 for a period of five years.

c] Vision Projects claimed under the terms of the BARECON 2001, it carried out a special survey, drydocking and various repairs to the defendant vessel, at the instance of Continental

Radiance. Under the terms of charterparty 90% of the costs incurred for carrying out the special survey/statutory drydock was to be incurred by Continental Radiance. The plaintiff further averred that it had also arranged for agency services of Benline Agency India Private Limited and had also made payments to various authorities, vendors etc. for and on behalf of the defendant vessel, at the instance of Continental Radiance.

d] The plaintiff asserted that Continental Radiance failed to pay the agency fees as well as reimburse the amounts incurred by the plaintiff towards agency fees, for and on behalf of the defendant vessel. Continental Radiance also failed to pay for the statutory drydock and for various repairs carried out by the plaintiff to the defendant vessel, at the instance of Continental Radiance. This gave rise, according to the plaintiff, to a maritime claim to the tune of USD 1,873,082.32 for the costs incurred and services provided by the plaintiff to the defendant vessel.

3. Apprehending that the defendant vessel may be re-exported out of Indian waters, by the owners of the defendant vessel, by circumventing the necessary customs procedure and without following proper re-export formalities and the defendant vessel may be taken to a location beyond the jurisdiction of this Court, the

plaintiff moved for the arrest of the defendant vessel. By an order dated 21st June, 2021 this Court ordered the arrest of the defendant vessel.

4. The defendant vessel and her registered owner have taken out this application for vacating the order of arrest and the consequential or alternative reliefs with the assertion that the order of arrest is required to be vacated as it was obtained by suppressing material facts and on the basis of the material which did not justify the arrest of the vessel. Multiple grounds have been raised by the applicants, which according to the applicant, either singly or collectively make it imperative to vacate the order of arrest of defendant vehicle as it is causing grave prejudice to the applicant.

5. The grounds on which the order of arrest is sought to be vacated can be culled out as under:-

a] A false case of urgency, to the knowledge of the plaintiff, was attempted to be made out to obtain the order of arrest.

There was no possibility of the defendant vessel sailing out of the Indian territorial waters, without following proper re-export formalities. In fact, the plaintiff was in default in transferring the agency and taking steps to re-export the defendant vessel.

b] The order of arrest was obtained without notice to the defendant despite the defendant having lodged a caveat under section 148A of the Code.

Neither any notice was given by the plaintiff before moving the Court nor the Court gave notice to the defendant. Moreover, the plaintiff suppressed the fact that it was served with a notice of caveat. Yet, ex parte ad-interim relief of arrest of the defendant vessel was obtained on 21st June, 2021.

c] The plaintiff's case also suffers from active misrepresentation.

(i) Notice was not given to the defendant despite service of the caveat, (ii) The defendant moved for ex parte interim order in breach of an express undertaking given to the Court on 16th June, 2021. The said fact of an undertaking having been given was suppressed from the Court. (iii) The plaintiff, "used and relied upon" without prejudice correspondence.

d] On merits the claim of the plaintiff that it discharged the liability of the defendant vessel to the third party is not at all made out. It is contended that third party to whom the plaintiff claimed to have made payments had already been secured or their liabilities were discharged by the owners of defendant vessel. The plaintiff have failed to substantiate the claim of having made the payments on behalf of the defendant vessel to the third party.

e] Lastly, since the charterparty provide for resolution of the dispute through arbitration, an admiralty action in rem in aid of security of arbitration proceeding is not permitted.

6. The defendant/applicant further contended that the defendant has a counter claim of USD 4.5 million against the plaintiff. Since the substantial sums are due and payable by the plaintiff to the applicant, as particularized in paragraph 40 of the application, the instant claim is nothing but a counter blast to avoid the liability.

7. An affidavit in reply is filed on behalf of Vision Projects.

8. After adverting to the jural relationship between the plaintiff and Continental Radiance under the charterparty agreement, the plaintiff asserts that, indisputably, the plaintiff had drydocked the defendant vessel, undertaken repairs and completed the special survey of defendant vessel. However, Continental Radiance failed and neglected to pay to the plaintiff the contractual sums as agreed under clause 10(g) of the Charterparty Agreement. It is further asserted that whilst charterparty was in its concluding stage, the Continental Radiance reneged from its obligations under the charterparty and sought to unjustifiably impose the costs of repairs

and dry dock of defendant vessel solely to the count of the plaintiff.

9. The plaintiff has contested the assertion of the defendant that it had approached the Court with unclean hands and that there was no urgency. The caveat filed by the owners of the defendant vessel under section 148A of the Code was of no avail in admiralty action. No caveat was filed in accordance with the Rule 1072 of the Bombay High Court (Original Side) Rules, 1980 (Rules, 1980). It was denied that the plaintiff committed breach of the undertaking given to the Court. According to the plaintiff, the undertaking was only to the effect that the plaintiff would not in any manner object to the owner of the defendant vessel making the necessary application to move the defendant vessel or allow it to be sent out. The plaintiff was neither directed nor undertook to make any application and/or to take any steps for the defendant vessel to sail out. The said undertaking did not impair the statutory right of the plaintiff in seeking arrest of the vessel, for enforcement of the maritime claim.

10. The plaintiff averred that there is no embargo to enforce a maritime claim against a vessel despite existence of arbitration agreement. According to the plaintiff, an action in rem is maintainable for enforcement of maritime claim and for arrest of

vessel despite the existence of arbitration agreement. As regards the expenses incurred for drydocking, special survey and repairs, the plaintiff asserted that all those expenses were incurred by the plaintiff under the terms of the charterparty and Continental Radiance was liable to defray the costs thereof.

11. The applicant has filed an affidavit in rejoinder.

12. In the wake of the aforesaid pleadings, I have heard Mr. Ashwin Shanker, learned counsel for the applicant and Mr. Prathmesh Kamat, learned counsel for the respondent. The learned counsels have taken me through the pleadings and the documents placed on record in support of their respective claims.

13. In the context of the submissions canvassed by the learned counsels, it may be apposite to record and consider the submissions under the broad heads which, according to the applicant, warrant the vacating of the order of the vessel. I propose to deal with the grounds in two parts. First, those grounds which are not rooted in thickets of facts. Second, the grounds which emerge from the facts.

14. To begin with, it may be appropriate to note few un-

controverted facts. The jural relationship between the defendant vessel and Continental Radiance is not in dispute. Nor the fact that Vision Projects and Continental Radiance entered into a charterparty on 19th October, 2015 for a term of five years. It was a Bimco Standard Bareboat Charter.

15. By and large, there is no controversy over the fact that under clause 10(g) captioned “periodical drydocking”, the charterer was to drydrock the vessel, clean and paint her under water parts and 90% of the costs of special survey were to be borne by the owners of the defendant vessel and the balance 10% were to be borne by the charterer. It seems a dispute arose between the parties over the scope of special survey and the party who was liable to pay the expenses of drydocking and repairs. The charter party provided for resolution of the dispute through arbitration to be conducted in accordance with London Maritime Arbitrators Association.

16. Continental Rediance, the owner of the vessel filed Commercial Arbitration Petitions (L) No. 12391 of 2021 and 12392 of 2021. After noting that the defendant vessel had already been in possession of the petitioner and recording the statement made on behalf of Vision Projects that Vision Projects will not in any manner

object to the petitioner making necessary application and taking necessary steps to move the vessel or to allow it to be sent out, by consent of parties, Hon'ble Mr. Justice Mohit Shah, came to be appointed to decide the disputes and differences between the parties under the contract in question, and the petitions were disposed of.

17. In the backdrop of the aforesaid unconroverted facts, I deem it appropriate now to deal with grounds which do not hinge upon the facts.

Non Disclosure of caveat filed under section 148A of the Code :-

18. Mr. Ashwin Shanker, learned counsel for the applicant submitted that the plaintiff deliberately suppressed the fact that caveat under section 148A of the Code was served on the plaintiff. A notice, which the plaintiff was enjoined to give consequent to the service of the caveat before making a motion for the arrest of the defendant vessel, was not given to the defendant. This non-disclosure of caveat coupled with non-service of notice upon the defendant, according to Mr. Shanker, constitute a *malafide* litigative strategy of highest order and therefore furnishes a surer ground for vacating the order of arrest. Had the factum of caveat been

disclosed, Mr. Ashwin Shanker urged, the Court would not have passed an ex parte order of arrest of the defendant vessel. Mr. Shanker would further urge that a caveat under section 148A of the Code and the one under Rule 1072 of Rules, 1980 can both co-exist. These provisions are not mutually exclusive. Therefore, the fact that caveat was not filed in accordance with Rule 1072 cannot be put forth as a subterfuge for not disclosing the factum of caveat under sec.148A of the Code having been served upon the plaintiff.

19. Mr. Prathamesh Kamat, learned counsel for the plaintiff joined the issue by canvassing a submission that the caveat under section 148A of the Code is not at all germane to the proceedings under admiralty jurisdiction. Since special rules are framed by the High Court in exercise of the powers under section 16 of the Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017 (Admiralty Act, 2017) entitled, 'Rules for Regulating The Procedure And Practice in Cases Brought Before The High Court Under The Admiralty (Jurisdiction And Settlement of Maritime Claims) Act, 2017' which prescribe a special caveat under Rule 1072 against the arrest of the vessel, the general provisions under section 148A cannot be resorted to. Thus, the special rules prevail over the general procedure prescribed by the Code.

20. To bolster up this submission, Mr. Kamat placed reliance on the judgment of the Supreme Court in the case of **Iridium India Telecom Limited vs. Motorola INC.**[1] and an order by this Court in the case of **K. Marine Agencies Private Limited vs. M.V. Bahri Jazan (IMO No.9620970)**[2].

21. Rule 1072 of the Rules, 1980 read as under:-

> Caveat against arrest of ship :-
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> (a) Any person desiring to prevent the arrest of any ship shall file in the registry a praecipe, signed by himself or his Advocate, who may be acting for him, requesting for entering caveat against the arrest of such ship and undertaking to enter appearance in person or by vakalatnama in any suit that may be instituted against such ship and undertaking to give security in such suit in a sum not exceeding the amount to be stated in the praecipe or to pay into the registry such sum. The caveat shall contain the name, address and email address of the caveator and/or his advocate, as the case may be. Caveat against issue of a warrant or order of arrest of such ship shall thereupon be entered in a book to be kept in the registry, called "Caveat Warrant Book". The Caveat Warrant Book shall state the amount of security that the Caveator has undertaken to provide as per the praecipe.
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> (b) The fact that there is a caveat against arrest in force shall not event a party from applying for a warrant or order of arrest and the ship to which the caveat relates, arrested without notice to the Caveator. Where any ship with respect to which a caveat against arrest is in force is arrested in pursuance of a warrant or order of arrest, the person at whose instance the caveat has been entered may apply to the court by way of an interim application for

1 (2005) 2 Supreme Court Cases 145.
2 Comm.Admiralty Suit (L) No. 677 of 2017 Dt.21-11-2017

> an order under this rule and, on the hearing of the application, the court, unless it is satisfied that person procuring arrest of the ship had a good and sufficient reason for so doing, may order discharge of warrant or order of arrest and may also order such person to pay to the applicant, damages in respect of the loss suffered by the applicant as a result of the arrest.

22. A bare perusal of the aforesaid provisions and comparing and contrasting it with the provisions contained in Rule 148A of the Code, make it evident that a caveator in admiralty action who desires to prevent the arrest of any ship, gives two undertakings. First, to enter appearance in person or by filing vakalatnama in any suit that may be instituted against such ship. Second to give security in such suit for a sum not exceeding the amount to be stated in the praecipe or to pay into the Registry such sum. These two special requirements in a caveat under Rule 1072 stem from the purpose for which a ship may be ordered to be arrested. Rule 1070 makes the position clear. It provides that in any suit in rem, no service of writ of summons or warrant of arrest shall be required when the advocate for defendant agrees to accept the service having entered a caveat or otherwise or to give security or to pay money into Court. Thus undertakings to enter appearance and to give security or to pay money in Court serve a definite purpose. I, therefore, find it rather difficult to accede to the submissions of Mr. Shanker that there is no qualitative difference between a caveat

under section 148A of the Code and the one under Rule 1072 of the Rules, 1980 and the party who files an ordinary caveat, under section 148A, is equally entitled to the privilege of notice and hearing before interim order is passed.

23. It is well recognized that in the event of conflict between the rules framed by the Chartered High Court and the provisions of Code of Civil Procedure, 1908 the rules framed by the High Court prevail. Reliance by Mr. Kamat, on the judgment of the Supreme Court, in the case of **Iridium India Telecom Limited** (supra) appears well placed. In the said case, the Supreme Court was confronted with the correctness of the view of this Court that the amended provision of Order VIII Rule 1 of the Code would not apply to the suit instituted on the Original Side of the High Court and that such suit would continue to be governed by the High Court (OS) Rules. In paragraph 20, the Supreme Court underscored the primacy of the rules framed by the Chartered High Court as under.

> 20] The Legislature recognized the special role assigned to the Chartered High Courts and exempted them from the application of several provisions of the Code in the exercise of their ordinary or extra-ordinary civil jurisdiction for the simple reason that those jurisdictions were governed by the procedure prescribed by the rules made in exercise of the powers of the Chartered High Courts under clause 37 of the Letters Patent. Interestingly, Section 652 of this Act itself empowered the High Courts to make rules "consistent with this Code to regulate any matter connected with the procedure of the Courts of Civil Judicature subject to its

> superintendence", suggesting that consistency with the Code was a sine qua non only when making rules for the subordinate courts.

24. In paragraph 39, the Supreme Court concluded as under:-

> 39] Taking into account the extrinsic evidence, i.e. the historical circumstances in which the precursor of Section 129 was introduced into the 1882 Code by a specific amendment made in 1895, we are of the view that the non obstante clause used in Section 129 is not merely declaratory, but indicative of Parliament's intention to prevent the application of the CPC in respect of civil proceedings on the Original Side of the High Courts.

25. Consistent with the aforesaid position in law, it would be impermissible to urge that a caveat filed under section 148A of the Code in admiralty jurisdiction would command the same value as the caveat filed under Rule 1072 of the Rules, 1980.

26. Mr. Kamat also invited the attention of the Court to the observations of a learned single Judge in the case of **K. Marine Agencies Private Limited vs. M. V. Bahri Jazan**[3] wherein while passing an ex parte order of arrest of vessel, where a caveat under section 148A of the Code was filed but not the one as contemplated under Rule 929 of the Rules, 1980 (Old Rules), the learned single Judge observed that in the absence of caveat under Rule 929, no cognizance of caveat filed under section 148A of the Code could be

3 Com.Admr.Suit (L) NO.677 of 2017, Dt.21-11-2017.

taken by the Court. Undoubtedly, the said observation was made while passing an ex parte order and it may not commend itself as ratio. However, the fact remains that this Court refused to take cognizance of a caveat filed under section 148A of the Code, while exercising admiralty jurisdiction in the face of special provision contained in the High Court (O.S.) Rules.

27. In view of the aforesaid consideration, I am not persuaded to agree with the submissions of Mr. Shanker that the order of arrest deserves to be vacated for the non disclosure of the caveat under section 148A of the Code and/or non service of the notice on the applicant/defendant.

Breach of undertaking recorded in order dated 16th June, 2021 in Commercial Arbitration Petition (L) Nos. 12391 of 2021 and 12392 of 2021 :-

28. Mr. Shanker advanced a two pronged submission. One, there is a deliberate suppression of the undertaking, given by the plaintiff in the above arbitration petition, in the plaint. Two, the action of moving for the arrest of defendant vessel was in breach of the said undertaking.

29. It would be necessary to immediately notice the statement made on behalf of the plaintiff-Vision Projects in the said petition and recorded by the Court.

> 4] Mr. Kamat in addition makes a further statement that, in view of these instructions, his clients will not in any manner object to the Petitioners making the necessary application and taking all necessary steps to move the vessel or to allow it to be sent out. If the Respondents or their existing agent's consent or co-operation is required, whether for repairs or for removal of the vessel, Mr. Kamat assures the Court that this will be readily forthcoming from the Respondents. The statement is also noted and accepted.
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> 7] It goes without saying that Mr Kamat statements are without prejudice to his rights and contentions in arbitration.

30. On the aspect of the alleged non-disclosure, it would be suffice to note that in paragraph 33 of the plaint, the plaintiff made a reference to the arbitration proceeding initiated by Continental Radiance and the order passed therein dated 16th June, 2021. It is further pleaded that the statement of the plaintiff to handover /transfer its agency to the owners of defendant vessel was recorded therein.

31. It could be urged that the plaintiff ought to have extracted the relevant part of the order dated 16th June, 2021, which recorded the said statement of the plaintiff and also annexed copy thereof.

However, the omission to do so does not constitute suppression of facts as the plaintiff did plead the gist of the proceedings in the arbitration petition.

32. The second limb of the submission on behalf of the defendant that the said statement recorded by the Court constituted an undertaking not to seek arrest of the defendant vessel, in my considered view, is not borne out by the statement recorded by the Court. Moreover, it would be superfluous to delve into this aspect of the matter in view of the clarification made by the learned Single Judge (Hon'ble G.S. Patel, J.), in an order dated 24th September, 2021, as to what the said statement connoted. In paragraph 3 of the order dated 24th September, 2021, Hon'ble G.S. Patel, J. clarified as under:-

> 3] It seems that the Respondent to the Arbitration Petitions represented by Mr Kamat has since moved for arrest of the vessel. Obviously, the statement that he made on 16th June, 2021 was, first, confined to that matter and could not have permissibly extended to any other litigation. Second, that statement could not operate as a restraint against the Respondent from adopting legal proceedings as in accordance with law.
>
> 4] No further clarification is required.
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> (emphasis supplied)

33. In view of the clear and explicit clarification that the said statement could not operate as a restraint against the respondent

(Vision Projects) from adopting legal proceeding in accordance with law, I am afraid it is still open to the defendant to urge this ground.

Arrest of vessel in aid of security for arbitration proceeding under part 1 of the Arbitration and Conciliation Act, 1996 impermissible :-

34. It would be contextually relevant to note, at this stage, another ground of challenge to the arrest of vessel emanating from the Commercial Arbitration Petition (L) Nos. 12391 of 2021 and 12392 of 2021. Mr. Ashwin Shanker submitted that as recorded in the order dated 16th June, 2021 in Commercial Arbitration Petition (L) Nos. 12391 of 2021 and 12392 of 2021, the parties agreed that the dispute be resolved through arbitration in accordance with the Indian Law. A sole arbitrator came to be appointed. With this development, according to Mr. Ashwin Shanker. The institution of the admiralty suit can only be said to be for the purpose of the arrest of the vessel so as to obtain the security for the award which may eventually be passed. Inviting the attention of the Court to the provisions contained in sections 5 and 8 of the Arbitration and Conciliation Act Mr. Ashwin Shanker submitted that the arrest of a ship in aid of security for Indian arbitration is legally impermissible.

35. Mr. Ashwin Shanker would further urge that even in the

affidavit in reply to the instant application, the plaintiff/respondent has not disputed that section 8 of the Arbitration and Conciliation Act applies with full force and vigor and the dispute between the parties was required to be referred to arbitration. In the light of this stand of the plaintiff, according to Mr. Ashwin Shanker, nothing survives in the admiralty suit. To bolster up the submission that the admiralty action in rem in aid of security for Indian arbitration proceeding is not permissible in law, Mr. Ashwin Shanker placed a very strong reliance on a Division Bench judgment of this Court in the case of **Altus Uber vs. Siem Offshore Rederi AS**[4].

36. Mr. Prathmesh Kamat, controverted the aforesaid submission on behalf of the applicant by canvassing a proposition that the commencement of *'in personam'* proceeding (arbitration) is not an impediment to initiate an action *'in rem'*. Elaborating the submission, Mr. Kamat would urge that right in rem is available to a party having a maritime claim notwithstanding the commencement of any in personam proceeding in respect of the same claim or cause of action. It was, thus, submitted that the fact that owners of the defendant vessel had proceeded against the plaintiff in arbitration 'in personam' cannot preclude the plaintiff from instituting an action 'in rem' for the arrest of the defendant vessel. Mr. Kamat

4 2019 SCC OnLine Bom 1327.

submitted that the reliance placed by the applicant on the judgment of the Division Bench in the case of **Altus Uber** (supra) does not advance the cause of the applicant. On the contrary, the said judgment lends support to the proposition canvassed on behalf of the respondent/plaintiff.

37. Mr. Kamat would urge that the judgment of the learned single Judge in the case of **Siem Offshore Redri AS vs. Altus Uber**[5] which was carried in appeal before the Division Bench in the case of **Altus Uber** (supra) extensively considers the challenge now sought to be mounted on behalf of the applicant and repels the submission that an action in rem for arrest of the vessel is barred in the event the dispute is amenable to arbitration (whether the arbitration has commenced or yet to be commenced). The observations of the learned single Judge, in paragraph 56, in the case of **Siem Offshore** (supra) encapsulate the position in the context of right 'in rem'. It reads as under:

> 56. A right in rem is a valuable right that a party has for the purpose of obtaining security in respect of a maritime claim. To debar a party from approaching the Court on the ground that the party has agreed to arbitration would tantamount to depriving a party of his vested right to file an action in rem under the Admiralty Act, 2017. This right cannot be taken away unless there is a statutory bar or an express provision denying such a right to a Claimant. There is no such

5 2018 SCC OnLine Bom 2730.

> bar or prohibition under existing law. Neither is there any bar to the exercise of this right merely because in personam proceedings have been commenced by way of arbitration or in Court. On the contrary considering the distinction between in rem and in personam proceedings, it is manifestly clear that a right in rem is available to a Claimant notwithstanding commencement of in personam proceedings in respect of the same claim and cause of action. This is because a right in rem in admiralty jurisdiction is essentially available to secure a maritime claim by arrest of a ship. It is only after the owner of the ship enters appearance and submits to jurisdiction and provides security that the action in rem would proceeds as an action in personam. It is only at that stage that the Court will apply the arbitration clause in the Contract between the parties and require the parties to arbitrate their claims. By this the right in rem is preserved and any security that the Claimant is able to obtain by exercising this right, is retained and made available to the Claimant for the purposes of satisfying his claim in the in personam proceedings whether by way of arbitration or in Court.

The appeal Bench in the case of **Altus Uber** (supra), considered the challenge to the aforesaid enunciation of law.

38. Mr. Ashin Shanker invited the attention of the Court to the observations of the Division Bench in paragraph Nos. 71, 92, 98, 99 and 100 to lend support to the proposition that an order of arrest, even in an action in rem, cannot be passed in aid of Indian arbitration proceeding.

39. I have carefully considered the submission of Mr. Ashwin

Shanker and perused the judgment of the Division Bench in the case **Altus Uber** (supra) especially the observations in the above numbered paragraphs. I am afraid to accede to the submission on behalf of the applicant that the observations in the aforesaid paragraphs lay down the proposition as is sought to be canvassed on behalf of the applicant. In fact, the Division Bench had postulated, at places more than one, that the fact that the dispute is amenable to arbitration does not *ipso facto* imply that the vessel cannot be arrested in an action in rem. The observations of the Division Bench in paragraphs 68 to 72 make this position abundantly clear. Paragraphs 68 to 72 read as under:

> 68. No statute caters to every fact situation. The submission that what is not provided of is impliedly excluded, is not correct. The Admiralty Act 2017 is not a self-contained code unlike the Arbitration and Conciliation Act, 1996. It sets out the extent of the jurisdiction of the court (territorial and over ships - section 3) , a list of maritime claims (section 4) and the powers of the court to arrest a ship for the purpose of providing security in respect of a maritime claim (section 5). The Admiralty Act, 2017 does not refer to stay of Admiralty proceedings once the ship is arrested and security provided. That comes in by virtue of Section 45 of the Arbitration and Conciliation Act, 1996. This does not mean that the suit is not maintainable or that there is an implied bar. The presence of an arbitration agreement does not oust the jurisdiction of a Civil Court. Even if the suit is stayed there is no bar to retention of security in the suit.
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> 69. The Apex Court has in several judgments supported such interpretative changes having regard to the ever changing global scenario (paragraph 56 of m.v. Sea Success (2004) 9 SCC 512). In the case of Al Quamar (2000) 8 SCC 278 para 43 the Apex Court also

observed that "the Court has to approach modern problems with some amount of flexibility as is now being faced in the modern business trend. Flexibility is the virtue of the law courts as Roscoe Pound puts it. The pedantic approach of the law courts are no longer existing by reason of the global change of outlook in trade and commerce".

70. Courts promote alternate dispute resolution by arbitration and mediation. A party willing to arbitrate cannot be put at a disadvantage and be told that he has lost his right to obtain security by arrest of a ship. Every charterparty and every other form of Standard Shipping Contract out of which most disputes arise contains a printed arbitration clause. It would be a retrograde step if in case of disputes a party has no right to obtain security by arrest of a ship if he has a maritime claim. This would not serve the cause of ADR in India which Courts are keen to promote to ease the burden on Courts of law suits clogging the system.

71. On Mr. Chinoy's submissions Mr. Pratap would submit that section 5 of the Arbitration Act bars intervention of the Court in matters governed by Part-I. The present case is not an application under Part-I and consequently the bar of section 25 of the Arbitration Act 1996 has no application. He would submit that the suit is not barred inasmuch as it is only on an application of the party that section 8 of the Arbitration Act 1996 applies. He would submit that we must refer to section 10 of the Code of Civil Procedure, 1908. The pendency of a suit in a foreign Court does not preclude the Courts in India from trying a suit founded on the same cause of action. If this be so, then, how can the pendency of foreign arbitration proceedings be a bar to a suit in India on the same cause of action. In such a case of a prior foreign suit, if security by way of interim relief is obtained by the plaintiff in the suit in India the Court may, on the application of the defendant, either put the plaintiff to an election if it is found to be vexatious or stay the suit and retain security or make the stay conditional upon alternate security being provided. The suit in India on the same cause of action can be stayed and security retained. The same can be done in the case of a foreign arbitration.

72. The submission that once there is an arbitration

> agreement and arbitration has been invoked, the Court has no jurisdiction to arrest a ship in exercise of the Admiralty jurisdiction, has been specifically held to be incorrect by the English Court of Appeal in The Andria. Thus the purpose of the Plaintiff in invoking the Admiralty jurisdiction cannot affect the existence of the jurisdiction. Thus it cannot be said that the Court has no jurisdiction to arrest a ship or to maintain an arrest where the purpose of the Plaintiff is simply to obtain security for an award in arbitration proceedings. The jurisdiction is simply there. The Court has the power to arrest.
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> (emphasis supplied)

The Division Bench has thus ruled in clear and explicit terms that it cannot be said that the Court has no jurisdiction to arrest the ship or to maintain an arrest where the purpose of the plaintiff is simply to obtain security for the award in arbitration proceeding. It was in terms observed that the purpose of the plaintiff in invoking the admiralty jurisdiction cannot affect the existence of the jurisdiction.

40. The observations in paragraphs 98 to 100 in the case of **Altus Uber** (supra) read as under:

> 98. We are not deciding any larger issue or wider controversy simply because Mr. Sen's argument have not rested on the above provision of the Arbitration Act alone. He has gone ahead and criticized the approach of the learned single Judge by contending that the instant suit only seeks to protect or secure the claim in the on-going foreign arbitration. Thus, his contention is that this suit is filed to obtain a security for the ultimate award that would be made in favour of the plaintiff.
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> 99. Far from it, this suit is filed to recover the amounts,

> more particularly set out in the prayer clause by urging that there is a maritime claim. Mr. Sen pertinently does not dispute that the underlying claim in this case is otherwise a maritime claim. However, his argument is that such a claim, which is referred to in section 4 of the Admiralty Act, 2017, is pressed by the plaintiff in the on-going arbitration proceedings. Therefore, the present suit is filed only to secure the claim and the fruits of the arbitral proceedings abroad. Thus, in the event the Award passed in favour of the plaintiff in the foreign arbitration has to be enforced, then, there has to be a security for it and for that reason, this suit is filed.
>
> 100. We do not think so. Ultimately, this aspect has to be decided on the facts and circumstances of each case. No general rule can be laid down. One would have to read every plaint and the allegations therein carefully. One would have to take the plaint allegations as a whole and read them harmoniously. One would have definitely and to arrive at a proper conclusion, read the allegations in this manner. They would have to be assumed to be true. Therefore, we are not saying that a suit to secure the claim in the arbitral proceedings can be filed irrespective of the requirements stipulated in the Admiralty Act, 2017. They have to be fulfilled and all preconditions satisfied. We are not laying down such a principle as is apprehended by Mr. Sen. All that we are saying is that in the backdrop of the facts and circumstances of this particular case, we do not think that the suit has been filed to secure the claim in the pending foreign arbitral proceedings. By this finding and conclusion and which is based entirely on the facts and circumstances of each case, we are not laying down any general rule, much less a principle of law that a suit simplicitor to secure a claim in the arbitration abroad would be always maintainable in the Admiralty jurisdiction of this Court. We think that our clarification is enough to understand the ultimate conclusion that we have reached. It is only to negate the argument of Mr. Sen that the instant suit is filed to claim arrest of a vessel as a security for the pending foreign arbitration that we have made these detailed observations.

41. The aforesaid enunciation of law indicates that when the arrest of the ship is sought to be contested as being an exercise directed merely to ensure the security in aid of arbitration proceeding, the Court is enjoined to evaluate the true nature and

remit of the plaint. The Division Bench was cautious enough to explicitly observe that it did not propose to lay down that the suit to secure the claim in arbitration proceeding can be filed irrespective of the requirements stipulated in the Admiralty Act, 2017. The question as to whether the suit has been instituted merely to secure the claim in arbitration proceeding has to be decided on the facts and circumstances of each case. Applying the aforesaid test, in the said case, the Division Bench observed that it did not find that the said suit had been filed to secure the claim in the pending foreign arbitration proceeding.

42. On the aforesaid touchstone, reverting to the facts of the case, from a meaningful perusal of the averments in the plaint as a whole it becomes abundantly clear that the plaintiff/respondent has premised its claim on the facts that it had provided services to defendant vessel at the instance of its owners, employees, representatives etc. The particulars of the claim (Exhibit HH to the plaint) comprises costs of dry docking and special survey, including repairs procurement of spares and supplies, costs of supplies from 17th November, 2020 to 4th March, 2021 and agency fees from 17th November, 2020 till the date of the institution of the suit. The plaintiff has thus sought a decree against the defendant vessel to

pay to the plaintiff a sum of USD 187308.32 along with interest. The plaintiff asserts that the claims of the plaintiff are maritime claims under section 4(1)(h), 4(1)(p) and 4(1)(t) of the Admiralty Act, 2017. A reading of the plaint as a whole thus prima facie leads to an inference that the plaintiff has instituted a comprehensive suit for the recovery of the amount which plaintiff asserts constitutes a maritime claim.

43. In other words the suit does not appear to be a measure for interim relief only but presents itself as a substantive action for recovery of maritime claim. The submission on behalf of the applicant that the suit is instituted merely to secure the claim, in an arbitration proceeding, is simply not borne out by the averments in the plaint and the material on record.

44. The aforesaid consideration dissuades me from acceding to the submission on behalf of the applicant that in view of the invocation of the arbitration and commencement of the arbitration proceeding, the arrest of the vessel in an action in rem is legally unsustainable. The challenge to the order of arrest on this count thus falls through.

Restricted liability of the owner of the vessel under the Charter Party Agreement :-

45. It was urged on behalf of the applicant that the under the terms of the Charter Party Agreement dated 19th October, 2015, the liability of the owner of the vessel was restricted to 90% of the special survey costs. In contrast, all the costs and expenses of the repair and maintenance of the vessel were to be borne by the Charterer. The plaintiff has in breach of the contract professed to saddle the owner with the costs of non class survey repairs and upkeep of the vessel as well as the costs of drydocking which was under the terms of the contract to the account of the plaintiff. The plaintiff thus inflated the claim exponentially. Mr. Shanker invited attention of the Court to the clauses in the Charter Party Agreement which, according to him, make it explicitly clear that the owners were not liable to pay any amount save and except 90% of the special survey costs. Even the expenses of drydocking were exclusively to the account of the plaintiff.

46. Mr. Kamat, learned counsel for the plaintiff, on the other hand, submitted that the case sought to be developed at the time of canvassing submissions is at variance with the case set up in the Interim Application. There are admissions by way of pleadings in

the Interim Application wherein the applicant/ defendant admitted that it had agreed to incur 90% of the costs of drydocking and special survey. According to Mr. Kamat, the applicant/defendant did not question the apportionment of the liability. What was sought to be put in contest was the quantum of the liability qua each item of expenses claimed to have been incurred by the plaintiffm on the premise that there was no break up of the expenses, no invoices and the invoices were not supported by underlying documents. And there was misfeasance on the part of the plaintiff in not properly negotiating with the vendors before the invoices were raised. To this end, reliance was sought to be placed on the correspondence exchanged between the parties, prior to the institution of the suit.

47. Before dealing with the aforesaid rival contentions, it may be expedient to note few clauses of the Charter Party dated 19th October, 2015. The following sub-clauses of Clause 10 under the caption 'Maintenance and Operation' bear upon the controversy.

> 10] Maintenance and Operation :-
>
> (a)(i) Maintenance and Repairs- During the Charter period the vessel shall be in the full possession and at the absolute disposal for all purposes of the every respect. The charters shall maintain the vessel, her machinery, boilers, appurtenances and spare parts in a good state of repair, in efficient operating condition and in accordance with good commercial maintenance practice and, except as provided for in Clause 14(I), if applicable, at their own expenses they

shall at all times keep the vessel's Class fully up to date with the classification society indicated in Box 10 and maintain all other necessary certificates in force at all times.

(b) Operation of the Vessel- The Charterers shall at their own expense and by their own procurement man, victual, navigate, operate, supply, fuel and whenever required, repair the Vessel during the Charter period and they shall pay all charges and expenses of every kind and nature whatsoever incidental to their use and operation of the Vessel under this Charter, including annual flag State fees and any foreign general municipality and/or state taxes excluding any Singapore Taxes associated with the Owner's profit and revenue. The master, officers and crew of the vessel shall be the servants of the Charteres for all purposes whatsoever, even if for any reason appointed by the owners. Charterers shall comply with the regulations regarding officers and crew in force in the country of the Vessel's flag or any other applicable law.

(f) Use of the Vessel's Outfit, Equipment and Appliances-

The Charterers shall have the use of all outfit, equipment, and appliances on board the vessel at the time of delivery, provided the same or their substantial equivalent shall be returned to the owners on re delivery in the same good order and condition as when received, ordinary wear and tear excepted. The Charterers shall from time to time during the Charter period replace such items of equipment as shall be so damaged or worn as to be unfit for use. The Charterers are to procure that all repairs to or replacement of any damaged, worn or lost parts or equipment to effected in such manner (both as regards workmanship and quality of materials) as not to diminish the value of the vessel. The Charterers have the right to fit additional equipment at their expense and risk but the Charterers shall remove such equipment at the end of the period if requested by the owners. Any equipment including radio equipment on hire on the vessel at time of delivery shall be kept and maintained by the charterers and the Charterers shall assume the

> obligations and liabilities of the owners under any lease contracts inn connection therewith and shall reimburse the owners for all expenses incurred in connection therewith, also for any new equipment required in order to comply with radio regulations.
>
> (g) Periodical Dry Docking- The Charterers shall dry dock the Vessel and clean and paint her underwater parts whenever the same may be necessary, but not less than once during the period stated in Box 19 or, if Box 19 has been left blank, every sixty (60) calendar months after delivery or such other period as may be required by the classification society or flag state. 90% of the costs of the special survey shall be borne by the owners and the balance 10% shall be borne by the Charterers. Charterers shall be granted an allowance of a period free of charter Hire from the date the vessel embarks on her voyage for the special survey and until the vessel returns on site to recommence the End Contract. The Charterers undertake to exercise their best endeavors to complete the special survey and return the vessel on site in the shortest possible period.

48. Clause 10(a)(i), inter alia, provides that the Charterer shall maintain the vessel, her machinery, boilers and spare parts in a good state of repair, in efficient operating condition and in accordance with good commercial maintenance practice. Sub clause (b) provided for the operation of the vessel at the expenses of the Charterer and whenever required repair the vessel during the charter period. Sub clause (f) casts an obligation on the Charterer to return to the owner the vessel in the same good order and condition as it was when received, ordinary wear and tear excepted.

49. The controversy in the case at hand primarily revolves

around the clause (g) which provides for periodical drydocking. Under sub clause (g), the Charterer was enjoined to drydock the vessel and clean and paint her under water parts whenever the same may be necessary but not less than during the period specified and, if not specified, over 60 calendar months after delivery. The second part of clause (g) provides that 90% of the costs of special survey shall be borne by the owners and balance 10% shall be borne by the charterer.

50. In the light of the aforesaid stipulations in the Charter Party, the nature of the case set up by the plaintiff and the response thereto, as is evident from the averments in the Interim Application, need to be appreciated.

51. It is the case of the plaintiff that it had carried out statutory drydock and incurred the costs of special survey in its entirety. Despite having incurred the expenses and raised invoices, the defendant committed default in payment of its share of costs and expenses. Paragraph 34 of the plaint culls out the nature of the claim. It reads as under:

> 34] The plaintiff submits that despite carrying out the statutory dry dock as well as repairs in the dry dock, procuring materials from various vendors, the owners of the defendant vessel have failed to pay for the same.

> Under the terms of the Charterparty, the owners of the defendant vessel were required to incur 90% of these payments with the liability of the plaintiff being 10%. Despite providing the owners of the defendant vessel with invoices, work done certificates, invoices raised by the vendors and the proof of remittances, the owners of the defendant vessel have failed and neglected to make the payments which they were obliged to make under the Charterparty.

52. The aforesaid averments were sought to be met by the applicant/defendant in paragraph 40 of the Interim Application. The applicant/defendant contended that it agreed that it was liable to pay 90% of the costs in terms of clause 10(g) of the Charter Party extracted above. However, the non-payment thereof was sought to be justified by ascribing reasons in sub para (a) to (k) of paragraph 40 of the Interim Application. It would be expedient to extract the sub paragraph (a) and (h) as the rest of the paragraphs contained the amount which the plaintiff owes to the defendant on other counts. Relevant part of paragraph 40 reads as under:-

> 40. With reference to paragraph 34, the applicants agree that 90% is payable, as per the terms of clause 10(g) of the bare boat charter. This amount has not been paid because :
>
> (a) Insufficient proof of the Class Special Survey liability has been provided by the respondent/plaintiff to the applicants, as referred to above. Further, not all tax invoices provided pertain to the alleged Class Special Survey liability. There are also discrepancies between the invoice at Exhibit T (at Page 142 of the plaint) with the plaintiff's compilation of documents.
> (h) Respondent/plaintiff's incorrectly claim USD 1,252,432 towards non-Class Special Survey Costs which were to the Respondent/plaintiff's account and/or arose as a result of the respondent/plaintiff's failure to properly maintain the applicant vessel.

53. After referring to the invoices, raised on the defendant, in paragraph 37, the plaintiff has averred as under:-

> 37] The owner of the defendant vessel has deliberately failed to make payments on specious grounds. The plaintiff was obliged to carry out dock /special survey. Though not contractually bound, the plaintiff kept the owners in the loop before carrying out the said survey. The owners of the defendant vessel through their representatives have confirmed Goa Shipyard to carryout special survey/dry dock for the defendant vessel had themselves negotiated with the vendors from whom the plaintiff procured spare parts materials etc for repairs of the defendant vessel. Mr. Jayaraman Venkatraman had personally negotiated and approved the vendors. Therefore, specious grounds on which the owners of the defendant vessel are attempting to renege from their obligations to make payments are contrary to their own conduct and agreement. It is clear that the plaintiff having got their vessel dry dock are now trying to arm-twist the plaintiff by not paying the entire amounts which they are obliged to pay under the terms of the Charterparty and basis what was agreed between the parties.

54. In response thereto, in paragraph 43 of the Interim Application, the defendant/applicant inter alia contends as under:-

> 43] With reference to paragraph 37, the reasons why no amounts are payable by the applicants to the respondent/plaintiff have already been previously made out above. In fact, there are substantial sum due and payable by the respondent/plaintiffs to the applicants. This suit is nothing but a counter blast, with a view to try and avoid liability. ....
>
> The applicants were not involved in, and have not approved, the costing for the Class Special Survey of the applicant vessel. The respondent/plaintiffs have failed to show the normal requirements to be entitled to reimbursement of 90% of the Class Special Survey expenses from the applicants.

55. In the backdrop of the aforesaid pleading, at the outset, it is necessary to appreciate arena of the controversy between the parties. Evidently, there is no qualm over the fact that the defendant/applicant was obligated to pay 90% costs of the Special Survey. Upon perusal of the correspondence, which has been exchanged between the parties, the fact that the Special Survey was carried out at Goa Shipyard appears rather incontrovertible. The controversy between the parties essentially seems to revolve around the question as to whether the expenses which the plaintiff claimed to have incurred properly fell in the realm of Special Survey or they were non-class repairs. Additionally, the quantum of the expenses allegedly incurred by the plaintiff is sought to be put in contest on both the counts; one, the factum of repairs and two, the expenses allegedly incurred therefor.

56. At this stage, it would be necessary to note that though a distinction was sought to be drawn between the expenses of drydocking and the Special Survey, yet, it seems that, the parties did not appreciate the issue of liability for drydocking and special survey costs in such water-tight compartments. In fact, in paragraph 9 of the Interim Application while dealing with averments in paragraph 4 of the plaint, the defendant contended

that while the liability to pay the statutory drydock and repairs was partly admitted, there was no amount due and payable by the defendant/applicant after set off, of the liability of the plaintiff to the defendant/applicant.

57. Mr. Ashwin Shanker, the learned counsel for the applicant/defendant would, however, urge that the defendant has consistently taken a stand that the liability of the defendant was restricted to 90% of the Special Survey costs and non class repairs were to the account of the plaintiff. To this end, attention of the Court was invited to a communication dated 23rd December, 2019 whereby the plaintiff's attention was drawn to clause 10(b) of the Charter Party, extracted above, and it was asserted that the defendant was willing to assist in the procurement of the spares on behalf of the VPT (the plaintiff), if payment could be made to them in advance prior to the issue of purchase order for spares.

58. In the aforesaid context, the correspondence exchanged between the parties, especially in the wake of demand made by the plaintiff is required to be considered. In the communication dated 5th February, 2021, the plaintiff claimed a sum of USD 1375661.46 towards Special Survey Costs. Clause (a) to (d) and (g) of the said

communication read as under:-

> a) As you are aware, the vessel Special Surveys were undertaken and completed at Goa Shipyard Ltd.
>
> b) The Total expenditure incurred is INR 15,30,00,000/- (INR Fifteen Crores and Thirty Lakhs Only) which is equivalent to USD 2,067,568/- (USD Two Million Sixty-Seven thousand,five hundred and sixty-eight Only).
>
> (c) The entire total expenditure of INR 15,30,00,000/- was financed by VPT as requested by PR in view of excellent on-going relationships.
>
> (d) As per the Clause 10(g) of the Bare Boat Charter between PR and VPT, the owner's Share (90%) is Rs.13,77,00,000/- (Rs. Thirteen Crores Seventy Seven Lakhs Only) which is equivalent to USD 1,860,810/-(USD One Million Eight Hundred Sixty Thousand Eight Hundred Ten Only) and Charter's i.e. VPT share is 10% amounting to INR 1,53,00,000/- (INR One Crore Fifty Three Lacs Only) or USD 206756.
> ....
>
> (g) Accordingly, we request to PR to reimburse/refund an anount of INR 10,17,98,208/- (INR Ten Crores Seventeen Lakhs Ninety Eight Thousand Two Hundred Eight Only) which is equivalent to USD 1,375,651.46 (USD One Million Three Hundred and Seventy Five Thousand Six Hundred Fifty One only) after adjusting an amount due to PR as per (d) above and after adjusting VPT's share of 10% of the Special Survey & Drydock Expenses mentioned at (c) above. The amount refundable to VPT in equivalent USD is 1,375,661.46/-.

59. In response to the aforesaid communication, the defendant called upon the plaintiff to furnish a break down of the amount claimed under paragraph (b) and (d) above and copies of supporting documents for the work allegedly executed, so as to

facilitate the defendant to verify as to whether the amounts claimed were recoverable under clause 10(g) of the Charter Party. This was followed by further exchange of correspondence leading to demand by the plaintiff on 1st March, 2021 whereby the copies of invoices and supporting documents were professed to be shared. The demand was reiterated on 4th March, 2021.

60. In the communication dated 5th March, 2021, addressed on behalf of the defendant, with reference to the previous correspondence and in the context of the controversy, the defendant asserted as under:-

> 5. Finally, on 25th February, 2021 by five emails VPT sent CROPL copies of what you say are all relevant invoices which make up the claims asserted. However, VPT note that despite the special survey having been completed more months earlier, VPT have yet to provide very basic industry standard supporting documents. VPT have merely provided invoices and a table summarizing the invoices.
>
> 6. As VPT will recall CROPL and VPT agreed a matrix of responsibility for the costs incurred for the special survey which allocated costs between VPT and CROPL. No attempt was made by VPT to put forward claims based on an agreed allocation of costs and all that VPT provided was a collection of invoices with no apparent order, no supporting documents whatsoever and no breakdown based on what was agreed still less any evidence of payment let alone work completion and delivery of parts and materials invoiced. Moreover, CROPL was not at any stage given the opportunity to verify or approve or re-negotiate financial commitments before thy were made or before invoices were issued.

> 9. Once this has been done, we can discuss at an operational and commercial level to try to reach some agreement on what work was properly done and parts and material supplied at what verifiable and proper cost and for whose accounts the costs fall under the agreed matrix of responsibility. There is also the question of the time spent and agreement needs to be reached on an appropriate time for VPT to have taken to carry out the Class Special Survey having in mind that CROPL have not been pain hire.

61. In the communication dated 23rd March, 2021, emanating from the defendant, it was contended that the cost claimed by the plaintiff related to routine maintenance and does not form part of the Special Survey Drydocking Matrix of Responsibility, the parties had agreed upon.

62. The following paragraphs of the said communication make the stand of the defendant clear:-

> There are costs related to routine maintenance and not part of the special survey/dry docking matrix of responsibility we agreed upon. There are many examples of this related to opex-navigational charts,servicing, ships spares, lamps/lights, PPE, pest control, etc. We have indicated all the attached amounting to USD 1.2 mil for your easy reference. Do note that out of this amount, almost USD 900,000 are only pro-forma invoices and not even final invoices.
>
> On the Goa dry dock charges, it is very high. Despite the COVID situation, the vessel could have been taken out of Goa and put into anchorage, but that did not happen.

63. A peculiar feature of the case at hand is that the parties agreed that a 'Responsibility Matrix' was agreed upon prior to the docking of the vessel for repairs, a copy of which is annexed at Exhibit J to the Interim Application. The responsibilities of the Charterer and joint responsibilities of owner and Charterer in the ratio of 90% and 10% were carved out qua each of the items of the repairs. Interestingly the parties are in unison on the point that they disown the said Responsibility Matrix.

64. The situation which thus emerges is that, at this stage, the fact remains that Special Survey of the vessel was carried out at Goa Shipyard. Indubitably, the defendant/applicant was enjoined to pay 90% of the costs of the Special Survey. It seems the parties had also agreed to share the responsibility as regards the items of the repairs. The controversy between the parties revolves around the issue as to whether particular item of repairs falls within the ambit of Special Survey or a non-class repair, who was to incur the expense of such repairs, whether there were documents in support of the claim of the plaintiff of having incurred the expenses and the like. In the very nature of things, these issues are rooted in facts. At this juncture, the Court is not equipped to adjudicate these issues which plainly warrant a trial.

65. In the aforesaid view of the matter, I am not persuaded to agree with the submission on behalf of the defendant/applicant that liability of the applicant was restricted and, prima facie, there is material to indicate that the plaintiff has exponentially inflated the claim.

Suit claim includes the items for which the plaintiff has not incurred any expenses and/or the defendant has already satisfied those claims :-

66. Mr. Ashwin Shanker strenuously submitted that the falsity of long list of claims of the plaintiff is borne out by the fact that the plaintiff has included even those items which have been already secured and/or paid for by the defendant, and for which no demand has ever been raised on the plaintiff much less discharged by the plaintiff.

67. Mr. Ashwin Shanker invited the attention of the Court to Item No. 17 of the Chart containing the particulars of the expenses allegedly incurred by the plaintiff for the defendant vessel. Mr. Shanker submitted that the claim of Unique Marine Services was already secured by the defendant in terms of the order dated 17th February, 2021 passed in Commercial Admiralty Suit (L) No. 10052

of 2020 instituted by Unique Marine Services. Mr. Shanker would further urge that the expenses allegedly shown to have been incurred at Item Nos. 24, 25 and 37 of the said chart have also been discharged by the defendant. Attention of the court was invited to payment advice, Exhibit (f) to the affidavit in rejoinder dated 27th July, 2021, whereunder a sum of USD 12697.96 was paid by the defendant to vendor Bureau Veritas.

68. Mr. Kamat, learned counsel for the plaintiff submitted that the plaintiff agrees for a reduction of Rs. 26 lakhs claimed by the plaintiff towards the claim of Unique Marine Services and a further reduction of USD 12236.85 being the amount paid by the owners of the defendant vessel, to Bureau Veritas.

69. Mr. Shanker further pointed out that even the claim of Indian Register of Shipping for a sum of Rs. 12,27,031 and Triton Diving Services Pvt. Ltd., for a sum of Rs. 1,78,180/- have been discharged by the applicant. Mr. Shanker would thus urge that these discrepancies and duplication demonstrate un-trustworthiness of the claim of the plaintiff.

70. Indeed, the plaintiff concedes in no uncertain terms that the

claims towards Unique Marine Services and Bureau Veritas are required to be excluded from the total claim of the plaintiff. Prima facie, the claims towards Indian Register of Shipping and Triton Diving Services Pvt. Ltd. adverted to above, appear to be contentious. However, I find it rather difficult to throw the entire claim of the plaintiff overboard on account of aforesaid discrepancies. The reason is not far to seek. Indisputably, the Special Survey of the vessel has been carried out at Goa Shipyard. The controversy, as is indicated above, revolves around the liability qua each item of the repairs/expenses, which is essentially a matter for trial. The proper course, in my considered view, would be to reduce the security to be furnished by the defendant/applicant by the aforesaid four items.

False case of urgency :-

71. Mr. Ashwin Shanker, would submit that there was no prospect of the defendant vessel leaving territorial waters without necessary custom and port clearances. Since the respondent/ palintiff had imported the vessel by completing the customs formalities, it was only the plaintiff who could have completed the re-export custom formalities. Therefore, there was no pressing urgency to seek the arrest of the vessel. Mr. Shanker invited the attention of the Court

to the correspondence from Benline Agencies emphasizing that re-export was required to be advised by the plaintiff. The attention of the Court was also invited to the contentions in the affidavit in sur-rejoinder that the plaintiff admitted that it had imported the defendant-vessel under its own importer/exporter code, to bolster up submission that the vessel could not have sailed without completion of export formalities.

72. In opposition to this, Mr. Kamat laid emphasis on the fact that in the Arbitration Petition filed by the owner of the defendant vessel, it was noted that the vessel in question was already in possession of the owner and its crew was on board the vessel. It was further submitted that a person seeking the arrest of the vessel was only required to satisfy the Admiralty Court that he had undischarged maritime claim, to proceed in rem against the vessel.

73. There is a serious dispute as to whether the owner of the defendant vessel was put in effective control over the defendant vessel. In this proceeding and at this stage, I deem it superfluous to delve deep into this contentious issue. In my view, what has to be seen is whether the action of moving for arrest of the ship was legally sustainable. It is not sought to be contested that the plaintiff

had a maritime claim.

74. The reliance placed by Mr. Kamat on the judgment of this Court in the case of **Raj Shipping Agencies vs. Barge Madhwa and Another**[6] to point out the distinction between an action for arrest of a ship and an order of attachment before judgment seems well founded. This Court pointed out the distinction in the following words:

> 88] Also, to be borne in mind is the difference between an arrest and an attachment. An arrest cannot be equated to an attachment. A maritime claimant has a right in rem which he is entitled to exercise by an arrest of the ship. The only test he has to satisfy is to show that he has prima facie a maritime claim and identify the ship. As against this, an attachment before judgment is a discretionary interim order that any type of Claimant would be entitled to apply upon satisfying the requirements of the Code of Civil Procedure (CPC). He is not entitled to an attachment as a matter of right or as a manner of enforcement of a right.
>
> 89] The arrest of a ship in an Admiralty claim in rem is "sequestration" and not an "execution". In Meeson paragraph 3.81 refers to the judgment in In re Australian Direct Steam Navigation Company58 where the Master of the Rolls Sir George Jessel said "The term 'sequestration' has no particular technical meaning; it simply means detention of property by a Court of Justice for the purpose of answering a demand which is made. That is exactly what the arrest of a ship is .....".

75. Since prima facie there does not seem to be much controversy

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over the fact that the plaintiff had a maritime claim and the plaintiff had undertaken not to object the defendant making necessary application and taking necessary steps to move the vessel or to allow it to be sent out, I am not persuaded to hold that the action of moving for the arrest of the ship was mala fide. Thus, the prayer of the defendant to vacate the order of arrest on this count cannot be acceded to.

76. The conspectus of the aforesaid consideration is that the application for vacating the order of arrest of the vessel deserves to be rejected. However, the amount of security to be furnished needs to be scaled down to the extent of four claims adverted to above.

Hence, the following order.

ORDER

1] The application stands rejected.

2] However, the amount of security to be provided by the defendant for the release of the defendant vessel stands reduced by:

(a) Rs. 23 lakhs towards the claim of Unique Marine Services.

(b) USD 12697.96 towards claim of Bureau Veritas.

(c) Rs. 12,27,031/- towards the claim of Indian Register of Shipping.

(d) Rs. 1,78,180/- towards claim of Triton Diving Services.

3] The reduction of security as regards Item (c) an d (d) is, however, subject to the rights and contentions of the parties.

The application stands disposed in aforesaid terms with no order as to costs.

(**N.J.JAMADAR, J.**)