ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI

Admiralty Suit No. 05 of 2017

Date	**Order with signature of Judge**

Present:
Mr. Justice Muhammad Ali Mazhar

Spectre Consulting Limited.....Plaintiff

Vs.

MT "Everrich 6" & others .....Defendants

Hearing of C.M.A Nos.60/2017 and 61/2017.

Dates of hearing: 19.9.2017 and 26.9.2017.

M/s. Shaiq Usmani, Manzar Bashir Memon and Ms.Asmara Parveen, Advocates for the Plaintiff.

Mr.Aga Zafar Ahmed, Advocate for the Defendant No.1 & 2.

Mr. Mayhar Kazi, Advocate for the Defendant No. 3 & 5.

Mr. Shahnawaz Mangrio, Deputy Manager (Legal),
Port Qasim Authority.

Muhammad Ali Mazhar, J: This lawsuit has been brought under the Admiralty jurisdiction of the High Court Ordinance 1980. The plaintiff has entreated for the decree in the sum of US$ 874,161/- against defendant No.3 with a further request to pass directions that the LPG cargo on board defendant No.1 vessel may not be discharged till adequate security for the plaintiff's claim is furnished to the satisfaction of Nazir of this court.

2. The evanescent facts of the case are that the plaintiffs are duly incorporated company under the laws of UK and they are engaged in the business of Liquefied Petroleum Gas (LPG). The defendant No.1 is a vessel which carried a cargo

of LPG to Port Qasim. The defendant No.2 are defendant No.1 vessel's owners and the defendant No.3 is Charterer of the vessel. The plaintiffs entered into a Contract on 02.06.2017 with defendant No.3 to purchase 7000-8200 M/T to ship the CFR to Aden, Yemen within 30-35 days. The plaintiff made advance payment of US$ 874,161/- to the defendant No.3 whereas the outstanding amount was to be paid upon issuance of Notice of Readiness ("NOR") at the Discharge Port by defendant No.1. The plaintiffs came to know that instead of arranging for the cargo to Aden, Yemen, the defendant No.3 planned to carry it to a Pakistani Port and sold the cargo.

3. The learned counsel for the plaintiff argued that clause 14.1 of the contract articulates that if the contract does not go through the deposit will be returned, however he candidly admitted that no arbitration proceedings have been initiated against the alleged breach. According to the contract, a Notice of Readiness by Master of defendant No. 1 vessel was sent to the plaintiff which indicated the cargo would be loaded on board the vessel MV Everrich '6'. This was also accompanied by a certificate of quality of cargo. According to Section 3 (2) (h) the phrase "any agreement" is wide enough to include even a contract of carriage which is not between the parties to the suit that is to say all that is required is that the claim should arise from a contract of carriage. In this case the vessel Everrich is the particular ship under a charter party between Defendant No. 2 and Defendant No. 3 and examination of the charter party would show that the cargo of plaintiff was to be carried to Yemen and plaintiff's claim arises from the breach of this contract of carriage. He further argued that the plaintiffs have not filed this suit in rem at all but this is a suit in personam for the recovery of deposit paid to defendant No. 3. A perusal of the prayer in

the plaint would show that the plaintiffs have not sought the arrest of the vessel at all nor the plaintiffs have filed any application for arrest of the vessel under Rule 731 of Sindh Chief Court Rules. The record shows that cargo was loaded on 10th July 2017 but the defendant No. 2 cancelled the bill of lading in favor of plaintiff unilaterally and issued fresh bill of lading on 29th August 2017 and also mentioned different Port of Loading to that of Bandar Abbas. He further argued that the plaintiffs are entitled to injunction under Section 94 CPC which is similar to Mareva Injunction and hence the restraint of the vessel from sailing from Karachi is fully within the ambit of the law.

Judicial precedents quoted by the plaintiff

1. PLD 1990 Karachi 1 (Balagamwala Oil Mills (Pvt.) Ltd vs. Shakarchi Trading A.G. and others). 2. PLD 1986 Karachi 447 (Compagnie Continentale (France) S. A. vs. Pakistan National Shipping Corporation and others). 3. 2012 SCMR 1267 (C.V. "Lemon Bay" and others vs. Sadruddin and others). 4. [1988] 1WLR 1145 (Mitsui & Co. Ltd. & another Vs. Flota Mercante Grancolombiana S.A.).

4. The learned counsel for the defendant No.1 and 2 argued that the suit does not fall under Admiralty Jurisdiction of High Courts Ordinance. Reliance of section 3(2)(h) of the Ordinance by the Plaintiff is irrelevant; the suit does not disclose any 'cause of action' against the defendant No. 1 or 2 and therefore, the said defendants are liable to be struck off; the interim order dated 31.08.2017 amounts to 'arrest' of the vessel, which relief can only be availed by the plaintiff in an action *in rem* and not in action *in personam.* Admittedly, there is no agreement relating to carriage of goods or use or hire of the ship. Clause 3(2)(h) of the Ordinance clearly states that the claim should arise out of agreement relating to the carriage of goods. The plaintiff has

not produced or even alleged that 'any agreement' e.g. bill of lading was issued in favour of the plaintiff and that the defendant No.1 or 2 have breached any of its obligation under the said bill of lading. The first bill of lading was issued naming the Defendant No.3 (charterer) as the consignee, there was no agreement for carriage between the plaintiff and the defendant No. 1 & 2.

5. The learned counsel for the defendant No. 3 and 5 argued that the plaintiff cannot possibly have any *in personam* claim against the defendants. The plaintiffs have conceded in the Rejoinder that they have invoked the admiralty jurisdiction *in personam* and not *in rem*. A vessel, which is not a legal person, cannot be impleaded as a defendant except in a suit filed in rem. The plaintiffs have submitted in their Rejoinder to CMA No.60/2017 that they have not moved any application for arrest under Rule 731 of the Sindh Chief Court Rules. However, the prayer restraining the movement of the vessel is for all intents and purposes and effectively an arrest of the vessel. The Plaintiff has sought to establish territorial jurisdiction of this court solely on the basis that the defendant No.1 vessel is in the territorial waters of Pakistan. However, the presence of the vessel in the territorial jurisdiction of the court only establishes territorial jurisdiction if the claim is in rem. It is an admitted fact that defendant No.3 is a company incorporated in the United Arab Emirates and does not have any office in or any other form of presence in Pakistan. Furthermore, the contract was admittedly not executed in Pakistan and the performance thereof was not supposed to take place in Pakistan. The plaintiff is a company incorporated in the United Kingdom; pursuant to the contract the LPG was to be delivered in Yemen. Advance payment was made by the plaintiff to defendant No.3 in

UAE. The plaintiff alleges that the contract was breached by defendant No.3 which is denied by defendant No.3 in fact the plaintiff repudiated the contract for causing losses to defendant No.3 in excess of the amount of advance payment. The bill of lading was never issued in favour of the plaintiff but it was issued in favour of defendant No.3 and cancelled. So far as notice of readiness is concerned such Notice of Readiness was not addressed to plaintiff; a Notice of Readiness is a unilateral document and therefore cannot be a contract and in any event the Notice of Readiness was notice that vessel was ready for loading of cargo and not for discharge. It was further averred that pursuant to clause 14 of the Contract, the plaintiff and defendant No.3 had agreed that all disputes and claims arising out of or relating to this agreement or the alleged breach thereof shall be submitted to the UAE High Court. Furthermore, under clause 15.1 of the contract, the plaintiff and defendant No.3 had agreed that all disputes arising in connection with the contract shall be brought for final settlement under the rules of Conciliation and Arbitration of the Dubai, UAE Chamber of Commerce and the place of arbitration shall be Dubai, therefore, this court also does not have jurisdiction because the plaintiff itself contractually agreed to adjudicate disputes arising under the contract in UAE. So far as the merits of the case, the learned counsel argued that under the contract, the content of propane in the LPG was supposed to range from 25-35% and the content of butane from 75-65%. The plaintiff tried to force defendant No.3 to change the specification to maximum 30% propane. Emails evidencing this conduct of the plaintiff are annexed to defendant No.3's Counter Affidavit. The plaintiff represented the intended port of discharge could handle a ship having a length of 159 meters but the defendant No.3 later found out that the maximum length of ship that could be berthed at Aden Port

was 150m. The plaintiff after the vessel had been loaded changed this stance and started requesting cargo split in 2-3 ships as Port of Aden could not handle 8,000 MT cargo. Had the defendant No.3 sent by means of single LPG shipment of 8,000 MT, the ship would have to spend over a month discharging, leaving the Port terminal and going to outer anchorage until amount discharged taken up. This entire process would have required the vessel to remain at Aden for 90 days, and cause defendant No.3 incur over US$ 1,000,000 in freight and charter hire charges.

Judicial precedents cited by the counsel for defendant No.3 and 5

(1). [1995] Vol.1 Q.B.54. The "Lloyd Pacifico. (2). 2002 CLD 936 (Messrs Masoomi Enterprises Pakistan (Pvt.) Limited. and others Vs. Messrs Ping Tan Fishery Company and 5 others). (3). 2002 CLD 926 [Karachi] (Jaffer Brothers (Pvt.) Limited Vs. M.V. 'Eurobulker II').

6. Heard the arguments. In essence, the confrontation congregated in the midst of plaintiff and defendant No.3 is the alleged contravention and breach of the contract for sale and purchase of Liquid Petroleum Gas (LPG) signed on 02.06.2017. The contractual quantity of commodity sold and purchased under this agreement was between 7000 to 8200 tons with variation of 10% minus-plus. The port of delivery of the cargo was Aden, Yemen. The plaintiff has filed this suit under Admiralty jurisdiction and for the purposes of determining the jurisdiction of this court, it is pleaded that the defendant No.1 vessel under the charter of defendant No.3 thus the lawsuit encompasses the provisions of Section 3(2)(h) of Admiralty Jurisdiction of High Courts Ordinance, 1980. Though this lawsuit in its extant and structure seems to have embedded for an action in rem but after filing the counter affidavit by the defendants, the plaintiff in their rejoinder filed to CMA No.61/2017, self-confessed that they

have not set up this suit for an action in rem but for an action in personam which is permissible under Section 4(1) of the Ordinance. It is further avowed that the plaintiff has not pursued the arrest of the vessel under Rule 731 of the Sindh Chief Court Rules (O.S.). The record reflects that the plaintiff has filed two interlocutory applications i.e. CMA No.60/2017 under Order 39 Rules 1 and 2 read with Section 94 C.P.C with the prayer that the defendant Nos.1, 2 and 3 be restrained from discharging the cargo on board defendant No.1 vessel and the vessel itself be restrained from leaving territorial waters of Pakistan till a decision in this suit or upon furnishing adequate security for plaintiff's claim. Whereas in CMA No.61/2017 moved under Order 38 Rule 5 read with Section 151 CPC the plaintiff concomitantly prayed that the LPG cargo on board defendant No.1 vessel be attached till further orders of this court. Nevertheless, the plaintiff in the rejoinder endeavored to express that this is a suit in personam and no application moved for the arrest of the vessel but if the injunction application is envisioned at one fell swoop, the plaintiff has in fact prayed for restraining orders against the vessel not to leave territorial waters of Pakistan till decision in the suit or upon furnishing adequate security for plaintiff's claim.

7. Although the nomenclature of the application is not under Rule 731 of the Sindh Chief Court Rules (O.S.) but making a request for restraining the vessel not to sail is analogous and consonant to the virtual effect of its arrest which the plaintiff strived in this case. Anyway, under Section 3 of the Admiralty Jurisdiction of the High Courts Ordinance, 1980 this court has been conferred jurisdiction to determine the cases, questions or claims mentioned in clauses (a) to (r) likewise under Section 4 it is envisaged by what means the Admiralty Jurisdiction is to be exercised. It is clear from

letter of the law that the Admiralty jurisdiction of the High Court may also be invoked by an action in personam but it is subject to provisions of Section 5. In Subsection (4), it is further provided that in the case of any such claim as is mentioned in clauses (e) to (h) and (j) to (q) of Subsection (2) of Section 3, being a claim arising in connection with a ship, where the person who would be liable on the claim in an action in personam was, when the cause of action arose, the owner or charterer of, or in possession or in control of the ship, the Admiralty jurisdiction of the High Court may, whether the claim gives rise to a maritime lien on the ship or not, be invoked by an action in rem against that ship, if at that time when the action is brought it is beneficially owned as respects majority shares therein by that person or any other ship which, at the time when the action is brought, is beneficially owned as aforesaid. Under the same Ordinance, Section 5 deals with jurisdiction in personam of courts in collision and other similar cases. For the ease of reference, Section 5 of the Admiralty Jurisdiction of the High Courts Ordinance, 1980 is reproduced as under:

> **"Jurisdiction in personam of Courts in collision and other similar cases.-**
>
> **(1) No Court shall entertain an action in personam to enforce a claim to which this section applies unless-**
>
> **(a) the defendant has his ordinary residence or a place of business within Pakistan; or**
>
> **(b) the cause of action arose within the internal or territorial waters of Pakistan; or**
>
> **(c) an action arising out of the same incident or series of incidents is proceeding in the Court or has been heard and determined in the Court.**
>
> **(2) No Court shall entertain an action in personam to enforce a claim to which this section applies until any proceedings previously brought by the plaintiff in any Court outside Pakistan against the same defendant in respect of the same incident or series of incidents have been discontinued or otherwise come to an end.**
>
> **(3) The preceding provisions of this section shall apply to counter-claims, not being counter-claims in proceedings arising out of the same incident or series of incidents, as they apply to actions in personam, but as if the references to the plaintiff and the defendant were respectively references to the plaintiff on the counter-claim and the defendant to the counter-claim**

(4) The preceding provisions of this sections shall not apply to any action or counter-claim if the defendants thereto submits or has agreed to submit to the jurisdiction of the Court.

(5) Subject to the provisions of subsection (2), the High Court shall have jurisdiction to entertain an action in personam to enforce a claim to which this section applies whenever any of the conditions specified in clauses (a) to (c) of subsection (1) are satisfied.

(6) The claims to which this section applies are claims for damage, loss of life or personal injury caused by ships or arising out of collision between ships or out of the carrying out of or omission to carry out a manoeuvre in the case of one or more of two or more ships or out of non-compliance, on the part of one or more of two or more ships, with the regulations made under section 214 of the Merchant Shipping Act, 1923 (XXI of 1923).”

8. A significant peculiarity of an action in rem is that the plaintiff is allowed to commence the proceeding by going after specific piece of property, the ship or the cargo or certain other associated property. It is not a proceeding against any one person or another, nor does it deal with this or that man’s title to the thing (res) but is a legal device employed for satisfying, under conditions of seafaring life and exigencies of international maritime transactions and the claim of a person who has suffered damage or injury. The proceeding commences by issuing the process on the ship and taking steps to arrest it, so that it may not move out of jurisdiction. The distinguishing feature of the action in rem has always been the ability of the maritime claim to proceed against the ship directly, which was regarded as the defendant, the ship being personified. Whereas the action in personam in Admiralty jurisdiction is of the same nature as ordinarily common law action commences by summons served on a defendant which is a person, natural or juridical and not thing (res). If the technical object of the suit is to establish a claim against some particular person, or to bar some individual claim or objection, so that only certain persons are entitled to be heard in defence, the action is in personam although it may concern the right to or possession of a tangible thing. An action in personam is an ordinary action as in common law courts. The judgment of the court

is a personal one in the nature of a command or prohibition against the unsuccessful party. For exercising jurisdiction in action in personam, English statutes have engrafted certain restrictions in respect of collision in similar cases. The restriction applies to claims for damage, losses of life or personal injury caused by ships arising out of collision between ships, or out of the carrying out of or omission to carry out a manoeuver by one or more of two or more ships or out of non-compliance with the collision regulations. The action may be initiated either as action in rem or as action in personam, depending on conditions specified in the Admiralty law for each form of action. These forms of actions are not mutually exclusive; if conditions for both the forms of actions are satisfied, a plaintiff may take recourse to either of them or both of them, as he may find expedient. **[Ref: Maritime Jurisdiction and Admiralty Law by Samareshwar Mahanty].** At this juncture I would like to quote an excerpt from the book "**Admiralty Jurisdiction and Practice"** Fourth Edition by **Nigel Meeson and John A Kimbell"** Paragraph 3.7- Page 88 as under:

> **"The decision in *The "Longford"* was considered by the Court of Appeal in *The "Burns"* where the court had to consider whether a claim in rem against a ship owned by the London County Council was a claim against the London County Council which by statute had a limitation period of six months. Again this was a claim for damages arising out of a collision between two ships which gave rise to a maritime lien. Collins MR described the decision in *The "Longford"* in the following words: "It seems to me that that case in substance decides that there is a real, and not a mere technical, distinction between an action in rem and an action in personam....". Fletcher Moulton LJ said: "The very able argument of a counsel for the appellants rests upon the contention that the process of arrest of a vessel.... is merely a method of enforcing an appearance in an action. In other words, that an action in rem in no way differs in its nature from an action in personam; save that there is attached to it a means of compelling the appearance of the defendant by the arrest of the vessel. I am of the opinion that this view cannot be supported. The two cases upon which counsel have chiefly relied—The '*Dictator*' and The '*Gemma*'—appear to me, when closely examined, to negative and not to support that proposition. They both of them treat the appearance as introducing the characteristics of an action in personam. In other words, it is not the institution of the suit that makes it a proceeding in personam, but the appearance of the defendant. And further, I think that the contrary is conclusively established by the case of The 'Bold Buccleugh', supported and approved as it was by the House of Lords in the case of Currie v McKnight.....**
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> **I am, therefore, of the opinion that the fundamental proposition**

of the argument of the appellants' counsel fails, and that the action in rem is an action against the ship itself. It is an action in which the owners may take part, if they think proper, in defence of their property, but whether or not they will do so is a matter for them to decide, and if they do not decide to make themselves parties to the suit in order to defend their property, no personal liability can be established against them in that action. It is perfectly true that the action indirectly affects them. So it would if it were an action against a person whom they had indemnified... I do not think that we are entitled to suppose that there has been a change in the nature of the action in rem merely because the modern language of the writ by which it is now commenced is unsuitable to that which I think the authorities establish to be its real nature."

9. The starting point and or the nucleus of plaintiff's suit is encompassed Clause (h) of Section 3 of the Ordinance in which the jurisdiction confers likewise to this court to 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. The agreement relied upon is fundamentally an agreement for sale and purchase of Liquid Petroleum Gas (LPG) in which certain modalities were settled between the parties for supplying LPG including the date of discharge of cargo at the designated port including the contractual quantity of commodity. On the contrary the learned counsel for the defendant No.3 pointed out certain lapses and breaches perpetrated by the plaintiff also. As a result, the cargo could not be shipped or discharged at the designated seaport. He also pointed out correspondence to put on view the controversy cropped up. It is an admitted fact that 23% payment has been made by the plaintiff in advance and balance 77% of the payment was to be made within 24 hours from the time of notice of readiness (NOR) by means of telex transfer to the seller's designated bank account. The plaintiff made much emphasis that NOR was issued on 10.07.2017 to all concerned parties though it did not convey the name of plaintiff but the name of ship was same with mentioned seaport Bandar Abbas. The certificate of quality dated 25.07.2017 is also attached with the plaint. The plaintiff pointed out nothing that the balance amount was

paid to the plaintiff at the time of receiving notice of readiness. Nothing articulated by the plaintiff's counsel as to whether the balance amount was paid at the time of receiving NOR which was also one of the terms and conditions of the subject contract. Furthermore, the parties with their open eyes, volition and commercial wisdom agreed to other terms and conditions with regard to the nonperformance or breach of contract. Under Clause 15 it was unambiguously agreed that all disputes arising in connection with the contract shall firstly be settled amicably and should the parties reach no agreement then the case shall be brought for final settlement under the rules of conciliation and arbitration of the Dubai, UAE Chamber of Commerce. It is further mentioned in the same clause that findings as assessed by arbitration will be final and binding to both parties without any possibility of recourse and they also mutually agreed that the place of arbitration shall be in Dubai, UAE Court. In Clause 17.6 it is provided that in case of buyer's failure to comply with the payment schedule/terms or non-payment or non-receipt of funds by the seller on seller's nominated bank account as per clause 7.1(b), seller shall have the right, at its own discretion, to immediately without any notification to the buyer cancel the shipment and terminate the contract/sell the cargo to any third party. Though the counsel for parties attributed vice versa the breach of contract but they have not brought anything on record to show formal termination of contract by either side. The choice of forum with the arbitration clause in a particular country was made in an arm's length negotiations between the parties and absent some compelling and countervailing reasons it should be honored by the parties. The clause with regard to exclusive and non-exclusive of the jurisdiction of the court of choice is not determinative but is most crucial factor and when question

arises as to the nature of the jurisdiction agreed between the parties, the court has to decide the same on true interpretation of the contract.

10. According to Section 5 of the Ordinance, 1980, it is clearly provided that no court shall entertain an action in personam to enforce a claim to which this section applies unless the defendant has his ordinary residence or a place of business within Pakistan or the cause of action arose within the internal or territorial waters of Pakistan or an action arising out of the same incident or series of incidents is proceeding in the Court or has been heard and determined in the Court. Moreover in Subsection (6) it is postulated that the claims to which this section applies are claims for damage, loss of life or personal injury caused by ships or arising out of collision between ships or out of the carrying out of or omission to carry out a manoeuvre in the case of one or more of two or more ships or out of non-compliance, on the part of one or more of two or more ships, with the regulations made under section 214 of the Merchant Shipping Act, 1923.

11. It is an admitted fact that the plaintiff is U.K. based company, whereas the defendant No.3 is a Dubai based company. So, it is translucent that none of them has ordinary residence or place of business within Pakistan. Insofar as the cause of action have to do with, I would like to assess critically that for the reason the defendant No.1 is berthed scarcely at Port Bin Qasim in Pakistan, it does not ensue and mount up any cause of action in favour of the plaintiff for simple rationale that the port of discharge in the contract in question was never agreed Pakistan but Aden, Yemen. At this juncture, I would like to quote paragraph 8 of the plaint as under:

"The cause of action for the suit arose on 02.06.2017 when Plaintiffs and Defendant No.3 entered into a Contract for shipment of a cargo of LPG to Aden, on 02.06.2017 when Plaintiffs made advance payment to the Defendant No.3, when Plaintiffs lawyers served legal notice on the Defendant No.3 without any response and continues to accrue each day that the cargo remains undelivered to the Plaintiff or the Deposit is not returned."

12. Mr. Manzar Bashir Memon, learned counsel for the plaintiff in rebuttal pointed out the counter affidavit filed on behalf of the defendant Nos.1 and 2 against the application moved for attachment of cargo that the cargo was loaded by the defendant No.1 at Bandar Abbas in Iran for discharging it in Yemen. He further pointed out that owners' bills of lading were issued showing defendant No.3/charterer as consignee at the port of discharge as Aden in Yemen. He further pointed out that the defendant Nos.1 and 2 in their counter affidavit disclosed that earlier bill of lading was nullified and the charterer ordered the ship not to discharge the cargo in Yemen but they later issued the new bill of lading on 29.08.2017.

13. What makes sense of that the earlier bill of lading was also issued in the name of defendant No.3 and not in the name of the plaintiff and subsequent bill of lading was also issued in the name of defendant No.3 as shipper with the notified address of defendant No.5 and port of discharge was "Port Bin Qasim, Pakistan". The above scenario unequivocally makes obvious that the bill of lading for the cargo in question or even the earlier bill of lading were never issued at any moment in time in the name of the plaintiff which is principal document in shipping goods having three functions such as document of title to the goods, receipt for the acceptance for carriage and shipment and evidence of the contract of carriage. The transfer of bill of lading prima facie represents transfer of goods, and possession of a bill is

in law the same as possession of the goods. When goods are shipped the carrier signs the bill and marked the name of shipper, consignee, ports of discharge and loading, whether freight paid and if not, when freight payable and the name of the ship. The bill of lading is only evidence of the contract of carriage that the carrier and shipper have agreed on carriage of goods before a bill of lading is issued.

14. The learned counsel for the plaintiff referred to the case of ***Balagamwala Oil Mills (Pvt.) Ltd.*** (supra) in which the learned Division Bench of this court discussed the judgment of Lord Denning rendered in the appeal filed by M/s. Mareva Compania Naviera, S.A. in which it was held that court in order to foster the cause of justice in a fit case, may grant interim injunction even if the case does not fall within the four corners of well settled principles under Order 39 Rules 1 and 2 CPC if the facts of the case so demand. Though the background of the case is based on invention of Mareva Injunction in England but at the same time the hon'ble Judges were fully cognizant that such powers can only be exercised in a fit case even if the case does not fall within the four corners of Order 39 Rules 1 and 2 CPC. The court in the above case observed that at this stage it cannot be said that how much amount of damages the appellant would be entitled in case they succeed to prove breach on the part of the respondent No.1. Secondly, the injunction is sought in respect of the money received by the respondent No.3 under a letter of credit of some different transaction, the letter of credit being negotiable, so the court cannot make respondent No.3 to commit the breach of terms of letter of credit. In the case of ***Compagnie Continentale (France) S. A.*** (supra), the plaintiff was charterer of m.v. Ken Lucky under a charter-party agreement. The plaintiff time-chartered the vessel to defendant No.2 under an agreement

and the defendant No.3 sub-time chartered the said vessel to the defendant No.2. The defendant No.2 sub-voyage chartered the said vessel to defendant No.1 for carriage of fertilizers from Tampa Florida to Karachi. Under the charter-party agreement the plaintiff was entitled to claim lien upon all cargos, freight and sub-freight for the amount due under the charter-party agreement. The defendant No.2 made part payment of the higher charges to the plaintiff but failed to pay two installments, therefore, the plaintiff as disponent owner of the vessel exercising rights under the charter-party served a notice on the defendant No.1 claiming lien on all charges, freights or sub-freights. Due to nonpayment, the plaintiff filed an action in rem. The discussion made in this judgment by the learned Judge on Section 3(2)(h) of the Ordinance was altogether in different scenario. In the judgment in the case of ***C.V. Lemon Bay*** (supra), while expounding provisions of Section 3(2)(h) of the Ordinance, the court held that the action in personam can be founded on any agreement such as ***bill of lading*** [emphasis applied] relating to the carriage of goods in a ship. It was further held that in addition to the right to bring an action in personam, the Admiralty jurisdiction of the court can also be invoked by an action in rem for the arrest of its sister ship. What I read in this judgment that basically, the plaintiff of this case filed two admiralty suits in this court against the vessel, shipping company, shipping agent and the consignees of six shipments of potatoes consigned by the plaintiff. The case was filed on the plea that the defendant had not obtained the bank guarantees necessary for the release of consignments. In the case of ***Mitsui & Co. Ltd.*** (supra), the cartons of prawns shipped on the defendants' vessel by sellers under bills of lading were found damaged on discharge. The court of appeal held that where goods were damaged on board ship, only the person who was the owner

of the goods at the time when damage occurred could sue the ship owner in tort; that, since by the bills of lading the goods were deliverable to the order of the sellers, under Section 19 of the Sale of Goods Act, 1979, there was a prima facie presumption that the sellers reserved the right of disposal and the property in the goods would not pass until the conditions imposed by the sellers had been fulfilled. The ratio decidendi deducible from the above dictums are distinguishable and not helpful to the case of the plaintiff in the present facts and circumstances of the case.

15. Whereas the learned counsel for the defendant No.3 referred to the case of ***Lloyd Pacifico*** (supra). The Queen's Bench Division Admiralty Court held that the claim did not arise in connection with any particular ship or ships. The position might have been different if particular containers had been booked or notified to the defendants by the plaintiff. Neither the draft amended statement of claim nor any of the affidavit evidence suggested that was so. The court held that the plaintiffs were not entitled to arrest Lloyd Pacifico. In the case of ***Masoomi Enterprises Pakistan (Pvt.) Ltd.*** (supra), the petitioner No.1 entered into an agreement with respondent No.1 whereby the latter was authorized to operate vessels/trawlers for the development of ocean fishery production. It was alleged that the respondent Nos.1 to 3 defaulted in payment of agreed amount and committed various other breaches of contract whereupon the petitioner filed admiralty suit with the relief of arrest of respondent Nos.5 and 6. The apex court in this case held that the agreement in question basically was for use of license and such condition is not covered by clause (h). It is proven that two arrested vessels were not those trawlers which were being used in performance of the contract. The apex court further held that the High Court

reached the conclusion and rightly so that the ship in question did not belong to respondent No.1 as such even action under Subsection (4) of Section 4 was not warranted though the suit was rightly transferred to the original side. In the case of ***Jaffer Brothers (Pvt.) Ltd.*** (supra), the appellants purchased the consignment of fertilizer in bulk from the shippers on the board of respondent vessel and bill of lading was a contract of carriage between the appellants and the shippers. The apex court held that the appellants themselves have relied upon the charter-party which contains the terms and conditions of affreightment. The court further held that the shipper who was also voyage or sub-charterer endorsed the bill of lading in favour of the plaintiff/appellant, where the shipper himself was a charterer then the bill of lading in the hand of the charterer is merely receipt for goods and such receipts, even if endorsed as in the present case in favour of the consignee it will not change its complexion and will remain a receipt of goods. Finally, the apex court dismissed the appeal with the observations that the vessel cannot be attached in an action in rem as the appellants have failed to show that the time charters are the beneficially owned majority shares or interest in the respondent vessel.

16. The above narration and chronicle of the cause of action exemplified in the plaint depicts the execution of agreement for shipment of cargo to Aden on 02.06.2017, the payment made to defendant No.3 and the legal notice served upon the defendant No.3. In all fairness, according to its own described cause of action, the plaintiff cannot claim its accrual within the territorial waters of Pakistan nor the contractual obligations arising between the parties in respect of contract in question can be strictly construed within the parameters of Clause (h) of Subsection (2) of

Section 3 of Admiralty Jurisdiction of the High Courts Ordinance, 1980. The dominance and peripheries of Clause (h) of Subsection (2) of Section 3 of Admiralty Jurisdiction of the High Courts Ordinance, 1980 are not unbridled and emancipated so that any person may bring in *any claim* against the other. No doubt the words *'any agreement'* have to be given a wide meaning but this cannot be stretched nor overextended in every case but it is contingent and depending upon the circumstances of each case independently so as to bring the case within the jurisdiction. The plaintiff has failed to establish any probable and persuasive right to grant any injunctive order under Order 39 Rule 1 & 2 read with Section 94 C.P.C in the variety and diversity of Mareva Injunction nor the plaintiff is entitled to the relief of attachment of cargo shipped to defendant No.5. Seeing as the plaintiff's own statement that they have not moved application under Rule 731 of Sindh Chief Court Rules (O.S) but under Order 39 Rule 1 & 2 C.P.C., I feel like to elucidate that there is a marked distinction in the significances and characteristics of both the provisions, the former may come to rescue in an urgent situation to cause the arrest of vessel moored/anchored within the territorial waters with or without condition of furnishing surety for further things to be decided then whereas in the latter situation some indispensable components and dynamics are to be satisfied such as the phrase prima facie case, balance of convenience and irreparable injury. With reference to my own judgment in the case of Al-Tamash Medical Society vs. Dr. Anwar Ye Bin Ju & others, reported in 2017 MLD 785, the phrase prima facie in its plain language signifies a triable case where some substantial question is to be investigated or some serious questions are to be tried and this phrase 'prima facie' need not to be confused with 'prima facie title'. Before granting injunction the court is bound to

consider probability of the plaintiff succeeding in the suit. All presumptions and ambiguities are taken against the party seeking to obtain temporary injunction. The balance of convenience and inconvenience being in favour of the defendant i.e. greater damage would arise to the defendant by granting the injunction in the event of its turning out afterwards to have been wrongly granted, than to the plaintiff from withholding it, in the event of the legal right proving to be in his favour, the injunction may not be granted. A party seeks the aid of the court by way of injunction must as a rule satisfy the court that the interference is necessary to protect from the species of injury which the court calls irreparable before the legal right can be established on trial. In the technical sense with the question of granting or withholding preventive equitable aid, an injury is set to be irreparable either because no legal remedy furnishes full compensation or adequate redress or owing to the inherent ineffectiveness of such legal remedy.

17. As a result of above discussion, the listed interlocutory applications are dismissed.

Karachi:-
Dated. 12.10.2017 **Judge**