

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL APPLICATION (FOR VACATING INTERIM RELIEF) NO.1 of
2019

In
ADMIRALITY SUIT NO.6 of 2019

=====

M.V. GLOBAL DIAMOND (IMO NO 9145774)

Versus
SIVA BULK DMCC

=====

Appearance :

MR DEEP D VYAS for the APPLICANT – ORIGINAL DEFENDANT.
MR BIMAL RAJASEKHAR WITH MR RISHI MURARKA WITH MS PAURAMIB
SHETH for the RESPONDENT – ORIGINAL PLAINTIFF.

=====

CORAM : HONOURABLE MR.JUSTICE A.J.DESAI

Date : 03/05/2019
IA CAV ORDER

1. By way of the present application, the applicant – original defendant M.V. GLOBAL DIAMOND (IMO No.9145774) has prayed to release the applicant Vessel which came to be arrested pursuant to an order dated 22.1.2019 passed by this Court in the above mentioned suit mainly on the ground that M.V. GLOBAL DIAMOND, owned by Grand Pacifica Navigation Corporation (hereinafter referred to as ‘GPNC’), is nowhere connected with the World Way Marine Transportation and Logistics Company Limited (hereinafter referred to as ‘WWMT&LCL’) and Mr. Chou Ching-Hui who have given performance guarantee to the original plaintiff for two Vessels, namely, M.V. GLOBAL DREAM and M.V. GLOBAL DIAMOND (applicant herein).

2. The applicant has also sought the above relief on the ground of material suppression of important facts at the time of filing of the suit by not disclosing that the plaintiff has already entered into Charter Party Agreement dated 13.2.2018 with the principal debtor i.e. Ray Group Lines Company Limited (the

Charterers) by which the principal debtor has already provided security for the claim by way of cash deposit in the sum of USD 318,000.00 (US Dollar Three Hundred Eighteen Thousand) pursuant to an Escrow Agreement executed in Arbitration proceedings at Singapore.

3. The present applicants have filed several affidavits in the suit and counter affidavits have also been filed by the original plaintiff. Similarly, affidavit-in-reply has been filed by the present opponent i.e. original plaintiff in the present Civil Application.

4. The case put forward by the original plaintiff in the suit is as under :-

5. That the plaintiff is a Company incorporated under the laws of UAE and carries on the business of *inter alia* chartering of ships. The plaintiff's place of business is at DUBAI, UAE. The defendant Vessel is a foreign flagged vessel flying a Panamanian flag. As per the case put forward by the plaintiff, claim arose in respect of a Vessel, namely, M.V. MORNING ORCHID. The plaintiff had chartered the said Vessel vide Charter Party Agreement dated 13.2.2018 to Ray Group Lines Company Limited (hereinafter referred to as 'Ray Group'). Ray Group's performance was guaranteed by World Way Marine Transportation and Logistics Company Limited (WWMT) and a performance guarantee was given by one Chou Ching-Hui being a Managing Director of the WWMT by which it was declared that WWMT is owner of two Vessels, namely, M.V. GLOBAL DREAM and M.V. GLOBAL DIAMOND (the present applicant).

6. It is the case of the plaintiff that Ray Group defaulted on its obligation and owes the plaintiff towards unpaid freight, dead freight, load port demurrage and discharge port demurrage.

7. Since Ray Group who is a principal debtor has defaulted in payment, WWMT being a guarantor is equally liable for the amount claimed and prayed in the suit. Therefore, Ray Group as well as WWMT is liable to pay jointly and severally to the plaintiff. It is the case of the plaintiff that the defendant Vessel i.e. M.V. GLOBAL DIAMOND is beneficially owned by WWMT i.e. one of the persons liable in *rem* for the maritime claim, the plaintiff would be entitled to proceed in *rem* against the Vessel i.e. M.V. GLOBAL DIAMOND. It is alleged by the plaintiff that though the registered owner of the Vessel is GNPC, for all practical purposes, the Vessel is owned by WWMT. GPNC is just a sham Company without any independent existence.

8. It is the case of the plaintiff that the Performance Guarantee which was signed by Chou Ching-Hui, it has been categorically stated in the said Guarantee that he is the Managing Director of WWMT and is part owner and registered shareholder of the Vessel GLOBAL DREAM.

9. It is further alleged that Mr. Chou Ching-Hui is also the Director of GPNC since the Vessel GLOBAL DIAMOND was purchased under his signature on behalf of WWMT. It is alleged by the plaintiff that though the Vessel GLOBAL DIAMOND belongs to WWMT, has with ulterior motive incorporated another Company, namely, GPNC as a front Company with an intention to defraud the Creditors, who may have claim against WWMT. It is also the case of the plaintiff that the Articles of Incorporation of GPNC establishes that Chou Ching-Hui and WWMT were both Directors in GPNC when the said Company was incorporated. It is also alleged that GPNC is owned and controlled by WWMT and they have inter-linked connections for all practical purposes since they operate as one and GPNC has no independent existence.

10. It is further alleged that WWMT has also incorporated two other Companies, namely, Grand Rich Line Inc. (GRL) through which it owns defendant vessel M.V. SOUTHERN SPIRIT and Worldway Marine Panama Corporation (WWMP) through which it owns the Vessel M.V. GLOBAL DREAM. All these companies have been incorporated in Panama, where it is difficult to get details of shareholding. The various vessels have been flagged at Panama, which is flag of convenience and to safeguard to get the details of beneficial ownership of the vessels. It is further alleged that another vessel, namely, M.V. SOUTHERN SPIRIT was also purchased under the signature of Mr. Chou Ching-Hui being the Director of GRL. Mr. Chou Ching-Hui is also one of the Directors of the WWMP. WWMP is also one of the Directors in GPNC i.e. owner of the applicant Vessel.

11. Therefore, it is alleged that WWMT, Mr. Chou Ching-Hui have created a web of entities designed to confuse and conceal the actual ownership of the vessels. All three entities i.e. GPNC, WWMP and GRL have been incorporated by WWMT and Mr. Chou Ching-Hui to insulate themselves and the vessels from claims and thereby defeat the claims of legitimate maritime creditors. It is alleged that it is evident that one Arias B. & Associates, a Commission Agent is common of all these companies and having common address at Panama, common address of all the Companies at Taiwan, common Directors like Mr. Chou Ching-Hui as well as all the vessels including M.V. GLOBAL DREAM and M.V. SOUTHERN SPIRIT as well as the vessel in question are in care of Jackson Shipping Safety Management Consultant Company Limited, Taiwan and by admitting such a modus operandi, they are dealing in the business so that in case of default, maritime claim can be defeated. Ultimately, the plaintiff has claimed under different heads such as (i) USD 282,565.24 for unpaid freight, (ii) USD 6,473.51 for dead

freight, (iii) USD 41,354.72 for demurrage at Load Port, (iv) USD 586,496.19 for Demurrage at discharge Port = total claim of USD 1,021,072.30.

12. In response to the suit, the original defendant vessel filed its affidavit-in-reply on 31.1.2019 and denied the claim of the plaintiff mainly on the ground that GPNC is the owner of the vessel which was purchased by Mr. Chou Ching-Hui in the year 2011 when he was one of the Directors. However, Mr. Chou Ching-Hui had resigned as the Director on 4.7.2017. WWMT&LCL had also resigned from the Directorship w.e.f. 27.11.2012. Therefore, when the performance guarantee was executed on 13.2.2018 with regard to the defendant vessel, namely, M.V. GLOBAL DIAMOND, neither WWMT&LCL nor Mr. Chou Ching-Hui had any control over the vessel which belonged to the GPNC. It is the case of the defendant that at no point of time, the plaintiff before executing the Charter Agreement or accepting the performance guarantee from WWMT&LCL as well as Mr. Chou Ching-Hui, ever approached the GPNC for verifying the creditness about the status of those two persons in GPNC. It is denied by the defendant that Mr. Chou Ching-Hui had merely incorporated GPNC as a front Company in order to defraud the creditors, may have claim against WWMT&LCL. It is also denied that GPNC is controlled by WWMT&LCL and Mr. Chou Ching-Hui. Therefore, it is contended in the written statement that the vessel cannot be arrested only on the ground that the same was purchased under the signature of Mr. Chou Ching-Hui in the year 2011.

13. Simultaneously, the defendant has filed the present application and requested to vacate the order of arrest by raising several contentions. Additional affidavit-in-reply has been filed on behalf of the plaintiff dated 18.2.2019. Further affidavits on behalf of the defendant have been filed dated 19.2.2019 and 20.2.2019 by

which allegations have been made against the plaintiff that the suit is required to be dismissed only on the ground of suppression of material facts by not bringing the true facts about entering into an Escrow Agreement by the plaintiff with the Ray group of Companies in arbitration proceedings which have taken place way back in the month of April, 2018 whereas the present suit has been filed in the month of January, 2019. In response to the further affidavit, the plaintiff has also filed affidavit-in-reply dated 27.2.2019 and has denied the allegation of suppression.

14. Mr. Dhaval D. Vyas, learned advocate appearing for the applicant – original defendant vessel has vehemently submitted that the present application is required to be allowed on two grounds, namely, (I) the Charter Agreement and Performance Guarantee dated 13.2.2018 entered into between the plaintiff and the WWMT&LCL as well as Mr. Chou Ching-Hui is not binding to the defendant vessel since both of them had no authority to perform such agreement or offer any guarantee having their resignation accepted way back on 4.7.2017 and 27.11.2012 respectively and (ii) the original plaintiff had initiated proceedings before the Arbitrator at Singapore as per the clause of Charter Agreement in the month of April, 2018 wherein an Escrow agreement has been entered into between Ray group and the plaintiff on 17.4.2018 where Ray Group has provided security for the claim in dispute by way of cash deposit in the sum of USD 3,18,000.00 as well as by incorporating certain terms and conditions including that the plaintiff would not take any action like arrest, seizure, detention or interference in the use or trading of any ship or other asset of the same ownership, associated ownership, management, possession or control of Charterers of the Ray group as well as shall not claim any lien over the cargo etc.

15. Mr. Vyas would further submit that the whole suit is

based on a Charter Agreement as well as performance guarantee dated 13.2.2018 by which the Ray Group had entered into the charter party agreement with WWMT&LCL wherein it is declared by WWMT&LCL that the same owns two vessels, namely, M.V. GLOBAL DREAM and M.V. GLOBAL DIAMOND (present applicant – defendant). The documents produced by the plaintiff of performance guarantee suggest that the same has been signed on behalf of WWMT&LCL and Mr. Chou Ching-Hui as a Managing Director of WWMT&LCL. In fact, when this performance guarantee was executed against the two vessels including the applicant, none of them were the Directors of GPNC who owns the applicant – defendant Vessel. By taking me through the public deed dated 4.7.2017 issued by Republic of Panama, he would submit that the resignation of Mr. Chou Ching-Hui was accepted and minutes of the GPNC were recorded on 23.6.2017 about the resignation. Resignation of WWMT&LCL which has resigned in the year 2012 was also recorded on 27.11.2012. He would submit that the factum of resignations has not been denied by the opponent – plaintiff. However, the plaintiff has tried to establish that several companies are inter-connected and, therefore, there is indirect control of WWMT&LCL as well as Mr. Chou Ching-Hui over several companies who are owner of different vessels and are carrying out maritime business. However, it is an undisputed fact that there is no direct evidence produced by the plaintiff to establish the accusation against the applicant – defendant vessel. He would further submit that a person entering into a contract with huge responsibility would certainly examine the credibility of a person who signs the contract as well as performance guarantee. In the present case, the plaintiff did not examine the ownership of the applicant vessel and entered the so-called Charter Party Agreement and performance guarantee at his own risk and, therefore, the vessel which is not owned by those signatories, cannot be permitted to be arrested till the suit is filed.

16. In support of his submissions, he relied upon the unreported decision of this Court **in the case of Croft Sales and Distribution Limited v. M.V. Basil and others rendered in Admiralty Suit No.10 of 2010 dated 24.1.2011** and would submit that when the vessel which is arrested does not belong to those persons who have signed the Charter Agreement and/or performance guarantee are not the owner, the same cannot be arrested. The said judgment was carried in appeal being OJ Appeal No.6 of 2011 and the Division Bench of this Court vide judgment dated 17.2.2011 held that to continue the arrest, the ownership of such vessel is required to be even *prima facie* established. In such a situation, a vessel is continued to be arrested, there would be huge damage to the vessel which is owned by the person who has never entered into Charter Agreement or has given any performance guarantee.

17. Mr. Vyas alternatively would submit that the applicant is the beneficial owner as alleged by the plaintiff is accepted, then the vessel which is registered with someone else and who is the registered owner cannot be deprived of his right of carrying on business with the ship which was never owned by those persons who had entered into Charter Party Agreement. In support of his submissions, he has relied upon the decision of the Hon'ble Supreme Court in the case of **Indowind Energy Limited v. Wescare (India) Limited and another, (2010) 5 SCC 306**. By relying upon the decision of Bombay High Court in the case of **M. T. Hartati v. M/T Hartati, 2014 SCC Bombay 223**, he would submit that it has been held that before entering into charter party agreement and performance guarantee, it was the duty of the plaintiff to verify the ownership of the vessel for which guarantee was given by those persons who have no authority to enter into such an agreement.

18. To support his second contention about suppression of material facts by the plaintiff at the time of filing of the suit, he would submit that the plaintiff had chartered a vessel, namely, M.V. MORNING ORCHID with Ray Group of which performance was guaranteed by WWMT&LCL and Mr. Chou Ching-Hui. In view of alleged breach of the agreement and one of the terms and conditions of the agreement, arbitration proceedings were initiated in Singapore. A Charter Escrow Agreement was entered into between the plaintiff and the Ray Group on 17.4.2018. The Ray Group provided security by depositing cash amount in the sum of USD 3,18,000.00 into an Escrow Account. By taking me through the Escrow Agreement dated 14.7.2018, he would submit that the plaintiff and Ray Group has recorded certain factual aspects and ultimately agreed not to claim any assets, seizure, detention or interference with the use of any ship of the Ray Group etc. He would further submit that the Ray Group by depositing certain amount is able to carry on all the ships belonged to it. However, the plaintiff is trying to get his rest of the money secured by arresting the vessel which never belonged to WWMT&LCL and Mr. Chou Ching-Hui who has entered into performance guarantee which does not belong to those two persons. He would submit that the plaintiff was aware about all these transactions when the present suit was filed in the month of January, 2019. If these aspects would have been brought to the notice of this Court, the Court might not have passed ex-parte order of arresting the vessel. He would further submit that the opponent – plaintiff in connivance with Ray Group, WWMT&LCL and Mr. Chou Ching-Hui is trying to get some security from the applicant though the vessel belonged to GPNC could not be made a part of performance guarantee executed by those persons who were never Director or Managing Director of the GPNC on 13.2.2018. He, therefore, would submit that the application be allowed.

19. On the other hand, Mr. Bimal Rajasekhar, learned advocate appearing with Ms. Paurami B. Sheth for the opponent – original plaintiff has vehemently opposed this application. It was argued by him that Mr. Chou Ching-Hui and WWMT&LCL and WWMT&LCL are the Directors of the GPNC. By taking me through the Articles of Incorporation of GPNC dated 23.6.2010, he would submit that Mr. Chou Ching-Hui and WWMT and WWMP are the Directors of the Company. The applicant vessel was purchased by GPNC. On 21.3.2011, Mr. Chou Ching-Hui was representative of GPNC at the time of purchasing of the applicant vessel. By taking me through several documents of 2011, he would submit that Mr. Chou Ching-Hui was Director of GPNC who had purchased the applicant Vessel. He would submit that by relying upon these documents, the applicant had entered into Charter Party Agreement and thereafter performance guarantee with regard to two vessels, namely, M.V. GLOBAL DREAM and applicant – M.V. GLOBAL DIAMOND. The plaintiff at the time of filing of the suit tried to collect information with regard to communications between several companies like WWMT, GPNC, Worldway Shipping Agency and Chartering Company Limited and WWMP and ultimately found that several vessels owned by the above referred Company, the same are controlled by Worldway Marine Group though the Directors might have resigned from one Company, however, continued in some other.

20. He would further submit that the address of the Agent with regard to bills, invoices etc. of all the Companies suggest that he is the same person and looking after the Worldway Marine Group. He would submit that the plaintiff is able to *prima facie* establish that all the Companies incorporated in Panama and, therefore, *prima facie* case is made out about the link between Worldway Marine Group and GPNC. He further argued that there

is no evidence or documents produced by the defendant that there exist no link between these two Companies.

21. By taking me through the xerox copy of the material collected from websites of Companies about the ownership of the applicant Vessel, which is produced along with the reply in Civil Application at Annexure A, he would submit that the same suggests that the vessel is owned by WWMT.

22. He would submit that all these aspects are required to be examined at the time of trial. He would submit that the witnesses from GPNC shall be cross-examined at the time of trial about the link between all these Companies and, therefore, if the order of arrest of the applicant Vessel is affected, there would be a great loss and if the plaintiff succeeds at the end of trial, it would be difficult to execute the award. He would further submit that whether to uphold the arrest or not, the Court is required to follow certain principles like whether the plaintiff has a reasonable arguable *prima facie* case based on pleadings and documents, whether the arrest is *ex-facie* vexatious or hopelessness of the plaintiff's case and whether there are triable issue or complicated questions of law and/or facts. The Court is also required to examine the balance of convenience while passing the order of lifting of arrest of a vessel.

23. He would further submit that the allegations made by the applicant about suppression of material facts, about non-disclosure of escrow agreement cannot be treated as suppression of fact in view of the escrow agreement has been entered into between the plaintiff and Ray Group only with regard to part of the claim and is not connected with the performance guarantee executed for the vessel in question. He would submit that even disclosure of the said aspect would not have any adverse effect of

passing an order of arrest and, therefore, on all these grounds, the order of arrest may not be lifted till the suit is finally disposed of.

24. As far as the second aspect of triable issue which are required to be dealt with at this stage by the Court and principles laid down by the Hon'ble Supreme Court, he has relied upon a decision of this Court in the case of **M. V. Cape Climber v. Glory Wealth Shipping Private Limited, 2015 SCC Gujarat 956**. By taking me through the observations made in paragraph 74 of the above referred decision, he would submit that the case of the plaintiff is neither vexatious nor frivolous and plaintiff has reasonable arguable case in law.

25. He would further submit that the balance of convenience is also in favour of the plaintiff because in absence of the availability of the applicant vessels in case of a decree passed in favour of the plaintiff, the same would be redundant and plaintiff would be unable to execute the same since the vessel might be out of control of this Court.

26. He would further submit that if the arrested vessel is permitted to leave the territorial jurisdiction of this Court without furnishing security, the plaintiff would suffer irreparable loss and, therefore, the application be rejected. He has also relied upon the decision of the Hon'ble Supreme Court in the case of **Videsh Sanchar Nigam Limited v. M. V. Kapitan Kud and others, (1996) 7 SCC 127**. Similar is the view taken by this Court in the case of **M. v. Cape Climber v. Glory Wealth Shipping Private Limited, 2015 SCC Gujarat 956**.

27. In support of his submission, Mr. Bimal relied upon the decision of the Hon'ble Supreme Court in the case of **Liverpool and London S.P. & I Association Limited v. M.V. Sea Success**

I and another, (2004) 9 SCC 512. Relying upon this submission, he would submit that where the applicant is beneficial for the transaction pursuant to the agreement is required to be determined by the Court by framing proper issues. He also relied upon the decision in the case of **MSC Mediterranean Shipping Company v. MV MSC Clementina, 2015 SCC Bombay 4224** and would submit that in similar facts of case i.e. having similar address, the Court has come to the conclusion that though the vessel is registered with another Company, it is controlled by the same group of Companies. He, therefore, would submit that the present application be rejected.

28. He also relied upon the decision of this Court in the case of **Bhatia Industries & Infrastructure Limited v. Asian Natural Resources (India) Limited, 2016 SCC Bombay 10695**, he would submit that it has been held that if it is found that the Companies are inter-linked, all are liable for execution of the decree if any passed in the matter.

29. As far as the third submission with regard to suppression of material facts, he has relied upon the decision of the Hon'ble Supreme Court in the case of **S.J.S. Business Enterprises (P) Limited v. State Bank of Bihar and others, (2004) 7 SCC 166**. He would submit that it has been held by the Hon'ble Supreme Court that if certain facts are not disclosed and the same are not material with regard to the question involved in the case, the same cannot be treated as suppression of material facts. He has also relied upon the decision of the Hon'ble Supreme Court in the case of **Mayar (H.K.) Limited and others v. Owners and Parties, Vessel M.V. Fortune Express and others, (2006) 3 SCC 10**. He would submit that the Court is bound to look where certain facts which were disclosed are material and if the same would have been disclosed, different view might have been taken

by the Court or not is to be examined. He, therefore, would submit that the present application be rejected.

30. I have heard learned advocates appearing for the respective parties and perused various documents produced by the plaintiff, defendant in the suit proceedings as well as in the present application. It appears from the record that the plaintiff had chartered a vessel, namely, M.V. MORNING ORCHID vide Charter Party Agreement dated 13.2.2018 to Ray Group Lines Company Limited. Ray Group's performance was guaranteed by WWMT&LCL and performance guarantee was given by one Mr. Chou Ching-Hui being a Managing Director of WWMT. By the said performance guarantee, it was declared that WWMT&LCL is owner of GLOBAL DREAM and applicant GLOBAL DIAMOND. If the performance guarantee is perused, the same was signed by Mr. Chou Ching-Hui as if he is Managing Director of the GPNC as well as on behalf of WWMT&LCL as one of the Director.

However, if the documents produced by the defendant with its affidavit dated 31.1.2009 at Annexure R-I is perused, the resignation of Mr. Chou Ching-Hui was accepted and the same was recorded in the minutes of meeting of Board of Directors of shareholders and GPNC on 23.6.2017. The same was registered by Republic of Panama on 31.7.2017. Therefore, when the Performance Guarantee was signed, Mr. Chou Ching-Hui had no authority to enter into such guarantee since he was not on the Board on 13.2.2018.

31. Similarly, WWMT&LCL had also resigned as a Director of GPNC way back on 27.11.2012 i.e. immediately after purchasing the applicant Vessel. The said resignation is produced by the present applicant along with the further affidavit dated 20.2.2019 filed in the suit. The said resignation of WWMT&LCL was recorded

in the Board meeting and was registered in the record of Republic of Panama.

32. Those persons who have entered into Performance Guarantee on 13.2.2018 declaring them as shareholders had no authority to execute the same. The opponent – plaintiff, therefore, ought to have examined relevant records about the existing Managing Directors / Directors of GPNC which owes the present applicant Vessel, namely, M.V. GLOBAL DIAMOND. WWMT&LCL had resigned way back in the year 2012 whereas Mr. Chou Ching-Hui had resigned much prior to the Charter Party Agreement. Therefore, the GPNC who owes the Vessel M.V. GLOBAL DIAMOND, *prima facie*, cannot be held liable to pay damages alleged to have been suffered by the plaintiff.

33. This Court in the case of Croft Sales and Distribution Limited v. M.V. Basil and others (Supra) has observed in paragraph 16 as under :-

“16. That 'sister ship' of a sister company and 'sister ship' of 'particular ship' on the basis of ownership both are different concepts. The person who would be liable on the claim in a claim in personam must have been owner or the charterer or in possession or control of 'particular ship' when the cause of action arose and, at the time when the claim is brought i.e. when the claim form is issued, the person who would be liable on the claim in a claim in personam must be the beneficial owner of all the shares in the ship against the the claim is brought [sister ship]. The person against whom the claim is lodged was not owner of 'particular ship' 'M.V. AXIS', Ex' M.V.

MAX' , that is the foundation of the claim against 'sister ship' defendant No.1BASIL. Unless the particular person is liable for the claim towards 'particular ship', he cannot be made liable for the claim of 'sister ship'. Further, arrest of sister ship of Exowner of particular ship is not permissible under the Arrest Convention. Admittedly, the owner of the sister ship at the time of its arrest was not the owner of the particular ship when the claim arose.”

34. The above referred decision was carried in appeal being OJ Appeal No.6 of 2011 and the Division Bench of this Court vide order dated 17.2.2011 has observed in paragraph 20 as under :-

“20. The aforesaid article provides for the arrest of any other ship, and it expressly provides that the other ship must be owned by the person, who is liable for the maritime claim. It is not the case of the plaintiff that the available ship is owned by the company, which owned the particular ship. Therefore, the language, if considered as it is, since the available ship is owned by respondent No.18, a different company, the arrest of available ship is not provided, even as per 1999 Convention.”

35. As far as the submission made by learned advocate appearing for the original plaintiff with regard to control of the Worldway Marine Group is concerned, the documents except certain documents downloaded from the website is not sufficient to establish the link between the Worldway Marine Group, WWMT&LCL and GPNC. In my opinion, the plaintiff has failed to

prima facie establish about the connections between different Companies controlled by Worldway Marine Group as alleged and, therefore, the decision relied upon on behalf of the plaintiff in the case of Bhatia Industries & Infrastructure Limited v. Asian Natural Resources (India) Limited as well as decision in the case of Liverpool and London S.P. & I Association Limited v. M.V. Sea Success I and another (Supra) are not applicable to the facts of the present case.

36. As far as the submission made by learned advocate appearing for the original plaintiff about the common agent, I am of the opinion that when different Companies are working independently in the similar business and *prima facie* there is no material about the connection amongst them, merely common agent of all these Companies would not entitle the plaintiff to get interim relief and to continue the arrest of the Vessel. Therefore the decision relied upon on behalf of the plaintiff in the case of MSC Mediterranean Shipping Company v. MV MSC Clementina (Supra) would not be applicable to the facts of the present case.

37. It is true that in the decision in the case of Videsh Sanchar Nigam Limited v. M. V. Kapitan Kud and others (Supra), while dealing with the provisions of Admiralty law, the Hon'ble Supreme Court has held that the Court has to examine whether any vexatious claim has been made or not. However, when the ownership of the Vessel was made part of the Performance Guarantee, which *prima facie*, does not belong to those persons who have signed the Performance Guarantee, therefore, the decree prayed for by the plaintiff may not be vexatious, but not against the Vessel which does not belong to those persons who have signed the Guarantee. Hence, the said decision would not be applicable in the facts of the present case.

38. It is also pertinent to note that the plaintiff had already availed the proceedings under the Arbitration laws of Singapore before approaching this Court against Ray Group. If the Escrow Agreement is perused, the Ray Group had provided security by way of cash deposit in the sum of USD 318,000.00 (US Dollar Three Hundred Eighteen Thousand). Ray Group as well as the plaintiff had agreed that with regard to the differences between the parties, they shall not arrest, seize, detain or interfere in the use or trading of any ship or other asset in the same ownership, associated ownership, management etc. Therefore, in my opinion, when on one hand, the plaintiff had agreed for abstaining itself from taking any coercive action against the Ray Group by accepting security for the agreed sums in the form acceptable to it, similar prayer of attaching a Vessel with regard to Performance Guarantee cannot be accepted. The relevant extract of Escrow Agreement entered into between the Ray Group Company and the plaintiff reads as under :-

“WHEREAS :

(A) Pursuant to a fixture recap dated 13 February 2018, the Charterers chartered the vessel MORNING ORCHID (the “Vessel”) from Owners to carry a cargo of fertilizer (the “Cargo”) from Ningbo, China, to Gresik, Indonesia.

(B) With the Charterers having loaded 23,658 MT of the Cargo on board the Vessel at Ningbo, the Owners issued to the Charterers an invoice for freight, deadfreight and load port demurrage totalling USD 330,393.97 on 7 March 2018.

(C) The Owners claim the invoiced sum of USD

330,393.97 for freight, deadfreight and load port demurrage (the "Claim") and currently retain a lien over the Cargo on board the Vessel in respect of the same. A dispute has arisen as to whether (inter alia) Charterers have paid the freight portion of the Claim, totalling USD 296,450, and thereby already discharged this obligation under the terms of the C/P, and whether Owners have received the said payment.

(D) On 4 April 2018, the Owners commenced arbitration in Singapore against the Charterers in respect of any and all claims under the charter party including but not limited to the Claim.

(E) Charterers have arranged for Juhua Group (Hong Kong) Limited of Taisheng Commercial Building No.498-500 Midun Rd., Hong Kong (the "Shippers") to provide security for the claim by way of a cash deposit in the sum of USD 318,000.00 (US Dollars Three Hundred and Eighteen Thousand only) net of any bank charges (the "Escrow Payment") into an escrow account as more particularly set out below.

NOW IN CONSIDERATION OF THE MUTUAL PROMISES SET OUT BELOW AND OTHER GOOD AND VALUABLE CONSIDERATION, THE RECEIPT OF AND SUFFICIENCY OF WHICH IS HEREBY ACKNOWLEDGED, IT IS AGREED AS FOLLOWS :-

1. The Owners shall :

(a) As soon as practicable following presentation of proof of remittance confirming that the Escrow Payment has been transferred to the Stakeholder's client account described in paragraph 3 below issue the original bills of lading to the Shippers in Ningbo, China and allow the discharge of the Cargo against presentation of one of those original bills of lading, or against Letters of Indemnity with Owners' P&I wording from Charterers, Shippers and Receivers, without delay and interruption and refrain from exercising a lien over the Cargo; and

(b) **Upon Charterers depositing the Escrow Payment referred to in paragraph 3 below and confirmation from the Stakeholder that the funds have cleared, refrain from taking any action resulting in arrest, seizure, detention or interference in the use or trading of any ship or other asset in the same ownership, associated ownership, management, possession or control of Charterers for the purpose of obtaining security in respect of the Claim.**

2. **Charterers shall also refrain from taking any action resulting in arrest, seizure, detention or interference in the use or trading of the Vessel or any other any ship or other asset in the same ownership, associated ownership, management,**

possession or control of Owners for the purpose of obtaining security in respect of the delay in discharging due to Owners having exercised a lien over the cargo and shall indemnify Owners in respect of any claims brought by the Shippers or Receivers of the cargo in that regard.”

39. Considering the above aspects of the matter, I am of the opinion that the application requires consideration. As far as the submission made by learned advocate appearing for the applicant about suppression of material facts, the same has not been dealt with when the Court has found the above aspect *prima facie* in favour of the applicant. Hence, the present application is allowed. The order of arrest dated 21.1.2019 passed by this Court is hereby vacated and the applicant Vessel is permitted to sail on her onward voyage. It is open for the applicant to intimate this order to the Port and Customs, Dindayal by fax/email and the Authorities are directed to act on fax/Email with an ordinary copy of this order.

40. With respect to prayer (B) seeking direction to the plaintiff to deposit cost of 4460600 as security towards damages which the applicant has suffered due to the order of arrest of the applicant vessel is concerned, it would be open for the applicant to move an appropriate application in the proceedings. It is made clear that this Court has not expressed any opinion with regard to the said prayer.

(A.J.DESAI, J)

41. Upon pronouncement of the judgment, Ms. Paurami Sheth, learned advocate appearing for the opponent – original

plaintiff has prayed to stay the operation, implementation and execution of this order. Considering the facts and circumstances of the case, the operation, implementation and execution of this order is stayed upto 20.5.2019.

(A.J.DESAI, J)

Savariya