

SUNIL B. NAIK v. GEOWAVE COMMANDER

Civil Appeal Nos 2617-18 of 2018

Reflect Geophysical Pte, was awarded a contract by the Oil and Natural Gas Commission for carrying out seismic operations off the coast of Gujarat. In order to perform the obligations under the agreement, Reflect Geophysical entered into a Charter party Agreement dated 29.06.2012 with one M/s Master and Commander AS Norway for charter of Geowave Commander- a specially built vessel for conducting seismic operations for a period of three years. The charter party agreement was in the nature of a Bareboat Charter where the charterer also had the option of purchasing the vessel and the seismic equipment of the owners. Reflect Geophysical also entered into charter agreements with the appellant on 30.10.2012 and one other person Yusuf Abdul Ghani on 01.10.2012 for charter of fishing trawlers and M.V Orion Laxmi to be used as chase boats to assist the survey operations to be conducted by Geowave Commander. Both the appellant and Yusuf Abdul Ghani raised invoices on Reflect Geophysical which were not paid. Owners of the vessel Geowave Commander also gave Notice of Default to the charterer Reflect Geophysical under the charter party. On the other hand, Reflect Geophysical also filed an application before a Singapore Court for placing the company under judicial management which was published in the official gazette.

On 15.03.2013, Yusuf Abdul Ghani moved the Bombay High Court seeking arrest of the vessel, thereafter the appellant also moved the Bombay High Court seeking arrest of the vessel. The owners of the vessel sought vacation of ex-parte stay of the arrest order. On 17.04.2013, the Bombay High Court vacated the arrest order granted earlier. Appellant and Abdul Yusuf Ghani filed intra-court appeals before the Division Bench of the Bombay High Court inter alia stating that their claim for arrest of the vessel was on the basis of supplies made to the respondent vessel and was therefore covered under Article I(1)(f) and (l) and 3(1)(b) of the Arrest Convention 1999. On the other hand, the owners contended that no goods and services were supplied to the vessel and therefore the question of application Article I(1)(l) does not arise. The Division Bench dismissed the appeals holding that the claim of the appellants was not covered under Article I(1)(l) of Arrest Convention, 1999 as no necessary supplies were made to the Respondent vessel Geowave Commander by the Fishing Trawlers chartered by the appellants. It was also held that since the maritime claim is for hire of vessels other than Geowave Commander therefore article I(1)(f) of the Arrest Convention would have no application. The Court held that “*Moreover, Article I(1)(l) of the Arrest Convention, 1999 appropriately covers a situation where goods have been supplied and not to a case where goods have been given on hire or for use only.*”

Appellants moved the Supreme Court challenging the decision of the Bombay High Court and reiterated their stand taken earlier. The Respondents also reiterated their stand. The issue amongst others before Supreme Court was “*whether a maritime claim could be maintained under the admiralty jurisdiction of the High Court for an action in rem against the respondent ship in respect of the dues of the appellants when the charterer himself is in default of the payment to the owner.*”

The Court upheld the decision of the Division Bench of the High Court and held that claims in respect of the fishing trawlers chartered by the Appellant could not be converted into maritime claims against the respondent vessel not owned by Reflect Geophysical. It was further observed while concluding that “*The appellants have neither any agreement with the owners of the respondent vessel nor any claim against the respondent vessel but their claim is on account of their own vessels hired by the charterer of the respondent vessel. There is no claim against the owners of the respondent vessel.*”. The following observations are noteworthy in the judgment;

- a. The Court after considering the terms of the charter agreement between Reflect Geophysical and Master and Commander AS Norway observed that Reflect Geophysical had the status of a de facto owner. Further it was observed that the charter did contain the option of buying the vessel but that situation never came where Reflect Geophysical became de jure owner of the vessel. Similarly the court observed that the contracts between Reflect Geophysical and the appellant and Abdul Yusuf Ghani were a different set of charter agreements and the unpaid amounts under these contracts amounted to claim against Reflect Geophysical. The Court also noted that in the present case the maritime claims is against the

- respondent vessel whereas it is Reflect Geophysical which is liable to the claims in *personam*. It was held by the court that “*Thus if there was another vessel owned by Reflect Geophysical, the appellants would have been well within their rights to seek detention of the vessel as they have a maritime claim but not in respect of the respondent vessel.*”
- b. The Court referred to the test of ownership of vessel which is to be applied in maritime claims where the arrest of vessel is sought as there has to be liability of the shipowner since the proceedings in rem against the vessel would be converted into proceedings in personam when the owners enter appearance. On the issue of provisions of the Arrest Convention, 1999, the Court observed that the question was “*which is the ship in question?*” as detention order in such cases could only be passed against ship against whose owners a claim in personam lies and cannot be used to arrest a vessel of third party. The Court held that “*The crucial test would be of ownership, which in the present case clearly does not vest with Reflect Geophysical and the de facto ownership under their bareboat charter cannot be equated to a de jure owner, which is necessary for an action in personam.*”
- c. The plea of “beneficial ownership” of the vessel with Reflect Geophysical was raised by the appellants to contend that their claim could be enforced against the vessel. Appellants relied upon an English judgment in *Medway Drydock & Engg. Co. Ltd v M.V Andrea Urusla* 1973 QB 265. The Court relied upon the judgment in *I Congreso Del Partido* 1978 QB 500 which dissented from the judgment in *Medway Drydock* on the issue of beneficial ownership of a vessel. The Court went on to observe that “*Thus, mere possession of the ship, however, complete and whatever be the extent of the control was not found good enough to confer the status of ownership. The “beneficial use” of a chartered ship would not ipso facto convert the status of a charterer into a “beneficial owner”.* The Court referred to various judgments of England, Singapore and Canada where the issue of beneficial ownership in a Demise Charter was discussed.
- d. The clear difference between the Beneficial Ownership of a vessel and the Charterer was noted by the Court. The Court held that the term maritime claim was used in the Arrest Convention 1999 with regard to claim arising out of an agreement relating to the use or hire of “the ship” which in the present case would mean the vessel chartered by the appellant and Yusuf Abdul Ghani and not the respondent vessel. Referring to Article 3(2) of the Convention, the Court observed that the liability of the claim is of Reflect Geophysical, because as per Article 3(2) the demise, voyage, time charterer of the vessel is liable. The Court held that “*In view of the discussion aforesaid, really speaking Reflect Geophysical cannot be said to be the beneficial owner in the capacity of a demised charterer of the respondent ship. Reflect Geophysical is not the owner of the respondent ship and the owner cannot be made liable for a maritime claim, which is against the trawlers and Orion Laxmi.*”
- e. The Court cited section 5 of the Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017, which relates to the liability of Demise Charterer in such cases. Section 5 is reproduced hereinbelow;

5. Arrest of vessel in rem.—(1) The High Court may order arrest of any vessel which is within its jurisdiction for the purpose of providing security against a maritime claim which is the subject of an admiralty proceeding, where the court has reason to believe that—

(b) the demise charterer of the vessel at the time when the maritime claim arose is liable for the claim and is the demise charterer or the owner of the vessel when the arrest is effected; or”.

Article I (1)(f) of the Arrest Convention 1999

“1. Definitions.— For the purposes of this Convention:

(1) “Maritime Claim” means a claim arising out of one or more of the following:

(f) any agreement relating to the use or hire of the ship, whether contained in a charter party or otherwise;(1) goods, materials, provisions, bunkers, equipment (including containers) supplied or services rendered to the ship for its operation, management, preservation or maintenance;”

Article 3 (1) & (2):

“3. Exercise of right of arrest.—(1) Arrest is permissible of any ship in respect of which a maritime claim is asserted if:

(a) the person who owned the ship at the time when the maritime claim arose is liable for the claim and is owner of the ship when the arrest is effected; or

- (b) the demise charterer of the ship at the time when the maritime claim arose is liable for the claim and is demise charterer or owner of the ship when the arrest is effected; or
- (2) Arrest is also permissible of any other ship or ships which, when the arrest is effected, is or are owned by the person who is liable for the maritime claim and who was, when the claim arose:
 - (a) owner of the ship in respect of which the maritime claim arose; or
 - (b) demise charterer, time charterer or voyage charterer of that ship.

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