IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
ADMIRALTY AND VICE-ADMIRALTY JURISDICTION

ADMIRALTY SUIT NO.44 OF 2010

Jotindra Steel and Tubes Ltd., …Plaintiff

Versus

M.V. Khalijia 3 & Ors., …Defendants

WITH

ADMIRALTY SUIT NO.45 OF 2010

Mauria Udyog Ltd., …Plaintiff

Versus

M.V. Khalijia 3 & Ors., …Defendants

Lavina C. Kripalani for the Plaintiffs in both Admiralty Suits.

CORAM : R.I. CHAGLA, J.

RESERVED ON : 10TH MAY, 2024.

PRONOUNCED ON : 12TH JUNE, 2024.

JUDGMENT :

1. Both the Admiralty Suits have been heard together as the same Issues arise in both the Suits and common evidence has been

recorded in both the Suits. Further, common written arguments have been filed by the Plaintiff in both the Suits.

2. Ample opportunity was given to the Defendant Nos. 1 and 2 who are the same in both the Suits for making oral arguments and inspite of which neither the Defendant Nos. 1 and 2 nor their Advocates have remained present to make the oral arguments. Further, the Defendant Nos. 1 and 2 have not led any evidence in the matter, though they have cross examined the Plaintiffs' witness. Further, the Defendant Nos. 1 and 2 have also made statement through their Counsel that they do not desire to rely on any documents and which has been recorded in the Order dated 28th July, 2018 when the Issues were framed and which statement has been accepted by this Court. Thereafter, an Interim Application (L) No.15287 of 2023 was filed by Defendant Nos. 1 and 2 in the above Suits seeking production of documents which they claim were discovered in due course of time and after which the Applicant approached Quadrant Maritime Private Limited, acting as their agents and / or service providers to assist with the deliverance of the required documents. However, this Court by Order dated 23rd June, 2023 had not allowed the Interim Application for production of

documents, considering that the Defendant No.2 had been represented by Quadrant Maritime Private Limited from the inception of the filing of the Suits and it has been mentioned in the cause title of the Suits that the Defendant No.2 is to be served through Manager, Quadrant Maritime Private Limited who had been separately made a party i.e. Defendant No.4 and thereafter dropped as a party. Accordingly, the Written Statement and Additional Written Statement of Defendant Nos. 1 and 2 have been taken into consideration for the purpose of considering their defence to the above Suits.

3. The above Suits were initially filed against Defendant Nos.1 and 2, being the subject Vessel and the owner of the subject Vessel respectively, for seeking arrest of the Defendant No.1-Vessel and sale thereof in view of failure on the part of Defendant Nos.1 and 2 to deliver the Plaintiffs' Cargo which at that point of time was lying inside the abandoned Defendant No.1-Vessel. In addition the Suits had been filed against the Managers / Agents who were Defendant Nos.3 and 4 as well as against the Port Authorities and Commissioner of Customs for securing the delivery of the Plaintiffs' Cargo and for which permission for discharge / delivery of the said Cargo was also required to be obtained. In the Plaint filed in the above Suits, the

Plaintiffs' rights against the Defendant Nos.1 and 2 / Ships / Vessels / Vessel Owner was for all the incurred and potential damages / losses to the Plaintiffs' Cargo which they alleged occurred as a result of sea water ingress into the Defendant No.1-Vessel and the unseaworthiness of the Defendant No.1-Vessel. Further, the Plaintiffs reserved their rights to seek indemnity / reimbursement of all costs / expenses / damages / losses towards Salvage and whatever was incidental thereto. Thus, at the time of filing of the Suit, the entire Cargo was on board. Hence, the value of the Cargo had been taken in the Particulars of Claim filed in the respective Suits.

4. Thereafter, the Plaint had been amended in view of the fact that the Cargo had been discharged and the Salvage was carried out, for which a Salvage claim had been made and which had been referred to arbitration. A Salvage Arbitration Award has resulted. Hence, the Particulars of Claim in both the Suits were sought to be amended to claim discharge costs / expenses and quantum of Cargo damage / loss etc. and the Plaintiffs' proportion of amount awarded / payable to the Salvors and all related costs / expenses which were to be particularized / detailed. The Application for proposed amendment had come up before this Court and the learned Single

Judge had by an Order dated 28th April, 2014 rejected the proposed amendment with regard to claim of quantum of Cargo damage / loss as it was held to be beyond the limitation period of three years from discharge in December, 2020. Hence, only the indemnity / reimbursement claim pertaining to Salvage and related costs / expenses was held to be within the three years limitation period as the Salvage Award was published in December, 2011.

5. The Plaint was accordingly amended in April, 2014. However, in August, 2014 the Plaint was further amended to claim indemnity for the Bank Guarantees which had been invoked towards the Salvage Award dated 2nd December, 2011. Further, the Particulars of Claim were proposed to be amended to reflect the Bank Guarantees which had been encashed towards the Salvage Award in terms of the Consent Terms which had been arrived at between the parties in Appeal (L) No.177 of 2014 in Arbitration Petition No. 185 of 2012 pursuant to the Minutes of Order dated 14th August, 2014. By encashment of the Bank Guarantees, the Salvor's claim was paid and proceedings against the Salvors came to an end. In addition, the Particulars of Claim sought to reflect the Bank Charges incurred in putting up the Bank Guarantees to secure the Salvor's claim and legal

expenses incurred in Defendant's London arbitration as well as legal expenses incurred in challenging the enforcement of the Salvage Award in London arbitration. The revised Particulars of Claim in both the above Suits had been tendered during the oral arguments and which were taken on record and marked '**X**' for identification.

6. The Written Statement has been filed by the only surviving Defendant Nos. 1 and 2 as the other Defendants have been dropped pursuant to the withdrawal of the Suit against them by the Plaintiffs reflected in the orders of this Court. The Defendant Nos. 1 and 2 have raised the defence to the Plaintiffs' Claim with regard to the value of the Cargo when the original Suit had been filed was on board of the Vessel. The Defendant Nos. 1 and 2 have relied on the subsequent fact that there had been complete discharge of Cargo from 13th December, 2010 to 19th December, 2010. The Defendant Nos. 1 and 2 have also relied on the Surveyor's Report dated 29th December, 2010 wherein it is observed that prior to commencement of discharge, the Cargo in each hold had been inspected and the coils were observed to be in stow and there was no indication of any shifting. The observation in the Report with regard to the condition of the Cargo is that their inherent defect is due to the very nature of

the said Cargo. Upon placing reliance on this Report, the Defendant Nos. 1 and 2 had stated that they are not liable.

7. Further, these Defendants in the original Written Statement have relied upon certain events with regard to the Defendant-Vessel being tied up in Dubai in February, 2010 and all underwater steel repairs having been carried out during the dry docking in Dubai. Further, the first Defendant-Vessel had also carried out renewal of steel at Wenchong Shipyard, China. It is only after such repairs were carried out that the steel coils had been loaded on the Defendant No.1-Vessel which sailed to Mumbai on 12th June, 2010 and arrived at in Mumbai on or about 6th July, 2010. The Defendant Nos.1 and 2 have further stated en-route the voyage there was no incident whatsoever. It is only upon the shifting of the Defendant No.1-Vessel to berth of W1 anchorage at Mumbai Port on 10th July, 2010 that incidents took place which resulted in the abandonment of the Defendant No.1-Vessel.

8. The Defendant Nos.1 and 2 have also filed an Additional Written Statement which deals with the amendment to the Plaint wherein they have not admitted that the Defendant No.1 was in

unseaworthiness condition prior to the collision of the Defendant No.1-Vessel with the Vessel-MSC Chitra. The Defendants have generally denied any failure and / or neglect to properly man and equip the Defendant No.1-Vessel. The Defendants have denied that the Defendant No. 1 was unseaworthy and that there was any failure to exercise due diligence to make the Defendant No.1-Vessel seaworthy and / or ensure that the holds are fit for carriage of the Plaintiffs goods as alleged or at all. These Defendants have further denied that they are in any manner liable to indemnify the Plaintiffs in respect of Plaintiffs' Salvors liability and / or interest and / or exercise or any part thereof which includes Bank Charges.

9. It is necessary to advert to certain admitted facts which are as under:

(i) The Plaintiff in both the Suits are the holders and / or Consignees and / or Indorsees of the original Bill of Lading issued on behalf of the Master of the Vessel and Defendant No.2 as owners covering the respective Cargo which comprise of Prime Hot Rolled Steel Sheet in Coils loaded on board the

Defendant No.1-Vessel at Jingtang Port, China to be discharged at Kandla Port and delivered to the Plaintiff.

(ii) The Plaintiff in both the Suits had entered into contract with Coutinho & Ferrostaal GmBH for purchase of the respective quantities of Prime Hot Rolled Steel Sheets in Coils (referred to as "the Cargo"). As aforementioned, the said Cargo was required to be shipped at Jingtang Port, China for delivery to the Plaintiff at Kandla Port.

(iii) The said Cargo was shipped on board the Defendant No.1-Vessel which is a foreign flag Vessel, owned by the Defendant No.2-Company being the Shipper which is a foreign company. The Plaintiff has relied upon the "CLEAN OF BOARD" Bill of Lading dated 7th June, 2010 issued by Grand Fortune International Shipping Agency Limited, evidencing that the respective Cargo was shipped on board the Defendant No.1-Vessel.

(iv) The Plaintiff in the respective Suits have relied upon the said Bill of Lading dated 7th June, 2010, in particular "Conditions of carriage" on the reverse which *inter alia* provided that the International Convention for the Unification of certain rules relating to Bills of Lading, Brussels dated 25th August, 1924 (for short "the Hague Rules, 1924") shall apply the to said Bill of Lading. Article II Rule 1 of the Hague Rules, 1924 provides the carrier shall be subject to the responsibilities and liabilities of the said Rules. Further, Article III Rule 1 of the Hague Rules, 1924 provides that the carrier shall be bound before and at the beginning of the Voyage to exercise due diligence to make the Ship seaworthy. Article III Rule 2 of the Hague Rules, 1924, provides that the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried. The Hague Rules, 1924 are also enacted in India which is the country of destination by virtue of the Carriage of the Goods by Sea Act, 1925 and are applicable to the shipment.

(v) The Plaintiffs in the respective Suits have relied upon the Invoice dated 7th June, 2010 issued by the Sellers Coutinho & Ferrostaal GmBH providing for terms of delivery as CFR liner out Kandla and the price. The Sellers had also issued various other documents as required under the Invoice including the packing list setting out details of the Cargo shipped on board the Defendant No.1-Vessel. The Invoice provided that the Cargo shipment was to be on Defendant No.1-Vessel from Jingtang Port, China to Kandla Port, India and reference was made to the said Bill of Lading dated 7th June, 2010.

(vi) The Plaintiff accepted the said Bill of Lading for payment of full purchase price to the Seller and became the lawful holder of the original Bill of Lading dated 7th June, 2010.

(vii) There were other Cargo which had been loaded on the Defendant No.1-Vessel and to which similar terms applied.

(viii) The Defendant No.1-Vessel arrived at Mumbai on 6th July, 2010 and was allotted berth to discharge the Cargo which as aforementioned comprised of Prime Hot Roll Steel Sheet in Steel Coils using its own Cranes on 9th July, 2010. The Defendant No.1-Vessel had hardly discharged about 17 Coils that its Cranes failed / suffered breakdown and hence, the Defendant No.1-Vessel was shunted out of berth. Further, the Master of the Defendant No.1-Vessel had signed off and the incoming Master took command of the Defendant No.1-Vessel. The incoming Master had not sailed to Mumbai Port earlier in the capacity as the Master of any Vessel. On 15th July, 2010, the Vessel was moved out of berth.

(ix) On 17th July, 2010 at about 1730 hours, the Defendant No.1-Vessel started dragging Anchor. The Vessel commenced Leaving Anchor at 1800 hours but in the process the Windlass Motor got burnt. The Vessel accordingly was grounded off Mumbai outer anchorage on or around midnight on 17th July, 2010.

(x) On 18th July, 2010, the Crew reported water ingress in one of Vessel's holds and Double Bottom Tank, which was a cause for great concern. Besides the sea water ingress, the Defendant No.1-Vessel was drifting and was in imminent danger of being lost at sea. At about 2030 hours the Crew on the Defendant No.1-Vessel sent SOS distress message and were evacuated / lifted at about 0110 hours next day. Due to continuous sea water ingress the Vessel was sinking hence Quadrant Maritime as the agents of the Owners / Defendant No.2 and on their behalf signed a Salvage Agreement dated 18th July, 2010 – Lloyds Open Form of Salvage.

(xi) At about 0330 hours on 19th July, 2010, the Defendant No.1-Vessel started drifting again and the Port informed the Managers to arrange Tugs for towing the Vessel to a safe place. OSV Garware 3 reached the abandoned Vessel and brought it towards "W1" anchorage. At about 1000 hours, the Salvage services were commenced.

(xii) On 21st July, 2010, the Master alongwith 9 Crew members re-joined the Defendant No.1-Vessel. On 30th July, 2010, MbPT agreed to shift the Defendant No.1-Vessel to "E3" Anchorage. Whilst heaving up both anchors the Windlass Motors got burnt again and the Defendant No.1-Vessel re-anchored at "W1". The Motors were once again sent ashore for repairs.

(xiii) By 4th August, 2010, the Motors had been repaired and fitted back and by 7th August, 2010, the Defendant No.1-Vessel had been repaired and was ordered to proceed to the Mumbai Port. However, whilst proceeding, the Defendant No.1-Vessel collided with MSC Chitra. Post the collision the Vessel was abandoned by the Owners.

(xiv) The Salvors – Smit Singapore filed an Arbitration Petition (L) No.956 of 2010 in order to seek security and obtained ad-interim orders on 13th August, 2010 to restrain the Cargo interests from

their Cargo which was on the Defendant No.1-Vessel.

(xv) This Court by an Order dated 18th August, 2010 upon being informed that the Salvor had moved before the Arbitrator who passed an order directing the Cargo interest to put up security worth USD 7 million, vacated the ad-interim orders.

(xvi) The Salvor filed an Appeal being Appeal (L) No.557 of 2010 against the said Order dated 18th August, 2010. The Appeal was heard on 24th August, 2010 by the Division Bench of this Court which partly allowed the Appeal and directed the Cargo interests / owners to deposit altogether Bank Guarantees aggregating to Rs.14 Crores in proportion to their Cargo share.

(xvii) The Plaintiffs filed their respective Admiralty Suits on 27th October, 2010 and obtained an order of this Court which granted liberty to the Plaintiff to approach the Board and Trustees of the Mumbai Port and Commissioner of Custom (Imports)

for discharge and delivery of the Cargo in Mumbai instead of Kandla as the Defendant No.1-Vessel was unseaworthy and not in a condition to proceed in Kandla.

(xviii) In December, 2010, the Cargo interests / owners including the Plaintiffs in the above Suits had arranged for discharge of their Cargo and ultimately received their Cargo.

(xix) On 20th August 2010, the Salvage services of the Salvors – Smith Singapore were terminated.

(xx) The Salvage Award was published on 2nd December, 2011.

(xxi) An Arbitration Petition No.51 of 2011 had been filed by the Salvors for enforcement of the Salvage Arbitration Award.

(xxii) The Salvors – Smith Singapore as aforementioned filed Arbitration Petition (L) No.956 of 2010 to seek security and obtained ad-interim

orders. The Cargo interests have thereafter put up the Bank Guarantees. A few of the Cargo interests including the Plaintiffs in the above Suits challenged by a way of Arbitration Petition No.185 of 2012, the contribution sought by the Salvors in the UK Court proceedings to enforce the Award. Being dissatisfied with the orders passed in the Arbitration Petition, an Appeal No.494 of 2014 had been filed.

(xxiii) On 31st July, 2014 pursuant to an Order dated 1st July, 2014, the Prothonotary and Senior Master invoked the Bank Guarantees put up by the Plaintiff and other Cargo interests / owners and which Bank Guarantee was encashed and deposited in the Cash Section of this Court.

(xxiv) The Cargo interests including the Plaintiff in the respective Suits on the one hand and the Salvors on the other hand reached as amicable settlement which was recorded Consent Terms dated 11th August 2014 filed in Appeal (L) No.117 of 2014 in

Arbitration Petition No.185 of 2012 pursuant to Minutes of Order dated 14th August, 2014. The Salvor's claim was accordingly paid and proceedings against Salvors came to an end.

10. This Court has framed the Issues and out of the Issues framed, two of the Issues viz. Issue Nos. 1 and 2, pertaining to the delivery of the Cargo and damage caused to the Cargo due to the inherent defect due to the very nature of the Cargo no longer arise in view of the Order dated 20th April, 2014 passed by this Court disallowing the proposed amendment sought of the claim to include the value of the Cargo. The remainder of the Issues and findings on each of the Issues are set out as under:

Sr. No.	**Issues**	**Findings**
3.	Whether Plaintiff proves that the Defendant No.1 - Vessel was unseaworthy and defendant No.2 had failed and neglected to secure the ship and the ship was not properly manned and equipped ?	**Yes**
4.	Whether the Plaintiff proves that	**Yes**

	Plaintiff was required to furnish a bank guarantee as salvage security in the sum of Rs.1,32,71,173/- in Admiralty Suit No. 44 of 2010 and Rs. 2,14,29,682/- in Admiralty Suit No. 45 of 2010 only because of ingress of sea water into the hold of defendant no 1 vessel and listing of the vessel and the basic reason for that was unseaworthiness of the vessel ?	
5.	Whether the Plaintiff proves that Plaintiff had to pay the Salvors a sum of USD 3,03,769.28 plus GBP 32,679.38 with interest at 5.5528% and further interest at US prime rate plus 1% cost in Admiralty Suit No. 44 of 2010 and the sum of USD 4,86,103.81 plus GBP 52,294.86 with interest at 5.528% and further interest at US Prime Rate Plus 1% cost in Admiralty Suit No. 45 of 2010 which the Plaintiff would not have to pay but for defendant vessel being unseaworthy ?	**Yes to the extent of the quantum of encash-ment of the Bank Guarantee**
6.	Whether the Plaintiff proves that	**Yes**

	Plaintiff is entitled to recovery of these amounts paid to the salvors plus bank charges incurred for the bank guarantee securing salvor's claim, legal cost in connection with challenging salvors arbitration in London and the legal cost incurred in connection with challenging salvage award in this Court	**to the extent of the quantum of encashment of the Bank Guarantee plus bank charges incurred in putting up the Bank Guarantee to secure the Salvor's claim.**
7.	Whether the Plaintiff proves that Plaintiff is entitled to decree against defendant nos 1 and 2 in the sum of USD 3,30,769.28 plus GBP 32,679.38 plus Rs 13,34,791/- in Admiralty Suit No. 44 of 2010 and USD 4,86,103.81 plus GBP 52,294.86 plus Rs. 18,51,024 in Admiralty Suit No. 45 of 2010?	**Yes to the extent of the quantum of encashment of the Bank Guarantee plus bank charges incurred in putting up the Bank Guarantee to secure the Salvor's claim.**
8.	What decree ? What order ?	**The Plaintiff is entitled to a Decree as set out herein below.**

11. The Plaintiffs have led the evidence of one witness viz.

Mr. Gopal Gupta who was the Manager (Imports and Exports) as well as the authorized signatory of the Plaintiff in Admiralty Suit No. 44 of 2010 when his Affidavit in lieu of Examination-in-Chief was filed. He has in his Affidavit of Evidence for leading secondary evidence placed reliance upon the Preliminary Enquiry Report of D.G. Shipping which is the Government of India Authority and which Report is dated 7th August, 2010 concerning the collision of the Defendant No.1-Vessel with MSC Chitra. He has also placed reliance upon the Salvor's proceedings and which had resulted in the settlement between the Salvor and the Cargo interests / owners which included the Plaintiff in the above Suits. The Plaintiff's witness had been cross examined by the learned Advocate for the Defendants and he has stood by his evidence given in Examination-in-Chief.

12. The Defendants as aforementioned have neither produced any Witness nor relied upon any documents in support of their defence.

13. Ms. Lavina Kripalani, learned Counsel for the Plaintiff in both the above Suits has made oral arguments. She has submitted that no sooner did the Defendant No.1-Vessel arrive in India that the

Vessel suffered Crane Breakdowns, thereafter, at the outer Anchorage, she could not maintain her position as the Anchors kept dragging and in trying to releave the situation, her Windlass Motors got burnt. Further, the Defendant No.1-Vessel whilst drifting, developed a leak not just in the Cargo hold but in the Double Bottomed (a double steel layer tank). Since the crew members of Defendant No.1-Vessel were in serious danger of getting lost at Sea, they sent the distress SOS message. The Salvors were got in to salvage the Vessel and again on 30th July, 2010, the Windlass Motors got burnt which had in fact just been repaired and fitted after getting burnt on 17th July, 2010. Thereafter, the Defendant No.1-Vessel was refloated and allotted a berth. Although, there were two standby tugs by the side of the Defendant No.1-Vessel, the Owner / Master of the Defendant No.1-Vessel took the decision to berth the Defendant No.1-Vessel on her own power and whilst coming to berth, the Defendant No.1-Vessel collided with MSC Chitra in the channel between the JNPT and MVPT. Post the collision, the Defendant No. 1-Vessel was abandoned by her owners as she was in terrible condition as well as at the end of her trading life, being a 26 year old vessel fit to be demolished then used for commercial purposes.

14. Ms. Kripalani has referred to the observations in the D.G. Shipping Preliminary Enquiry Report, in particular Paragraph 32 thereof, wherein it is observed that subsequent to the Defendant No.1 - Vessel berthing after collision on 7th August, 2010 a PSC inspection was carried out by the Surveyors Department of D.G. Shipping on 26th August, 2010 which brought forth 37 deficiencies of which 15 are detainable deficiencies, mostly related to safety aspect and not having any direct bearing on the collision issue except non-functioning of the Echo-sounder. However, this implies that SMS (Safety Management System) of Defendant No.1-Vessel was not in order.

15. Ms. Kripalani has submitted that the Preliminary Enquiry Report of D.G. Shipping is a Government of India's publication and hence, a "Public Record" under the Public Records Act, 1993. She has submitted that D.G. Shipping is the Appex Shipping Body of India. The said Report reports the results of enquiry which are listed and which includes serious deficiencies / defects of the first Defendant-Vessel and negligence and / or faults attributed to her Master & Crew. She has relied upon the Witness Summons which had been issued by the Plaintiffs upon the office of D.G. Shipping and in

particular to Captain S. S. Darokar – the Nautical Surveyor cum Dy. D.G. Shipping (Tech) who attended this Court on 5th September, 2018 and identified the Report from the Court's Records. Captain Darokar further produced the Original Report before this Court and as directed, furnished a Photostat copy of the Original Report with is in the records of this Court. He has submitted that the Report being a Public Record is admissible as Evidence and has been admitted by the Defendant Nos. 1 & 2 in the above Suits. The Preliminary Inquiry Report being a Public Record of India is binding within India. She has placed reliance upon the definition of Public Record in the Public Records Act, 1993 to contend that the Preliminary Enquiry Reports fall within such definition of "Public Records".

16. Ms. Kripalani has further submitted that the facts in the matter speak for themselves and the Plaintiff has established 'Res Ipsa Loquitor', as these facts establish that everything that could possibly go wrong with the 1st Defendant - Vessel did go wrong.

17. Mr. Kripalani has placed reliance upon the definition of 'Seaworthiness' by well-known authors in order to contend that the 1st Defendant Vessel was not Seaworthy according to those

definitions.

18. Ms. Kripalani has also referred to the test of "Preponderance of Probabilities" in the Civil Admiralty Suits and which is contrasted with "beyond reasonable doubt" which is the test in criminal proceedings. She has placed reliance upon the decision of the Supreme Court in Government of Goa through the Chief Secretary Vs. Maria Julieta D'souza[1], wherein the distinction of standard of proof in civil cases which is by preponderance of probabilities from that in criminal cases has been drawn by the Supreme Court. The Supreme Court has held that there is a clear distinction between the burden of proof and standard of proof. While enquiring into whether a fact is proved, the sufficiency of evidence is to be seen in the context of standard of proof, which in civil cases is by preponderance of probabilities.

19. Ms. Kripalani has accordingly submitted that in the present case, the test of preponderance of probabilities has been met by the Plaintiffs and that they are entitled to their claim for indemnity as well as the claims as set out in the Particulars of Claim which has been tendered and taken on record and marked 'X' for

1 *Civil Appeal No.722/2016 Judgment dated 31/01/2024*

identification by this Court.

20. Having considered the submissions, in my view, the Defendant Nos. 1 and 2, who are now the only remaining Defendants, had ample opportunity to support their defence with evidence as well as documents and which they miserably failed to do so. The Defendants have themselves to blame for not mounting an adequate defence to the Plaintiffs' claim in the above Suits. They have not been able to disprove the Plaintiffs' claim which is supported not only by evidence which are common in both the Suits but also by documents which includes the Preliminary Enquiry Report of D.G. Shipping which found there to be as many as 37 deficiencies out of which 15 are detainable deficiencies and mostly related to safety aspects, not have been any direct bearing on the collision issue except the nonfunctioning SMS (Safety Management System) of the Defendant No.1-Vessel which were not in order.

21. I find there to be much substance in the submission of Ms. Kripalani that the Preliminary Enquiry Report of D.G. Shipping is a Public Record falling within the definition of "Public Record" under the Public Records Act, 1993 and being a Public Record, is admissible

in evidence and in fact, in the present case, has been admitted by the Defendant Nos. 1 and 2. The Preliminary Enquiry Report being a Public Record of India, its contents are binding within India. The Preliminary Enquiry Report has more than amply established that the first Defendant – Vessel was unseaworthy right from the outset. Further there was improper manning and equipping which resulted in its collision. The relevant observations in the Preliminary Enquiry Report are required to be set out as under:

> *1. Though 'Khalijia 3' was manned with Master, Chief Off., 2/Off, 3/Off, and 6 deck crews, all officers were having commensurate CoC except Master, who was holding Indian CoC, other officers were holding only Panamilan CoC. It was apparent from their depositions/Interactions that the level of competency was below par.*
>
> *2. The vessel had mixed nationalities with inherent language barrier which could be critical in dealing with contingencies. This may be a reason that the Master could not, in crucial time take the opinion of the officer next to him in command.*
>
> *3. The very fact that vessel had gone aground more than once Impiles that effective anchor watch was not maintained.*
>
> *4. Though the vessel was fitted with bilge alarm but it was of no use as this was inoperative. If operational, it could have given early warning of flooding of holds.*
>
> *5. All hold bilges and tank valves are situated in the*

duct keel making it impossible to pump out the flooded bilges of the cargo hold. The remote operation of these valves was not possible since these were inoperative.

6. The 'Khalijia-3' had a new Master having only about 11 months command experience. The new Master had not been to the Mumbai Port earlier as Master on any vessel.

7. The vessel 'Khalijia-3' was earller abandoned by the Master and crew of the vessel after which the owners of 'Khalijia-3' entered into a LOF contract with SMIT Singapore.

8. SMIT Singapore stabilised the vessel 'Khalijia-3" within a few days and the Master and some of the crew subsequently returned onboard the vessel.

9. The vessel required to have to two tugs constantly in attendance with the vessel while she was at anchorage.

10. Earlier attempt to move the vessel to inner anchorage was not successful.

11. The 'Khalijia-3' had a draft of 10.2 meters and was considered as a deep drafted vessel in the port.

12. Despite the earlier problems of the vessel, on 07.08.2010, the "Khalijia-3 and the LOF contractor (SMIT Singapore) agreed to berth the vessel on the vessel's own power without assistance of tugs. Also, they did not insist for the Pilot to board the vessel at the anchored position even though MbPT Pilot had earlier boarded the vessel in the anchored position.

13. The 'Khalijia-3' was anchored west of the channel. The vessel therefore required to cross the channel to enter the channel in the right direction of flow of traffic.

The vessel crossed the channel at 90°T to the channel as required under the rules.

14. 'Khalijia-3' did not use tugs that were already made fast to the vessel to turn her Inward. Instead, she turned on her own propulsion resulting in having, to turn large angle to port side This large turn may have disoriented the Master.

15. On 07.08.2010, there were large numbers of vessels inbound and outbound from JNPT and MbPT. The Pilot Instructed 'Khalija-3' to enter the channel wherever she found space between the Incoming vessels. The 'Khalijia-3' Informed the Pilot that she would follow a container ship.

16. Even though the 'Khalijia-3 had informed port that she would follow a container ship (Louisa Schulte), she could not follow the container ship and was behind the subsequent inbound vessel 'Woojin Emerald' (Chemical Tanker) and ahead of the inbound vessel 'Romeo Maersk' (Product Tanker).

17. The vessel Khalijia-3' while entering the channel did not have required lookouts at the time of the movement.

18. At the time of the movement, the Master of 'Khalijia-3' was stationed at the starboard radar of the vessel. It appears that his attention was focused on the Inbound vessels on the starboard side rather than on the outbound vessels on the port side of his vessel as he was trying to find space to cross the channel. The 'Khalijia-3' also overshot the channel while turning and reached on the other side of the channel which had charted depth of about 10.1 – 10.3 meters.

19. The vessel 'Khalijia-3' was late to reach the Pilot point due to which Pilot instructed the Master to increase

speed. The Master appears to have increased speed immediately without ascertaining and comprehending the traffic movement in the vicinity.

20. The Master of "Khalijia-3' was stationed mainly at the startboard radar of the vessel. It appears the master of 'Khalijia-3' did not monitor the outbound traffic in the channel as he has stated that he saw the outbound 'MSC Chitra' and the outbound dredger for the first time only at about 0934-35 hrs (i.e. about 2-3 minutes before the collision) when the "MSC Chitra" was sighted nearly right ahead.

21. The Master has stated that he did not alter course to starboard fearing that his vessel would go outside the outer limit (i.e. further into shallow waters).

22. It appears that the Master did not consider the additional water of about 3 metres available above the chart datum due to High tide while the vessel was being manoeuvred.

23. As per VTS recording, it appears that 'Khalijia-3' had commenced her turn to port before attempting to contact 'MSC Chitra on the VHF.

24. The "Khalijia-3" did not sound the appropriate sound signals prescribed in the rules.

25. The Master of of Khalijia-3' has stated that the stern movement was given for about 2-3 minutes before the collision occurred.

26. Khalijia-3 did not use her anchors to check the momentum of the ship even after collision became imminent.

27. The SVDR data of 'Khalijia-3' regarding the collision was not retrievable even though the Master has

stated that he had saved the data. Till date i.e. 07/09/2010, despite repeated reminder phone, and in written correspondence the said data is not made available to this department for analyses.

28. Entries In the engine movement book (Bell book) on the day of collision were made in pencil which is not permissible.

29. The in-water survey report (by divers) of SMIT Singapore some days after the collision indicates that there was was no apparent sign of abnormality or damage to the rudder, rudder holder or its appendages. The report also indicates that there was no apparent sign of abnormality or damage at the propeller blades and the propeller rope guard and the stern tube was observed intact with no visible sign of abnormality.

30. MbPT Pilot who boarded the Khalijia-3 after the collision has stated that he did not find any problem with the steering and engine of the vessel during the berthing subsequent to the collision.

22. Apart from the aforementioned observations in the Preliminary Inquiry Report of D.G. Shipping, in my considered view, the Plaintiffs' witness Mr. Gopal Gupta has established the case of the Plaintiffs' claim of unseaworthiness of the Defendant No.1-Vessel. In the Affidavit of Evidence of the Plaintiffs' witness Mr. Gupta, he has placed reliance upon the proceedings initiated by the Salvors viz. Admiralty Suit No.48 of 2010 seeking arrest of the first Defendant – Vessel. He has quoted Paragraph 5(f) of the Salvor's Plaint which

relates to the condition of the Vessel and which is as under:

> "the 1st Defendant vessel is built in the year 1984, and is approximately 26 yrs old. *The 1st Defendant vessel is in extremely poor state and/or condition.* Considering the age of the 1st Defendant - Vessel, her grounding on 17th July 2010 and her subsequent collision with MSC Chitra, the 1st defendant vessel clearly reached the end of her trading life. Repairing the 1st Defendant-Vessel and making her fit to be out at sea will not be commercially viable and it will make better commercial sense to scrap her…..".

23. I find much merit in the submission of Ms. Kripalani for the Plaintiffs that the Plaintiffs have been able to establish that the first Defendant – Vessel was unseaworthy and the definition of seaworthiness as defined by the well-known Authors including the world's leading marine insurer – Assuranceforeningen Gard, in the context of "seaworthiness – safety – security" states:

> 2.1.1.1"….in its broadest sense seaworthiness means the fitness of the vessel to encounter the ordinary

perils contemplated for the voyage. It is generally interpreted to mean that, to be seaworthy, the vessel "must have that degree of fitness which an ordinary, careful and prudent owner would require his vessel to have, having regard to all the probable circumstances of the voyage…."

"….finally, seaworthiness includes the state and condition of the vessel's superstructure. Although the vessel's structure may be surveyed during the required classification surveys, deficiencies nevertheless arise during the interim period…."

24. Thus, the first Defendant – Vessel clearly does not fall within the definition of "seaworthiness". The Plaintiffs have been able to establish their claim for indemnity considering their having to settle the Salvor's claim by furnishing the Bank Guarantee which has thereafter been invoked and encashed and the claim settled. The Defendant Nos. 1 and 2 would be liable for indemnifying the Plaintiffs for their having to settle the Salvor's claim and which is only as a result of unseaworthiness of the Defendant No.1 - Vessel and the failure and neglect on the part of Defendant No.2 in property

manning and equipping the Defendant No.1-Vessel. The Plaintiffs are entitled to a Decree against Defendant Nos. 1 and 2 to the extent of the quantum of encashment of Bank Guarantee towards full and final settlement reached with the Salvors plus Bank Charges for furnishing the Bank Guarantee.

25. The Plaintiffs have also claimed costs and have attempted to establish costs on actual which in my considered view they have failed to do so. There are no supportive documents produced by the Plaintiffs in order to establish their claim of costs on actual. However, considering that in the revised Particulars of Claim which have been taken on record and marked 'X' for identification, reasonable costs have been claimed i.e. an amount of Rs.8,00,000/- which are by way of legal expenses incurred in defending the Salvor's claim in the London arbitration and further expenses of Rs.3,00,000/- in challenging the enforcement of the Award in London arbitration in this Court. Thus, this Court considers it fit to grant the Plaintiffs the costs as claimed in the revised Particulars of Claim marked 'X' for identification.

26. In that view of the matter, the Admiralty Suit No.44 of

2010 and Admiralty Suit No.45 of 2010 are decreed in the following terms:

(i) The Defendant Nos. 1 and 2 shall pay the Plaintiff in Commercial Admiralty Suit No.44 of 2010 a sum of Rs.1,32,71,173/- together with interest at 10% p.a. from December 2010 till the date of this decree and shall pay the Plaintiff in Commercial Admiralty Suit No.45 of 2010 a sum of Rs.2,14,29,682/- together with interest at 10% p.a. from December 2010 till the date of this decree, which are the amounts of the respective Bank Guarantees which had been furnished by the Plaintiffs to meet the Salvor's claim in compliance with the order of this Court and which had thereafter been encashed pursuant to the settlement between Salvors.

(ii) The Defendant Nos. 1 and 2 shall pay Bank Charges incurred in putting up the Bank Guarantee to secure the Salvor's claim which is an amount of Rs.13,34,791/- together with interest at 10% p.a. from

December 2010 till the date of this decree in Admiralty Suit No.44 of 2010 and an amount of Rs.18,51,024/- together with interest at 10% p.a. from December 2010 till the date of this decree in Admiralty Suit No.45 of 2010.

(iii) The Defendant Nos. 1 and 2 shall pay the Plaintiff the legal expenses incurred in defending the Salvor's claim in the London arbitration being an amount of Rs.8,00,000/- each in Admiralty Suit No.44 of 2010 and Admiralty Suit No.45 of 2010.

(iv) The Defendant Nos. 1 and 2 shall pay legal expenses incurred by the Plaintiff in resisting the challenging the enforcement of the London Arbitration Award being an amount of Rs.3,00,000/- each in Admiralty Suit No.44 of 2010 and Admiralty Suit No.45 of 2010.

(v) The Admiralty Suit No.44 of 2010 and Admiralty Suit No.45 of 2010 are accordingly disposed of and decreed in above terms.

(vi) The drawn up Decree / Order is dispensed with unless the parties seek drawn up Decree / Order, in which case they are entitled to apply.

[R.I. CHAGLA J.]