

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/O.J.APPEAL NO. 18 of 2018****In R/ADMIRALITY SUIT NO. 37 of 2017****FOR APPROVAL AND SIGNATURE:****HONOURABLE MS.JUSTICE BELA M. TRIVEDI****and****HONOURABLE MR.JUSTICE A.C. RAO**

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

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ZATRIX LIMITED**Versus****MV NIKIFOROS (IMO 9108116) (EX-NAME - MV GO TRADER)**

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Appearance:**MR S N SOPARKAR, SENIOR ADVOCATE WITH MS PAURAMI B SHETH(841) for the Appellant(s) No. 1****MR DEVANG NANAVATI, SENIOR ADVOCATE and MRS PRACHITI SHAH, ADVOCATE WITH MS ANUJA S NANAVATI(5229) for the Opponent(s) No. 1**

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CORAM: HONOURABLE MS.JUSTICE BELA M. TRIVEDI**and****HONOURABLE MR.JUSTICE A.C. RAO****Date : 06/03/2020**

CAV JUDGMENT
(PER : HONOURABLE MS.JUSTICE BELA M. TRIVEDI)

1. By way of present Appeal, the appellant Zatrix Ltd. (original plaintiff) has assailed the order dated 09.04.2018 passed by the single bench in Civil Application (O.J.) No. 1 of 2017 in R/Admiralty Suit No. 37 of 2017, whereby the Single Bench has allowed the said Civil Application preferred by the respondent (original defendant) and directed the Registry of the Court to return the amount of Rs. 3,41,44,852/- deposited by the respondent- defendant pursuant to the order of arrest dated 04.12.2017 read with further order dated 15.12.2017 passed by the Single Bench, and has further set aside the order of arrest dated 04.12.2017.

2. It appears that on 04.12.2017, at the request made by the learned Advocate for the appellant- plaintiff, the Admiralty Suit was permitted to be circulated urgently on the same day. The suit was filed by the appellant-plaintiff seeking following reliefs:

“a. That this Hon'ble Court be pleased to pass an order and decree in favour of the Plaintiff and against the Defendant Vessel MV NIKIFOROS (IMO 9108116) (ex-name- MV Go Trader) and/or her master and/or her owners and/or managers and/or operators and/or all persons interested in her in the sum of principal amount of USD 477,000 along with interest at the rate of 2% per annum from date of disbursement of funds till date amounting to USD 34,272 and USD 20,000 for cost of litigation in India aggregating USD 531,272 with further interest at the rate of 2% per annum from date of suit till its realization as per particulars of claim;

b. That the Defendant vessel MV NIKIFOROS (IMO 9108116) (ex name- MV Go Trader) together with her hull, engines, gears, tackles, bunkers machinery, apparel, plant, furniture, fixtures, appurtenances and paraphernalia, plant and machinery at present lying at Dahej Port, or wherever she is within the territorial waters of India be arrested by a Warrant of Arrest of this Hon'ble Court and the same be condemned in respect of the Claim herein and be ordered to be sold along with her hull,

engines, gears, tackles, bunkers machinery, apparel, plant, furniture, fixtures, appurtenances and paraphernalia and the net sale proceeds thereof be ordered to be applied to the satisfaction of the Plaintiff's claim herein and the cost of this Suit;

c. That pending the hearing and the final disposal of the suit, this Hon'ble Court be pleased to order and direct the arrest of the Defendant Vessel MV NIKIFOROS (IMO 9108116) (ex name- MV Go Trader) along with her hull, engines, gears, tackles, bunkers machinery, apparel, plant, furniture, fixtures, appurtenances and paraphernalia, plant and machinery at present lying at the Port of Dahej or wherever she is within the territorial waters of India until the satisfaction of the Plaintiff's claim as per particulars of and also be committed for sale and the same be sold under the Orders and directions of this Hon'ble Court and the sale proceeds thereof be utilized in satisfaction of the Plaintiff's claim herein.

d. for interim and ad-interim reliefs in terms of prayer clauses (c) and (d) above;

e. for costs of this Suit; and

f. for such further and other reliefs as this Hon'ble Court may deem fit and proper in the nature and circumstances of the case;"

3. The Single Bench after hearing the learned Advocate appearing for the appellant-plaintiff and taking into consideration the undertaking in writing given by the plaintiff to the Registrar of the Court, inter alia ordered that the Registrar of the Court shall issue a warrant for the arrest of the defendant vessel, MV NIKIFOROS (IMO 9108116) along with her hull, engines, etc., and all appurtenances, at present lying at Dahej Port within the Indian territorial waters. It was further ordered that in the event of the defendant and/ or those interested in her, depositing in the Court the principal amount of USD 477,000 along with interest as directed in the order, the said Warrant of Arrest shall not be executed. The said order of arrest was modified

by the Single Bench vide the order dated 15.12.2017, whereby the defendant was directed to deposit an amount of Rs. 3,41,44,852/-, for the release of the defendant vessel.

4. The respondent- defendant thereafter filed an application being Civil Application (OJ) No. 1 of 2017 in the said Admiralty Suit No. 37 of 2017 seeking to vacate and set aside the order of arrest of the vessel dated 04.12.2017 contending inter alia that the plaintiff had obtained the order of arrest of the applicant-vessel suppressing important, relevant and material facts as stated in the application. The Single Bench after hearing the learned Advocates appearing for the parties vide the impugned order dated 09.04.2018 allowed the said application holding that the plaintiff had suppressed the material facts, more particularly about the express consent given by the plaintiff on 06.12.2016 for the sale of the defendant vessel, withdrawing its objections raised vide e-mail dated 29.11.2016 as well as about the consent given by their advocate. The Court also held that there was no maritime claim existing in favour of the plaintiff on the date of filing of the suit and the arrest of the vessel. The Court by the said order, set aside the order of arrest dated 04.12.2017 and directed the Registry to return to the defendant the amount of Rs. 3,41,44,852/- deposited by the defendant pursuant to the order of arrest dated 04.12.2017 read with the further order dated 15.12.2017. Being aggrieved by the said order the present appeal has been preferred by the plaintiff.

5. The learned Senior Advocate Mr. S N Soparkar for the appellant and the learned Senior Advocate Mr. Devang Nanavati appearing for the defendant have made lengthy submissions, however before advertent to their submissions it would be necessary to state certain facts as emerging from the record:

5.1. The plaintiff is a company incorporated under the foreign laws engaged in the business of providing financial services and advancing loans for acquisition of vessels. On 27.05.2015, the plaintiff entered into an agreement with various parties including 'Nikiforos Shipping S.A.' (hereinafter referred to as "the erstwhile owners of the defendant vessel") for financing the purchase of three ships including the defendant vessel MV NIKIFOROS (IMO 9108116) (ex-name- MV Go Trader). As per the said agreement, the vessel acquisitions were to be funded through a loan granted by Eurobank Ergasias S.A. (Eurobank) and the equity contributed by the investors. The share holding structure of each of the holding companies including Zatrix Ltd i.e. the plaintiff was also specified, whereby the plaintiff had agreed to hold 26% share. Pursuant to the said agreement, another loan agreement was entered into between the shipping companies and the said Bank.

5.2. On 02.10.2016, a private settlement agreement was entered into between the erstwhile owners i.e. Nikiforos Shipping S.A. and the Buyers i.e. Poseidon Navigation Corporation, whereby the Buyers had agreed to purchase and the erstwhile owners had agreed to sell the defendant vessel, subject to the terms and conditions mentioned therein.

5.3. On 29.11.2016, the plaintiff addressed an e-mail putting all concerned parties to Notice, raising objections against the sale of the defendant vessel to the Buyers and declaring that the plaintiff did not consent to the sale of the vessel 'Nikiforos' as per the terms of the private agreement dated 02.10.2016, nor to the Bareboat Charter dated 28.01.2016.

5.4. On 06.12.2016, a private settlement and release agreement

was entered into between the plaintiff and other parties including the erstwhile owners.

5.5. On 06.12.2016, the authorised directors of the plaintiff also addressed an e-mail to the authorised directors of the Buyers i.e. Poseidon Navigation Corporation withdrawing their objections contained in their earlier e-mail dated 29.11.2016. Similar e-mail was addressed on 06.12.2016 by the advocate of the plaintiff to the buyers and the erstwhile owners, specifically consenting to the sale of the vessel 'Nikiforos' pursuant to the agreement dated 02.10.2016, as amended.

5.6. On 07.12.2016, a certificate of ownership and encumbrance was issued by The Republic of Liberia in respect of the vessel in question.

5.7. The appellant -plaintiff filed the admiralty suit before this Court on 04.12.2017 i.e. after one year of the purchase of the vessel by the Buyer and obtained ad-interim ex-parte order of arrest as stated herein above, suppressing their e-mails dated 06.12.2016 whereby they had withdrawn their objections contained in the earlier e-mail dated 29.11.2016 and expressly granted consent to the sale of the defendant vessel.

6. The learned Senior Advocate Mr. S N Soparkar appearing for the appellant taking the Court to the documents on record more particularly, the averments made in the plaint as also the documents annexed thereto including the agreements entered into between the parties, submitted that there was no suppression of material facts by the appellant plaintiff as held by the Single Bench. Placing reliance on the decision of the Supreme Court in case of **S.J.S Business**

Enterprises (P) Ltd. versus State of Bihar and Others reported in **(2004) 7 SCC 166**, he submitted that the general rule of denial of relief would apply only when the parties suppress a fact which is a material one, i.e. one which would have had an effect on the merits of the case, however so far as the facts of the present case are concerned, no such suppression was made as no such document which would have effect on the merits of the case was suppressed. Mr. Soparkar submitted that a perusal of the plaint clearly shows that the plaintiff had disclosed the facts justifying the cause of action for the arrest of the defendant vessel, as the plaintiff had a maritime claim against the defendant vessel. According to him, the Single Bench had failed to consider the fact that the email dated 06.12.2016 whereby the plaintiff had given consent for the sale was a conditional one and “without prejudice” and therefore it could not be said that the appellant had withdrawn its objections unconditionally. Mr. Soparkar has also relied upon the decision of the Supreme Court in case of **Chairman and M.D., N.T.P.C. Ltd Versus M/S. Reshmi Constructions, Builders & Contractors** reported in **(2004) 2 SCC 663**, wherein the Supreme Court has elaborately dealt with the interpretation of the words “without prejudice”. Reliance is also placed on the decision of the Supreme Court in the case of **Videsh Sanchar Nigam Ltd. Versus M.V. Kapitan Kud & Ors** reported in **(1996) 7 SCC 127** to submit that the Single Bench had failed to appreciate the ratio laid down in the said case to the effect that if the plaintiff had an arguable, even though difficult case even in law, the action would be allowed to proceed to trial. Lastly he submitted that the admiralty action is an action in rem and when the claim of the plaintiff is found to be *prima facie* triable, the plaintiff is entitled to the interim relief.

7. The learned Senior Advocate Mr. Devang Nanavati appearing for the respondent-defendant however, vehemently submitted that the

appellant- plaintiff had obtained the ex-parte ad-interim order of arrest suppressing material facts from the Court and making misleading statements in the plaint, which order has been rightly set aside by the Single Bench, on the defendant having moved the application bringing true facts on record. According to Mr. Nanavati, the plaintiff had specifically withdrawn their objections raised in the e-mail dated 29.11.2016, as per the e-mail dated 06.12.2016, consenting for the sale of vessel by the erstwhile owners to the defendant, however the said facts were deliberately, knowingly and purposefully not disclosed in the plaint nor the copy of the said e-mail was produced on record. He further submitted that the withdrawal of the objections raised by the plaintiff against the sale was further confirmed by their attorneys by addressing an e-mail on the same day to the Buyers and accordingly the defendant had proceeded further for the purchase of the vessel, and got the vessel registered on 07.12.2016 in the Office of Deputy Commissioner of Maritime Affairs of the Republic of Liberia. Placing heavy reliance on the decision of the Supreme Court in case of **S.P Chengalvaraya Naidu vs Jagannath & Ors.** reported in **(1994) 1 SCC 1**, Mr. Nanavati submitted that the plaintiff was bound to produce all the documents executed by them which were relevant to the litigation alongwith the plaint, and withholding of any vital document with a view to gain advantage would amount to playing fraud on the Court as well as on the defendant, and the entire proceedings filed by the plaintiff have to be thrown out on the ground of suppression of material facts alone. Mr. Nanavati further argued that as per the settled legal position, the arrest of the vessel is permissible only if a maritime claim existed against the person who owned the ship at the time of institution of the suit and as also when the arrest is affected. In the instant case, no maritime claim as contemplated in Section 4 of the Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017

(hereinafter referred to as “the said Act”) existed as there was neither any hypothecation or charge existing in favour of the plaintiff, nor was there any privity of contract between the plaintiff and the defendant in respect of the vessel in question. According to him, if there were disputes between the plaintiff and the erstwhile owners of the vessel in respect of the non-fulfillment of the terms of the settlement agreement executed between them, the defendant could not be made responsible for the same. Lastly, he submitted that the suit is one of the vexatious litigations filed by the plaintiff misusing the process of law one year after the purchase of the vessel by the defendant, and after the plaintiff having lost the litigation in the Court at Greece. Mr. Nanavati has relied upon various decisions of the Bombay High court and of this High Court to buttress his submission that the Court cannot order the arrest of the vessel on the basis of surmises and bald allegations made in the vexatious and oppressive litigations.

8. Apropos the first and foremost allegation against the appellant -plaintiff about the suppression of material facts, it may be noted that an order of arrest is akin to an order of injunction, and the remedy of injunction being an equitable remedy, the principles of equity would be applicable when an order of arrest is sought. It cannot be gainsaid that the party seeking an injunction is obliged to bring to the notice of the Court all relevant facts and materials necessary for the determination of his right to that injunction and has to come with clean hands. If the plaintiff had failed to do so, and obtained ex-parte order suppressing any material fact, the Court would not hesitate in vacating the ex-parte injunction without even entering into the merits of the case. The equitable remedy of injunction has to be invoked following the principles of *uberrima fides* i.e. utmost good faith. The person who claims equity must do equity and come with clean hands disclosing all material facts relevant for

obtaining ex-parte ad-interim order from the Court. As held by the Supreme Court in catena of decisions, a litigant who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands is not entitled to any relief, interim or final. Beneficial reference of the decisions of Supreme Court in case of **S.P Chengalvaraya Naidu Vs. Jagannath & Ors.** reported in **(1994) 1 SCC 1**, **Amar Singh Vs. Union of India** reported in **(2011) 7 SCC 560**, **S.J.S Business Enterprises (P) Ltd. versus State of Bihar and Others** reported in **(2004) 7 SCC 166** and **Mayar (H.K.) Ltd. and Ors. Vs. Owners & Parties, Vessel M.V. Fortune Express and Ors.** reported in **(2006) 3 SCC 100** be made in this regard.

9. In light of the aforesaid settled legal position, if the allegations of the respondent- defendant as regards the suppression of material facts at the instance of the appellant – plaintiff are examined, it appears that though the appellant- plaintiff in the plaint had averred about the settlement and release agreement entered into by them with the erstwhile owners, the plaintiff had conveniently suppressed the material fact that in view of the said settlement with the erstwhile owners, the plaintiff had withdrawn their objections against the sale of the defendant vessel to the Buyer Poseidon Navigation Corporation. The e-mails dated 06.12.2016 addressed by the plaintiff and their attorneys specifically withdrawing their objections and consenting to the sale of the subject vessel were neither referred to in the plaint, nor produced along with the plaint. The said e-mails produced by the respondent- defendant read as under:

“We refer to our below message.

Always without prejudice to the rights of the Seller of m/v Nikiforos and to the obligations of Buyers, pursuant to the, Agreement dated 02.10.2016, as amended, and pursuant to your relevant request, in so far as you may be concerned, this is

to advise you that the below message has been withdrawn.

Regards,

On behalf of Zatrix Limited

Rodolfo Odoni”

10. It may be noted that the 'below message' referred in the said e-mail was the trailing e-mail dated 29.11.2016, wherein the plaintiff had raised objections against the sale of the defendant vessel to the buyers. The said withdrawal of objections was further confirmed by the attorneys of the plaintiff by addressing an e-mail on the same day i.e. 06.12.2016 to the Buyers, consenting for the sale of the defendant - vessel to the Buyers. The said e-mail reads as under:

“Dear all,

Further to our below and Buyers lawyers request always without prejudice to Sellers position, pursuant to the Agreement dated 02.10.2016, as amended, and is so far as you may be concerned, we hereby clarify that we consent to the sale of the vessel Nikiforos pursuant to the said agreement.

On behalf of Zatrix Ltd.

Akis Tourkantonis”

11. It is significant to note that the aforestated correspondences ensued between the appellant-plaintiff and their attorneys with the Buyers in respect of the defendant vessel have not been disputed by the appellant - plaintiff. As transpiring from the record, the said facts about the withdrawal of their objections against the sale of the vessel were not mentioned in the plaint, nor the said e-mail correspondences ensued between the parties were placed on record at the time of seeking arrest of the vessel alleging that the plaintiff had a Maritime

lien/claim in respect of the vessel in question. In this regard, the only contention raised by the learned Senior Advocate Mr. Soparkar appearing for the appellant is that such non-disclosure or non-production of the e-mail correspondences could not be said to be suppression of material facts, in view of the decision of the Supreme Court in case of **S.J.S Business Enterprises (P) Ltd. (supra)** wherein it has been observed inter alia that the suppressed fact must be material one in the sense that had it not been suppressed it would have had an effect on the merits of the case, and in the instant case the plaintiff had disclosed the material facts including the fact that the vessel was sold by the erstwhile owners to the defendant, however the said sale being prejudicial to the rights of the plaintiff and being fraudulent was not binding to the plaintiff. According to Mr. Soparkar, in any case, the said e-mail correspondences having been ensued using the phrase “without prejudice”, such correspondences would not be admissible in evidence and therefore non-production of the same or non-disclosure of the said e-mail correspondences could not be said to be material suppression of facts dis-entitling the plaintiff to claim arrest of the vessel in question. Such untenable submissions of Mr. Soparkar cannot be accepted. The Single Bench has elaborately discussed and dealt with the pleadings of the parties more particularly, the averments made in the plaint and has recorded the findings holding that the plaintiff had suppressed the material facts. This Court completely agrees with the findings recorded by the Single Bench. The precise findings of the Single bench are reproduced as under:

“34. As noted hereinabove, the suit is based on the point that the defendant vessel could not have been sold without previous consent of the plaintiff and even if the contentions made in para 4 of the suit is believed to be gospel truth, the fact remains that in para 2 of the suit, it is specifically averred by the plaintiff that written consent was a prerequisite for sale which was never given by the plaintiff, which is factually incorrect. The record

further indicates that acting upon the express consent given by the plaintiff's advocate, the defendant vessel came to transferred and the ownership was changed and defendant became owner w.e.f. 07.12.2016. It is the case of the plaintiff that the consent which was given on 06.12.2016 was in reference to the agreements between the plaintiff and the erstwhile owner, however, it is specifically mentioned that while giving consent, with the earlier objections raised on 29.11.2016, so far as defendant is concerned, is withdrawn and reference is made to the agreement to sell entered into by the erstwhile owner and defendant on 02.10.2016. Even in the email sent by the learned advocate of the plaintiff, there is direct reference to the agreement dated 02.10.2016 and no other agreement which have been entered into between the plaintiff and the erstwhile owners and others is mentioned. Though the plaintiff was in knowledge of such facts and even the transfer of ownership, only a cursory statement is found in the plaint whereby it is stated that no consent was given and that sale is null and void, however these five emails have neither been referred to in the plaint nor have been placed on record by the plaintiff, which are vital to the very issue involved in the suit. It is not the case of the plaintiff that anything is due and payable by the defendant, but the claim in the suit is that they have charge or hypothecation over the defendant vessel and on that basis, it is stated that there is a maritime claim and therefore, the present suit is filed in admiralty jurisdiction of this Court and thus, plaintiff has deliberately suppressed the aforesaid material fact and in opinion of this Court, even though the plaintiff was well aware about the consent given by the plaintiff as well as the advocate and even though specifically the message dated 29.11.2016 has been withdrawn in reference to the agreement dated 02.10.2016, the email dated 29.11.2016 is relied upon by the plaintiff and at the same time the aforesaid five important documents have been withheld and having not produced on record, this Court exercised its admiralty jurisdiction and passed the order of arrest of defendant vessel on 04.12.2017 whereas the defendant became registered owner of the defendant vessel since 07.12.2016 and therefore, on the date of arrest, the erstwhile owner was not the owner of the defendant vessel, but the defendant was the registered owner.

35. ***

36. This Court is of the opinion that even though the plaintiff was aware about all the aforesaid emails and more particularly two emails dated 06.12.2016, they have not fully disclosed the

facts before this Court and thus, in opinion of this Court, they have suppressed the material facts. The argument raised by the learned counsel appearing for the plaintiff that the said aspect even as per the ratio laid down by the Apex Court in the case of Amar Singh (supra) and S.P. Chengalvaraya Naidu (supra) cannot be looked into at this stage as it requires full fledged trial in facts of this case, ex facie there is no disclosure of the material fact and therefore, the said contention deserves to be negated and as such therefore, there is suppression of material fact.

37. As decided the Apex Court in the case of Chrisomar Corporation (supra), it is materially to be considered that who was the owner of the defendant vessel on the date of arrest. In the facts of this case, the defendant was the owner of the vessel on the date of the arrest order and unilateral statement made in the plaint that the sale is bad and illegal and making a statement that no consent was given even though specific consent was given, there is nothing on record even further to suggest that the consent given by the emails dated 06.12.2016 by the plaintiff as well as the advocate of the plaintiff separately have been withdrawn at any time by the plaintiff.

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41. ****

42. Consequently therefore, considering the submissions made by the learned counsels appearing for the parties and considering the ratio laid down by the judgments which are relied upon by both the sides, this Court is of the opinion that the plaintiff has suppressed material fact and more particularly the aspect of express consent given by the plaintiff on 06.12.2016 withdrawing objection raised vide email dated 29.11.2016 as well as the consent given by his advocate. There is nothing on record to show that such consent has ever been withdrawn by the plaintiff and therefore, on the said ground, the order of arrest as well as the further of deposit deserves to be modified. Having come to the conclusion that the sale of the defendant vessel is after the consent given by the plaintiff and in absence of any document to even remotely show that there was hypothecation in favour of the plaintiff and the defendant became the owner of the defendant vessel on 07.12.2016, i.e., on the date of order of arrest, the defendant was the owner and not the erstwhile owner as portrayed in the plaint, the

defendant cannot be made liable for breach of settlement agreement dated 06.12.2016 and there is no privity of contract between the defendant and the plaintiff and resultantly, in opinion of this Court, no maritime claim exist.”

12. The learned Senior Advocate Mr. Soparkar appearing for the appellant -plaintiff has failed to convince this Court to take a different view from the view expressed by the Single Bench. He has also failed to dispel any of the findings recorded by the Single Bench as regards the suppression of material facts and withholding of material documents namely the relevant e-mails from the Court, while seeking the ex-parte ad-interim order of arrest of the defendant-vessel. As held by the Supreme Court in case of **S.P Chengalvaraya Naidu (supra)**, a litigant who approaches the Court is bound to produce all the documents executed by him which are relevant to the litigation, and if he withholds any vital document in order to gain advantage over the other side, then he would be guilty of playing fraud on the Court as well as on the opposite party. The legal position as to what is fraud on the Court, has also been elaborately discussed by the Supreme Court in case of **Ram Chandra Singh versus Savitri Devi and Others** reported in **(2003) 8 SCC 319**. The relevant observations made thereunder are reproduced herein below:

“22. Recently this Court by an order dated 3-9-2003 in *Ram Preeti Yadav vs. U.P. Board of High School & Intermediate Education & Ors.* reported in (2003) 8 SCC 311 held:

13. "Fraud is a conduct either by letter or words, which induces the other person, or authority to take a definite determinative stand as a response to the conduct of former either by words or letter. Although negligence is not fraud but it can be evidence on fraud. (See *Derry vs. Peek* [1889] 14 A.C. 337)

14. In *Lazarus Estates Ltd. vs. Beasley* [1956] 2 W.L.R. 502 the Court of Appeal stated the law thus:

"I cannot accede to this argument for a moment. No Court in this land will allow a person to keep an advantage which he has obtained by fraud. No

judgment of a Court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything". The Court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved it vitiates judgments, contracts and all transactions whatsoever."

15. In *S.P. Chengalvaraya Naidu vs. Jagannath 1994 (1) SCC 1* this Court stated that fraud avoids all judicial acts, ecclesiastical or temporal."

23. An act of fraud on court is always viewed seriously. A collusion or conspiracy with a view to deprive the rights of the others in relation to a property would render the transaction void ab initio. Fraud and deception are synonymous.

24. ****

25. ****

26. ****

27. In *S.P. Chengalvaraya Naidu vs. Jagannath* this Court in no uncertain terms observed:

"The principles of "finality of litigation" cannot be pressed to the extent of such an absurdity that it becomes an engine of fraud in the hands of dishonest litigants. The Courts of law are meant for imparting justice between the parties. One who comes to the Court, must come with clean hands. We are constrained to say that more often than not process of the Court is being abused. Property-grabbers, tax-evaders, bank-loan dodgers and other unscrupulous persons from all walks of life find the court-process a convenient lever to retain the illegal gains indefinitely. We have no hesitation to say that a person whose case is based on falsehood, has no right to approach the Court. He can be summarily thrown out at any stage of the litigation.

A fraud is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to get an advantage... A litigant, who approaches the Court, is bound to produce all the documents executed by him, which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side then he would be guilty of playing fraud on the Court as well as on the opposite party."

28. In *Indian Bank vs. Satyam Fibres (India) Pvt. Ltd.* [1996

(5) SCC 550, this Court after referring to *Lazarus Estates* (supra) and other cases observed that 'since fraud affects the solemnity, regularity and orderliness of the proceedings of the Court it also amounts to an abuse of the process of the Court, that the Courts have inherent power to set aside an order obtained by practising fraud upon the Court, and that where the Court is misled by a party or the Court itself commits a mistake which prejudices a party, the Court has the inherent power to recall its order". It was further held:

"22. The judiciary in India also possesses inherent power, specially under Section 151 CPC, to recall its judgment or order if it is obtained by fraud on Court. In the case of fraud on a party to the suit or proceedings, the Court may direct the affected party to file a separate suit for setting aside the decree obtained by fraud. Inherent powers are powers, which are resident in all Courts, especially of superior jurisdiction. These powers spring not from legislation but from the nature and the constitution of the tribunals or Courts themselves so as to enable them to maintain their dignity, secure obedience to its process and rules, protect its officers from indignity and wrong and to punish unseemly behaviour. This power is necessary for the orderly administration of the Court's business."

13. The aforestated legal position aptly applies to the facts of the present case. The Court therefore is of the opinion that by withholding the vital documents and not disclosing the correct facts in the plaint, the appellant- plaintiff had suppressed material facts from the Court and had also committed fraud on the Court as also on the other side. The submission of Mr. Soparkar that the erstwhile owners having not fully complied with the terms of the settlement agreement entered into with the plaintiff and the e-mails dated 06.12.2016 addressed by the plaintiff and their attorney to the Buyers being "without prejudice", the consent given by the plaintiff for the sale of the defendant vessel was of no significance, has no force. If there were disputes pending between the plaintiff and the erstwhile owners, in respect of fulfillment of the settlement and release agreement executed between them, that would not justify the act of plaintiff in withholding the material

documents/e-mails from the Court, while seeking ex-parte order of arrest of the vessel, already purchased by the Buyers from the erstwhile owners with the consent of the plaintiff one year prior to the order of arrest. The decision of the Supreme Court in case of Chairman and M.D., N.T.P.C. Ltd (supra) relied upon by the learned Senior Advocate Mr. Soparkar for the purpose of interpretation of the words “without prejudice” has no relevance to the facts of the present case.

14. It is pertinent to note that the appellant – plaintiff had challenged the action of the erstwhile owners in terminating the settlement agreement dated 06.12.2016 by initiating the proceedings in the month of June, 2017 before the Multi Member Court of First Instance of Piraeus in which the respondent- defendant was also made a party. In June, 2017 when the defendant vessel called Cotonou Port in Benin near Nigeria, the appellant – plaintiff had made an application for the arrest of the defendant vessel, and defendant vessel was arrested by the concerned Court at Cotonou. Subsequently, the Poseidon Navigation Corporation having made an application before the Cotonou Court for the release of the vessel, the same was allowed by the concerned Court. It appears that the Appeal filed against the said order was also dismissed by the concerned Cotonou Court. It is not disputed that the proceedings filed by the appellant -plaintiff in respect of their disputes with the erstwhile owners of the defendant vessel are pending in the concerned Court in Piraeus. The present proceedings have been initiated by the appellant – plaintiff by filing the Admiralty Suit on the ground that the plaintiff has maritime claim over the defendant vessel. In this regard, it would be relevant to refer to the provisions contained in the International Convention on Arrest of Ships, 1999 as applicable at the relevant time of filing of the suit. Ofcourse, in the meantime the Admiralty

(Jurisdiction and Settlement of Maritime Claims) Act, 2017 has come into force with effect from 01.04.2018. The provisions of the Convention, 1999 and of the Act, 2017 are in *pari materia*, and therefore it would be more convenient to refer to the provisions contained in the Act. The relevant provisions contained in Section 5 pertaining to the 'Arrest of Vessel in Rem' reads as under:

“5. Arrest of vessel in rem.- (1) The High Court may order arrest of any vessel which is within its jurisdiction for the purpose of providing security against a maritime claim which is subject of an admiralty proceeding, where the Court has reason to believe that-

(a) the person who owned the vessel at the time when the maritime claim arose is liable for the claim and is the owner of the vessel when the arrest is effected; or

(b) ***

(c) the claim is based on a mortgage or a charge of the similar nature on the vessel; or”

15. The Supreme Court in case of ***Chrisomar Corporation versus MJR Steels Private Limited*** reported in ***(2017) SCC Online Supreme Court 1104*** has succinctly dealt with the history of the admiralty law while considering the issue as to when the Maritime Claim could be enforced, whether at the stage of institution of the suit or at the stage of arrest of the vessel, it was held in para. Nos. 29-31 as under:

“29. The next important aspect that was argued was that the ownership of the vessel to enforce a maritime claim has to be seen at the stage of institution of the suit and not at the stage of arrest. The general rule that is contained in our country as to what crystallises on the date of a suit is reflected in ***Rameshwar and others v. Jot Ram and others***, (1976) 1 SCC 194 :(1976) 1 SCR 847 at 851-52. This Court held:-

“In ***P. Venkateswarlu v. Motor & General Traders [(1975) 1 SCC 770, 772 : AIR 1975 SC 1409, 1410]*** this Court dealt with the adjectival activism relating to post-institution circumstances. Two propositions were laid

down. Firstly, it was held that [SCC p. 772, para 4] ‘it is basic to our processual jurisprudence that the right to relief must be judged to exist as on the date a suitor institutes the legal proceeding.’ This is an emphatic statement that the right of a party is determined by the facts as they exist on the date the action is instituted. Granting the presence of such facts, then he is entitled to its enforcement. Later developments cannot defeat his right because, as explained earlier, had the court found his facts to be true the day he sued he would have got his decree. The Court’s procedural delays cannot deprive him of legal justice or rights crystallised in the initial cause of action. This position finds support in ***Bhajan Lal v. State of Punjab [(1971) 1 SCC 34]***.

The impact of subsequent happenings may now be spelt out. First, its bearing on the right of action, second, on the nature of the relief and third, on its impotence to create or destroy substantive rights. Where the nature of the relief, as originally sought, has become obsolete or unserviceable or a new form of relief will be more efficacious on account of developments subsequent to the suit or even during the appellate stage, it is but fair that the relief is moulded, varied or reshaped in the light of updated facts. ***Patterson [Patterson v. State of Alabama, (1934) 294 US 600, 607]*** illustrates this position. It is important that the party claiming the relief or change of relief must have the same right from which either the first or the modified remedy may flow. Subsequent events in the course of the case cannot be constitutive of substantive rights enforceable in that very litigation except in a narrow category (later spelt out) but may influence the equitable jurisdiction to mould reliefs. Conversely, where rights have already vested in a party, they cannot be nullified or negated by subsequent events save where there is a change in the law and it is made applicable at any stage. ***Lachmeshwar Prasad Shukul v. Keshwar Lal Chaudhuri [1940 FCR 84 : AIR 1941 FC 5]*** falls in this category. Courts of justice may, when the compelling equities of a case oblige them, shape reliefs — cannot deny rights — to make them justly relevant in the updated circumstances. Where the relief is discretionary, courts may exercise this jurisdiction to avoid injustice. Likewise, where the right to the remedy depends, under the statute itself, on the presence or absence of certain basic facts at the time the relief is to be

ultimately granted, the Court, even in appeal, can take note of such supervening facts with fundamental impact. Venkateswarlu, read in its statutory setting, falls in this category.

30. However, the International Convention on the Arrest of Ships, 1999, in which India participated, states as follows:-

“Article 3: Exercise of right of arrest

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

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

(b) – (e) xxx xxx xxx

(2) xxx xxx xxx

3. Notwithstanding the provisions of paragraphs 1 and 2 of this article, the arrest of a ship which is not owned by the person liable for the claim shall be permissible only if, under the law of the State where the arrest is applied for, a judgment in respect of that claim can be enforced against that ship by judicial or forced sale of that ship.”

31. India is not a signatory to the aforesaid Convention, yet following *M.V. Elisabeth* (supra), this Convention becomes part of our national law and must, therefore, be followed by this Court. Article 3(1)(a) is in two parts. First, arrest is only permissible of any ship if a maritime claim is asserted against the person who owned the ship at a time when the maritime claim arose for which the owner is liable, and second, that the same ship owner should be the owner of the ship when the arrest is effected. Thus, article 3(1)(a) sets the controversy at rest because a maritime claim can be asserted only at the time the arrest is effected and not at the time of the institution of the suit. This being so, Shri Divan’s reliance on English judgments to the contrary, namely *Monica S.* (1967) 2 Lloyd’s Rep. 113 as followed in *Re, Aro Co Limited* 1980 1 All ER 1067, cannot be followed. Both judgments were prior to the 1999 Convention and it is this Convention that must be followed. It is, therefore, clear that the relevant date on which ownership of the vessel is

to be determined is the date of arrest and not the date of institution of the suit. “

16. In view of the above, there cannot be any disagreement to the proposition of law that the High Court may order arrest of any vessel which is within its jurisdiction for the purpose of providing security against the Maritime claim in the admiralty proceedings, where the High Court has reason to believe that the person who owned the vessel at the time when the maritime claim arose, is liable for the claim and is the owner of the vessel when the arrest is effected, or where the Court has reason to believe that the claim is based on a mortgage or a charge of similar nature on the vessel. So far as facts of the present case are concerned, the Poseidon Navigation Corporation had become the owner of the vessel one year prior to institution of the suit, within the knowledge of the plaintiff and no Maritime claim as contemplated in the Convention of 1999 or in Section 4 of the Act existed either at the time of the filing of the suit or the arrest of the vessel. Mr. Soparkar had also failed to *prima facie* satisfy the Court about the existence of any mortgage or charge of similar nature on the vessel, on the basis of which the appellant-plaintiff could have based their claim. As transpiring from the Share Holders' Agreement dated 27.05.2015, the appellant- plaintiff along with the erstwhile owners had agreed to jointly acquire three vessels including the defendant vessel, further deciding the share holding structure of each of the holding companies, according to which, the appellant- plaintiff had 26% share holding. There is nothing on record to remotely suggest that the plaintiff's claim was based on the mortgage or a charge on the defendant vessel, which could be said to be a Maritime claim entitling the plaintiff to obtain an order of arrest of the vessel in question.

17. In that view of the matter, the Court does not find any merit in the present appeal. However, the Court is of the opinion that when the

Single Bench had found that the appellant –plaintiff had suppressed material facts from the Court while obtaining the ex-parte ad-interim order of arrest of the vessel in question, the Single Bench ought to have set aside the said order imposing cost on the plaintiff while allowing the application of the defendant. Since this Court agrees with the findings recorded by the Single Bench and further finds that such suppression of material facts would tantamount to fraud on the Court and on the other side, the present Appeal is required to be dismissed with cost, with clarification that it would be open for the Single Bench to determine the loss or damage if any incurred by the respondent-defendant as a result of the arrest of the vessel. The Appeal is therefore dismissed with cost of Rs.2,00,000/- (Rupees Two Lakhs Only) to be deposited by the appellant within two weeks from today, on such deposit being made it shall be open to the respondent to withdraw the same. Appeal stands dismissed accordingly.

(BELA M. TRIVEDI, J)

(A. C. RAO, J)

SINDHU NAIR

FURTHER ORDER

The request made by learned Advocate Ms. Paurami Sheth appearing for the appellant- plaintiff to continue the interim relief in order to approach the higher forum, is rejected for the reasons stated in the judgment.

(BELA M. TRIVEDI, J)

(A. C. RAO, J)

SINDHU NAIR