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

ADMIRALTY SUIT NO. 08 OF 2022

IN THE MATTER OF:
Shanghai Lisheng Oil Co. Limited, Seat 095, 19th Floor, 1200 Century Avenue, Pilot Free Trade Zone, Shanghai, China.
..... Plaintiff

-VERSUS-

The Vessel MT GALA (Ex: WINSOME, IMO No. 9192260, Flag: St. Kitts & Nevis) and others.
.....…Defendants

Mr. M. Belayet Hossain, with
Mr. M. Mahmudul Hasan, and
Mr. M. Aminul Islam Nazir, Advocates
…… for the plaintiff

Mr. Md. Bodruddoza, Senior Advocate
……for the defendant No. 3

The 11th March, 2025

Present:
Mr. Justice Zafar Ahmed

1. Principal defendant No. 3 (vessel owner) has filed the instant application for a direction upon the plaintiff to furnish security in the form of bank guarantee to the tune of USD 2.6 millions against the counterclaim filed by this defendant. The plaintiff has contested the application by filing a written objection.

2. On 06.03.2022, the plaintiff filed this admiralty suit against the 1st defendant vessel MT GALA (Ex: WINSOME, IMO No. 9192260, Flag: St. Kitts & Nevis) and others seeking recovery of damages,

compensation and losses for USD 53,516,511.80 due to the non-delivery of 99,380.796 metric tons (equivalent to 730,580.00 barrels) of Oman light blend crude oil under two separate bills of lading.

Arrest, security, counter security and release of the vessel MT GALA (Ex: WINSOME):

3. This Court admitted the suit on 09.03.2022 and passed an order for arrest of the 1st defendant vessel. The vessel was accordingly arrested. On 25.08.2022, this Court passed an order for release of the vessel subject to furnishing a bank guarantee for USD 10 millions by the principal defendant No. 3. The plaintiff was directed to furnish a bank guarantee as counter security to cover the interest to be accrued on USD 10 millions for a three-year period. The principal defendant No. 3 furnished a bank guarantee for USD 10 millions and the plaintiff furnished a bank guarantee for USD 1 million as counter security to cover the interest. The vessel was released. Thereafter, the principal defendant No. 3 filed written statement along with a counterclaim for USD 14,264,419.30 for the wrongful arrest of the 1st defendant vessel. Now, the principal defendant No. 3, by this application, has prayed for a direction upon the plaintiff to furnish a security to the tune of USD 2.6 millions in the form of bank guarantee against the counterclaim.

Relevant facts:

4. It is stated in the plaint that on 25.06.2021, the plaintiff entered into a contract with the seller Nimr International LLC based in Oman to purchase crude oil. As per terms of the contract, the seller nominated the 1st defendant vessel to carry the crude oil from the port of Sohar, Oman. On 04.07.2021, the master of the vessel issued two separate bills of lading covering 6420.616 M.T. oil and 92,960.180 M.T. oil respectively to discharge at the port of Qingdom, China. In those bills of lading, the seller was named as the shipper and the plaintiff was described as the consignee. The shipper transferred both bills of lading by endorsement to the plaintiff entitling them to take delivery of the cargo at the port of discharge *i.e.* Qingdao, China on or about 26.07.2021. After loading of the cargo, the vessel sailed from the port of Sohor, Oman on 05.07.2021 but failed to call at the port of Qingdao, China. The plaintiff did not receive the cargo.

5. It is further stated in the plaint that the plaintiff had reasons to believe that the vessel with her owners had stolen the cargo to make illegal gain. On 06.01.2022, the plaintiff filed an application before the Qingdao Maritime Court of China for arrest of the vessel during her subsequent call at the port of Qingdao, China. On 07.01.2022, an order of arrest of the vessel was passed and the vessel was arrested. On 12.02.2022, the vessel switched its AIS off and escaped from the territorial waters of China. On 28.02.2022, she called at the port of Chattogram, Bangladesh changing her

name. Be it mentioned that the Qingdao Maritime Court of China dismissed the case on 17.09.2023 and lifted the arrest order on 12.01.2024.

6. It is stated in the instant application filed by the principal defendant No. 3 that on 05.07.2021, while the vessel was sailing in the international water and was heading towards the port of discharge in China, it was intercepted and arrested by Iranian Navy and was taken towards Jask Island in Iran. A criminal case was filed against the vessel by the Iranian authority in the Iranian Court, namely 'The Judiciary of Hormozgan Province'. The cargo was discharged on 06.10.2021 at the port of Bandar Abbas in Iran as per the Court's order and was sold. The plaintiff claimed ownership of the cargo. It seems that the sale proceeds have been deposited in the account of the Iranian Court. The vessel was released from arrest on 06.11.2021. Thereafter, the vessel went to China with separate consignment under a separate bill of lading.

Argument of principal defendant No. 3 (shipowner):

7. Mr. Md. Bodruddoza, learned Senior Counsel appearing for the principal defendant No. 3 submits that the plaintiff lodged a complaint with the Iranian Court in the criminal proceeding claiming ownership of the cargo carried by the 1st defendant vessel. The ownership of the cargo is under investigation by the Iranian Court. Mr. Bodruddoza submits that non-disclosure of facts by the plaintiff in the plaint and in the application for arrest of the vessel in the instant suit as to the arrest of the vessel in Iran, sale of the

cargo and the plaintiff's claim regarding the ownership of the cargo made before the Iranian Court tantamounts to suppression of material facts. The learned Counsel elaborates his point by submitting that had those facts been stated and disclosed before the Admiralty Court of Bangladesh, the arrest order dated 09.03.2022 would not have been passed. Thus, the vessel was arrested wrongfully.

Argument of plaintiff:

8. Mr. M. Belayet Hossain, learned Advocate for the plaintiff, opposes the application for furnishing security against the counterclaim and advances the following arguments:

(a) Ship arrest is a statutory right in this jurisdiction under the Admiralty Court Act, 2000, distinct from pre-judgment attachment under the Code of Civil Procedure, 1908 (the 'CPC') and does not inherently require the arresting party to provide counter-security. However, in the present admiralty suit, this Court ordered the plaintiff to provide counter-security of USD 1,000,000/- to protect the parties interested in the vessel, MT GALA (Ex: WINSOME) for any losses if the arrest was later deemed unjustified. Therefore, any additional counter-security demanded in the subsequent counterclaim for wrongful arrest by the principal defendant No. 3 is unnecessary.

(b) Plaintiff in a *rem* proceeding who intends to arrest the vessel in question to invoke admiralty jurisdiction must not be emburdened with a security as that would go against the public policy. It may happen that this jurisdiction will not be chosen by the suffering litigants of the international community/ IMO member states in the long run.

(c) A full-fledged trial is a must to prove/disprove the allegations raised by the owner of the vessel. Moreover, there is no provision in the Admiralty Court Act, 2000, the Admiralty Rules, 1912 or the CPC that supports the prayer for direction, at this stage, to be issued upon the plaintiff asking for arranging a security for arresting a vessel in our jurisdiction.

(d) The criminal proceeding pending in the Iranian Court in respect of the cargo in question is not a civil/ admiralty proceeding. No security for release of the vessel in the Chinese Admiralty Court was provided. Thus, arresting her in this jurisdiction was necessary to establish jurisdiction vis-a-vis the vessel (to initiate a *rem* proceedings) that failed to deliver the cargo at the destination port (China) which gave rise to the cause of action (maritime lien) on the vessel. Vessel carries the lien with her wherever she travels, when she entered the territorial waters of Bangladesh she entered with a cause of action, plaintiff's lien lied with her, so she

must be arrested for the purpose of security. There is no question of wrongful arrest.

(e) The alleged non-disclosure of the pendency of the Iranian proceeding is not a fatal/material suppression. The decision given in CIVIL PETITION FOR LEAVE TO APPEAL No. 1197 of 2011 (***Trade Venture Investment Ltd. vs. M.V. Phuc Hai Star and others***) dated 23/06/2011 holds the view, *inter alia*, that since the plaintiff did not secure a security outside this jurisdiction in the earlier suit, there is no bar in commencing a second suit in Bangladesh for obtaining security.

In support of the arguments, Mr. Belayet Hossain refers to some English decisions.

9. In the case in hand, the vessel was released upon furnishing security. The principal defendant No. 3 filed a counterclaim alleging that the vessel was arrested wrongfully and now prays for an order directing the plaintiff to furnish security against the counterclaim. The trial of the case has not commenced yet. Therefore, I will have to rely on documents provided by the parties to determine the question whether the vessel was arrested wrongfully. Determination of the question requires a thorough examination of the Common Law developed over more than 150 years on purpose of arrest, test for wrongful arrest and case laws

where the test was either applied or rejected and other related issues.

Arrest of vessel in an action in *rem*:

10. In England, it was held in ***The Vasso*** [1984] 1 Lloyd's Reports 235 that the issue of a warrant of arrest of a vessel was discretionary. Thereafter, the relevant rules were amended in England in 1986. Following the amendment, it was held by the Court of Appeal of England in ***The Varna*** [1993] 2 Lloyd's Reports 253 that the issue of a warrant of arrest was of right and was not discretionary. It was further held that accordingly there was no duty of full and frank disclosure as there is upon an application for an *ex parte* injunction. The rules of the Court made that clear. It was held in ***The Stolt Kestrel*** [2016] 1 Lloyd's Reports 125 that the right to arrest is "the unique feature of a claim in *rem*".

11. In Bangladesh, the provisions contained in Section 4(4) of the Admiralty Court Act, 2000 and rules 4 and 5 of the Admiralty Rules, 1912 empower the admiralty Court to issue a warrant for the arrest of a vessel in an action in *rem*. Thus, ship arrest is a statutory right in our jurisdiction.

Purpose of arrest:

12. In ***The Alkyon*** [2018] 2 Lloyd's Reports 601=[2018] EWHC 2033 (Admlty), para 14 Teare, J. observed:

> "The purpose of an arrest is to enforce an admiralty action in *rem*. By arresting a ship the claimant establishes

> the jurisdiction of the Admiralty Court to hear and determine the claim in the action notwithstanding that the ship is registered in a foreign country and that the claim has no connection with this country. By arresting the ship the claimant also obtains the means by which he can enforce his claim in the event that he establishes his claim. The ship may be sold by the Admiralty Marshal upon the order of the court and the claimant may recover his claim from the proceeds of sale. In that way an arrest provides security for the claim in *rem*."

The Court of Appeal upheld the decision given by Justice Teare in *The Alkyon* [2018] EWCA Civ 2760=[2019] 3 All ER 791.

Test for wrongful arrest:

13. In ***The Evangelismos*** (1858) 12 Moo PC 352, the Privy Council held that in order to succeed in a claim for wrongful arrest, the defendant must establish that the arrest proceedings were commenced or continued either (a) with "*mala fides*" (malice or bad faith) or (b) with "*crassa negligentia*" (gross negligence).

14. The test applies to the circumstances arising at the time of the arrest. The claimant's conduct after the arrest does not give rise to an inference of malice or *crassa negligentia* [***The Pola Devora*** [2022] EWHC 2095 (Comm) para 139].

Test explained in *The Kommunar* (No. 3):

15. Colman J. in ***The Kommunar (No. 3)*** [1997] 1 Lloyd's Reports 22 explained *The Evangelismos* test as follows:

> "Two types of cases are thus envisaged. Firstly, there are cases of *mala fides* which must be taken to mean those cases where on the primary evidence the arresting party has no honest belief in his entitlement to arrest the vessel. Secondly, there are those cases in which objectively there is so little basis for the arrest that it may be inferred that the arresting party did not believe in his entitlement to arrest the vessel or acted without any serious regard to whether there were adequate grounds for the arrest of the vessel. It is, as I understand the judgment, in the latter sense that such phrases as '*crassa negligentia*' and 'gross negligence' are used and are described as implying malice or being equivalent to it. The reference at the end of the passage from the judgment just cited to there being circumstances which afforded grounds for believing that the arrested ship was the one that had been in collision suggests that if on the evidence there is a genuine but understandable mistake as to the identity of the vessel, that will not amount to *crassa negligentia*. Taking the judgment as a whole, it would not appear that mere absence of reasonable care to ascertain entitlement to arrest the vessel would necessarily amount to *crass negligentia* in the sense there used."

Earlier, in Astro ***Vencedor SA vs. Mabanaft*** (1971) 2 QB 588, 595 Lord Denning approved *The Evangelismos* test in considering whether a claim for damages for wrongful arrest was within the scope of an arbitration. Lord Denning said:

> "The arrest of the ship was the direct consequence of the charterers' claim for damages against the shipowners. … The arrest was simply the follow-up to

> that claim. It was so closely connected with it that the rightness or wrongness of the arrest is also within the scope of the arbitration. This is borne out by the practice of the Admiralty Court. There have not been many claims for wrongful arrest recently. But the practice of the Court of Admiralty is to deal with a claim for wrongful arrest at the same time as the claim for which the arrest was made. In *The Evangelismos* ... the Privy Council said that such procedure is very 'convenient'."

Cases where plaintiff was held liable for wrongful arrest:

16. In ***The Cathcart*** (1867) L.R 1A.&E. 314, damages were awarded where a claim was brought by the transferee of a mortgage before the debt was due. It was held,

> "the plaintiffs had full knowledge of the facts, and must be held to the legal effect of their own engagements. If they had regarded the terms of those engagements, they would have known they had no right to arrest the vessel."

17. In ***The Cheshire Witch*** (1864) Br. L. 362=(1864) 11 LT 350, the claimant was held liable in damages where, his substantive claim in proceedings in *rem* having been dismissed, he applied for the arrest to continue for 12 days to give him time to consider an appeal, but on the 13th day he released the vessel from arrest.

18. In ***The Margaret Jane*** (1869) LR 2 A.&E. 345=(1869) 20 LT 1017, it was held that where a receiver of wreck had valued a salved vessel at £746 and salvors thereafter commenced proceedings in the Admiralty Court for £2,500, applying for an appraisement of the vessel but subsequently abandoning the claim,

they would be liable in damages for the reason that salvors were guilty of *crassa negligentia*.

19. ***The Walter D. Wallet*** [1893] P 202 was not an admiralty action in *rem*, but an action at Common Law for the malicious arrest of the vessel. *The Evangelismos* was cited in the case. It was held that there was no actual damage; the ship was not detained in port by the arrest; nor was her loading interfered with. Still, the action of the defendants was ... in common law phrase, without reasonable or probable cause; or, in equivalent admiralty language, the result of *crass anegligentia*, and in a sufficient sense *mala fides*. One pound sterling was awarded as damages.

20. In ***MV "Kalyani" and another vs. Mutiara Shipping Company NY*** (1998) 2 Sri L.R. 105 both the plaintiff and the 2nd defendant claimed ownership of the vessel "Kalyani". While the vessel was in the Port of Colombo in the possession and control of the defendant, the plaintiff brought an action in *rem* on 10.04.1995 and got the vessel arrested on the same day. The defendant furnished security to the tune of USD 300,000 and the vessel was released on 21.04.1995. The defendant filed counterclaim claiming that the plaintiff had wrongfully and/or maliciously and/ or fraudulently caused the vessel to be arrested and as a result of the wrongful test the defendant had suffered loss and damage in a sum of USD 300,000 and continuing damages in a sum of USD 3,000 per day. The defendant asked the Court to order the plaintiff to deposit security/ bail in respect of the counterclaim. The High Court of

Colombo directed the plaintiff to deposit security for the claims in reconvention in a sum of USD 300,000 as a condition precedent to the trial of the action. The Court of Appeal of Sri Lanka stayed the order. The Supreme Court of Sri Lanka applied *The Evangelismos* test and referred to other cases and directed the plaintiff to provide security in the sum of USD 30,000. The Supreme Court considered the fact that the defendant was in possession of the vessel and the possible loss occasioned by detention during the short period which elapsed before the Court ordered the release of the vessel, and the costs of finding bail by the defendant.

21. In ***The Tjaskemolen*** [1997] 2 Lloyd's Reports 476, a vessel was arrested in Rotterdam in support of a cargo claim in a London arbitration but had then been released from arrest after consideration of the merits of the claim. When the vessel arrived in Liverpool she was arrested in support of the same claim. Security was provided and she was released. The defendant owners applied to discharge the security on the grounds that the arrest in Liverpool was vexatious and an abuse of the process of the Court. Clarke J. noted that the defendants had not only secured the release of the vessel from arrest in Rotterdam but had also obtained security for their claim for damages for wrongful arrest. He concluded that it would not be oppressive to permit the plaintiffs to retain the security "provided that they in turn provide security for any loss which the owners prove that they have suffered as a result of

arresting the vessel in England if their claim fails before the arbitrators." Clarke J. continued:

> "I recognise that such counter-security is not required in the ordinary case of an arrest, but this case is unusual…. It appears to me that on the facts of this case the position here should be the same as it would have been in Holland if the arrest had been maintained and that it would be oppressive to permit the plaintiffs to retain the security for their claim if to do so would put them in a better position than they would have been in Holland. On the other hand the maintenance of the security will not be oppressive if appropriate counter-security is given."

It appears that the Court in *The Tjaskemolen* was considering the question of abuse of process which can potentially arise where a claimant arrests a vessel twice and obtains security on both occasions.

Cases where defendant's claim for security for wrongful arrest was rejected:

22. In ***The D.H. Peri*** (1862) Lush 543, the arresting party was a foreign shipowner who alleged that the defendant's vessel had collided with his vessel. The vessel was arrested whereafter the defendant informed the claimant that his vessel had not collided with the claimant's vessel and that the claimant would be liable in damages for wrongful arrest. The defendant's vessel remained under arrest until she was released on bail. The defendant later sought security for its costs and security for damages. Security for costs was sought on the basis that the claimant was a foreigner and

security for damages was sought on the basis that without security the defendant would be unable to recover damages for wrongful arrest and that the claimant had security for the damages alleged to have been caused by the collision. Dr. Lushington ordered security for costs but refused security for damages holding:

> "To order security for damages as for a wrongful arrest would be an innovation on the practice of the Court and would form a serious bar to foreigners suing in this Court."

23. In ***The Strathnaver*** (1875) LR 1 App Cas 58, the wrong vessel was seized. The Privy Council held that in the absence of proof of *mala fides* or malicious negligence, damages against the parties arresting the ship would not be awarded for a simple error in judgment in bringing the suit.

24. In ***The Bazias 3 and Bazias 4*** [1993] 1 Lloyd's Reports 101 the claimant was the bareboat charterer of two vessels from the defendants and had sub-let the vessels to Sally Line who employed them in a cross-channel ferry service. The defendants withdrew both vessels from the charters for non-payment of hire and other breaches and entered into fresh bareboat charters with Sally Line. The defendants commenced arbitration proceedings against the claimant. The claimant counterclaimed. The claimant also issued in *rem* proceedings against the vessels and arrested them in order to obtain security in the sum of US$10,700,000 million in respect of their counterclaim in the arbitration. The defendants then sought a

stay of the in *rem* proceedings pursuant to section 1 of the Arbitration Act 1975. The Court of Appeal granted the stay. Counsel for Sally Line submitted that the court should order that the claimants give a cross-undertaking in damages in case the arrest turned out to have been unjustified. After noting counsel's submission Lloyd LJ said:

> "But, as he accepts, this has never been the practice in Admiralty actions and I do not regard this case as being one in which we can introduce so far reaching a change in the practice for the first time."

Lloyd LJ did not consider that the Court of Appeal could ignore the practice of the Admiralty Court in not requiring such a cross-undertaking.

25. ***Willers v Joyce*** [2016] 3 WLR 477 was not an admiralty case but concerned the question whether English law recognised a tort of malicious prosecution. It was held, by a majority of 5 to 4, that it did. Lord Clarke was in the majority and made reference to the action for damages for wrongful arrest. He said:

> "A person who arrests a ship does not have to provide security to the defendant in respect of any loss which he might incur."

26. In ***The Alkyon*** (*supra*), the Bank lent USD 15,700,000 to the owners. The loan was secured by, among other things, a First Preferred Mortgage over the vessel (Alkyon). The underlying dispute between the parties was whether an "event of default" had

occurred under the loan agreement. On 15.06.2018, the Bank sent the shipowner a Notice of Acceleration which declared the loan immediately due and payable. On the same day, the Bank issued an in *rem* claim form and obtained the issue of a warrant of arrest against the vessel. The owners were informed of the issue of the warrant on 21.06.2018. The vessel berthed at Newcastle on 26.06.2018 and was arrested. The shipowners denied that there was an event of default and that the Bank was entitled to accelerate the loan. It was argued on behalf of the shipowners that whilst under arrest the vessel would lose gross hire of USD 11,350 per day, a profit of some USD 3,500-USD 4,000 per day causing a potentially catastrophic loss as its only income producing asset was out of operation; that the shipowner's only asset was the vessel which was already mortgaged to the Bank and as such the shipowner did not have access to funds to effect a suitable security arrangement to release the vessel, and that the Bank being aware of the shipowner's position placed them under commercial pressure to agree to sell the vessel in order to repay the loan. In the circumstances, the shipowner applied to the Court for an order releasing the vessel from arrest unless the Bank provides a cross-undertaking in damages in the form usually given in the context of freezing orders, namely, that if the Court later finds that the warrant of arrest has caused loss to the shipowner and decides that the shipowner should be compensated for that loss, the Bank will comply with any order the Court may make. The issue before the

Court in *The Alkyon* was whether "a claimant who arrests a vessel, like a claimant who seeks a freezing order, should provide a cross-undertaking in damages in respect of the damage which an arrest can cause a shipowner." Teare J. referred to a number of case laws, contributions and observed:

> "The right of arrest in an admiralty action in *rem* assists a claimant in *rem* not only to establish the jurisdiction of this court over the claim (in the absence of agreement to the jurisdiction) but also to obtain security for his claim. Given that ships are mobile assets that may be within the jurisdiction for only a short period of time such a right may well be essential to a claimant obtaining justice. The shipowner whose vessel is arrested and will as a result suffer trading losses may recover that loss by an action for damages for wrongful arrest but only if he can establish the serious conduct required as set out in *The Evangelismos*. He can obtain the release of his ship by providing security in the sum assessed by the reference to the claimant's reasonably arguable best case as explained in *The Moschanthy* [1971] 1 Lloyd's Reports 37. The Court is aware that "the power to exact security in support of a claim in rem is a very strong power and it must not be used oppressively". If the claimant does not "put his cards fairly on the table" he may suffer a costs penalty. But those protections for the shipowner are not complete. If a shipowner is unable for some special reason to obtain a release of his vessel from arrest by putting up security he may therefore suffer a loss which he cannot recover because the circumstances of the case cannot be brought within the scope of an

> action for damages for wrongful arrest, as explained in *The Kommunar* by Colman J. p.33. And even if he does put up security he will or may incur a cost which he cannot recover for the same reason.
>
> Whether the balance between, on the one hand, the interests of the claimant in *rem* and, on the other hand, the interests of the shipowner, which has been struck by English Admiralty law and practice over the last 150 years or more remains appropriate and sufficiently "responsive to modern realities" is not a matter for the court to judge but a matter for either the legislature or the Rules Committee to consider."

Mr. Justice Teare concluded thus:

> "The Court is unable to accede to the application that the vessel be released in the event that the Bank fails to provide a cross-undertaking in damages. To exercise the court's discretion to release in that way would (i) run counter to the principle that a claimant in *rem* may arrest of right, (ii) be inconsistent with the court's long-standing practice that such a cross-undertaking is not required, and (iii) be contrary to the decision of the Court of Appeal in *Bazias 3 and Bazias 4* and to the *dicta* of Lord Clarke in *Willers v Joyce*."

27. The reason I have dealt with *The Alkyon* in detail is that it answers the objections that Mr. Bodruddoza appearing for the principal defendant (owner of the vessel) have raised in the instant case. For example, wrongful arrest of a vessel certainly causes loss to the shipowner but if security against the counterclaim is not provided and if the shipowner eventually succeeds in proving the wrongful

arrest, he would leave the Court empty handed; that the test is harsh and its application is likely to encourage prospective litigants to bring admiralty suit on frivolous causes etc. In dealing with the objections generally raised, Teare J. observed in *The Alkyon* at para 48 and 52:

> "The Shipowner will suffer loss whilst the vessel remains under arrest unable to trade. If the Bank fails to prove its claim the Shipowner may never recover that loss from the Bank because it may not be able to establish the tort of wrongful arrest. But those circumstances do not make the present case unusual or exceptional. … I have in mind the crew of a vessel or the supplier of necessaries to a vessel. Vessels are trading assets and an arrest will almost always cause loss. Claimants, even well-resourced claimants, may be unwilling to given an open-ended undertaking. … at present P&I Clubs and hull underwriters routinely give undertakings either to avoid arrest or to secure release from arrest. If the Court, following an arrest, routinely required a cross-undertaking in damages as the price of retaining the arrest, there might, it seems to me, be uncertainty as to whether an arrest would be maintained and so P&I Clubs and hull underwriters might not so readily provide security as they presently do and have done so for a great many years."

28. The Court of Appeal in *The Alkyon* observed at para 44 and 46:

> "… no damages can be claimed for wrongful arrest absent malice (bad faith) or (effectively) gross negligence on the part of the arresting party. … It is recognised that

> this rule of English Law is capable of bearing harshly on a shipowner in circumstances where it subsequently transpires that the arrest was unjustified, but the shipowner is left without remedy for his loss. Nonetheless, that is the rule and it carries Privy Council authority. Accordingly,… a foreign plaintiff suing in *rem* would be required to give security for costs but not security for damages; security for a wrongful arrest …would be an innovation on the practice of the Court, and would form a serious bar to foreigners suing in this Court."

Application and non-application of *Evangelismos* test in other Commonwealth jurisdictions:

29. The *Evangelismos* test has continued to prevail in various other Commonwealth jurisdictions. For example, in ***MV "Kalyani"*** (*supra*) the Supreme Court of Sri Lanka, in ***The Vasiliy Golovnin*** [2008] SGCA 39 the Singapore Court of Appeal, in ***The Maule*** (1994, No. 187) the Hong Kong Court of Appeal, in ***Armada Lines Ltd. vs. Chaleur Fertilizers Ltd.*** [1997] 2 SCR 617 the Supreme Court of Canada held that the relevant test was furnished by *The Evangelismos* and the test presented no difficulty in interpretation. In other jurisdictions, for example, in Australia, South Africa, Nigeria, the test for wrongful arrest has been specifically enacted in legislation and has been tied to the concept of reasonableness and the existence of good cause.

30. In Bangladesh, in the absence of any specific legislation, I see no reason not to follow and apply *The Evangelismos* test and the same

remains good law in our jurisdiction as the test could be said to "serve a wider economic or policy purpose" [*The Vasily Golovai* (*supra*), per Rajah JA of Singapore Court of Appeal].

Application of Evangelismos test in the instant case:

31. In this case, the plaintiff did not receive the cargo. They arrested the vessel MT GALA (Ex: WINSOME) in China but without furnishing any security the vessel escaped from China and arrived at Chattogram Port, Bangladesh. The plaintiff arrested the vessel for a 2nd time. This time, the vessel was released on furnishing security. Facts of the case in hand are clearly distinguishable from those of *The Tjaskemolen* (supra). ***Trade Venture Investment Ltd. vs. M.V. Phuc Hai Star and others*** (Civil Petition For Leave To Appeal No. 1197 of 2011, decided on 23.06.2011, unreported) was decided by the Appellate Division of the Supreme Court of Bangladesh. In this case, the plaintiff entered into an agreement with the 3rd defendant to purchase the vessel M.V. Phuc Hai Moon owned by the 3rd defendant but the defendant failed to deliver the vessel and also refused to repay the money advanced to the plaintiff. Another vessel M.V. Phuc Hai Star owned by the 3rd defendant arrived at Chattogram Port. The vessel was arrested. The defendant filed an application before the Admiralty Court for vacating the order of arrest on the grounds that earlier the plaintiff filed a suit in the Federal High Court of Nigeria and secured arrest of another vessel M.V. Phuc Hai Sun owned by the 3rd defendant but the plaintiff did not disclose those facts before the Court in

Bangladesh. Order of arrest was vacated. The plaintiff moved the Appellate Division. The Apex Court observed that explanation to Section 10 of Code of Civil Procedure, 1908 confers jurisdiction on the Courts of Bangladesh to entertain and try a suit in spite of pendency of a suit in a foreign Court on the same cause of action. The Apex Court noted that the defendants did not furnish any security in the Nigerian Court for release of the vessel M.V. Phuc Hai Moon. Therefore, non-disclosure of pendency of the suit in Nigeria is not fatal and does not go to the root of the matter. The Apex Court restored the order of arrest.

32. Applying *The Evangelismos* test as well as elaboration of the test in *The Kommunar (No.3)*, *The Alkyon* (both Queen's Bench Division and Court of Appeal) and *The Pola Devora*, I do not have the slightest hesitation to hold that the defendant has failed to establish that the arrest proceedings were commenced or continued either (a) with *mala fides*, or (b) with *crassa negligentia*. The decision given in *Trade Venture (M.V. Phuc Hai Star)* strengthens my view.

Non-disclosure of arrest in China, 1999 Arrest Convention and The Carriage of Goods by Sea Act, 1925:

33. Mr. Md. Bodurddoza appearing for defendant shipowner argued that the vessel was arrested in Iran, the cargo was discharged there and the sale proceeds are deposited in the account of the Iranian Court. The plaintiff claimed ownership of the cargo in the Iranian Court which is now under investigation. Thus, the plaintiff has

been pursuing its claim in the Iranian Court and at the same time got the vessel arrested in Bangladesh and obtained security with a view to getting enriched unjustly. However, these material facts have not been disclosed by the plaintiff in the instant suit. Hence, the plaintiff is guilty of *mala fides* and *crassa negligentia* in arresting the vessel.

34. Mr. Bodruddoza refers to Article 5 of the INTERNATIONAL CONVENTION ON ARREST OF SHIPS, 1999 and submits that following the release in Iran as well as arrest in China, the subsequent re-arrest of the vessel in Bangladesh is unlawful. Article 5 of the 1999 Arrest Convention is reproduced below:

> "Article 5
> Right of rearrest and multiple arrest
>
> 1. Where in any State a ship has already been arrested and released or security in respect of that ship has already been provided to secure a maritime claim, that ship shall not thereafter be rearrested or arrested in respect of the same maritime claim unless:
>
> (a) the nature or amount of the security in respect of that ship already provided in respect of the same claim is inadequate, on condition that the aggregate amount of security may not exceed the value of the ship; or
>
> (b) the person who has already provided the security is not, or is unlikely to be, able to fulfil some or all of that person's obligations; or
>
> (c) the ship arrested or the security previously provided was released either:

(i) upon the application or with the consent of the claimant acting on reasonable grounds, or

(ii) because the claimant could not by taking reasonable steps prevent the release.

2. Any other ship which would otherwise be subject to arrest in respect of the same maritime claim shall not be arrested unless: (a) the nature or amount of the security already provided in respect of the same claim is inadequate; or (b) the provisions of paragraph 1 (b) or (c) of this article are applicable.

3. "Release" for the purpose of this article shall not include any unlawful release or escape from arrest."

34. Suffice it to say that the vessel was arrested in Iran by the Iranian authority, not at the behest of the plaintiff. The ongoing proceeding in Iran is a criminal proceeding. If the plaintiff succeeds in the instant admiralty suit and/ or succeeds in establishing its ownership of cargo discharged and sold in Iran, the vessel owner/ its representative who has been contesting the criminal proceeding in Iran as well as the instant suit can raise the matter before the concerned Court either in Iran or in Bangladesh and thus can resist plaintiff from getting unjustly enriched. The plaintiff arrested the vessel in China but she escaped from there without furnishing any security. Therefore, Article 5 does not assist the defendant in establishing its case of wrongful arrest. In this regard, I note that Article 6.1 of the Convention provides provisions to impose obligation on the plaintiff to provide security for any loss which

may be incurred by the defendant as a result of the arrest for which the plaintiff may be found liable in consequence of:

(a) the arrest having been wrongful or unjustified; or

(b) excessive security having demanded and provided.

36. Article 6.1 has effectively incorporated *The Evangelismos* test. Bangladesh is not a member state of the 1999 Arrest Convention. I do not feel it necessary to venture on the issue whether this Court should apply the Convention in our jurisdiction.

37. As far as non-disclosure of arrest in Iran, criminal proceedings and plaintiff's claim on the cargo in the Iranian Court are concerned, I do not consider those as suppression of material facts going to the root of the case. *Trade Venture (M.V. Phuc Hai Star)* case can be recalled for this reason.

38. Mr. Bodruddoza lastly draws my attention to various provisions contained in the Carriage of Goods by Sea Act, 1925 which has incorporated the Hague Rules. Section 2 of the Act, 1925 states that the Act and the Rules shall apply in relation to and in connection with the carriage of goods by sea in ships carrying goods from any port in Bangladesh to any other port whether in or outside Bangladesh. In this case, the vessel carrying the cargo sailed from the port of Sohor, Oman and the port of discharge was at Qingdao, China. Therefore, the Act, 1925 has no manner of application to the case.

Conclusion:

39. *The Evangelismos* test remains good law in our jurisdiction. The 1999 Arrest Convention is of no assistance to the defendant shipowner in advancing their cause that the vessel was arrested wrongfully. The Carriage of Goods Act, 1925 does not apply to facts of the instant case. The non-disclosure of facts are not material in deciding the question whether the vessel was arrested wrongfully. No wrongful arrest has occurred in the case. Therefore, I do not find merit in the application filed by the principal defendant No. 3 (vessel owner) for a direction upon the plaintiff to furnish security against the counterclaim. The application is rejected accordingly.

Mazhar, BO