

Lee Young Sang and anr. Vs. the Board of Trustees for Port of Calcutta and the Owners and Parties Interested in the Vessel M.V. green Opal and ors.

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Court : Kolkata

Decided On : Jul-08-1997

Reported in : (1997)2CALLT359(HC)

Judge : Ajoy Nath Ray and ;Barin Ghosh, JJ.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 51 and 94 - Order 38, Rule 1; ;Code of Civil Procedure (CPC) , 1882 - Section 478; ;Indian Ports Act - Sections 6 and 14; ;Ship Breaking Rules - Rules 135 and 140

Appeal No. : Admiralty Suit No. 12 of 1997

Appellant : Lee Young Sang and anr.

Respondent : The Board of Trustees for Port of Calcutta and the Owners and Parties Interested in the Vessel M.V.

Advocate for Def. : Anindya Mitra, Addl. Solicitor General, ;Hirak Mitra and ;Tilak Bose, Advs. for Respondent No. 1, ;Sanjib Banerjee and ;Amit Bose, Advs. for Respondent No. 4 and ;B.K. Bachawat and ;D.N. Mishra, Advs

Advocate for Pet/Ap. : Jayanta Mitra and ;Shyam Sarkar, Advs.

Judgement :

1. We have heard an appeal from an ad-interim order passed by an Hon'ble Single Judge on the 24th of June 1997 as modified by His Lordship's order dated 30th June 1997.

2. The appeal has been heard out on the most expeditious basis because by those two orders His Lordship directed to the effect that the two appellants should not leave Calcutta unless security to the extent of Rs. 50 lakh is furnished in the case of such of those two persons.

3. The only provision on the basis of which such an order of semi- arrest can be supported is contained in Order XXXVIII Rule 1 of the Code of Civil Procedure which deals with an arrest before Judgment.

4. That rule is preceded in the Code by Section 94 which permit the making of such an arrest.

5. Both the appellants who have been arrested are foreign nationals. The authority which has obtained the arrest of these two persons is the Port of Calcutta, more accurately the Trustees for the Port of Calcutta operating under, inter alia, the Major Port Trusts Act of 1963.

6. On the 30th of June 1997 His Lordship gave time for filing of affidavits. Three weeks were granted for filing the affidavit-in-opposition. If the ad-interim order remains, two foreign nationals would, against their will, be confined to the limits of the City of Calcutta. We thus heard out the appeal so as either to permit the detention or to cancel it if that did not appear to be just and in accordance with law.

7. Some facts have to be set out at this stage. A ship named 'GREEN OPAL' under a bare boat charter of the charterers, who are also defendants in the suit, suffered the misfortune of sinking in a navigational channel of the Calcutta Port. This occurred on the 19th of June 1997.

8. The sunken ship is still there. We are told by the Port Authorities that the top of the ship can still now be seen during low tide. The Port Authorities complained that the blockage of their navigational channel is causing them a daily loss of Rs. 1

crore.

9. They further alleged that the ship sank due to negligence of the crew including the master of the vessel. The master is the first appellant, also a defendant in the suit, is the Managing Director of the Charterers, who are Dooyang Line Co. Ltd.

10. The owner of the ship is a certain Baron Shipping, and the ship is registered in Panama. The cargo carried by the ship, we are told, included certain valuable steel coils which were being imported by TISCO, it is said that the value of these coils is between Rs. 5 and 6 crore.

11. It is said by plaintiff supporting the orders under appeal that the orders were rightly passed against the Managing Director of the Charterer and the master of the vessel; they say that if these orders for security were not passed the decree in the suit as and when passed would be unreasonably obstructed or delayed in execution.

12. Their case is that due to the negligence of, amongst others, the master of the vessel the event has happened and the master and the other defendants are liable to compensate the Port Authorities for the loss which they are suffering because of the negligence of the concerned defendants. There is another very important head of claim in the suit. It is not directly concerned with negligence but is concerned with salvage. Under Section 14 of the Indian Ports Act, the Conservator of a port is entitled to serve a notice upon the owner of a sunken ship calling upon such owner to salvage or destroy the ship and during the process of such salvage or destruction as the case might be, to furnish adequate security therefor to the Conservator. It is submitted that in the present case the Trustees for the Port of Calcutta are the Conservator. Further according to them they have authorised the Director of the Marine Department to serve a notice on their behalf and this notice was served on the 20th of June 1997, i.e. the day after the sinking.

13. In this notice salvage is directed to be undertaken and security for Rs. 10 crore is called for. It is served not on the owners themselves but on the agents of the owners in Calcutta. It is said on this basis that there is a statutory liability of the owner to furnish security and the suit claims a mandatory injunction directing

furnishing of security for ensuring the salvage work.

14. It is submitted that the charterer is also the owner of the ship and that the salvaging operation is to be undertaken by the charterers also.

15. On the 23rd of June 1977 there was a meeting wherein the Protection & Indemnity Club of London, who were the insurers were represented. The second appellant also attended the meeting. The Port Authorities were there. Salvaging was discussed. It was noted that the salvaging operation might be complex and that it might involve cutting up of the ship underneath water.

16. On the 24th June 1997 the suit was filed. An order was passed restraining the appellants from leaving Calcutta for 24 hours. On the 25th of June in the morning the parties in court mentioned about discussions and the co-operation regarding salvaging work. There was a meeting thereafter on the same day. Minutes were drawn up. The presence was practically as on 23.6.97. In this meeting time was asked for the giving of a concrete action plan regarding selvage; also, and this played an important role, it was said that the provision of security should be held in abeyance.

17. The Port Authorities were not minded to hold the provision for a security in abeyance. They had the interim order continued against the two appellants and the final continuation come on 30.6.97.

18. Just as Section 14 of the Indian Ports Act provides for the giving of a notice by the conservator, so also it provides that if the salvaging operation is not undertaken by the owner or security is not furnished, the Port Authorities might themselves raise the vessel and the property that they salvage by reason of the notice given under Section 14 might be sold by them to recover the salvage costs pro-tanta. There is some doubt whether the Port Authorities are entitled to sell the cargo along with the raised vessel in the same manner as the vessel itself.

19. We have heard the appeal on this basis that unless we are compelled to reach the conclusion that on the basis of the pleadings and papers before the Hon'ble Single Judge in the first court, It would be impossible by use of reasonable

discretion to pass the orders appealed from, the appeal must fail. If on the other hand we come to the conclusion that the pleadings and papers would not permit of the passing of an order for arrest against the two appellants on a reasonable use of discretion on the true view of the law, the appeal would have to be allowed and the appellants would have to be immediately freed. Because of the stake in the appeal we have given it the utmost priority. We have not thought it fit to pass an interim order in an appeal from an interim order. After all, the papers before the first court were but the plaint and the petition. Those are already before us, a paper book and the formality of its preparation would serve no further useful purpose. The appeal has therefore been fully argued out before us.

20. Before coming to the authorities cited, we should set out the relevant part of the Section 94 and order XXXVIII Rule 1 of the Code of Civil Procedure.

'94. In order to prevent the ends of justice from being defeated the court may, if it is so prescribed,

(a) issue a warrant to arrest the defendant ...to show cause why he should not give security for his appearance, and if he falls to comply... commit him to the civil prison,

Order XXXVIII Rule 1:

Where ... the court is satisfied ...

(a) that the defendant, with intent to delay the plaintiff, or to avoid any process of the court or to obstruct or delay the execution ...

(i) has absconded ...

(ii) is about to ... leave...

(iii) has ... removed ... property or

(iv) that the defendant is about to leave India under circumstances affording reasonable probability that the plaintiff will or may thereby be obstructed or delayed in the execution of any decree that may be passed against the defendant

in the suit,

the court may issue a warrant to arrest ...'

21. We need not set out the later provisions which provide that the arrest need not be made if the defendant pays the money to the arresting officer as might be specified in the warrant; or that in case of a defendant who does not pay, the result might ultimately be a sentence of civil imprisonment for a period upto six months. It is the interpretation of this Rule of Order XXXVIII which was the principal subject of argument in this appeal. The issue was whether on the pleadings and papers before the first court, an order under sub-rule (b) could be passed against the two appellants, the first of whom was the master of the vessel at the time it sank and the second of whom is the Managing Director of the charterers who arrived in Calcutta, admittedly, two days after the vessel had sunk.

22. In so far as the claim against the two appellants themselves are concerned, it is clear and beyond dispute that the Managing Director cannot be personally hold to be liable for any decree which might be passed for alleged negligence which caused the sinking of the ship. This is simply because the Managing Director was nowhere on the scene when the ship sank.

23. It is equally beyond dispute that so far as the master of the vessel is concerned, even though he might be liable personally for the alleged negligence in the sinking of the ship, yet he is in no manner liable to furnish security for ensuring the salvaging operations because the master of the vessel is not the owner of the vessel within the meaning of Section 14 of the Indian Ports Act which allows the conservators to call for security.

24. The Managing Director is, therefore, to be looked at for the claim in regard to the security for salvage and the master of the vessel is to be considered in regard to the claim for negligence in sinking the ship causing the port the alleged loss of Rs. 1 crore per day for navigational channel blockade. We now recount the authorities which were cited by the appellants and the respondents.

25. Mr. Jayanta K. Mitter appearing for the appellants first relied on a 5 Member Bench Decision of the Supreme Court in the case of A.K.K. Nambiar reported at : [1970]3SCR121 . That is a high authority in regard to verification of pleadings. It is pointed out in that decision that the importance of verification is to test the genuineness and authenticity of those allegations.

26. Indeed it is important to have a verification because the person verifying takes upon himself the responsibility as to the authenticity and genuineness of the allegations made in the petition or in the affidavit. Without such a verification, even a very well drafted petition or affidavit would be without any value whatsoever.

27. Also if an affidavit containing allegations as to material points of fact is verified as a mere submission to court, those allegations of fact are practically not made. This is because nobody vouches for the accuracy of those statements as being true to his knowledge or as being believed reasonably by him to be true on the basis of sources disclosed.

28. This point was emphasised on behalf of the appellants and also on behalf of the owners by Mr. Bachawat. They pointed out that almost all the material parts of the plaint are verified as submissions, and, what is more important, the petition also is verified from paragraph 2 onwards as a mere submission to court. A peculiar mode of verification has been adopted in that, in the petition, in the first paragraph, the statements in the plaint are said to be true, that first paragraph of the petition is verified as true to the knowledge of the deponent who is the head of the Department of the plaintiffs.

29. The learned Additional Solicitor General stationed in Calcutta, who took up the part of the Port Authorities submitted that because of the first paragraph of the petition the deponent has undertaken upon himself the responsibility as to the truth of the facts alleged. Giving him the greatest benefit we assume that he has taken upon himself the responsibility by verifying the first paragraph of the petition as true to his knowledge.

30. Even then no point of verification leaves a very significant gap. It is alleged in the petition that the salvage cost of the vessel would far exceed the cost of the

salvaged vessel. This statement is not to be found in the plaint. This statement, therefore, is verified as a submission and a mere submission. We cannot place any credence on such a submission as to a point which is a matter of fact, either a fact of ascertainment, or a fact of assessment.

31. This has to be borne in mind that on the basis of the Supreme Court Authority, there is no properly verified statement before us, and there was none before the first court as to whether the salvage price of the vessel would exceed, or be equal to or be less than the probable cost of the salvaged vessel; there is also naturally no allegation as to how far and by what reasonably assessed money figure, the salvage cost would differ from the price of the salvaged vessel which can be obtained from the open market. Since we are on the point of pleadings, we think it best to summarise the arguments which were made in regard to pleadings, in this part of the Judgment.

32. In these submissions Mr. Mitter and Mr. Bachwat were at one. They said that in plaint there are no particulars of negligence given. The petition is equally devoid of any allegations as to the particulars of negligence. The learned solicitor has pointed out that negligence is alleged and that under Section 31 of the Indian Ports Act, it is no answer to say that the vessel, at the time she had not with the accident, was being compulsorily piloted by the Port's pilot out of the Calcutta Port. He submitted that the facts regarding what happened on board the ship which has now sunk are within the special knowledge of the defendant crew. They have given no particulars in their affidavit exculpating themselves of any liability; although they could not file an affidavit in the court below when the ad-interim orders were passed yet they had a chance to come out with the facts before us.

33. In our opinion, there is a prima facie lack of particulars in regard to the allegation of negligence. We will point out that areas where we find the lacunae to be the most dissatisfying. When the vessel sank, it was moving. It collided with a barge which was apparently also moving. In the plaint or in the petition of the Port Authorities there is no indication given as to the personnel who were piloting the vessel, as to how the accident came to be according to the version of the pilots, or whether according to those pilots there was some specific fault of the master or

the crew which had come to their notice. We should bear in mind that although compulsory pilotage does not exculpate the vessel automatically from charges of negligence yet the law is not that if a vessel meets with an accident during pilotage it is always irrebuttably presumed to have been guilty of negligence.

34. Also in regard to the barge, which is presumably an Indian barge which collided with the vessel the Port Authorities are totally silent. They do not even tell the court whether they have any belief as to the manner in which the colliding barge was conducted at the time the collision took place. It would not be an exaggeration to say that the plaintiff merely alleges negligence by use of that word, against the crew and the master and assesses the loss to the Port Authorities at the daily figure of Rs. 1 crore for such negligence.

35. In regard to Rs. 1 crore per day which is a round figure, there is a similar lack of particulars. The port can loss money because of the blockade of its navigational channel, if, say, the revenue it would otherwise have earned cannot be earned because of the blockade in the channel. ; There might be other heads of loss also. But this appears to us to be the possible main head. If we assume, therefore, that the channel got completely blocked by the sunken vessel we were told by the learned solicitor, however, that small ships can now pass though big ones cannot we would have to assume that before the channel got blocked in part ; the Port Authorities were earning revenue of at least 1 crore per day, which they can no longer earn because of the blocked channel. It should have been the easiest thing for the Port Authorities to show that they had earned Rs. 1 crore a day by reason of the navigable channel being open on the days prior to the 19th of June 1997. Thus from the 14th of June until the 18th the Port Authorities should have earned Rs. 5 crore.

36. The records in that regard should be absolutely current and freely available. Nothing at all is produced in the petition on which the orders for arrest before judgment were passed.

37. We give details above because the factor as to the possible strength of the plaintiffs case, and the likelihood of its success were matters of argument before us to, to what extent, such strength should shape the discretionary order of arrest

before judgment to be passed by the first court. We will come back to this topic later when we give our own interpretation and construction of the first rule of Order XXXVIII. i

38. Mr. Mitter next gave us the case decided by Coutts-Trotter C.J. somewhat surprisingly sitting singly. The case is of Seth Chand reported at AIR 1926 Mad. 584. It is there said that for exercising power under Order XXXVIII Rule 1 the plaintiff must show that his action is *prima facie* an unimpeachable one subject to his proving the allegations made in the plaint. The second point of decision in this case is that the court jealously guards the liberty of the persons sought to be arrested as if he were himself a subject (in our day subject should be read as citizen). With the second of these propositions we here and now respectfully agree. In our opinion the liberty of a foreign national is to be guarded as jealously as the liberty of an Indian citizen and he is not to be arrested or semi-arrested without the legal requirements being fully and completely satisfied.

39. Regarding the first of the propositions we feel that it is no more than saying that the plaint should disclose a cause of action. Of course if the allegations in the plaint are proved in this case, and completely, very probably the plaintiff might get some decree.

40. Mr. Mitter then gave us the case of V.K. Gujral, which is a decision of Goswamy J. reported at AIR 1980 Del. 71. There a diplomat had contracted for repair of a house and had alleged that the repair was badly done. There were leaks of a serious nature which were apparent during the rainy season. In refusing to issue a warrant of arrest, at the instance of the plaintiff repairer, the court mentioned and followed the decision in Seth Chand's case. There are also indications, although put in the briefest of compass, that the court considered the lack of bad motive of the senior diplomat in the matter of refusal of issuance of a warrant. It was thus submitted that if a foreign national in the natural course seeks to leave India, without a clear intent to delay or obstruct execution, he cannot be arrested simply because he does not have any property in India.

41. Mr. Mitter then gave us the case of Jolly George reported at : [1980]2SCR913 . The court was there concerned with Section 51 proviso (b) of the Code of Civil

Procedure. That deals with arrest for inability to satisfy a money decree. Oddly enough, we might remark here, the maximum time for imprisonment under Order XXVIII, which is the situation before hearing, is six months. But the maximum time for imprisonment after decree, which is the Section 51 situation is only three months.

42. The court opined in that case that in spite of the wording of Section 51 a Civil Court is not empowered to imprison a Judgment debtor if, from the time of the passing of the decree until the date of the order, the judgment debtor has, at some time, been able to pay the decretal amount and yet has not paid it. The court opined that at the date of the order of imprisonment the court should be satisfied that then, and at the point of time, the defendant was refusing to pay the decretal amount.

43. The Supreme Court remanded the matter with this direction that the imprisoning court should consider whether the defendant was able to pay the decree and was even then not paying it. In considering that, the court would take into account the available assets of the defendant and also pressing bills such as medical bills. The court opined that mere non-payment which might arise out of an inability to pay without any culpable refusal or bad intention would not be sufficient for imprisoning a defendant.

44. The court gave much importance to Article 11 of the Convention of Human Rights which provides that a person should not be imprisoned for mere inability to pay. The court opined that even though International Law or a treaty made by the Union of India does not by itself become a part of the Municipal Law, yet, when there is a scope for interpretation, the Municipal Law should be interpreted so as to be in accordance with the international treaties to which India is a party rather than in the opposite way.

45. Mr. Mitter submitted that in interpreting Order 38 Rule 1 we should opine some degree to refusal to pay, some degree of ill motive, some amount of what in the criminal courts would be called mens rea would have to be present before an order of arrest could be passed.

46. The learned Solicitor said, amongst other points, that in clause (a) of Rule 1 of Order 38 the presence of a bad intention is expressly made a condition precedent before exercise of power of arrest. He pointed out the absence of such express words in Clause (b). He said that we should not by interpretation introduce into clause (b) what is notably absent there and what is notably present in the earlier Clause(a).

47. Mr. Mitter showed us that in a later case (Peoples Union case) reported at : AIR 1997 SC568 the case of Jolly George was considered and the interpretation put upon Section 51 was noted.

48. The learned Solicitor submitted that under Clause (b) the courts have often passed orders issuing Warrant of Arrest and calling for security against foreigners how were about to leave India, He said that there is nothing wrong or inhuman in this provision. If a foreigner has no property within India, is a defendant in a suit instituted bona fide and is about to leave India the court might well issue a warrant of Arrest to get a security in the suit. He submitted that mere impecuniosity of the defendant, i.e., impecuniosity as far as the defendant's Indian assets are concerned, might be a sufficient circumstance to call for a security in a Warrant of Arrest. He submitted that in this case the first court's discretion was properly exercised because the foreign nationals might leave India any day and because they have shown no property of theirs in India against which execution can be levied if and when the suit succeeds against them. The first case relied on by the respondent is a decision of Mr. Justice Macpherson given in the case of Probode Chander Mullick reported at ILR 14 Calcutta page 695. The section prevalent at that time under the old Code of 1882 was Section 479. Section 478 is also relevant. Although the wording of these sections are different from the wording which we have in Rule 1 to-day yet the jurisdiction to arrest and call for security was present in the case of defendants about to leave India provided the appropriate conditions were satisfied. The learned Judge said that the principle applicable in England to suits of *no exeat regno* is not applicable in an arrest application (see page 702). It was emphasized that the court should be satisfied that the suit was instituted bona fide. His Lordship said as follows:-

'I have only to see whether, looking to the case as a whole, it is a bona fide case, or whether it is a case of a speculative character and brought with a view to harass or annoy the defendant, or to take advantage of his position and induce him to come to terms which perhaps, he otherwise would not do. The mere fact that the claim is disputed does not deprive it of the character of bona fides. ...'

49. In the beginning of the judgment His Lordship said that the defendant has no domicile in this country; and there was, therefore, clearly a reasonable probability that the plaintiffs will be obstructed or delayed in the execution of any decree that may be obtained.

50. The claim in the suit was for a sum a little under Rs. 10,000/and was for work done to a vessel while in the dock.

51. Relying on this case a submission was made that the departure of the defendant without leaving any property in India itself was though to be sufficient for the issuance of a warrant of arrest.

52. The next case is a decision of Mr. Justice Brandt in the case of Everet reported at ILR 8 Madras page 205. This was a case involving a suit for recovery of rent. Section 478 of the old Code of 1882 is helpfully set out in the reprint of the Law Reports. It shows that the jurisdiction to issue a warrant was present under Clause (c) of that section 'when the defendant is about to leave British India under circumstances ...'; thus words were present in the earlier section also and similar words are present in Clause (b) of Rule 1. The case really turned on the point of residence but the judgment shows that the Judge in the court below, being the court of Small Causes Ootacamund, had satisfied himself that the defendant was about to leave British India under circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed.

53. The learned Solicitor submitted that a reasonable probability of delay in execution is quite sufficient. If no security is given in India and a decree is passed and it has to be transmitted to a foreign land for execution in accordance with the laws of that land it will entail an unreasonable delay. The First Court was thus

submitted to have exercised its discretion appropriately in calling for security.

54. The third case of again another foreigner named Elie Goldberg reported at : AIR1929 Cal732 . It is a Division Bench decision and the judgment was delivered by Rankin, C.J. That was a case where the warrant of arrest mentioned payment of Rs. 10.000/-, and arrest if that sum was not paid. The claim in the suit was more than double that amount. The Division Bench opined that even on payment of Rs. 10,000/-Elie Goldbery will be entitled not to be arrested. The case does not, with respect, decide a point which arises in our case but the learned solicitor said that it is yet another instance where the court has issued a warrant of arrest against a foreign national and it is not such an extraordinary thing that we have to set aside expeditiously in appeal an order for arrest passed as an ad- interim measure with directions given for affidavits.

55. The last case cited on behalf of the respondents is the case of Luga Bay Shipping reported at : AIR 1997 SC544 . We are of opinion that this case with the contingency of a ship causing damage and thereafter seeking to leave the port, in these circumstances, the court showed how the Board of Trustees for the Port of Cochin were entitled to make an assessment of the damage on their own and call for security before giving the permission to the Boat to sail away. We do not feel free to apply this decision to the provisions of Section 14 of the Indian Ports Act, except to this extent that the assessment of security made by the conservator under that section is also unquestionable, provided such an assessment has been made reasonably, bona fide and has taken into consideration the relevant facts and circumstances.

56. In our case the security has been assessed at Rs. 10 crores. If that assessment is reasonable , bona fide and based on materials It cannot be challenged but these pre-conditions must be satisfied by the conservator like any other authority in India acting under the Constitution and statutory law.

57. It appears from the above the authorities on Order 39 Rule 1 are old, only a few, and far between. We feel it necessary, therefore, to set down the principles which should be observed in the matter of issuance of arrest before judgment when a court exercises power under Clause (b) of Order 98 Rule 1.

58. The first condition to be satisfied is that the defendant against whom arrest is sought for should be about to leave India. This has to be shown to be a reasonable probability in the near future on the basis of the facts and circumstances attendant on the particular case. So far as our case is concerned, in our opinion both the appellants can be said to be about to leave India because they are foreign nationals and there is nothing to hold them back in India until disposal of the suit .

59. The second point to be noted is that the plaintiff must come to the court with a case which is bona fide and is reasonably likely to produce some decree ultimately. Of what amount that decree will be is also to be reasonably assessed by the plaintiff, and considered by the court, for specifying the security in regard to the warrant of arrest.

60. We make it clear that although in a suit which claims money which is unsecured, an injunction restraining the defendant from dealing with his property or appointment of a Receiver over property might not be ordered, thereby rendering an unsecured claim secured, yet a warrant of arrest before judgment might issue even in plaints containing unsecured claims for money. This is principally because the arrest is directed against, if we might use an informal expression, a slippery defendant. A defendant in a simple money suit, about to abscond, or committing acts of insolvency, like disposing of property with a view to defeating the decree, or leaving India, selling off all his assets, might well find a warrant of arrest against him with a direction to furnish security even though the plaintiffs claim is an unsecured one.

61. Therefore, It is not enough answer for the appellants to say that, the claim is one for damages or a claim for money which is not. secured by any property interest and therefore they will not furnish security. The third point to be considered is that security and arrest must be directed against a defendant against whom a decree is likely to be passed in the suit. If a suit is instituted against two defendants, A and B and it appears that a decree might be passed against A but not at all against B, then the court has no jurisdiction to issue a warrant of arrest under Order 38 Rule 1 against B. One defendant cannot be arrested for the

possible decretal debt of another defendant.

62. On this third principle, the Managing Director being the second appellant would have to be released, but how, we shall explain a little later.

63. The fourth point is that the court must consider all the circumstance attendant upon the imminent departure of the defendant before it issues a warrant of arrest. What those circumstances might be it is impossible to set out exhaustively but indications can be given as to what are or might well be relevant circumstances. A person having no property in India and of a foreign domicile might wish to leave India quickly after being impleaded as a defendant in spite of his having a lot of property abroad, without giving any prior security.

64. In that event by reason of the departure of the defendant the decree, if passed, might be delayed in execution. This is because the decree would have to be transmitted abroad where the defendant has property. But if in the same position another defendant is unable to satisfy a decree for property either in India or abroad, then and in that event his departure from India does not by itself delay or obstruct the execution of a possible decree. We agree that the factor of the defendant's having no property in India is a relevant factor to be considered for issuing a Warrant of Arrest under Order 39 Rule 1 but that is not the only relevant factor. The court has to come to the conclusion that because of the attendant circumstances of the departure, the execution of the decree will be obstructed or delayed by reason of the departure itself. To this question the court must address its mind and without finding an answer to this question, the exercise of discretion for issuing a Warrant of Arrest under order 38 Rule 1(b) cannot be undertaken.

65. Let us take the case of second appellant, i.e., the Managing Director first. As to the case for negligence in sinking, he cannot be made liable because he came to India two days after the accident. As to furnishing of security for the salvage under Section 14 of the Indian Ports Act he is again not liable because he is not the owner of the vessel. Even the company of which he is the Managing Director is not the full owner of the vessel but is only a charterer of it. Even if we treat the charterer as the owner of the vessel, the Managing Director cannot be equated to the Chartering Company itself, The learned Solicitor argued that the Managing

Director is the representative of the owner and he has held himself out as such in the meeting held on 23.6.97 and 25.6.97. Because he is the representative of the owner, he, it was submitted, became for all purposes the owner, since under Rule 140 of the Rules framed under Section 6 of the Indian Ports Act for the Calcutta Port it is so provided. Rule 140 reads as follows:-

'140. the expression 'owner' includes his agents, representatives or assigns of vessels.'

66. This definition, however, is to be found in Chapter VI of the Rules which is headed 'Rules for Ship Breaking'. Rule 135 contemplates an application to the Director of the Marine Department for permission to break a ship. Rule 138 provides that if asked to do so the owner shall furnish a bank guarantee to cover the event of the vessel fully or partly sinking or becoming a wreck. It is our opinion that the special definition of owner which includes the owner's representative is applicable for the Chapter of Ship breaking and is intended for such restricted application only. It is not given as a general definition of an 'owner' which would land one into the peculiar consequence of any representative of the owner being equated to the owner himself. The chapter of ship breaking is not the chapter to cover sunken ships which were on their way out of the port. The Chapter covers only such sunken ships which have sunk and become a wreck during the ship breaking operation. We find it totally impossible to hold that because of Rule 140 in the ship breaking rules and the definition given there, the Managing Director is to be treated as an owner within the meaning of Section 14 of the Indian Ports Act dealing with salvage of fleeting ships which sink during voyage.

67. It was again said that the Managing Director is the alter ego of the Chartering Company. If the Chartering Company might be liable to give security for salvage, the alter ego being the Managing Director shall also be so liable. It was stated that we should lift the corporate veil and see the Managing Director himself as controlling the company and as being the company.

68. It is clear law that usually and in most of the cases the Managing Director of a company is a person separate from the company. In unusual cases the two might have to be equated as one but before this extraordinary step is taken it has to be

shown that the Managing Director is all in all in the company. We have no facts in this regard. All that we have in this regard is a Latin expression and that, in our opinion, is not of any help in transposing Mr. Chu into Dooyang Line. In our opinion doing so would be like a fairy tale.

69. It is our prima facie opinion, therefore, that it is almost impossible that a decree will ever be passed against the Managing Director, The suit against the Managing Director being most likely to fail a warrant of arrest before judgment against the Managing Director should not be issued. But, we are not hearing the application for arrest. We are hearing an appeal from the order issuing the warrant of semi-arrest. We cannot interfere if the Hon'ble Judge has addressed His Lordship's mind to the strength of the plaintiffs case against the Managing Director and has come to a reasonable conclusion in that regard as a relevant factor to be considered prior to issuance of warrant and has then issued it.

70. If His Lordship has considered the factor and given it reasonable weight we in the appeal court shall not interfere. But with the greatest respect, in the speaking orders of 24.6.97. and 30.6.97 we do not find that the strength of the plaintiffs prima facie case against the Managing Director has been considered at all. Since this is a non-consideration of a material factor prior to Issuance of warrant of arrest the use of His Lordship's discretion is vitiated.

71. We now come to Master. Although the pleadings, are, to use the most charitable word, a little sketchy, it is not prima facie outside the bounds of imagination that a decree for negligence might be passed against the master. We also accept on a simple common sense basis that the master has no property within India. Under these circumstances, was the direction to issue warrant used on some reasonable basis in the court below? We point out here the last of the factors mentioned by us above and we emphasize that factor. It must be shown that because the master is about to leave India, by reason of the master's departure the probable decree against him would become delayed in execution. We do not wish to say how this has to be shown, but shown it must be. If the master has property abroad and if he can, under a threat of arrest, so arrange his affairs that security to the extent of Rs. 50 lakh or Rs. 6 crore (six days having

elapsed after the sinking of the ship until the suit was filed) can be brought into India by the master, then and in that event a warrant of arrest for a reasonable security sum, might have been issued, at least, if issued, we could not have interfered with it. But about the circumstances of the master abroad, nothing is said even on the basis of a reasonable belief. We are quite aware of the very great difficulty faced by the Port Authorities in saying anything about the circumstances of the master of a vessel in the country of his domicile. But in these circumstances we must call in aid, that very faithful servant of the law, which goes under the name of common sense. It is usual that masters of vessels are themselves unable to satisfy by their personal means decree for negligence which might be passed in actions relating to collisions of sea going vessels. These damages come to huge and astronomical figures, satisfaction of which is had for the negligence of the master vicariously through the employer who employs the master. Just as a Managing Director is usually not a poor man, so also is a master usually not a Very wealthy man. It is theoretically possible that a very rich man's son feeling the call of the sea becomes a master of a sea going vessel; it is also theoretically possible that a Managing Director of a charterline lives the life of an ascetic and gives away all his profits as soon as he earns those. But a court of law cannot assume these unnatural things. In the absence of allegations to the contrary the court must and should proceed on the basis that the master of the vessel is unable by his personal means to satisfy a big decretal amount, whether you look at his non-existent asset in India or you look at his comparatively meagre assets abroad which are assumed on common sense to be comparatively meagre.

72. If we keep the master semi-arrested in Calcutta the employer will not doubt feel a responsibility to clear the master from such city arrest and bring him back to his own country. This is exactly what a court issuing a warrant of arrest is not permitted to do. The charterers are abroad. The charterers will remain abroad. An execution of a vicarious decree against the charterers will have to be executed abroad and whether the master stays in Calcutta or goes to Korea in a matter of complete irrelevance in so far as execution against the property of the charterer is concerned.

73. This brings us to a point of great importance where the case of Jolly George gives, with respect, at least some help. If the master can bring in lakhs and crores by way of security and leaves India without bringing in such money then he is leaving India for the purpose of fleeing the civil suit and its decree. If the master is not alleged to be able to bring in from foreign land property or security at his, we emphasize, his, will for securing the decree then the departure of the master itself, no longer remains a relevant factor in regard to delay of or obstruction in the execution of the decree. The master's bad motive i.e. the bad motive of leaving the plaintiff high and dry and running away to the security and wealth of his own in his own country cannot be shown to be present. Thus, before we arrest a foreign national some allegation has to be made that he can bring in security for securing the plaintiff's claim but is about to leave India without doing so. The circumstances mentioned in Clause (b) of Rule 1 are not limited to circumstances in India. Such circumstances also involve circumstances abroad because going from India to the foreign country is involved.

74. We find that there is no allegation that if the threat of arrest is kept hanging over master's head then he can arrange, out of his personal means, may be located abroad, to bring in security for securing the decree which might be passed against him personally. The allegation is not there; and again, with respect, the consideration of the master being able to secure for himself is also not present in the reasoned orders.

75. If the master can give security from foreign assets, and does not so give intentionally to delay the plaintiff, he can be held under a threat of arrest, but we emphasize that he cannot be held under a threat of arrest so that some other person might bring in some money belonging to that person for his release; then, and in that case, it is an exercise of a power of keeping a hostage which power does not exist in the Indian courts. The master cannot be arrested so that Dooyang pays security. One brother (who is impecunious) cannot be arrested, to give an example, so that his wealthy brother pays security for the claim in the suit in which only the poor brother is the defendant.

76. We find that, in the orders appealed from, two factors have been considered, and these are the likelihood of departure from India and the absence of the defendant's property and assets inside of India. We have tried to explain to the best of our ability why a consideration of merely these two factors leaves a lot of relevant matter unconsidered. Thus the order of arrest against the master is also vitiated.

77. The Port Authorities made a supplication for help before us. They said that they do not have money and resources for salvage. That salvors are not to be found in India, but must be hired from abroad. If they are earning Rs. 1 crore a day as revenue, or were earning it before 19.6.97, it appears to us that they should not be absolutely inpecunious. But they say they have no expertise to do the salvaging work themselves which is contemplated under the very same Section 14 of the Indian Ports Act. They said that the foreigners have engaged three firms for doing salvaging work, that they know salvaging cost, that they are in the know of special facts, that they are disclosing nothing so as only to obstruct the Port Authorities. That they must furnish security but they are not furnishing security. It was said that the Port of Calcutta is more important than two individuals. The learned Solicitor said so.

78. As regards these allegations we point out that the trustees of the Port of Calcutta are entrusted with the responsibility of the upkeep of the Port. If the Indian Ports Act envisages the possibility of their doing salvaging work themselves and they cannot do it, we can express our regret at the misfortune but we are unable to help.

79. We wholly disagree that the Port of Calcutta is more important than two persons. In a country which is governed by the rule of law the majority and the minority are not put in the balance only by virtue of their greater or lesser number. If the law does not permit two people to be arrested, then even if the Port of Calcutta ceases to be a Port from tomorrow, those two persons shall not be arrested.

80. We are of the opinion that the obtaining of the arrest orders against the Managing Director was wrong on the part of the Trustees as no semblance of a

plausible and potentially successful cause of action exists, in our prima facie opinion, against the Managing Director. It was, in our opinion, also wrong on the part of the Trustees to seek to keep a mere master of the vessel as a hostage so that big persons employing him and connected with him might be forced to give security for his release.

81. The costs of the appeal and of the court below until to-day shall follow the result. The appeals are allowed. The orders dated 24.6.97 and 30.6.97 are not aside in so far as those, to any extent at all, seek to restrain the movement of the appellants or any of them, even if such movements are about to take them outside Indian altogether, may be never to return. In short, the appellants shall be as free to leave India and of course, the city of Calcutta, as any passport holding free citizen of India is free. The undertakings given at the time of admission of appeal are discharged.

82. The hearing has gone on before us for 4/5 days. The matter has been heard in the court below for a few days also. The above costs are assessed at Rs. 1,00,000/-, Rs. 50,000/- to be paid to Mr. Jayanta K. Mitter's client and the balance to Mr. Bachawat's client. Such payment to be made within a month from date hereof.

Stay of operation of this order is prayed for by Mr. Bose but such prayer is unhesitatingly refused.

The parties and all others concerned including the Emigration Authorities shall act on a signed xerox copy of the minutes of the operative portion which we are dictating separately. Thereafter the parties and all others concerned shall act on a signed xerox copy of this dictated order upon the usual undertaking.