

**ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI**

Admiralty Suit No.01 of 2018

DATE ORDER WITH SIGNATURE(S) OF JUDGE(S)

**Before:-
Mr.Justice Muhammad Ali Mazhar**

Cress LPG (Pvt.) Ltd.....Plaintiff

Vs.

M.T. Maria III & others..... Defendants

For hearing of CMA No.03/2018.

Date of hearing: 20.03.2018.

Mr. Mohammad Mansoor Mir, Advocate for Plaintiff.

Mr. Aga Zafar Ahmed, Advocate for Defendant No.1 to 3.

Mr. Omair Nisar, Advocate for Defendant No.4.

None present for Defendant No.5.

Muhammad Ali Mazhar, J: This suit has been brought under Section 3 (2) of the Admiralty Jurisdiction of High Court Ordinance, 1980. In association with the main suit, the plaintiff has also filed an application under Rule 731 of the Sindh Chief Court Rules (O.S) for the arrest of Vessel (defendant No.1) until solvent surety equivalent to the claim of the plaintiff is furnished with the Nazir of this court. On 01.01.2018, the learned Judge of this court as an interim measure ordered the arrest of defendant No.1.

2. The learned counsel for the plaintiff argued that the claim falls against the Vessel and its owner by virtue of the BL which is a contract of carriage of goods under S.3(2)(h) of the 1980 Ordinance, hence, the arrest of the vessel is fully justified. A Contract of Carriage has been defined under Article 1 (b) of the Schedule to COGSA. The contract of carriage applies only to contracts of carriage covered by a bill of lading or any similar document of title in so far as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same. The Defendant No. 2 and 3 are covered under the definition of Carrier by virtue of its bill of lading issued to the Charterer/Defendant No.4, dated 23.08.2017. The said BL clearly shows 'consignee' and the notify address as to the order of Mobin International. Upon the strength of the Initial BL and in consonance with clause 25 and 36 of the Charter party (CP), the Defendant No 4 issued Charterer's BL to the Plaintiff on 25.11.2017 which is the Final BL. The cumulative effect is that the owner is liable in personam, and the vessel in rem to the plaintiff by virtue of the initial and final BLs. He relied on **2013 CLD 1829**.

3. He further argued that although plaintiff's main contract of Sale & Purchase was with defendant No 5, however, the plaintiff has maintained all along that the main seller of goods was the Charterer/Mobin for all practical purposes. Plaintiff's plea is strengthened and substantiated by the simple fact that the email address used by Mobin, i.e. mm@mobinogp.com, in all its correspondence is same as that mentioned in the Sale &

Purchase Contract (page 51 of plaint). Moreover, the person using the aforesaid email, Mehmood Madanipour is the person who has been dealing with the plaintiff all along in respect of the subject cargo and who has acknowledged the receipt of payment in lieu thereof and the same person has repeatedly appeared as the owner/authorized person of defendant No.4 in various letters throughout these proceedings, which leads to the irrefutable conclusion that the cargo was sold to the plaintiff and the payment received in lieu thereof by the defendant No.4, and defendant No.5 was merely a front. The email ID is shown to belong to the Charterer/Defendant No.4 and the name of Mehmood Madanipour appears as the authorized person of the Defendant No.4 in the following documents:

- i) Email from Mobin confirming the CP (page 51 of Applications)**
- ii) Charter party clause showing Mobin International Ltd as the Charterer at the bottom of the page (page 51 of Applications)**
- iii) Email and name of Charterer's contact person on the Lien Notices (page 197/201 of plaint)**
- iv) Email from Mobin/Mehmood confirming that they sold the LPG to the Plaintiff (page 209 of plaint)**
- v) All email correspondence to/from Plaintiff/Defendant No 4 in the plaint (page 211 - 325 of plaint)**
- vi) Mobin/Mehmood shown as addressee/recipient of emails relied upon by the Defendant No 4 itself in its CA (pages 253, 259, 265, 269 and 337)**

4. It was further contended that the email of plaintiff dated 28.12.17 (page 273 of plaint) asserting the factum of payment made and email from Charterer/Defendant No.4 dated 29.12.17 (page 325 of plaint) of plaint acknowledging the said payment. The WhatsApp conversation (pages 285-317) between the plaintiff and the Charterer clearly demonstrate that the latter was asking the plaintiff to bail them out of a financial crunch by lending 2.2 million AED that would be adjusted by

them in subsequent shipments. There was absolutely no demand or assertion of any unpaid amounts in respect of the subject cargo.

5. The learned counsel for the defendant No. 1 to 3 argued that the defendant No.1 vessel is on Time Charter of the defendant No.4 by her owners/defendant No.2 through Charter party dated 06.03.2017. The letting of vessel on hire to the defendant No.4 does not make the defendant No.4 beneficial owner of the defendant No.1. The charterer, be it time charterer or charterer by demise, is excluded from the category of persons who beneficially own majority shares in the ship sought to be arrested. The vessel could not be attached in an action in rem as the plaintiffs failed to show that the Time Charters are the owner or beneficially owned majority shares or interest in the defendant vessel itself. He placed reliance on *M/s. V.N.Lakhani & Company. v. m.v.Lakatoi Express & others*; PLD 1994 S.C. 894., *M/s.Arshad Corporation (Pvt.) Ltd. v. The Ship Maersk Astro & others*; PLD 1988 Kar. 515, *Jaffer Brothers (Pvt) Limited v. M.V.Eurobulker II*; 2002 CLD 926 and *M/s.Sun Line Agencies Ltd. v. M.V. "Psiloritis" & others*; 1984 CLC 1553.

6. He further argued that pursuant to the Charter party, the defendant No.4 was required to pay hire one month in advance for the duration of the Charter party period. AED 4,472,917.38 is liable to be paid under the Charter party up to 15.03.2018. The contractual lien over the vessel's cargo in a Time Charter party provides owners with a right to retain possession of cargo until monies owed to them have been paid. If the defendant No.4 owns the cargo then the lien is valid pursuant to the Charter party terms between owners and defendant No.4. If the

plaintiff (consignee) owns the cargo, then the bills of lading which the plaintiff holds are on Congenbill form which incorporates the terms of the Charter party, including the lien clause.

7. The learned counsel for the defendant No.4 argued that the defendant No.4 does not submit to the jurisdiction of this Court but its appearance is limited to the extent of assisting this court to the release its seized property i.e. 2630MT of LPG laden on board the defendant No.1. For other claims, the plaintiff is obliged to resort to the applicable law and jurisdiction which is English Law and either DIFC Courts UAE and/or arbitration in UK, as per the terms of Charter party & Bills of Lading and Sale & Purchase Contract. He referred to [1951] 2 All ER 69 in which the court held that if the defendant appears in the court only to challenge the jurisdiction and to prevent its property from seizure, then the defendant does not submit to the jurisdiction of the court, therefore, no judgment in personam can be rendered against it. He further argued that the plaintiff has violated the provisions of Import & Export Control Act, 1950 as well as Foreign Exchange Manual (Chapter 13), by purportedly importing goods without making any payment through the only three acceptable/legal modes i.e. (1) against a letter of credit (2) by registering contract with the SBP and (3) by remitting funds through approved agent/Bank. The pleadings are silent as regards any claim in personam against any of the defendants except the defendant No.5. If the plaintiff does not have any claim in personam against any defendant especially the defendant No.2 & 4, then in-rem claim of the plaintiff against the defendant No.1 vessel fails by virtue of Section 4 (4) of the Admiralty Jurisdiction of High Courts Ordinance, 1980 and the suit

is liable to be dismissed. The plaintiff's claim falls squarely within Section 3 (2) (h) of the Admiralty Jurisdiction of High Courts Ordinance, 1980. For the said claim to succeed, the plaintiff has to show that it has a claim in personam against the defendant No.4 (who issued the B/Ls) and/or against the defendant No.2/3, who are the registered/beneficial owner of the defendant No.1. The only remedy available with the plaintiff is either to invoke arbitration under the charter party/Bills of Lading or alternatively approach DIFC Courts, UAE, against the Defendant No.5.

8. It was further averred that as Charterer of the defendant No.1, the defendant No.4 is entitled to the demurrage accrued due to delay caused by the plaintiff since the date of issuance of the Bills of Lading as well as the demurrage accruing due to the wrongful arrest of the defendant No.1. As the owner of the Goods, the defendant No.4 is entitled to the price of the goods along with the demurrage accrued since September, 2017 which is as of date around AED 13 million (PKR 400 million).

9. He further contended that a bill of lading, which is non-negotiable or straight, is not a document of title as it does not transfer the ownership in the goods. It was further contended that this court can only arrest a vessel provided other prerequisites of the Admiralty Jurisdiction of High Courts Ordinance, 1980 are met. The plaintiff has knowingly not sought any attachment of the cargo. The application made under Rule 731 (CMA No. 03/2018) has been made only for arrest of the defendant No.1. No additional application seeking orders for mandatory discharge of the cargo is made, which disentitles the plaintiff from seeking any relief as to

discharge of the cargo at interim stage.

10. Heard the arguments. The sequences of events bring to light divulge that the plaintiff entered into a sale and purchase contract with defendant No.5 for 6600MT Liquefied Petroleum Gas (LPG). The seller agreed to deliver the cargo on cost insurance and freight bases at Port Qasim, Pakistan. In the indenture, performing vessel is defendant No.1, nominated by the seller and accepted by the buyer. The defendant No.2, the owner of defendant No.1 executed Charter Party with defendant No.4 against the charter hire US\$ 14500 per day pro rata (PDPR) for 6+6 months. According to Clause 25 master/owner was required to accept orders from Charterer for request to release cargo where no original bills of lading are available, during the whole period and optional extensions of time Charter period and to discharge cargo where nominated port is different from the port/place named in the bill of lading that may be issued at load port or presented at discharge port such orders shall be given in voyage order. It was further agreed in the Charter Party under Clause 21 that the arbitration if any to be settled in London as per English Law. The record depicts that earlier against the same vessel Adm.Suit No.11/2017 was instituted in this Court. The defendant No.2 was defendant No.5, defendant No.3 was defendant No.6 and defendant No.4 was defendant No.7. After sometime, the plaintiff and other defendants in that suit resolved the matter amicably outside the court, therefore, vide order dated 15.12.2017 the suit was dismissed as withdrawn with pending applications.

11. In the BL No.20171125A filed by the plaintiff, the name of shipper is Astra Global FZC (defendant No.5). The description of consignee cites the order of JS Bank

Limited and in the notified address, the name of plaintiff is mentioned. This bill of lading was issued for LPG 2630.585 MT by defendant No.4 on 25.11.2017, whereas another bill of lading is also available that was issued for LPG 4000 MT duly issued by defendant No.4 in which also the shipper is Astra Global FZC (defendant No.5). The heading of consignee mentions to the order of Allied Bank Limited with notified address of the plaintiff. No dispute cropped up or garnered between the parties for LPG 4000 MT consignment and the plaintiff unequivocally self-confessed that the said consignment was discharged however the dispute right now confines no more than LPG consignment 2630.585 MT.

12. The learned counsel contended that for the present consignment the L.C. was opened but due to some directorial sanctions countenanced by the bank, the LC was cancelled. As a result of this predicament, the payment was made to the defendant No.4 in UAE but the defendant No.4 in their counter affidavit denied to have received any payment against the balance cargo of 2630 MT from defendant No.5, therefore, they have taken the plea that neither the plaintiff nor the defendant No.5 can claim the cargo nor they can coerce the defendant No.4 to relieve its tittle or claim. Moreover they averred no privity of contract between the plaintiff and defendant No.4 with further rider that the defendant No.4 is not bound by contractual commitments and obligations coincided by the defendant No.5 with the plaintiff unless the defendant No.5 recompenses and pay back the outstanding amount to the defendant No.4.

13. The bill of lading is very good evidence of the contract of affreightment, though not the contract itself, for the contract is usually entered into before the bill of lading is

sighted. It is a receipt for the goods shipped and contains certain admissions as to their quantity and condition when put on board. It is also a document of title, without which delivery of the goods cannot normally be obtained. It is in the second and third of these functions that a bill of lading differs entirely from a charter-party. A charter-party is always a contract, and nothing more. Where the charter is also the shipper the bill of lading is usually only a receipt for the goods and a document of title. In no case, however, does a proper bill of lading fail to function as a document of title. Under modern conditions the bill of lading is usually signed by the loading broker, but sometimes by the master, acknowledging the quantity and condition of the goods when put on board. The precise effect of this acknowledgment is most important in view of the rule of law that the ship must deliver "what she received as she received as she received it, unless relieved by the excepted perils". For many purposes possession of a bill of lading is equivalent in law to possession of the goods. It enables the holder to obtain delivery of the goods at the port of destination and during the transit, it enables him to deliver the goods by merely transferring the bill of lading. A bill of lading contains (1) consignor's and consignee's name, (2) names of the ports of departure and destination, (3) name of the vessel, (4) dates of departure and arrival, (5) itemized list of goods being transported with number of packages and kind of packaging, (6) marks and numbers on the packages, (7) weight and/or volume of the cargo, (8) freight rate and amount. It serves as a proof of ownership (title) of the cargo, and may be issued either in a negotiable or non-negotiable form. In negotiable form, it is commonly used in letter of credit transactions, and may be bought, sold, traded or used as security for borrowing money. A bill of lading is required

in all claims for compensation for any damage, delay, or loss; and for the resolution of disputes regarding ownership of the cargo. The rights, responsibilities and liabilities of the carrier and the shipper under a bill of lading are governed generally either by the older Hague rules or by the more recent Hague-Visby rules. Bills of lading are one of three crucial documents used in international trade to ensure that exporters receive payment and importers receive the merchandise. A bill of lading is a writing signed on behalf of the owner of ship in which goods are embarked, acknowledging the receipt of the Goods, and undertaking to deliver them at the end of the voyage, subject to such conditions as may be mentioned in the bill of lading. The principal use of the bill of lading is as a receipt issued by the carrier once the goods have been loaded onto the vessel. This receipt can be used as proof of shipment for customs and insurance purposes and also as commercial proof of completing a contractual obligation. Simply, the bill of lading confers prima facie title over the goods to the named consignee or lawful holder.

Ref: Bramwell in Sewell v. Burdick (1884), 10 App.Cas.at p.105, and The Ardennes (Owner of Cargo) v. The Ardennes (Owners), [1950] 2 All E.R.517; [1951] 1 K.B.55, Rodocanachi v. Milburn (1886), 18 Q.B.D.67, Bradley v. Federal Steam, etc., Co. (1927), 137 L.T. 266, at p.267, Horst v. Biddell Bors, Erichsen v. Barkworth (1858), 3 H. & N.894, [1912] A.C.18, The Manual of Ports, Shipping & Admiralty Law by Mohammad Ahsan Ghani Siddiqui, www.businessdictionary.com/definition/bill-of-lading & https://en.wikipedia.org/wiki/Bill_of_lading.

14. A crowning veneer of the lis revealed that for the subject consignment (LPG 2630.585 MT) another BL of the same number was issued on the same date i.e. 25.11.2017 by the defendant No.4 with slight change that in the head of consignee and notified address, the name of plaintiff is mentioned. What is the difference/alteration? In the earlier BL, the caption

“consignee” was qualified to the order of JS Bank Limited but in the subsequent BL the consignee is the plaintiff directly but the name of bank was removed. This scenario to some extent reinforces and fortifies the contention of the learned counsel for the plaintiff that the LC was cancelled and for that reason, the name of plaintiff was directly avowed in the caption of consignee and notified address. Regardless of conveying and handing over this BL, the defendant No.4 has aroused and advocated that value of consignment was not paid to them by defendant No.5 whereas the plaintiff outstretched that the amount was paid to the defendant No.5 in UAE. Sequentially, the learned counsel for the defendant No.4 also referred to the provisions of Import and Export Control Act, 1950 as well as Foreign Exchange Manual Chapter 13 in which the certain means and methods are accessible for making payments i.e. against the letter of credit; by registered contract with State Bank of Pakistan and by remitting funds through approved agent bank. The learned counsel for the plaintiff responded that when the funds were not sent from Pakistan to the defendant No.5 then the question of alleged implementation of foreign exchange regulations do not arise. However to demonstrate the factum of payment, he relied on some emails and WhatsApp messages that the defendant No.5 was communicating through defendant No.4 email ID which may draw an assumption that the defendant Nos.4 and 5 are basically one and the same person/company. The bone of contention between the plaintiff and defendant No.4 is precisely a payment issue on the subject consignment otherwise in the same relationship, earlier consignment was released to the plaintiff without any demur or dispute.

15. The plaintiff besides requesting the arrest of defendant No.1 also sought directions against the defendant Nos.2 to 5 to refund AED 5,333,511.09 million equivalent to Pak Rupees.161,388,710.48 with markup at the Bank rate till realization. The plaintiff has also claimed the cost of illegally withholding the cargo, financial cost, transportation/halting charge, berthing charges, MSA Charges, loss of market price, loss of business reputation in the sum of Rs.348,728,216.48. In CMA No.03/2018 filed under Rule 731 of the Sindh Chief Court Rules (O.S), the plaintiff has entreated for the arrest of defendant No.1 until the Bank Guarantee in the sum of Rs.348,728,216.48 is furnished with the Nazir of this court. It is also an admitted fact that the arbitration proceedings have been commenced in London between the defendant Nos.1 and 2 and defendant No.4 in view of the charter party. However, it is a fact that neither in the suit nor in the interlocutory application the plaintiff requested for the delivery of consignment but different claims have been lodged which include the denomination of consignment as well as the financial losses and damages. The plaintiff has prayed for directions against the defendant No. 2 to 4 to furnish security equivalent to the amount claimed in suit. The plaintiff has also sought mandatory injunction against the defendant No. 1 to 4 to immediately discharge the cargo 2630 M.T. of LPG at EVTL terminal or in alternate direct the defendants to return the entire amount to the plaintiff. In the application filed under Rule 731 of the Sindh Chief Court Rules, the plaintiff has only requested for the arrest of vessel till furnishing surety of suit amount but neither claimed the consignment nor moved any application for the attachment of cargo. According to the invoice issued by defendant No.5, the total value of 2630 MT LPG is amounting to AED5,332,325. The bill of

lading issued by the defendant No.4 has not been honoured due to alleged nonpayment issue whereas the plaintiff has fostered a plea that entire payment has been made. Due to diminishing value and quantity of cargo by efflux of time the plaintiff has claimed the actual cost with damages. This is also a fact that the principal place of business of all defendants is beyond the territorial jurisdiction of this court and as soon as the defendant No.1 left, it would be troublesome for the plaintiff to salvage and recuperate its alleged claim. So in all fairness, the defendant No.4 is liable to furnish surety equivalent to the value of cargo to the satisfaction of Nazir of this court that will remain intact till final adjudication of the lis. The bone of contention cannot be decided until the parties are allowed to lead evidence. Apropos the contention that instead of this suit, the recourse should have been made by the plaintiff through arbitration in terms of Sale & Purchase Contract, I have no reluctance or indecisiveness in mind to sustain that the dishonoring and or discrediting of BL issued by the defendant No.4 and the cargo reached to its notified destination endows with and grant access to ample cause of action to the plaintiff to sue within the admiralty jurisdiction of this court without invoking arbitration clause provided in the Sale & Purchase Contract.

16. Recently in the case of **“Spectre Consulting Limited Vs. MT “Everrich 6”**, reported in **PLD 2018 Sindh 136 (authored by me)**, the niceties and exactitudes of an action in rem and action in personam have been discussed by me. The relevant excerpt of the judgment is replicated as under:-

“8. A significant peculiarity of an action in rem is that the plaintiff is allowed to commence the proceeding by going after specific piece of property, the ship or the cargo or certain other associated property. It is not a proceeding against any one person or another, nor does it deal with this or that man’s title to the thing (res)

but is a legal device employed for satisfying, under conditions of seafaring life and exigencies of international maritime transactions and the claim of a person who has suffered damage or injury. The proceeding commences by issuing the process on the ship and taking steps to arrest it, so that it may not move out of jurisdiction. The distinguishing feature of the action in rem has always been the ability of the maritime claim to proceed against the ship directly, which was regarded as the defendant, the ship being personified. Whereas the action in personam in Admiralty jurisdiction is of the same nature as ordinarily common law action commences by summons served on a defendant which is a person, natural or juridical and not thing (res). If the technical object of the suit is to establish a claim against some particular person, or to bar some individual claim or objection, so that only certain persons are entitled to be heard in defence, the action is in personam although it may concern the right to or possession of a tangible thing. An action in personam is an ordinary action as in common law courts. The judgment of the court is a personal one in the nature of a command or prohibition against the unsuccessful party. For exercising jurisdiction in action in personam, English statutes have engrafted certain restrictions in respect of collision in similar cases. The restriction applies to claims for damage, losses of life or personal injury caused by ships arising out of collision between ships, or out of the carrying out of or omission to carry out a manoeuvre by one or more of two or more ships or out of non-compliance with the collision regulations. The action may be initiated either as action in rem or as action in personam, depending on conditions specified in the Admiralty law for each form of action. These forms of actions are not mutually exclusive; if conditions for both the forms of actions are satisfied, a plaintiff may take recourse to either of them or both of them, as he may find expedient. [Ref: Maritime Jurisdiction and Admiralty Law by Samareshwar Mahanty]. At this juncture I would like to quote an excerpt from the book "Admiralty Jurisdiction and Practice" Fourth Edition by Nigel Meeson and John A Kimbell" Paragraph 3.7-Page 88 as under:

"The decision in *The "Longford"* was considered by the Court of Appeal in *The "Burns"* where the court had to consider whether a claim in rem against a ship owned by the London County Council was a claim against the London County Council which by statute had a limitation period of six months. Again this was a claim for damages arising out of a collision between two ships which gave rise to a maritime lien. Collins MR described the decision in *The "Longford"* in the following words: "It seems to me that that case in substance decides that there is a real, and not a mere technical, distinction between an action in rem and an action in personam...". Fletcher Moulton LJ said: "The very able argument of a counsel for the appellants rests upon the contention that the process of arrest of a vessel... is merely a method of enforcing an appearance in an action. In other words, that an action in rem in no way differs in its nature from an action in personam; save that there is attached to it a means of compelling the appearance of the defendant by the arrest of the vessel. I am of the opinion that this view cannot be supported. The two cases upon which counsel have chiefly relied—The '*Dictator*' and The '*Gemma*'—appear to me, when closely examined, to negative and not to support that proposition. They both of them treat the appearance as introducing the characteristics of an action in personam. In other words, it is not the institution of the suit that makes it a proceeding in personam, but the appearance of the defendant. And further, I think that the contrary is conclusively established by the case of The '*Bold Buccleugh*', supported and approved as it was by the House of Lords in the case of *Currie v McKnight*..... I am, therefore, of the opinion that the fundamental proposition of the argument of the appellants' counsel fails, and that the action in rem is an action against the ship itself. It is an action in which the owners may take part, if they think proper, in defence of their property, but whether or not they will do so is a matter for them to decide, and if they do not decide to make themselves parties to the suit in order to defend their property, no personal liability can be established against them in that action. It is perfectly true that the action indirectly affects them. So it would if it were an action against a person whom they had indemnified... I do not think that we are entitled to suppose that there has been a change in the nature of the action in rem merely because the modern language of the writ by which it is now commenced is unsuitable to that which I think the authorities establish to be its real nature."

17. In the wake of above discussion, the CMA No. 03/2018 is disposed of in the following terms:-

- (I) The defendant No.4 is directed to furnish solvent surety/bank guarantee amounting to AED 5,332,325 or equivalent amount in Pak rupee to the satisfaction of the Nazir of this Court.

- (II) On furnishing surety/bank guarantee as directed in the preceding paragraph, the arrest orders shall deem to have been recalled. Consequently, the Port Authorities may allow the Vessel (defendant No.1) to sail. However the release of Vessel (defendant No.1) shall be subject to production of certificate by the defendant No.4 issued by the Nazir of this court to verify the furnishing of surety/bank guarantee.
- (III) The dispute with regard to the monetary issues if any pending between the defendant No.2 and 4 is already subject matter of Arbitration proceedings in London so for this reason alone nothing is to be decided here for their claim vice versa in this suit but the recourse may be made by them in accordance with the agreement (charter party) containing the arbitration clause vis-à-vis choice of law and forum selection.
- (IV) On filing written statements by all the defendants, office shall fix this suit for settlement of issues. The parties may also apply for appointment of commissioner to record evidence for an early disposal of this lawsuit.

Karachi:-
Dated.13.4.2018

Judge