

PETITIONER:
VIDESH SANCHAR NIGAM LTD.

Vs.

RESPONDENT:
M.V. KAPITAN KUD & ORS.

DATE OF JUDGMENT 10/11/1995

BENCH:
RAMASWAMY, K.
BENCH:
RAMASWAMY, K.
KIRPAL B.N. (J)

CITATION:
1996 AIR 516 1996 SCC (7) 127
JT 1995 (8) 166 1995 SCALE (6) 339

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T

K. Ramaswamy. J.
Leave granted.

This appeal by special leave arises from the order dated October 13, 1995 passed by the Division Bench of the Bombay High Court in Appeal No.727 of 1995 in Notice of Motion in Admiralty Suit No. 46 of 1995. By the impugned order, the Division Bench modified the order of the learned single judge and directed release of commercial ship M/s. M.V. Kapita Kud. The facts not in dispute are that on July 21, 1995 at around 6.00 a.m. the International Cable which extends on sea-route from Singapore to France having branches at Bombay, experienced a break and the fault was got identified by the appellant-plaintiff at a distance of about 18.3 kms. from its office at Prabhadevi in Greater Bombay whereat its cable station is situated. According to the appellant, due to break of the cable, overseas telecommunication was disrupted. They requisitioned the services of Coast Guard authorities to identify whether any ship had anchored in the vicinity of the break-point. The appellant in that behalf wrote a letter to the Coast Guard authorities on July 21, 1995 itself and requested "to survey the area and identify if any vessel has anchored there". The co-ordinates of the break point were indicated as 18 deg. 59.4'N and 72 deg 41.0'E. On July 22, 1995, Deputy Commandant of the Coast Guard Region [West] had stated thus: "A helicopter reported that a vessel named "Kapita Kud" registered ODESSA was found anchored in position 310 PRONGS - 0.9 miles, in 18 deg 58.5'North and 72 deg 40.7' East".

The repairing vessel which repaired the faulted cable found thus: "Cable fault caused by Shift anchor". The Coast Guard further found that no other vessel was found in the vicinity. It contacted the vessel on radio and confirmed the position/mark co-ordinates as determined by the helicopter from the vessel itself. On July 29, 1995, the appellant laid

the Admiralty Suit No. 46 of 1995 against the respondent-vessel claiming damages of about Rs.28 crores the break-up whereof has been stated in Exh. 'C' of the plaint reproduced at page 94 of Additional Documents filed as Volume I at the exchange rate of Rs.32 per US Dollar. The appellants had taken Notice of Motion for arrest of the vessel by order dated July 29, 1995, the vessel was arrested and detained by the sheriff of Bombay. It is also not in dispute that the Captain of the vessel had not made any contact with the appellants for more than one month and for the first time on September 1, 1995 the vessel made an application for its release from arrest by way of Notice of Motion. The learned Trial judge having Admiralty jurisdiction dismissed the Motion and released the vessel.

Section 140 of Civil Procedure Code 1908, [for short, 'the Code'] provides that in any Admiralty or Vice-Admiralty cause of salvage.... the court, whether it be exercising its original or its appellate jurisdiction may, in its jurisdiction on request by either party summon to its assistance tow competent assessors in the manner stated thereunder and such assessors shall attend and assist the court accordingly. The Government of India exercising its power under section 9 [1] of Merchant Shipping Act, 1958 [44 of 1958] has notified the officers specified in the Schedule, to be assessors for the purposes of the said Act. For the Port of Bombay, the officers are Nautical Surveyor, Engineer and Ship Surveyor and Ship Surveyor attached to the Mercantile Marine Department, Bombay District or to the Directorate General of shipping, Bombay. The Division Bench by its order dated September 26, 1995 directed the assessors to give their estimate of the anchoring position and probable involvement of the first-respondent in the breakage of the cable and gave five direction in that behalf. When the notice was issued, though initially the Captain of the vessel and first respondent responded, later they declined to participate in the proceedings before the assessors. On the basis of the material available and the affidavit filed by the Captain of the vessel, the assessors accepting the statement of the Captain, opined that the distance between the position of 3rd July and 29th July approximately was 7.50 nautical miles. The reason for the shifting was strong winds then blowing from Southward. The vessel anchored was not able to hold the ship in her position and the vessel was either continuously or intermittently drifting in northerly direction. The vessel should have dropped anchor in the designated anchorage which was about 5 miles clear and northward from the subject communication cable. The possibility of the vessel having shifted her position after mishap completely could not be ruled out. Merchant vessels do not customarily anchor in the vicinity of the prohibited positions. Coast Guard authorities were not able to locate any other vessel within 3 nautical miles of the respondent-vessel. They concluded that "based on the foregoing it is quite clear that the subject cable has been damaged by the anchor of an ocean going ship. The probability of that ocean going vessel being the 1st Respondent vessel, as stated above, is very high".

When the correctness of the report was disputed the Division Bench appointed two Commissioners who were nautical advisors, one in service and the other having retired from Government of India service. In this behalf, one circumstance that becomes relevant to notice and could not be disputed is that after appointment of the Commissioners the proceedings of the Commissioners do indicate that neither the advocate nor the solicitors were present at the

time of inspection of the vessel. It would be relevant to note that when the report of the surveyors was submitted and when two Commissioners were appointed to assess the anchoring position and probable involvement of the respondent-vessel, it would be highly unlikely that the counsel or the solicitors of the appellant would abstain from participating in the proceedings before the Commissioners. On the other hand, having had the copy of the report of the surveyors, it would be, likely and highly probable in ordinary human conduct that they would present and press their case before the Commissioners. The case set up by the appellant is that when they went into the vessels, both, the advocate and the solicitor were wrongfully confined in the cabin of the vessel and they were thereby prevented to participate in the inspection and the report of the Commissioners was one-sided. It would appear to be probable though the objection came to be sent by Fax belatedly. The delay by itself is not material in view of the highly probable circumstance referred to earlier. The Commissioners' report is in favour of the vessel.

The Division Bench after considering the material held that "it cannot be said that the claim of the appellant/original plaintiff is vexatious. It cannot be said that the matter does not warrant a trial." The Division Bench was not inclined to draw any adverse inference for the inordinate delay of more than a month in providing access to the log book of the ship etc.

The crucial question is whether the appellant has made out prima facie case. Rules on Admiralty Jurisdiction in Part III were framed by Bombay High Court to regulate the procedure and practice thereof on the original side of the Bombay High Court. Equally, Original Side Rule 941 is relevant in this regard which provides that party applying under this rule in a suit in rem for arrest of the property shall give an undertaking in writing or through advocate to pay such sum by way of damages as the court may award as compensation in the event of a party affected sustaining prejudice by such order. In *Mahadeo Savlaram Shelke & Ors. v. Pune Municipal Corporation & Anr.* [(1995) 3 SCC 33], even in case of civil court, exercising its power under order 39 Rule 1, this Court held that while granting interim injunction, the Civil Court or Appellate Court is enjoined to impose as a condition that in the event of the plaintiff failing to prove the case set up and if damages are caused to the defendant due to the injunction granted by the court, the court would first ascertain whether the plaintiff would adequately be compensated by damages if injunction is not granted. Equally the court should also impose condition for payment of damages caused to the defendant in the same proceeding without relegating the parties for a separate suit. The plaintiff should give such an undertaking as a part of the order itself. Rule 954 of Admiralty Rules provides that subject to the provisions of Rule 952 [caveat property not to be released unless notice is given to the caveator], property arrested under a warrant may be ordered to be released - [i] at the request of the plaintiff, before an appearance in person or a vakalatnama is filed by the defendant; or [ii] on the defendant paying into Court the amount claimed in the suit; or [iii] on the defendant giving such security for the amount claimed in the suit as the Court may direct; or [iv] on any other ground that the Court may deem just. Thus a ship arrested under warrant may be released on fulfilment of any of the conditions mentioned hereinbefore. This could be done on the plaintiff showing prima facie best case.

Halsbury's Laws of England, Volume I [I], Fourth Edition at page 436 on Admiralty jurisdiction, Para 386 states that "the usual step following an acknowledgement of service in an action in rem is for the owner of the property arrested to procure its release by giving security for the plaintiff's claim. This may be done either by paying the amount of the plaintiff's claim into court, or by providing bail in a sufficient amount, or by furnishing a guarantee acceptable to the plaintiff. The third method is nowadays the most common in practice. Para 389 provides that "amount should be sufficient to cover the plaintiff's claim, together with interest and costs on the basis of his reasonably arguable best case."

The question, therefor, is whether the appellant has reasonably arguable best case in an admiralty action. As stated earlier, the damage to the International Cable of the appellant is not in dispute. The report of the Cable repairing ship shows that damage was done due to anchoring. The report of the survey conducted by helicopter which had flown over the vessel immediately after the notice of breakage of the cable found the vessel in the vicinity. It found no other vessel in the vicinity. The question is whether the vessel was anchored in the prohibited area. The map showing that inner approach to Bombay Port depths in meters would indicate the designated anchorage area. The survey conducted by the helicopter shows that cable break had occurred three nautical miles of the respondent-vessel. The bottle-green color marked in the map is the area surveyed by the helicopter. The survey conducted by the helicopter is contemporaneous to the proximately to the date of occurrence. It is seen that as for the plan, the original position of anchoring on July 3, 1995 at 1850 hours was at point 1. Immediately thereafter at 1230 hours the vessel had anchored at point 2. It had moved to point 3 by 1030 hours on July 6, 1995. It moved towards point 4 on 12th July, 1995. Thereafter, it was found at point 5 between 13th and 29th July, 1995. The crucial disputed area is at point 6 where the vessel was alleged to have been anchored. According to the appellant-plaintiff, she was anchored at point 6 on July 21, 1995 as per as report of the helicopter of the Coast Guard authorities. The cable was found damaged in the early hours of the said day. It is seen that till September 1, 1995 the Captain of the vessel had not given access to the log book etc and other relevant record maintained by the vessel. The surveyors have stated that it was not in dispute that during the monsoon season in July the blow of strong winds is very high in the West Coast. The report of the repairing ship shows that damage to the cable was done due to anchoring of a commercial vessel.

The question, therefore, is whether the respondent-vessel was one probably involved in causing the damage to the cable. It is true as contended by Shri Harish N. Salve, learned senior advocate that the Commissioners appointed by the Division Bench are advisors of nautical matters but prima facie the credibility of the report lost its efficacy when the advocate and the solicitor were not permitted to be present at the time of the inspection. According to the appellant they were wrongfully confined in the cabin of the ship. Therefore, much of the stream of the report lost its vitality. We have the report of the surveyors, the Government officials appointed by the Government of India by statutory notification. They are enjoined to assist the court under Section 140 of C.P.C. They have given reasons in their report to which we have been taken through. Prima facie we are satisfied that the reasons given by them cannot be said

to be partial or one-sided. They have stated at more than one place that they had no access to the log book and other records since they were not placed before them. They relied on the affidavit filed by the Captain of the ship. They also relied on the helicopter's report, Coast Guard authorities' report and also repairing vessel's report. The respondent-vessel was the one highly probable for the breakage of the cable. They also opined that no other vessel was found in the vicinity of the helicopter.

In *M.V. Elisabeth & Ors. etc. v. Harwan Investment & Trading Pvt. Ltd., Goa* [(1993) Supp. 2 SCC 433] this Court held thus:

"Maritime law is as much a part of the general legal system as any other branch of the law. It is within the competence of the appropriate India Courts to deal, in accordance with the general principles of maritime law and the applicable provisions of statutory law, with all persons and things found within their jurisdiction. The power of the court is plenary and unlimited unless it is expressly or by necessary implication curtailed. Absent such curtailment of jurisdiction, all remedies which are available to the courts to administer justice are available to a claimant against a foreign ship and its owner found within the jurisdiction of the High Court concerned. This power of the court to render justice must necessarily include the power to make interlocutory orders for arrest and attachment before judgment. Power to enforce claims against foreign ships is an essential attribute of admiralty jurisdiction and it is assumed over such ships while they are within the jurisdiction of the High Court by arresting and detaining them. This jurisdiction can be assumed by the High Court concerned, whether or not the defendant resides or carries on business, or the cause of action arose wholly or in part, within the local limits of its jurisdiction. Once a foreign ship is arrested within the local limits of the jurisdiction of the High Court, and the owner of the ship has entered appearance and furnished security to the satisfaction of the High Court for the release of the ship, the proceedings continue as a personal action."

In *The Asiatic Steam Navigation Co. Ltd. vs. Sub-Lt. Arabinda Chakravarti* [(1959) Supp. 1 SCR 979] this Court held that the function of the nautical assessors is to advise the court upon nautical matters. Their advice is admissible in admiralty courts on all issues of facts about the seamanship. The decision, however, rests entirely with the courts even on purely nautical matters. The Court is not bound to follow the advice of the assessors but on questions of nautical science and skill greater attention must obviously be paid to the opinion of the assessors since they are the only source of information on those points and some reason should be given for disregarding them.

In Schwarz & Co. [Grain] Ltd. v. St. Elefterio EX Arion [Owners]. [(1957) Probate Division 179], Willmer, J. considering the scope of prima facie case held at page 185 that "it has not been suggested that the proceedings are frivolous or vexatious, so as to call for the exercise of the court's inherent jurisdiction to halt such proceedings in limine. The defendants argument is founded on the proposition that section 3 [4] of the Act of 1956 introduced a new restriction on the right to proceed in rem and that a plaintiff cannot arrest a ship under that subsection unless he can prove - and prove at the outset - that he has a cause of action sustainable in law. In my judgment that proposition rests upon a misconception of the purpose and meaning of section 3 [4]". It was held that the scope of the Act was to enlarge the jurisdiction of admiralty court but not to restrict its jurisdiction. At page 187 it was held that "it is possible [these things have been known to happen] that a higher court might take a different view; but in the meantime the ship, which is a foreign ship, has been freed from arrest, has gone, and may never return to this country. It might be that in those circumstances the plaintiffs would have lost their right for ever to entertain proceedings in rem in this country. The remedy for the defendants is to release their ship is to be put in appeal. The action will then be tried at the appropriate time when all the facts have been ascertained due consideration will be given to the arguments at law which the defendants desire to advance. Accordingly the motion for release of the ship was dismissed.

In The Moschanthy [(1971) 1 Lloyd's Law Reports 37 at 42] where the question was whether the admiralty action was vexatious, following the ratio of Willmer, J. in St. Elefterio [supra] it was held that action could not be successful. It was held that courts should only stay the action on the ground when the hopelessness of the plaintiff's claim is beyond doubt. If it is not beyond doubt but on the contrary the plaintiff has arguable, even though difficult, case even in law the action would be allowed to proceed to trial. The application for stay was accordingly rejected.

The admiralty action is an action in rem. The Division Bench found that the claim was not vexatious but is triable. There is strong evidence to show that at the relevant time the respondent-vessel was within the vicinity of the damaged cable. The Division Bench declined to interfere on the ground that the Captain of the vessel filed an undertaking that the vessel belonged to the Black Sea Shipping Company which is wholly owned by the Ukrainian Government. The undertaking given by the Captain of the vessel that in the event of the suit being decreed they would honour the decree, was accepted by the Court and it directed the release of the vessel. We think that neither the approach of the Division Bench of the High Court nor the finding of the learned Trial Judge on the admiralty jurisdiction that no prima facie case is made out, is right. It is seen that there is strong triable case for the reasons stated earlier. The ship is a foreign ship and if it leaves the shores of Indian territorial waters it is difficult to get hold of it and it may not return to the jurisdiction of Indian courts. The claim thereby, even if successful, would remain unexecutable or land in trouble in private international law in its enforcement. Under these circumstances, we are of the firm opinion that the vessel may be released on the certain conditions, viz., [i] the respondent shall deposit a sum of Rs.10 crores; [ii] the Ukrainian Government shall give an

undertaking through its accredited authority, more particularly may be its Ambassador attached to its Embassy in India in writing duly undertaking that in the event of the suit being decreed they would comply with the decree without reference to the execution; [iv] the undertaking should be for balance amount of Rs.18 crores and towards costs and other expenses roughly put at Rs.25 crores. It would be open to them to comply with these directions at any time. We are not fixing any time limit because it would be open to them to comply with it at any time and until then the ship shall remain arrested and shall not leave the shores of the Indian territorial waters. On deposit of Rs.10 crores and on furnishing of undertakings to the satisfaction of the Division Bench of the High Court, as stated above, the High Court would give appropriate direction for releasing the vessel in accordance with law.

Accordingly, the appeal is allowed. The notice of motion is made absolute subject to the above conditions. In the circumstances, the parties are directed to bear their own costs.