IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(ADMIRALTY JURISDICTION)

Admiralty Suit No. 43 of 2024

Cetus Maritime Pool Limited

Plaintiff

-Versus-

M.V. Schuyler Trader, IMO No. 9638408, Flag: Singapore, now lying at Mongla Port, Bangladesh and others

Defendants

Mr. Mahiuddin Abdul Kadir, with
Ms. Zinia Amin, and
Mr. Noor Mohammad Mozumder Roni, Advocates

... For the plaintiff

Mr. Kazi Ershadul Alam, with
Mr. Ragib Kabir, Advocates

... For the added defendant No. 6(a)-applicant

The 12th January of 2025

Present:

Mr. Justice Zafar Ahmed

Added defendant No. 6(a) Clara Shipping Company has filed the instant application for vacating the order of arrest of the bunker on the 1st defendant vessel M.V. Schuyler Trader, IMO No. 9638408, Flag: Singapore, now lying at Mongla Port, Bangladesh. Earlier, this Admiralty Court on 18.12.2024 passed the order of arrest of the 1st defendant vessel. 4th defendant is Global American Transport (GAT LLC). Defendant No. 6(a) has not yet filed written statements. The

plaintiff Cetus Maritime Pool Limited has filed written objection against the application for vacating the order of arrest of the bunker on the vessel.

The relevant facts are that the plaintiff has some outstanding claims against the 4th defendant GAT LLC in respect of freight, hire and supply of bunker on two vessels, namely China Spirit and Asia Spirit which are totally unconnected with the 1st defendant vessel and/or its registered owner defendant No. 6(a).

Defendant No. 6(a)-applicant entered into a time charterparty agreement with Raffles Shipping International Pte Ltd. for chartering the 1st defendant vessel. Raffles sub-chartered the vessel to the 4th defendant under a single trip (via Jubail to Chittagong and/or Mongla) time charterparty contract for 35 days on 14.11.2024. On arrival of the 1st defendant vessel at Mongla Port, the plaintiff filed the instant admiralty suit for arrest of the bunker on the vessel in relation to the unsettled dispute with the 4th defendant on the ground that it has charge over the bunker on the vessel although it has no claim against the vessel or its owner. Eventually, the plaintiff obtained an order of arrest of the bunker as mentioned earlier.

The crux of the argument advanced by the learned Advocate appearing for the defendant No. 6(a)-applicant is that the claim of the plaintiff pertains solely to the sub-charterer 4th defendant and does not involve the 1st defendant vessel or its owner and further that there is

no maritime lien against the bunker in question. As such, the arrest of the bunker is not maintainable inasmuch as there is no action in *rem* against the bunker and in the absence of any action in *personam* against the vessel or its owner the admiralty jurisdiction of this Court under the Admiralty Court Act, 2000 is not attracted. In support of the arguments, the learned Advocate refers to an Indian case and a decision from our jurisdiction.

The learned Advocate appearing for the plaintiff, on the other hand, submits that under Section 4(3) of the Act, 2000 the instant suit is maintainable against the bunker only in an action in *rem*. In order to substantiate the argument, the learned Advocate refers to three English decisions and two South African decisions.

The only question to decide in the instant application is whether a claim in respect of the bunker or the property in the bunker can be arrested when there is no claim against the vessel or its owner.

Admittedly, there is no maritime lien against the bunker (***Marine Oil Broking Company Pte Ltd. vs. MV Daizu Maru and others***, 55 DLR 471). In ***Peninsula Petroleum Ltd. vs. M.V. Geowave Commander,*** 2015(3) Bom CR 693, the plaintiff was the unpaid seller of the bunker supplied to the 2nd defendant vessel. The 3rd defendant was the bareboat charterer of the vessel. The owner of the 2nd defendant vessel terminated the bareboat charterparty contract. The 2nd defendant vessel arrived at the port and harbour of Mumbai. The

plaintiff filed the admiralty suit. The vessel was arrested. The plaintiff admitted that he was no privity of contract with the 2nd defendant vessel or her owners and the claim was against the 3rd defendant. It was argued by the plaintiff that under the bunker supply contract between the plaintiff and the 3rd defendant, the risk in the bunkers would pass on to the 3rd defendant on the bunkers being delivered to the vessel but the title was to pass only upon payment for the value of the bunkers delivered. Therefore, the plaintiff contractually was entitled to exercise its lien on the title in the bunkers until it received payment for the same. The plaintiff also argued that until payment was made, the property in the bunkers did not pass on to the buyer, viz., the 3rd defendant until the conditions imposed by the plaintiff-seller are fulfilled. Therefore, even if the owners of the vessel have not paid any bareboat charter hire, still they cannot hold on to the bunkers or appropriate the bunkers which in effect belongs to the plaintiff.

The only issue in *Peninsula* was whether the bunkers on board a vessel can be arrested without any claim against the vessel and independent of the vessel. In answering the issue, the Bombay High Court referred to various case laws decided by the Indian Supreme Court, English Courts and the South African Courts. It was observed in *Peninsula* that though bunkers could be termed necessaries supplied to the vessel, the question herein is not claim against the

vessel but it is the claim against the bunker on board with no claim against the vessel and independent of the vessel. It was further observed that the counsel for the plaintiff could not show a single case where the English Courts exercised admiralty jurisdiction for arrest of bunkers on board a ship independently of a ship and with no claim against the ship. The only place where bunkers are being arrested and stored is in South Africa where jurisdiction to arrest bunkers is confirmed by statute. It was further observed that bunkers cannot be arrested independently of or with the ship as separate maritime property. It is not open to the plaintiff to argue that bunkers can be separated from the ship and treated as independent property capable of arrest even though the vessel itself cannot be proceeded against and arrested by the plaintiff in respect of its claim against the 3rd defendant. Therefore, whilst freight and cargo are considered as maritime property, bunkers are not and hence arrest of bunkers is not permissible irrespective of whether there is a maritime claim or lien against the vessel. Bunkers cannot be considered as maritime property independent of the ship. Bunkers are part of the ship and not capable of independent arrest. In the event the bunkers belong to the charterer against whom the plaintiff has a maritime claim, the plaintiff has no remedy by way of arrest of bunkers and the plaintiff must pursue its claim against the charterer by adopting such other remedies as are available in law. Any alleged lien over the bunkers as provided in the

bunker sale contract is of no consequence. It is a contractual lien at best and does not bind a person who is not a party to the contract. This does not give the plaintiff any right to arrest the bunkers on board the vessel nor does it entitle the plaintiff to proceed in *rem* against the bunkers.

In respect of action in *rem* it is observed in *Peninsula* that the foundation of an action in *rem* has been extensively dealt with by the Indian Supreme Court in the matter of *M.V. Elisabeth,* AIR 1993 SC 1014 which does not help the cause of the plaintiff. *M.V. Elisabeth* makes it clear that the admiralty jurisdiction of the High Court is founded on the arrest of the ship and is directed against the ship. *M.V. Elisabeth* also makes it clear that the foundation of an action in rem is a maritime lien or claim imposing a personal liability upon the owner of the vessel.

It was further observed in *Peninsula* that the res is the ship. There can be no action in *rem* without arrest of the ship because that is the foundation of the admiralty jurisdiction and an action in *rem* is directed against the ship itself to satisfy the claim of the plaintiff out of the res.

Now, I turn to the cases cited on behalf of the plaintiff.

In the "***Saint Anna***", [1980] vol.1 Lloyd's Law Reports Q.B. (Adm. Ct.) 181, the defendant owners let their vessel *Saint Anna* to the intervener charterers (W.) under a time charter dated Mar. 13,

1979. W. took delivery of the vessel on Mar. 22, 1979 and paid for the oil on board the vessel at that time. W. had provided and paid for all the fuel since taking delivery. The plaintiff-mortgagees issued a writ in *rem* in which they claimed from the defendants arrears of principal and interest payments due under a registered mortgage dated July 16, 1977. *Saint Anna* was arrested on July 20, 1979. An order was passed for sale of the vessel by the Admiralty Marshal without prejudice as to the ownership of the bunkers at present on board her and that the proceeds of sale of the said bunkers be separately accounted for. By notice of motion W. applied for a declaration that they were the owners of the fuel oil on board *Saint Anna*. Be it mentioned that after *Saint Anna* had been arrested a survey was carried out for the purpose of ascertaining the quantities of fuel and diesel oils remaining on board. The survey showed that 442.41 tonnes of intermediate fuel oil and 58.14 tonnes of marine diesel oil remained on board. The question before the Court was whether those oils are the property of W. or the property of the shipowners.

It was held by the Queen's Bench Division that on an analysis of the clauses in the charter, the fuel and diesel oil on board *Saint Anna* when she was arrested was the property of W. (charterers) and the application by the interveners (W.) would be granted.

In the "***Span Terza***" [1984] vol.1 Lloyd's Law Reports H.L. 119, by a charter dated Mar. 2, 1979, the defendant owners let their

vessel *Span Terza* to the charterers for a period of about three years from the date of delivery. On Mar. 12 the charterers let the vessel to the interveners for a period of two years from the date of delivery. In January, 1981, the owners of the vessel *Neptunia* let her to the defendants and on Sept. 18, 1981, they issued a writ in *rem* against the defendants' vessel *Span Terza* in which they made a claim for upaid hire due under the charterparty and damages for wrongful repudiation.

On Nov. 18, *Span Terza* was arrested, and on Dec. 16, 1981, the owners of *Neptunia* were given judgment on their claim and *Span Terza* was ordered to be appraised and sold by the Admiralty Marshal. On Dec. 23, 1981, the interveners cancelled the charter dated Mar. 12, and on the same day the charterers cancelled the charter dated Mar. 2, 1979.

On Mar. 9, 1982, the interveners obtained leave to intervene in the action between the owners of *Neptunia* and the defendants and moved the Court for a declaration that they were entitled to, and were the owners of, the bunkers on board the vessel *Span Terza* and for an order that the amount realized upon the sale of the bunkers by the Admiralty Marshal be paid to them after deduction of the Admiralty Marshal's charges.

The only question before the House of Lords in the *Span Terza* was whether at the date of the sale of the unbroached bunkers on July 8, 1982, they were then the property of the shipowners or the property

of the charterers. The House of Lords observed that the bunkers on *Span Terza* at the time of her arrest and at the time of cancellation of charterparty had all been paid for by the charterers. It was held that under the terms of the charter the bunkers while aboard *Span Terza* were at all material times the property of the charterers; the owners had possession of them as bailees of the charterers; upon cancellation of the charter the owners' right to use and consume the bunkers remaining on *Span Terza* terminated; the owners remained bailees of the charterers and any contractual right they might have had to retain possession as against the charterers came to an end. The appeal was allowed.

In the "***Eurostar***" [1993] vol.1 Lloyd's Law Reports Q.B. (Adm. Ct.) 106, by a charterparty dated Mar. 19, 1991 the owners let their vessel *Eurostar* to the interveners for two periods ending on Apr. 30, 1992. The owners delivered the vessels into the charterers' service and the charterers took over and paid for the fuel remaining in the ship's bunkers. Throughout the period of the charter it was the charterers who provided and paid for all fuel delivered to the ships.

In January and February, 1992 the ships suffered engine breakdowns and were laid up at Middlesborough. Repairs were commenced but were not completed because of the owners' failure to pay for the repairs. The ships were then removed from the repair yard to Tees dock where they were laid up. The ships were off hire during

this period and remained off hire until the period of the charter expired on Apr. 30, 1992.

The owners had on Nov. 9, 1990 mortgaged their shares in the ships to the plaintiffs to secure accounts current between the plaintiffs and themselves.The owners failed to make payments which were due to the plaintiffs under the terms of the loan agreements, and on June 17, 1992 the plaintiffs issued writs against the two ships. On July 6, 1992 the Court ordered the ships to be appraised and sold by the Admiralty Marshal pendente lite and pursuant to that order the ships were sold. The diesel and gas oil were sold for U.S.$28,987.30 (the bunker fund). The interveners claimed that they were entitled to payment out to them of the bunker fund.

The issues for decision in the *Eurostar* were (1) whether the fuel oil was at the date of sale the property of the shipowners or of the interveners; (2) if the answer to the first question was that the fuel oil was the property of the shipowners whether that oil was part of the security mortgaged to the plaintiffs.

It was held that (1) the bunkers in the vessels throughout the period of hire had all been paid for by the interveners and was their property; (2) the charterers (interveners) were entitled to control the amount of fuel remaining in the vessel and the shipowners having prevented the charterers from redelivering the vessel in accordance with the terms of the charter could not take advantage of cl. 6 when

the charter expired by effluxion of time the bunkers remained the property of the charterers; (3) when the period of hire expired by effluxion of time the shipowners right to use and consume the bunkers then remaining in the vessels terminated; the shipowners remained bailees of charterers' property; and as there was no sale of the bunkers to the shipowners thereafter the bunkers remained the property of the charterers until they were sold by the Admiralty Marshal; there would be an order that the net proceeds of sale of the bunkers be paid out to the interveners; (4) on the assumption that the bunkers were the property of the shipowners, the evidence of Bahamian law was unsatisfactory, and English law applied; the bunkers did not form part of the security mortgaged to the plaintiffs and if it were held that the bunker fund was the property of the shipowners it would be distributed pari passu between all the judgment creditors in *rem.*

In the "***M.V Vogerunner***" decided by the Western Cape High Court, Cape Town exercising its admiralty jurisdiction on 28.10.2009 (unreported) the basis for the arrest of the bunkers was to afford the applicant security for a claim it had instituted against the 2nd respondent in an arbitration proceedings in London for damages. The 2nd respondent was the owner of the bunkers. The intervening party was the owner of the vessel. At the time of the arrest of the bunkers, the vessel was on a five year time charter to the 2nd respondent.

Eventually, it was held that the intervener was entitled to an order setting aside the order authorizing the arrest of the bunkers.

The another South African case (unreported) was decided on completely different set of facts and law.

The instant suit has been filed under Section 3(2)(h) of the Admiralty Court Act, 2000. Under Section 3(2)(h), the Admiralty Court of Bangladesh has the jurisdiction to hear and determine any claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship. Under Section 4(2), the admiralty jurisdiction can be exercised through action in *rem* against the ship or property in question in relation to claims under clauses (a) to (c) and (r) of Section 3(2). Clause (h) of Section 3(2) is excluded in Section 4(2) which means that action in *rem* cannot be exercised in relation to clause (h). Under Section 4(3) action in *rem* can be exercised against the ship or any other property over which there is a maritime lien or other charge on the vessel or the property.

Admittedly, the plaintiff has no claim against the 1st defendant vessel or her owner who is the added defendant No. 6(a)-applicant. The plaintiff's claim is directed against the sub-charterer *i.e.* the 4th defendant in relation to two vessels which have no connection whatsoever with the 1st defendant vessel or her owner. The plaintiff is not the supplier of the bunker in question. It appears from the time sub-charterparty agreement that the property in the bunker is owned

by the sub-charterer *i.e.* the 4th defendant. There is no material on record to show that the tenure of the sub-charterparty has expired. Be that as it may, to decide the instant application for vacating the order of arrest of the bunker, the ownership of the bunker or the property in the bunker, in my view, is irrelevant for the reasons set out below.

In *Peninsula (supra)*, it is categorically decided that unless or until the owner of the ship is liable for the claim, the admiralty jurisdiction of the Indian Court cannot be invoked for the reason that admiralty jurisdiction relates to an action in *rem* against the vessel or cargo and there can be no action in *rem* without arrest of the vessel which is the foundation of the admiralty jurisdiction. This proposition of law equally applies to our law. It was further held in *Peninsula* that bunkers cannot be separated from the ship and treated as independent property capable of arrest when the vessel itself cannot be proceeded against and arrested by the plaintiff in respect of its claim against the charterer of the vessel. In the cases decided by the English Courts in '*Saint Anna'*, '*Span Terza'* and '*Eurostar'* cited on behalf of the plaintiff, the vessels, not the bunkers were arrested. The common question in those cases centered around the ownership of the bunker and/or the fuel oil. Action in *rem* and action in *personam* were never issues in the English cases unlike the *Peninsula* case which is also an issue in the case in hand. Moreover, in the cases decided by the English Courts and the South African Courts, it was common ground

that the claim against the bunker was directly connected with the vessel and/or its owner. In my view, the observations made in *Peninsula* on point of law apply to the instant case. The defendant No. 6(a)-applicant has made out a *prima facie* case in support of its application for vacating the order of arrest of the bunker on the vessel.

Before parting with the order, I put it on record that the question of law decided in the instant application based on the available facts is subject to the final outcome of the suit.

In view of the foregoing discussions, the application for vacating the order of arrest of the bunker on the 1st defendant vessel is recalled and vacated.

Communicate the order to the Marshal of the Court at once at the cost of the defendant No. 6(a)-applicant.

Arif, ABO