

(2011) 07 MAD CK 0287**Madras High Court****Case No:** O.S.A. No. 197 of 2011

LMJ International Limited

APPELLANT

Vs

Kim Geong Tai and Others

RESPONDENT

Date of Decision: July 1, 2011**Citation:** (2011) 5 LW 255**Hon'ble Judges:** V. Periya Karuppiah, J; R. Banumathi, J**Bench:** Division Bench**Advocate:** T. Poornam, for the Appellant; S. Vasudevan, for R1 to R14, M.V. Raghavan, for Auction Purchaser and J. Sivanandaraj, for Shinhan Bank, for the Respondent**Final Decision:** Dismissed**Judgement**

R. Banumathi, J.

Being aggrieved by the order in A. No. 2504 of 2011 in C.S. No. 75 of 2011 interalia directing the Appellant/Intervener-LMJ International Limited to pay USD 671,658.24 and also to pay a sum of Rs. 50,57,544.90 to M/s. Sea Traffic, the agent, who are now taking care of the supply of necessities to the vessel M.V. OSM Arena, Appellant has preferred this appeal.

2. M/s. Shinhan Capital Company Limited having purchased the vessel M.V. OSM Arena from M/s. Sunwoo Merchant Marine Company Limited under the Vessel Sale & Lease Agreement dated 04.11.2008. The said vessel was further leased back to M/s. Sunwoo Merchant Company Limited under the Vessel Lease Agreement dated 04.11.2008. Thereafter on 30.06.2009, there was amendment to the said Kun mortgage with M/s. Ocean Success (OS) Maritime Company Limited being the new lessee and agreeing to participate in debt thereby replacing the original mortgagor viz., M/s. Sunwoo Merchant Marine Company Limited. M/s. Ocean Success (OS) Maritime Company Limited (OSM) incurred debt under the mortgage security.

3. Charter party evidenced by fixture note entered into between the Appellant and disponent owner, viz., M/s. Seoil Shipping Company Limited. As per the Charter

party fixture note dated 01.08.2009, vessel M.V. OSM Arena carried about 43,000 MT Bulk iron ore belonging to the Appellant-LMJ International Limited from Haldia, Paradip, Vizag to a designated Port in China. Vessel M.V. OSM Arena arrived at the Port of Haldia in August, 2009 and completed the loading at the Port of Haldia on 22.08.2009. Master of vessel authorised one M/s. Bon Voyage Shipping and Logistics to sign bill of lading on behalf of the vessel.

4. Vessel M.V. OSM Arena arrived at Port of Paradip on 24.08.2009 for the purpose of loading further cargo. Due to congestion, berth permission was not granted in Paradip Port. Dispute and differences arose between the Appellant and the vessel as to the payment of demurrage and issuance of bill of lading. On 13.10.2009, freight rate was revised and Appellant agreed to pay the undisputed demurrage after completion of the discharge and a revised fixture note was entered into to record such agreement. On 13.10.2009, bill of lading was issued by M/s. Bon Voyage on behalf of the Master of the vessel. By its letter dated 23.10.2009, Appellant nominated M/s. Cafoedian as the Port of discharge. On 24.11.2009, M/s. Seoil Shipping issued a letter to the Appellant informing the Appellant that it had exercised its right of lien over the goods on board the said vessel.

5. After obtaining leave to sue under Clause 12 of Letters Patent, Appellant filed C.S. No. 353 of 2009 before the Calcutta High Court interalia claiming that the bill of lading dated 13.10.2009 has been rightfully issued and valid. In G.A. No. 3408 of 2009 in C.S. No. 353 of 2009, Calcutta High Court passed an order of injunction restraining the Respondents in that suit from dealing or disposing of or encumbering the cargo on board the said vessel. Another interim order was granted in G.A. No. 63 of 2010 whereby Respondents in that suit were directed to deliver the said cargo on surrendering the bill of lading dated 13.10.2009 to the Appellant or its nominee at Tianjin. On, 19.01.2010, Appellant filed an application G.A. No. 174 of 2010 in C.S. No. 353 of 2009 after getting informing that the said vessel was arriving at the Port of Chennai. On 12.02.2010, Calcutta High Court passed an order directing the Custom authorities to ensure that the vessel not to leave the Port of Chennai without leave of the High Court, Calcutta as directed by its earlier order dated 19.01.2010.

6. Appellant filed Admiralty Suit A.S. No. 3 of 2010 interalia claiming arrest of the vessel under Admiralty jurisdiction of the High Court at Calcutta. On 23.2.2010 in A.S. No. 3 of 2010, Calcutta High Court has passed an order of arrest of the vessel. Order of arrest was extended further. On application filed by the Appellant (G.A. No. 1607 of 2010 in A. No. 3 of 2010), in the Admiralty suit, on 20.5.2010, Calcutta High Court appointed the Receiver and directed the Receiver to file valuation report for the vessel. Despite service, none appeared on behalf of the owners of the vessel. On 22.6.2010, Calcutta High Court confirmed the order of arrest of the vessel. On 29.07.2010, the owners of the vessel M/s. Sinhan Capital Company Limited filed an application seeking to vacate the orders of arrest and dismissal of Admiralty suit. In

G.A. No. 1607 of 2010, the single Judge of the Calcutta High Court directed publication of advertisement for sale since the owners of the vessel who are duly represented had no instructions in the matter. On 31.01.2011, M/s. Ocean Success Maritime Company Limited claiming itself to be the financial lessee of the said vessel filed an application G.A. No. 358 of 2011 in A.S. No. 3 of 2010 claiming due of the crew members calculated to be Rs. 3,25,38,759.42. Exercising Admiralty jurisdiction, single Judge of Calcutta High Court partly allowed the application G.A. No. 2705 of 2010 filed by the owners of the vessel and ordered that the order of arrest to be vacated on condition that the owners of the vessel furnishing security to the tune of Rs. 5 crores. Being aggrieved by vacating the order of arrest, on 15.03.2011, Appellant herein filed appeal before the Division Bench of Calcutta High Court on the ground that order of arrest was allowed to be vacated on furnishing security to the tune of Rs. 5 crores whereas claim of the Appellant in the Admiralty Suit was Rs. 40,70,49,407.55. At the instance of the owners of the said vessel who are Respondents in the said appeal, the order of single Judge dated 08.03.2011 was directed to be stayed till the disposal of the appeal. In the Admiralty Suit A.S. No. 3 of 2010, the single Judge of Calcutta High Court directed the Receiver to inspect the vessel and file his report. The matter is thus now pending before the Calcutta High Court both in C.S. No. 353/2009 and Admiralty Suit A.S. No. 3 of 2010.

7. During the pendency of C.S. No. 353 of 2009 on the file of High Court, Calcutta, three of the crew members of the vessel which has been lying arrested in the Port of Chennai filed C.S. No. 75 of 2011 before the High Court, Madras claiming a sum of Rs. 4,18,294.72 being the wages and compensation payable up to 31.01.2011 together with future wages till the date of signing off from the vessel and for arrest of the vessel M.V.OSM Arena as is where is condition. Remaining crew members on Board the vessel M.V. OSM Area have filed A. No. 2504 of 2011 claiming Rs. 2,28,43,705.10 (USD 5,03,165.31) being the wages due from October, 2010 stating that the owner of the vessel committed breach of contract by not paying the wages as per the respective contracts of employment. Though notice was served on the owner of the vessel, they failed to appear and contest the suit. On 02.02.2011, order of interim arrest was passed in A. No. 651 of 2011. Since the owner of the vessel failed to appear before the Court, by an order dated 04.03.2011 in A. No. 1347 of 2011, sale of vessel M.V. OSM Arena was ordered. Date for the submission of bid was fixed on 26.4.2011 and the date of opening the bids on 28.04.2011. Sale was conducted on 28.04.2011. M/s. Fleet Management Inc, Marshal Islands is the highest bidder for the value US Dollars 4,700,000 which works out approximately Rs. 20.68 crores and the bid was accepted and bidder was directed to comply with the terms and conditions of the sale by making payment of 25% of the total price within three working day and the balance money within 15 days thereafter. As per the Memo/Statement, the arrears of wages due to 14 crew members up to 15.6.2011 would be USD 671,658.24 which is around Rs. 3.50 crores.

8. Observing that the owner had abandoned the vessel, learned Judge directed that M/s. Sea Traffic to take care of the maintenance and supplies to the vessel with a condition that the amount spent by them would be treated on priority basis for payment from and out of the sale proceeds. M/s. Sea Traffic had also filed memo stating that they have spent Rs. 63,27,855.50 towards the supplies effected.

9. Plaintiff before Calcutta High Court/LMJ International Limited who had secured the order of arrest of the vessel M.V. OSM Arena, Receiver was also appointed by the Calcutta High Court. Appellant had filed Intervener Application in A. No. 2503 of 2011 in C.S. No. 75 of 2011 which was allowed by the learned Judge. Appellant had also filed Memo before the learned Judge stating that they have filed Transfer Petition (Civil) No. 665 of 2011 on the file of Hon"ble Supreme Court for transfer of C.S. No. 75 of 2011 to the file of High Court, Calcutta. On 03.6.2011, the Hon"ble Supreme Court has passed the order in the said Transfer Petition (Civil) C.S. No. 665 of 2011 which reads as follows:

List in the second week of July 2011. In the mean while, the Petitioner will file an application to get itself imp leaded before the Madras High Court.

10. Learned Judge observed that when the order of provisional sale was passed on 28.04.2011, Appellant was present. Observing that in spite of appointment of Receiver by the Calcutta High Court, vessel could not be sold for about 13 months, learned Judge held that there was failure on the part of the Receiver appointed by the Calcutta High Court in not bringing the vessel to sale at the earliest point of time. Further observing that even if the sale is bad for the Plaintiff before the Calcutta High Court, it would be good for at least the crew who were stranded in the high sea, the learned Judge passed the impugned order as follows:

i. ...

ii. On 20.6.2011, the Plaintiff before the Calcutta High Court shall deposit an amount equivalent to USD 671,658.24 so that the crew could be paid the said amount and they could be discharged;

iii. On 20.6.2011, the Plaintiff before the Calcutta High Court shall also pay a sum of Rs. 50,57,544.90 Ps. to M/s. Sea Traffic the agent, who are now taking care of the supply of necessaries to the vessel;

iv. The Plaintiff before the Calcutta High Court shall also file an affidavit of undertaking to continue from 21.6.2011 onwards the supply of necessaries to the vessel till the date on which the Hon"ble Apex Court decides the transfer petition;

v. The affidavit of undertaking filed by the Plaintiff shall also indicate that they would pay simple interest at the rate of 9% per annum on the total amount of Rs. 20.68 crores deposited by the highest offer or with effect from 13.5.2011 up to the date of confirmation of sale;

vi. If the Plaintiff before the Calcutta High Court pays all the amounts, the payments shall constitute a first charge on the sale proceeds and it may be paid on priority basis from out of the sale proceeds.

11. Mr. T. Poornam, learned Counsel for Appellant contended that the Receiver appointed by the Calcutta High Court on 20.05.2010 is in custody of the vessel and that the order of arrest passed by the Calcutta High Court on 23.2.2010 is extended from time to time and is still in force and the order directing sale of the said vessel would result in the said vessel being consequently delivered to the highest bidder and the same would be in the conflict with the orders passed by the Calcutta High Court. Learned Counsel would further contend that the learned Judge failed to see that the Defendant in C.S. No. 75 of 2011 was seriously contesting the suit filed by the Appellant in Calcutta High Court but had deliberately chosen not to appear in C.S. No. 75 of 2011 to allow the vessel to be sold at a price far below the value priced by the Surveyors. It was further argued that vessel has been valued at Rs. 36 crores and the sale is only for Rs. 20.68 crores and Appellant has reason to believe that the Plaintiff and Defendant in C.S. No. 75 of 2011 acted in collusion to defeat the interest of the Appellant. It was further argued that if the sale is confirmed infavour of the highest bidder M/s. Fleet Management Inc, Marshal Islands, the proceedings initiated by the Appellant before the Calcutta High Court would become futile.

12. Learned Counsel for Plaintiffs Mr. S. Vasudevan contended that Plaintiffs/Crew members are stranded in the high sea and the available provisions on Board the vessel M.V.OSM Arena will last only for a couple of days and Diesel oil also got exhausted and the learned Judge rightly ordered sale of the vessel and that wages payable to the crew shall have priority over any other claim and having regard to the plight of the crew, learned Judge rightly ordered sale of the vessel and the same cannot be challenged.

13. We have heard Mr. M.V. Raghavan appearing along with Mr. V. Manisekaran, auction purchaser. We have also heard Mr. J. Sivanandaraj, learned Counsel appearing for M/. Shinhan Bank.

14. When the vessel M.V. OSM Arena arrived at Port of Chennai, on 19.01.2010 in G.A. No. 174 of 2010 in C.S. No. 353 of 2009, Calcutta High Court passed an order that the said vessel should not to leave Port of Chennai without the leave of Calcutta High Court. In G.A. No. 394 of 2010 in C.S. No. 353 of 2009, orders were passed directing the Custom authorities to ensure that the said vessel does not set sail without leave of the High Court, Calcutta as directed by the earlier order dated 19.01.2010. On 23.02.2010, Appellant filed Admiralty Suit in A.S. No. 3 of 2010 before the Calcutta High Court interalia claiming arrest of the vessel under Admiralty jurisdiction of the High Court at Calcutta. On the same day (23.02.2010), order of arrest of the vessel M.V. OSM Arena was passed in the Admiralty Suit A.S. No. 3 of 2010. On 06.5.2010, in G.A. No. 1607 of 2010 in A.S. No. 3 of 2010, Calcutta High Court passed an order appointing the Receiver. Vessel M.V. OSM Arena is under

the order of arrest of Calcutta High Court for more than one year.

15. It is pertinent to note that on the orders passed by the Calcutta High Court appointing the Receiver, Mr. Vasudevan, learned Counsel for Plaintiffs/Crew members sent a letter to the Receiver-Mr. Pradip Sancheti dated 22.12.2010 stating that he represents the Crew of the vessel on Board the ship is presently lying in the outer anchorage of Chennai Port. In the said letter, it was further stated that the essentials are getting depleted and the crew are on Board the vessel are facing difficult situation and that the family of the crew members are facing financial difficulties and are finding it difficult to eke out their livelihood. In the said letter, learned Counsel for Plaintiffs Mr. Vasudevan requested the Receiver to "place the matter regarding the claim of the crew to the Hon"ble High Court, Calcutta and obtain suitable directions for payment of the wages as well as air ticket for the crew towards repatriation to their native place. The relevant portion of the said letter reads as follows:

We therefore request you to kindly place the matter regarding the claim of the crew to the Hon"ble High Court Calcutta and obtain the wages as per the enclosed list which has been calculated up to 10.12.2010. The wages continue to be paid until the last day of discharge of all the crew. As and when the sale proceeds are received to the credit of the above suit, we request you to kindly place the claim of our clients before Hon"ble Judge of the Calcutta High Court and obtain suitable directions for payment of the wages as well as air ticket for the crew towards repatriation to their native place and country of all the crew.

(underlining added)

16. In response to the said letter, Advocate/Receiver Mr. Pradip Sancheti appointed by the Calcutta High Court has sent a reply dated 05.1.2011 stating that the matter was brought to the notice of the High Court, Calcutta on 05.1.2011 and after hearing the submissions made by the parties, the Hon"ble Calcutta High Court was pleased to direct the respective parties to file an application before the Court making statements of the Applicants on oath. Even though, Receiver informed the counsel for Plaintiffs/Crew to file necessary application before the Calcutta High Court, in compliance with the direction of the Calcutta High Court, Plaintiffs-Crew have not chosen to approach the Calcutta High Court; but chose to file a suit in C.S. No. 75 of 2011 claiming their wages and obtaining a fresh order of arrest of the vessel M.V. OSM Arena on 02.02.2011.

17. At the time when the learned Judge passed the order of sale of the vessel M.V. OSM Arena (i) already arrest order was passed by the Calcutta High Court on 23.02.2010 which was in force and the said order was prior in point of time; (ii) Receiver was appointed by the Calcutta High Court in G.A. No. 1607 of 2010 in A.S. No. 3 of 2010 to take care of the vessel and to take steps for sale of the vessel. Receiver had taken preliminary steps for the sale of the vessel.

18. When Calcutta High Court has appointed the Receiver for the vessel, it comes under the Court custody, Receiver being merely an Officer or Agent of the Court. Of course the Proprietorship of the vessel does not vest with the Receiver; but once Receiver is appointed, the Court is in possession of the vessel through Receiver. In Everest Coal Company (P) Ltd. Vs. State of Bihar and Others, , the Supreme Court held as follows:

...When a Court put a Receiver in possession of property, the property comes under Court custody, the Receiver being merely an officer or agent of the Court. Any obstruction or interference with the Court's possession sounds in contempt of that Court. Any legal action in respect of that property is in a sense such an interference and invites the contempt penalty or likely invalidation of the suit or other proceedings.

19. Considering to the status of Receiver and referring to various decisions, in Mrs. K.P.M. Saheed and Others Vs. The Aluminium Fabricating Company and Others, , the Division Bench of Kerala High Court held as under:

19. It is thus clear that the Court is in possession of the property through the receiver. Any disturbance of this possession without notice to that Court and that receiver and without obtaining permission of that Court, naturally, is contempt of the lawful authority of that Court. The possession of the receiver by Court is thus immune from judicial process. If the property in the hands of the receiver is sold without leave of the Court which appointed the receiver, the sale is illegal and is liable to be set aside in appropriate proceedings. The stamp of illegality vitiates the entire sale and the sale can be set aside on that sold ground.

20. When Calcutta High Court has appointed the Receiver and Receiver is a representative of the Court. It seems to us that when the Receiver was appointed to vessel M.V. OSM Arena by the Calcutta High Court, learned Judge ought to have directed the Plaintiffs to implead the Receiver appointed by the Calcutta High Court as party to the suit. Instead of directing the Plaintiffs to implead the Receiver, learned Judge proceeded to comment upon the Receiver in his absence. Learned Judge criticised the Receiver saying that Receiver failed to conduct the auction sale. The observation of the learned Judge reads as under:

" 11. ...The consequences of the failure on the part of the Receiver appointed by the Calcutta High Court to bring the vessel to sale at the earliest point of time are actually two fold:

(a) that the arrears of wages to the Korean and Myanmarese crew, who are now stranded in the high seas in an alien country are mounting day by day with no one taking any responsibility; and (b) that the supplies necessary at the bare minimum level to keep the vessel floating in the outer anchorage of the Port of Chennai are also mounting day by day with an agent appointed by the Court spending money in the hope that out of the sale proceeds, their money could be paid out. Without

addressing themselves to these issues, the Plaintiff before the Calcutta High Court cannot come up with a mere memo seeking postponement of the confirming of sale."

21. In exercising Admiralty jurisdiction when the order of arrest was already passed and Receiver was also appointed by the Court of coordinate jurisdiction, learned Judge was not right in commenting upon the Receiver more so, in his absence. Learned Judge was not right in passing the order of arrest without impleading the Receiver.

22. Learned Judge repeatedly pointed out that the order was already passed accepting the highest bid of M/s. Fleet Management Inc, Marshal Islands for USD 4,700,000. Learned Judge observed that on 28.04.2011 when the Court directed provisional sale infavour of M/s. Fleet Management Inc, Marshal Islands for the price of USD 4,700,000, Appellant-LMJ International Limited was present. Learned Counsel for Appellant contended that he received papers only in the second week of April, 2011 and Appellant could obtain advice from its lawyers at Calcutta only after 28.04.2011 and therefore, when the matter was listed on 28.04.2011, no instruction could be given to the counsel at Chennai. Mere presence of the counsel for the Appellant in the Court on 28.04.2011 cannot be taken against the Appellant. In any event, we feel that mere presence of counsel for Appellant in the Court on 28.04.2011 cannot be a ground to override the orders passed by the Calcutta High Court.

23. The conduct of the Plaintiffs also to be taken note off. In spite of directions by the Calcutta High Court, Plaintiffs-Crew have not approached the Calcutta High Court. Instead they have chosen to file a separate suit before Madras High Court. Learned Counsel for Plaintiffs Mr. Vasudevan contended that Plaintiffs-Crew are suffering without any sustenance and are waiting for discharge. It was further submitted that the wages payable to the Crew shall have priority over any other claim and taking note of the plight of the Crew, learned Judge passed the order directing sale of the vessel and the same cannot be interfered with.

24. Thomas on Maritime Liens stated it to represent a small cluster of claims which arise either out of services rendered to a maritime res or from damage done to a res and listed five several heads of maritime liens as under:

- (a) Damage done by a ship
- (b) Salvage
- (c) Seamen's wages
- (d) Master's wages and disbursements
- (e) Bottomry and Respondentia.

25. In 2002 (4) CTC 554 (SC) (Epoch Enterrepots v. WON FU), the Supreme Court quoted with approval, the definition of the expression from Brussels Convention of 1967 and from Thomas on Maritime Liens. The relevant portion of the decision is extracted below:

16. ...The International Convention for Unification of Certain Rules Relating to Maritime Liens and Mortgages at Brussels in 1967 defined the maritime lien to be as below:

- (a) wages and other sums due to the master, officers and other members of the vessel's complement in respect of their employment on the vessel;
- (b) port, canal and other waterways and pilotage dues;
- (c) claims against the owner in respect of loss of life or personal injury occurring, whether on land or on water, in direct connection with the operation of the vessel;
- (d) claims against the owner based on tort and not capable of being based on contract, in respect of loss of or damage to property occurring, whether on land or on water in direct connection with the operation of the vessel;....

21. Further on the issue, we find Thomas on Maritime Liens stated it to represent a small cluster of claims which arise either out of services rendered to a maritime res or from damage done to a res and listed five several heads of maritime liens as under:

- (a) Damage done by a ship
- (b) Salvage
- (c) Seamen's wages
- (d) Master's wages and disbursements
- (e) Bottomry and Respondentia.

26. There could be no two opinion that seamen's wages come under the category of maritime lien. But that cannot be the reason to order sale of ship in subsequent suit when the Court of Coordinate jurisdiction has already seized up the matter.

27. Learned Counsel for Plaintiffs contended that there is no impediment for passing any number of order of arrest of the vessel and having regard to the plight of the Crew being stranded in the high sea and due to the inability of the Receiver appointed by the Calcutta High Court to bring the vessel for sale, learned Judge has rightly passed the order for sale of the vessel and the same cannot be faulted with.

28. We are conscious of the plight of the Crew who are stranded in the high sea. It was stated that the Crew are not paid wages nor are discharged. All the essentials are being stated to be depleted. Merchant ship of different nationalities travel from Port to Port carrying goods or passenger. They incur liabilities in the course of their

voyage and they subject themselves to the jurisdiction of the foreign states when they enter the waters of those States. They are liable to be arrested for the enforcement of maritime claims. A ship traveling from Port to Port stays very briefly in any one Port. A Plaintiff seeking to enforce his maritime claim against a foreign ship has no effective remedy once it has no effective remedy once it has sailed away and if the foreign owner has neither property nor residence within jurisdiction. As a representative of the Crew, when learned Counsel for Plaintiffs Mr. Vasudevan has sent an elaborate letter to the Receiver on 22.12.2010, the Plaintiffs-Crew ought to have taken steps before the Calcutta High Court. Plight cannot be the reason to sell.

29. Here is the matter where order of arrest already passed by the Calcutta High Court was in force. When that being so, order of sale passed on 04.03.2011 and the order of provisional sale infavour of M/s. Fleet Management Inc, Marshal Islands dated 28.04.2011 cannot be sustained. Appellant is a Plaintiff before the Calcutta High Court in C.S. No. 353 of 2009 himself around Rs. 40 crores against the vessel, it would not fair to direct the Appellant to deposit the wages to the Crew and also file an affidavit to incur the expenditure for the maintenance of the Crew. When that being so, learned Judge was not justified in directing the Appellant to pay (i) USD 671,658.24 being the wages to the crew; (ii) Rs. 50,57,544.90 to M/s. Sea Traffic who are now taking care of the supply of necessities to the vessel; (iii) to pay interest at the rate of 9% p.a. on the total amount of Rs. 20.68 crores.

30. Learned judge repeatedly observed that Crew are stranded in the high sea and the owner of the vessel abandoned the vessel and therefore, Court is constrained to pass an order of sale of the vessel. Learned Judge did not keep in view that the owner of the vessel is hotly contesting the matter before the Calcutta High Court but conveniently chosen to remain absent in the suit proceedings before the Madras High Court.

31. As pointed out earlier, learned Judge appointed the Agent M/s. Sea Traffic to take care of the supply of necessities to the vessel with a condition that the amount spent by them would be treated on priority basis for payment from and out of the sale proceeds. M/s. Sea Traffic has filed a Memo stating that Rs. 63,27,855.50 is due towards the supplies made by them to the ship/crew. The Proprietor of M/s. Sea Traffic Mr. Alaudin was also present in the Court and he had stated that he will continue to maintain the ship provided the expenditure being reimbursed.

32. We may note the subsequent important development. Auction purchaser M/s. Fleet Management Inc, Marshal Islands has filed a Memo before us stating that the auction purchaser has deposited 25% of the bid amount within 3 days and the remaining 75% was deposited by borrowing from Bank within the time stipulated. In all Rs. 20.68 crores was deposited by them. In the Memo, the auction purchaser has further stated that the auction purchaser has borrowed heavily from Banks and has undertaken to register mortgage over the vessel as security. Auction purchaser further stated that he had acted in good faith in submitting a bonafide bid for

purchase of the vessel and that because of the protracting litigation and the objections to the sale, he may be permitted to withdraw the bid amount of Rs. 20.68 crores including the EMD deposited by the auction purchaser may be refunded to them. Mr. Raghavan, learned Counsel has also submitted that because of the protracted litigation, the auction purchaser is incurring interest payable merits acceptance.

33. When the Appellant themselves claims Rs. 40 crores by filing suit C.S. No. 353 of 2009 before the Calcutta High Court against the vessel M.V. OSM Arena and the order of arrest of the vessel in A.S. No. 3 of 2010 is in subsisting, the order of the learned Judge in A. No. 2504 of 2011 in C.S. No. 75 of 2011 cannot be sustained and the order of learned Judge is liable to be set aside.

34. In the result, sale of the vessel-M.V. OSM Arena infavour of M/s. Fleet Management Inc, Marshal Islands is set aside and the order of the learned Judge in A. No. 2504 of 2011 in C.S. No. 75 of 2011 dated 09.6.2011 is set aside and this appeal is allowed. Amount of Rs. 20.68 crores deposited by the auction purchaser-M/s. Fleet Management Inc, Marshal Islands is directed to be refunded to them forthwith. Further proceedings in C.S. No. 75 of 2011 pending on the file of this Court shall await further orders of the Hon"ble Supreme Court in Transfer Petition (Civil) No. 665 of 2011. M/s. Sea Traffic, agent to take care of maintenance of supplies to the vessel shall continue to take care of the maintenance of the supplies to the vessel-M.V. OSM Area. The amount so far spent by M/s. Sea Traffic and the future amount to be spent would be treated as first charge/priority basis for payment from and out of the sale proceeds of the vessel.

Order of this Court in O.S.A. No. 197 of 2011 (dt. 01.07.2011) shall be brought to the notice of the Calcutta High Court both before the Division Bench as well as the single Judge.

Copy of the order is directed to be marked to Mr. Pradip Sancheti, Advocate-Receiver, No. 12, Old Post office street, Kolkata appointed in the Admiralty Suit A.S. No. 3 of 2010 on the file of Calcutta High Court.

Consequently, connected M. Ps are closed. No costs.