(2004) 08 CAL CK 0045

Calcutta High Court

Case No: GA No''s. 3635 of 2003 and 2513 of 2004, APOT No. 679 of 2002 with AS No. 11 of 2000

Owners and Parties Interested in the Vessel M.V. "Fortune Express" Another		APPELLANT
	Vs	
Maavar (HK) Ltd. and Others		RESPONDENT

Date of Decision: Aug. 23, 2004

Acts Referred:

- Carriage of Goods by Sea Act, 1925 - Section 2
- Civil Procedure Code, 1908 (CPC) - Order 7 Rule 11, 151, 21, 9
- Evidence Act, 1872 - Section 57, 58

Citation: (2005) 1 CHN 204

Hon'ble Judges: Ajoy Nath Ray, Acting C.J.; Arun Kumar Mitra, J

Bench: Division Bench

Advocate: Gautam Chakraborty, S.N. Mukherjee, A. Ghosh, Abhijit Sarkar and Partha Basu, for the Appellant;Bhaskar Gupta, Tilak Bose and Subhojit Roy, for the Respondent

Judgement

This Judgment has been overruled by : Mayar (H.K.) Ltd. and Others Vs. Owners and Parties, Vessel M.V. Fortune Express and Others, AIR 2006 SC 1828 : (2006) 3 BC 156 : (2006) 2 JT 48 : (2006) 2 SCALE 30 : (2006) 3 SCC 100 : (2006) 1 SCR 860 : (2006) AIRSCW 863 : (2006) 1 Supreme 677

Ajoy Nath Ray, A.C.J.

1. The parties have agreed before us that the appeal should be disposed of on the applicant''s petition, since almost all the papers necessary are to be found there. We have heard the stay application along with the appeal and we dispose of both together.

2. It is an appeal from a judgment dated the lst of July, 2002 whereby the first1 Court refused to allow the application of the appellant/defendants, who had applied under Order 7 Rule 11 for summary rejection of the plaint in the admiralty suit. In the petition, there is a statement that the suit, even if not dismissed; should be stayed. However, the prayer for stay is not made in terms in the prayer! portion in the Court below. In our opinion, the order for stay being a lesser order than and order for outright dismissal, the appellant would be entitled to pray for either before us. The plaint proceeds on six separate bills of lading. We caused the plaint to be produced before us and we found, to our extreme dissatisfaction!, that the bills of lading, although annexed to the plaint, are so annexed in a seriously truncated form, which make those positively misleading.

3. None of the annexed bills of lading contains the clauses annexed thereto, which are some 19 in number, and amongst which occur the two most important clauses 3 and 9, whereupon the entire application of the appellant was based in the Court below. Those are as follows :

"3. Jurisdiction.

Any dispute arising under this bill of lading shall be decided in the country where the carrier has his principal place of business, and the law of such country, shall apply except as provided elsewhere herein.

9. Live Animals and Deck Cargo, shall be carried subject to the Hague Rules as refereed to in Clause 2 hereof with the exception that notwithstanding anything contained in clause 19 the carrier shall not be liable for any loss of damage resulting from any act, neglect or default of his servants in the management of such animals and deck cargo".

4. The case in the plaint relates to the failure of the appellant to deliver 456 Malaysian logs out of 578 which, according to the plaintiff, were lying on the deck of the vessel.

5. The plaintiffs state that the proportionate value of the said undelivered 456 logs is (we give approximate figures) Rs. 1.09 crore and that the port charges, custom duty and insurance cover thereof were respectively 4.14 lakh, 6 lakh and 10.9 lakh.

6. Out of the six bills of lading, with the exception of one which relates to 135 logs, all the other five, relating to much the larger part of the lost cargo expressly state that those logs were shipped on deck.

7. In the plaint, the following paragraphs viz. paragraph Nos. 13,14,16,17, 18, 19 and 25, which are set out below give the plaintiffs'' version of the case. Those seven paragraphs of the plaint mentioned above are set out below as the facts of the Order 7 Rule 11 application are all to be found there, and if not there, nowhere at all:

"13. As per the stowage plan of the vessel out of the aforesaid 642 logs being the subject-matter of the six bills of lading contained in Annexures "A" to "E" which were loaded on board the vessel 578 logs were lying on the deck of the vessel.

14. The defendant vessel arrived at the Port of Calcutta on 7th March, 2000 and started discharging the cargo lying on its deck on and from 15th March, 2000.

16. As the time of discharge of the cargo lying on the deck of the vessel, it was found that 456 logs out of the aforesaid 578 logs which was lying on the deck of the vessel were missing and had been short landed.

17. In breach of the defendant''s duty as carriers and/or bailees for reward and/or in breach of the contract contained in. and/or evidenced by the six bills of lading contained in Annexures "A" to "F" hereof, the defendants have failed to deliver 456 logs whereby the plaintiff has suffered loss and damage.

18. The plaintiffs state that the defendant have also acted in breach of their contract entered into with the plaintiff No. 1 being the shipper under the aforesaid six bills of lading contained in Annexure "A" to "F" hereof by failing and neglecting to deliver 456 logs out of 642 logs mentioned in the six split bills of lading.

19. The defendants have also acted in breach of the charter party agreement entered with the plaintiff No. 1 by failing and neglecting to carry on board the vessel from the loading port to the discharge port the agreed quantity of Sarawak Round logs.

25. The claim of the plaintiffs in the instant suit is in respect of loss and/or damage to goods carried on board the defendant vessel and is a maritime claim and is entertainable in the admiralty jurisdiction of this Hon''ble Court."

8. The ship "FORTUNE EXPRESS", which carried the cargo was arrested by an order passed by our Court on 27th March, 2000; a subsequent order was passed by the admiralty interlocutory Court whereby the vessel was allowed to sail away on the undertaking of the clients of Mr. Chakraborty to furnish Bank Guarantee in the sum of Rs. 1.30 crore approximately. In that order, the following reservation was noted as made on the part of the defendants :

"The above order is passed without prejudice to the rights and contentions of the owner of the vessel that the suit is not maintainable".

9. For all practical purposes here, the owner is also the carrier.

10. The Punjab National Bank gave the Bank Guarantee in terms of the undertaking and that contains, amongst others :

(i) A clause to the effect that the defendant and the Bank do thereby submit themselves to the jurisdiction of the High Court.

(ii) Then Bank Guarantee also sets out the order of release, containing the reservation about the maintainability of the suit and that reserving clause is also a part of the Bank Guarantee.

11. For the appellant, Mr. Chakraborty submitted that the jurisdiction clause binds the contracting parties to two courses of actions viz, (a) the dispute arising Out of the bill of lading is to be decided in the country where the carrier has his principal place of business; and also (b) that the law of such country shall apply except as provided elsewhere.

12. The place of business of the carrier ship owners "Sin Trade" is mentioned in the cause title as at a location in Singapore. We have not had any materials to show that the principal place of business is elsewhere than at Singapore. However, in each of the six bills of lading sued upon, the ports of shipment are all In Malaysia.

13. On this basis, Mr. Chakraborty''s submission was that India not being the place of business or the principal place of business of the defendant the institution of the admiralty suit here is an improper act and accordingly, the suit should either be dismissed summarily or be stayed permanently, compelling the plaintiffs to go to the chosen country, if they are so advised and if they so will.

14. Mr. Chakraborty also emphasised that in the matter of determining the merits of the disputes between the parties, even at this preliminary stage, the parties had already agreed to abide by the law of the carrier''s country, and not Indian Law. While dealing with the appeal, we have had the greatest difficulty while looking at many Indian authorities, quite a number of which are binding upon us, and several English authorities, which have a lot of persuasive force so far as we are concerned, and yet having to bear at the back of our minds that we really do not know how far or which portions of these laws would apply, as all these laws would further have to receive and additional stamp i.e., that the law is the same in Singapore, before we could apply those to the contract between the parties and determine the rights and liabilities arising therefrom. We have mentioned Singapore as that appears on the present materials to be the chosen country; even Mr. Gupta appearing for the respondent made some attempts to give us at least a sprinkling of Singapore Law in that he place before us a Singapore Act being the Carriage of Goods by Sea Amendment Act, 1995 (No. 6 of 1995).

15. In our opinion, a choice of the Courts of a country becomes doubly, if not even more, emphasised by a further choice that the laws of that country would govern the contract between the parties. Where the selection of a particular Court is made, say as between the Courts of two provinces within the same country, i.e., say between the Courts of West Bengal and the Courts of Jharkhand, neither of the Courts would be troubled so much by first ascertaining what the law applicable to the contract is. It is Indian law and may be some State law or local law easily available in both the States, and upon which submissions can be made on accepted

materials. The matter is not so if the choice is between the Calcutta High Court and the Singapore Courts, if it is provided that the chosen Court will apply the law of its own country. The law of Singapore is to be proved like proof of facts before us. Judicial notice might be taken only as permissible, of the matters and materials evidencing Singapore law. Great inconvenience would be faced by being compelled to use the doctrine of renvoi where the Court of one country is under an obligation to apply the law of another. Therefore, when both the Courts and the law of an other country are selected, those chosen Courts of other countries would have to be approached by the parties, as per the bargain of theirs, unless there are extremely cogent reasons for the contrary, course to be adopted.

16. One case which was cited by Mr. Gupta near the conclusion of his long arguments is quite in point here. It is the case of "Bargain" reported at 1997(1) Lloyd''s Law Reports, page 380, a judgment of Mr. Justice Clarke. The jurisdiction clause in that case is identical to ours and the parties had chosen Germany in that case. The case proceeded to determine that the English Courts had jurisdiction to entertain the admiralty claim but whether the English Court should exercise that jurisdiction or stay the action, still remained to be seen. In our case, hardly any dispute can be raised about the Calcutta High Court having jurisdiction. The Fortune Express having sailed into the Calcutta Port, and the claim being of an admiralty nature, the Court had jurisdiction by the laws of India in the same manner as it would have had jurisdiction if a Singapore trader happened to open up a place of business within the local limits of the Ordinary Original Civil Jurisdiction of this Court. The issue is not one of possession of jurisdiction but of its exercise. The English case does not answer that question at all but the ease contains extremely important pointers to the ruling principle, that if parties have chosen a particular forum and a particular set of laws in the World to govern them, then they are, in the large majority of ordinary cases, to be held to their bargain and not be allowed to depart therefrom only because one party finds it convenient and, therefore, chooses to do so.

17. Mr. Chakraborty cited the case of the Cap Blanco, (1913) p.130, a decision of the Court of Appeal, wherein one of several cases of German gold coins was found missing. The parties to the bill of lading had agreed that the disputes concerning the interpretation of the bill of lading were to be decided in Hamburg according to German law. Although invested with jurisdiction, the English Court ordered that the admiralty proceedings be stayed. The Court was giving effect to the choice of forum made by the parties. However, the Court permitted proceedings to be instituted in Hamburg within two months. This is a clear instance of an admiralty case being stayed because of the choice of forum made by the parties.

18. In regard to this point, in the impugned judgment a very short reason is given. His Lordship stated that the appellant had taken advantage of a favourable order obtained from this Court, i.e., the order which permitted the sailing away of the

vessel upon furnishing of security. As a supporting authority His Lordship relied upon the case of Chittaranjan Mukherji Vs. Barhoo Mahto, .

19. With the greatest of respect, we are unable to agree with this manner of disposal of the important point. In Barhoo Mahato''s case a consent order had been passed by a learned Single Judge of the Calcutta High Court (which celebrated Judge had also edited a well known book in 1940 on the Rules on the Original Side of our High Court), and by that order joint receivers were to collect a sum of Rs. 21,000/-. It was opined by the Supreme Court that the respondent had availed himself of the pending suit by obtaining that consent order. They also opined that the proceedings in the suit had been allowed to reach a stage where it would result in grave injustice if the Court were to hold the parties to their chosen forum, which was the appropriate Court in the State of Bihar.

20. Nothing like what happened in Mahato''s case has happened here. The defendant sailed away with its ship after leaving only that part of the ship which could be laid a claim to by the plaintiffs still within Calcutta, i.e., not a physically separated portion of the ship, but its money equivalent, i.e. Rs. 1.30 crore. In effect and for all purposes and reasons in which the plaintiffs are interested, the ship has not yet sailed away. As practically in all admiralty claims the action in rem has become an action in personem and instead of the arrested ship lying in wait to satisfy the decree that might be passed a sufficient money equivalent provided by the owners and parties interested in the ship lies so in wait. The defendants have not taken advantage of any order. The plaintiffs have taken advantage of the order of arrest and as a result of the taking of such advantage the bank guarantee has now come into being. We are unable to sustain the reasoning given by the learned Judge in repelling the appellant''s case in this regard.

21. Mr. Gupta said that it would be most unjust today to compel the plaintiffs to go elsewhere and file a suit. A long delay has occurred. Time bars of legal rights might possibly have taken place. Although the arrest was made in early 2000, the application for taking the plaint off the file was delayed until the 7th July, 2001. Mr. Gupta submitted that according to the Hague Rules relating the carriage of goods by sea, the claim of the cargo owner might get defeated by a discharge of the liability of the carrier after a lapse of one year from the time when the goods were to be delivered but were not, in fact, so delivered.

22. A convenient place for getting the Hague Rules would be the Schedule to the Indian Carriage of Goods by Sea Act, 1925, The Schedule reproduces the rules, as those were adopted, and the preamble to the Act states how the International Conference and the meeting of the 1920''s gave rise to the Rules.

23. Relying upon the Sixth Rule of Article III of the rules, Mr. Gupta submitted that if the action is stayed today his clients would be unjustly prejudiced because of the lapse of time which has already occurred.

24. The portion of the rules which is relevant states as follows:

"In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or with the date when the goods should have delivered".

25. Taken in its isolation, this rules would be quite a red herring. Mr. Chakraborty appearing for the appellant/defendants submitted that several arguments of the respondents were, so to speak, red herrings. It will be remembered that the phrase owes its origin to large messes of that smelly fish which used to be drawn across trails, to put dogs off the scent. The reason why this argument would be a red herring is that in accordance with the rules, deck cargo carried as such are not goods at all. Article I(c) defines goods as including goods, wares, merchandises and articles of every kind whatsoever, except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried.

26. Excepting for 135 logs, all the others were described in the bill of lading as deck cargo and the paragraphs of the plaint set out above can leave no manner of doubt that those logs were also carried on the deck, even according to the case of the plaintiffs.

27. Also, our Act of 1925 applies the Hague Rules only in connection with carriage of goods by sea in ships carrying goods from any port in India to any other part whether in or outside India. This is the purport of Section 2 of the Act,

28. Each of the bills of lading sued upon shows the port of commencement as a port in Malaysia.

29. As such, the so called one year clause has no application to the facts and circumstances of the case as made out in the plaint.

30. This brings us to a very important point, that of the plaintiffs withholding from the Court most relevant material in the shape of the clauses of the bills of lading. In one clause the law applicable as well as the chosen Court is stated to be the law as well as the Court of principal business of the carrier, which, for want contrary or better materials we assume to be Singapore.

31. The Singapore Law with regard to the discharge of liability is quite different. According to the Singapore Acts which we have mentioned, the Hague Rules have been somewhat amended. For voyages, which starts from ports of Singapore or even for goods which are first shipped from there, the Act seems to include even deck cargo as goods, There is not a single line in the plaint stating either that the Singapore Law is the applicable law or that by reason of the application thereof the goods are not deck cargo and therefore, the action, if not commenced within one year, would result in a discharge of liability of the carrier.

32. Apart from this, whether rightly or wrongly, the action in the Calcutta High Court has been commenced. Even if the Hague Rules are applicable as such, in our opinion, the commencement of such a suit would certainly put the shipper on notice and would prevent the complete discharge of the shipper''s liability by reason of the Hague Rules which have been applied to the contract by the parties.

33. Moreover, when the plaintiffs are fully aware of the appropriate forum where the suit should have been commenced, they can take no advantage of the lapse of time, if they themselves not commenced their action in the right and appropriate Court. To give them relief in this regard would be to allow them to reap the benefits of their own inappropriate action.

34. The plaint also does not contain the clause which states that the disputes under the bills of lading shall be decided in Singapore. Naturally, therefore, the plaint does not contain a single statement or reason, why, notwithstanding the said clause, the plaintiffs should be allowed to commence and maintain an action in India. Not a single ground is given in the plaint showing the injustice, if any, which would be caused to the plaintiffs if they were held bound to the clause in the contract. In this view of the matter, the suppression of the forum selection clause from the plaint is a very serious one and has resulted in the plaintiffs disentitling themselves from obtaining relief. It is best to explain how this type of suppression causes prejudice in cases of this nature. The consignee of the cargo approaches the wrong Court, which is the Calcutta High Court, on the basis of an admiralty plaint obtaining thereupon almost as a matter of course, as the law and practice are, an order of arrest of the ship. Since holding up of the ship is likely to cause demurrage quite out of proportion to the claims for lost or undelivered cargo, the carrier or the ship owner, as the case might be, is compelled to pray for release of arrest upon furnishing of, adequate security. At that stage, the carrier or the ship owner is not expected to be as ready with the papers and documents which can be presented to Court but the consignee is, comparatively speaking, quite ready. If the plaint contains the full bill of lading, containing the jurisdiction clause and the clause relating to exclusion of deck cargo, submissions on that basis can be made on the very first day, and at the very first opportunity by relying upon the plaint itself which gives the clauses going against the consignee.

35. If that is not done, it often falls to the lot of the shippers only to make a general reservation about the lack of jurisdiction of the Court in question, that too if the experience of learned Counsel appearing is sufficient and ample for the purpose of making such a reservation. The matter has to rest there. Security has to be furnished and thereafter the ship can sail away.

36. It is only thereafter when the full clauses can be had by the shipper that they can come to Court praying for a permanent stay of the action as they have been dragged to the improper Court, This is exactly what has happened her. No doubt, between the sailing away of the ship and the making of the defendant/appellant''s

application under Order 7 Rule 11, there elapsed more than a year and we should not be understood as saying that this much time must have elapsed or that the time gap could not have been abridged or even very much abridged.

37. The point is not so much about the period of delay but the sequence of events. By reason of the suppression the obtaining of security occurs at a point of time before the Court, ordering such security, has the advantage of hearing the full defence on the full materials. This is why suppression of this nature causes hardship and also causes the continuance of security for a very long period of time, although, in appropriate cases, the Court might have refused in the very first place the prayer for obtaining security if it were pointed out that the admiralty claim has been lodged in the wrong forum.

38. In our opinion this suppression is of such a serious nature, that we would be compelled to stay the suit on this single ground alone. In a recent copyright case, which dealt with the book "A Woman of Substance" we have dealt with the law relating to suppression in quite some detail. The parties did not refer to this case but we believe it has already been widely reported. We also believe that the Supreme Court of India has been pleased substantially to disallow the special leave application from our judgment excepting for modifying the order as to costs, which is not very material for our purposes here.

39. We thus emphasize that on the ground of suppression of the jurisdiction clause and the suppression of law applicable to the contract and the obtaining of ex parte orders of arrest on the basis of such suppression, we would be minded to stay the suit permanently. We have every sympathy for an Indian Trader and an Indian Consignee who has lost its goods but we cannot allow that sympathy to allow it to take improper means for obtaining security for an action wrongly commenced on its behalf.

40. This is the proper place to point out in passing a remark made by Mr. Chakraborty that no less than Rs. 10 lakh approximately was paid by the consignees for the purpose of insurance. We have not been told what has happened to that money or that insurance claim. We feel confident, that businessmen are not likely to allow a substantial sum like Rs. 10 lakh to go down the drain. For a trader of this nature, who can obtain an order of arrest ********** suppression of material clauses. We would most certainly not exercise any discretion unless we were satisfied about all facts relating to the insurance claims; we do not put it beyond the possibilities that even after obtaining insurance cover the party has made a claim in the suit once again trying to get his money twice over. We are not saying that this has happened but we are saying, and quite emphatically, that in circumstances of the present nature it is incumbent upon the plaintiffs to place before the Court all materials regarding the insurance claims, if any, before they can have the discretion of the Court exercised in their favour.

41. Mr. Gupta resisted the jurisdiction clause also on the ground of Section 21 of the CPC and he relied upon the Supreme Court Case of Seth Hiralal Patni Vs. Sri Kali Nath, . We are of the opinion that this is not a case of inherent lack of jurisdiction at all as was considered in the Supreme Court case; we are also of the opinion that at the very first opportunity, reservation about the maintainability of the suit was made on behalf of the defendants. The oversubtle distinction which Mr. Gupta sought to make, that the non-maintainability of a suit can refer only to a lack of inherent jurisdiction, but cannot refer to a case like the present, where the Court declines to exercise its jurisdiction, does not appeal to us at all. A suit might not be maintainable either because the Court would never have jurisdiction or the suit might not be maintainable because the Court does not feel compelled injustice to exercise its jurisdiction. In either case the plaintiff would be unable to maintain his suit or obtain a hearing or a decree thereupon.

42. Mr. Gupta also relied upon a point of submission to jurisdiction made by the defendants and said that at this distance of time they should not be allowed to resile from such submission. He relied upon the case of "ANNA H", the decision in which is reported at 1994(1) Lloyd''s Law Reports page 287 (the Admiralty Court decision of Mr. Justice Clarke), and at 1995 Vol. 1 Lloyd'' s Law Reports Page 11 (the decision of the Court of Appeal). Passages would be found in the judgment of the First Court to the effect that it has always been possible to put up bail under protest in regard to arrests of ship. The passage would be found at page 234. It is mentioned in the judgment of the Court of Appeal that the "ANNA H" which was flying a German Flag was carrying goods under a London Arbitration Clause and that the owners and demise characterers of the ship had entered a caveat against the arrest of the vessel. The plaintiffs took steps to procure the arrest when the vessel was just about to leave the British waters and as such the question of submission to jurisdiction came up.

43. In the admiralty Rules of our Court also, a preacipe (which is the Latin name for a writ or an order obtaining a writ) can be found in Form No. 9 which is in the nature of, so to speak, an anticipatory bail for a ship; similar terminology is used in shipping matters as in criminal matters like bail, bail bond and arrest.

44. In our opinion this is just another red herring. No caveat of this nature anticipating arrest had been entered on the part of the carriers of the ship owners. There was no question of any submission of jurisdiction in the manner of entering of such caveat when the caveat itself had not been lodged.

45. The next submission of Mr. Gupta related to the exercise of the Court''s discretion in not staying the action even though the parties had agreed to the Singapore Courts as the exclusive Courts. There would be no other way of construing the jurisdiction clause, excepting as an exclusion clause, since it simply states that the disputes shall be decided in the Courts of Singapore. The clause, simply means that the decision must, of necessity be had in Singapore and,

therefore, as a simply logical consequence nowhere else. Mr. Gupta submitted nonetheless that the Court should not hold the parties to their bargain. In support of that submission he referred to the case of Baghlaf Al Zafar, a decision of the Court of Appeal reported at 2000 Vol. 1 Lloyd''s Law Reports page 1. In that case although action was first commenced in England, the plaintiffs undertook to commence action in Pakistan which was the country selected by the parties in their contract. However, this was done on the basis that the defendants undertook in their turn to waive objections if any to the action so to be commenced in regard to limitation. The Court of Appeal considered Section 14 of the Limitation Act, 1908 of Pakistan which, needless to mention, is the same Limitation Act which we followed until. 1963. We do not enter into the question whether the Court of Appeal correctly (with all due respect) laid a very great deal of emphasis upon Section 14 of that Act which relates to exclusion of time spent bona fide in a forum which has been wrongly chosen; we neither seek to discuss the provisions of Section 14 accurately here, nor do we enter into the question whether a discharge of liability made on the basis of a contract, or the Rules like the Hague Rules, whether those Rules are contractual or statutory, could at all attract the provisions of Section 14 of the Limitation Act which is applicable to suits and proceedings mentioned in the Limitation Art and the Schedule thereto.

46. Suffice it for us to say that we have not found a single good cause why the plaintiffs should not have commenced action in Singapore, as they had contracted to do. No offer of any sort came to us during hearing that they would undertake to commence action in Singapore and that if they commenced such action within a reasonable time they should have the benefit of the security transferred by appropriate means to the credit of that suit in Singapore. The consignees maintained a rigid case that their action in India was good, it was well commenced, and that it should not be stayed and no security already taken in aid of it should be discharged.

47. Let us see, therefore, what are the factors weighing in favour of the Indian Courts as against the Courts of Singapore. The evidence regarding shortage of goods was said to be in India. In our opinion this evidence does not justify the continuance of the action in the wrong Court, because the shortage is practically admitted; in any event the proof of it in Singapore is not a matter of any very great difficulty. The other great factor in favour of the Indian action is that the ship Fortune Express lost the goods in the very voyage in which it happened to travel to the Port of Calcutta, and that by reason thereof, it could be quite clearly and easily arrested and the security obtained for the action upon the lost logs.

48. This, in our opinion, takes a very one sided view of the matter. The arrest conventions, the decision of the Supreme Court in the case of M.V. Elezabeth, reported at 1993 Suppl.(2) Supreme Court Cases page 433, and the various observations therein from, say paragraphs 75 to 85 of the judgment, no doubt show

that the Fortune Express could be arrested on an admiralty claim of the present nature. That arrest makes the action of the consignee very much secure. But we are deciding upon the issue of appropriate commencement of the action. If the action can be appropriately commenced in Calcutta, security can be obtained and to that extent the consignee can feel safe. This does net mean that the reverse is true. It would be putting the cart before the horse if one were to say that because the plaintiff can commence an action and obtain security here the action should be held as appropriately commenced. This is not the correct way to look at the case at all. If that were so parties would be encouraged not to pay any attention to solemnly agreed clauses of forum selection and they would rush to the Admiralty Court even contrary to such a selection clause and obtain arrest, thereafter arguing, that the arrest was most convenient for them, that it produced a security from the shipper, and that if decree should be passed in their favour there would be no difficulty in its execution.

49. The true view is that the wrong Court, as soon as it becomes aware that it is the wrong Court, will never call for security and will never allow the arrest to be made in the first place.

50. This shows once again the utmost importance of the forum selection clause and the degree to which the plaintiffs rendered themselves unfit for having a discretionary order by suppression of the same.

51. The other factor for leaning heavily in favour of Singapore is that parties have chosen Singapore law. We have not had any experts on Singapore law attending the proceedings before us and indeed this choice of law was also suppressed by the plaintiffs like the choice of Court.

52. No doubt, arrest of a ship and the consequent obtaining of security would be of great advantage to a plaintiff if it were shown that the owners of the ship were difficult to trace or hard to sue. Not so here. The owners have come forward. They can be sued in their country. There is nothing to show that they are so impecunious or that they are such slippery customers that filing a suit against them in Singapore would be a matter of no use at all. These factors are not present in the case. We do not see why in view of these circumstances we should not hold the parties to their bargain and send them away from a Court which they had not agreed to come to.

53. Much the most important point in this case is the point of choice of law and the suppression made in regard thereto. The other point, although not that determinative is also not to be brushed aside. This is the point of exclusion of liability. The clause in regard to this is already mentioned above. Two or three points have to be established by the defendants before they can here and now claim that the action should be dismissed or stayed. They have to establish first that the cargo was described as deck cargo in the bill of lading, which is the contract of carriage of the parties, and they are further to establish that the cargo was also carried on deck.

Even after this they are further to show that the exemption clause applies by reason of the loss or damage to the deck cargo having resulted from any act neglect or default of the shipper''s servants in the, management of such cargo. .

54. About the description of the deck cargo as such, the bills of lading in the plaint show that apart from 135 logs the rest were described as shipped on deck. As regards the carriage of that cargo on deck in fact, a reading of the paragraphs of the plaints set out above can leave no room for doubt that the plaint accepts the stowage plant of the said cargo as showing those to be put on deck, and also states that the cargo was lying on deck and lost therefrom. Save for 135 pieces the admission in the plaint is quite sufficient in this regard. Mr. Gupta gave us a Bombay case decided by a learned Single Judge reported at AIR 1960 Bomb 416, which emphasises that the defendant is to prove the fact of the carriage of the cargo on deck and that the defendant must discharge this burden as the matter of such carriage is in the special knowledge of the defendant.

55. This is quite true but it is equally true, and also an elementary rule of evidence, that nothing which is admitted by the adversary need be proved by the party once again. An admission can come in a written statement and it can also come equally well in a plaint. The fact of carriage on deck has been admitted by the plaintiffs, and, therefore, to that extent the defendants are discharged from their burden in this regard.

56. About the width of the exclusion clause, Mr. Gupta made a half-hearted-submission, if we understood him correctly, that the clause almost seeks to avoid liability for a fundamental breach ; in support of this he gave us the case of Photo Production v. Securior, reported at 1980 Appeal Cases page 827.

57. Wide as this clause might be, it is a clause of very wide usage and acceptance. Many cases would be found where clauses of this nature have been used and applied by the Judges, One old case in this regard is the Jellicoe, reported at ILR 10 Cal 489. Passages would be found here, inter alia, at pages 495 and 496 showing that defendants would be entitled to get rid . of their liability by use of clauses of this nature and that parties cannot plead the unreasonableness of the terms because it was upto them to agree to the terms or not. We have been shown English text books and also the acts relating to carriage by sea, both of Singapore and of England; arguments were made before us that the tendency in the modern day is not to exempt even deck cargo from the liability for safe and sound carriage which attaches to other goods. In Singapore and in England, for shipments starting respectively from the ports of these countries, the enactments have, by force of law, removed the exclusion of deck cargo from the general category of goods. The authors of text books also seem to favour this approach. But in India we cannot take this approach now. The Supreme Court in the Elizabeth case urges Courts to go on with admiralty laws and take progressive steps even if Parliament will not; but the Supreme Court has nowhere said that the Court should go contrary to Indian

enactments themselves. The Indian enactment being the Carriage of Goods by Sea Act, 1925 maintains, by force of law, the exclusion of deck cargo from the general category of goods in regard to safe carriage by shippers. No doubt this is true for ships sailing from Indian ports; but cannot, at least according to Indian law, say that for ships sailing from Indian ports liability regarding deck cargo can be excluded but for ships sailing from foreign ports such liability cannot be excluded. This, in our opinion, would be going contrary to an enactment, if not in terms at least in spirit and logic.

58. We do not feel called upon to decide the question whether this very same deck cargo could be the subject-matter of a contractual exclusion clause if the action were commenced in Singapore and the matter were decided in accordance with Singapore law. The plaint, as it stands, has to be decided on the basis of Indian law, because it makes no claim on its face that it be decided by the laws of any other country. The pleading to that effect is a must, if the plaint is to sustain itself in the face of contrary Indian laws. There are no pleadings of that nature in the plaint.

59. The legality of the exclusion clause would also be found from British India Steam Navigation Co. Ltd. Vs. T.P. Sokkalal Ram Sait by agent K.A. Hariganga Ram, , where there are dicta to show that non-delivery of goods is a loss within the meaning of the exemption clause. The clause is also not held to be contrary to public policy.

60. The Jellicoe case of Calcutta is approved in the Irawarddy Flotila case a decision of the Judicial committee reported at ILR 18 Calcutta, page 620, In discovering an exclusion clause of this nature, Mr. Justice Langley said in the "Imvros" (1999) ILR 848 853, that in view of the widespread usage, there was no need for Court to be astute about the meaning to be ascribed to these clauses. The clause in that case is set out at page 850 of the reports :

"Carried on deck at shippers'' risk without responsibility for loss or damage however caused."

61. The clause, therefore, is good and applicable. But, have the defendants shown that the loss occurred due to the acts or negligence of their servants in the management of the cargo? Mr. Gupta submitted that the negligence of a stevedore would not be negligence of the servants of the shipper because the stevedore is an agent, or a person bound by contract to the shipper and not really its servant. He gave us in this regard the case of the Ferro reported at 1893 p.38, a decision by the Divisional Court in the probate division in England.

62. This, in our opinion, is another red herring. No agent, no stevedore, nothing is mentioned in the plaint. The plain states in paragrph 18 that the defendants failed and neglected to deliver the 456 logs. There is no negligence of any defendant''s agent mentioned. There is no negligence of any defendant''s contractor or stevedore contemplated. There is no attempt made in the plaint to show that the cause of action in the plaint is not covered by the exclusion clause. The obvious

reason for this is that the plaint does not mention the exclusion clause at all. It suppress the clause.

63. We would also be willing to opine that a failure or neglect of the defendant itself, i.e., its Directors and controllers who are the very brain of the defendant, would not be act or negligence on the defendant''s servants; but again the plaint mentions nothing of this nature. No controller or Director of the defendant, i.e., the defendant itself, is involved in the statements in the plaint.

64. It simply states that the goods were on board the ship and those were carried but only in part and that a loss had occurred of 456 logs, Each one of the persons involved in the carriage is a servant of the defendant including the master of the vessel. We do not see how the pleadings in the plaint can be construed as anything but an allegation that the 456 logs got lost due to defaults of the defendants'' servants.

65. We are thus of the opinion that in regard to the 456 logs less 135, the plaint would be liable, to be rejected as being barred by the exclusion clause which was agreed upon by the parties.

66. We are also of the opinion that the entirety of the plaint would be liable to be stayed permanently because of the suppression of the exclusion clause, read with the suppression of the jurisdiction clause.

67. Mr. Gupta also argued that the Court should take note of several other bills of lading than the bills of lading sued upon. He said that there were originally five bills of lading which were split up into 17 and out of those 17 only six formed the subject of the suit. According to him, the original bills of lading did not mention any cargo as deck cargo. The original bills of lading are not annexed to the plaint but those came in the affidavits and are also before us. Those bills also show shipment from Malayasian ports. We are of the opinion that this is again another red herring. The Court is not to look at the bills of lading which are not the subject-matter of the contract between the parties. If those original bills of lading were to be construed as the contract, then and in that event, none but the first plaintiff could be a plaintiff in the suit itself. It is only with the split up bills of lading, so to speak that the Court is concerned.

68. It is because of the very great length of arguments and numerous ramifications thereof adopted by the plaintiffs that we have been compelled to deliver such a long judgment. In our opinion, the short summary thereof will be as follows :-

(i) The parties have chosen the Singapore Court and the Singapore Law by express contract. They should be held bound to it.

(ii) Arrest of the ship was obtained from the Calcutta High Court in Calcutta wrongfully since it was in breach of the above clause.

(iii) The defendants never submitted to the Calcutta jurisdiction as they made reservation about the maintainability suit within about a fortnight of the arrest when the order for furnishing Bank Guarantee and release of the vessel was obtained on their behalf.

(iv) Save for 135 logs, the lost logs being 456 in number are covered entirely by the exclusion clause agreed upon which excludes liability for any defaults of the shippers'' servants in the management of the deck cargo.

(v) Deck cargo is that which is described as such in the bill of lading and is also carried as such. The admission in the plaint are clear as to the deck-cargo nature of the said balance number of logs, and the admissions in the plaint are equally clear that the loss thereof occurred due to the actions or neglect of the defendants'' servants.

(vi) The plaintiffs suppressed the jurisdiction clause and the liability exclusion clause; arrest of the ship being obtained thereupon the Court should decline to proceed any further on the improper plaint, improperly proceeded with by the plaintiffs.

69. Order 7 Rule 11 of the Code might not in terms be applicable as the plain discloses the cause of action fully and wholly, but that by reason of the suppression contained in it; had the exclusion clause been inserted , the cause of action would be lost with regard to the lost cargo excepting for 135 logs.

70. Again, under the said rule the suit might not be held to be barred as such, because the Calcutta High Court does have the necessary admiralty jurisdiction to entertain the plaint and even cause arrest of the ship.

71. The case is not so much on the terms of Order 7 Rule 11 as upon the'' inherent jurisdiction of the Court, which it always possesses to or stay a plaint by treating it as complete and by notionally removing the suppression for that purpose. After treating the plaint as complete in that manner, if the Court finds that the cause of action is lacking, it can reject the plaint just as it could reject a plaint had it been properly presented along with all relevant and necessary materials. It can also similarly stay a suit permanently.

72. The judgment under appeal is in only about 2 pages. It states that the defendant must prove the negligence of the defendant''s servant and it is not yet proved; it further states that the forum selection clause is not be given effect to because the defendant has taken advantage of a release order from the Court by furnishing security.

73. We have already been at paints, perhaps a little too much so, to show why, with all due respect, we are unable to agree with His Lordship''s findings or order. The order under appeal is set aside and the appeal is allowed. The suit and the plaint will remain permanently stayed. The Bank Guarantee furnished in the matter shall stand immediately discharged. In reversal of the order which we have set aside, we direct

that the appellants would be entitled to their costs both in the Court below and before us, compendiously assessed at Rs. 75.000/-. In assessing such costs, we laid a lot of emphasis upon the improper suppression contained in the plaint.

74. Stay of operation of the order is asked for; since the plaintiff has shown no indication of even now going to the Courts in Singapore, such prayer is turned down.

75. All parties and all others concerned to act on an authenticated copy of the judgment and order on the usual undertakings.

Arun Kumar Mitra, J.

76. I agree.