A MAYAR (H.K.) LTD. AND ORS.

v.

OWNERS & PARTIES, VESSEL M.V. FORTUNE EXPRESS AND ORS.

JANUARY 30, 2006

B [RUMA PAL AND P.P. NAOLEKAR, JJ.]

Admiralty Suit—Indian Carriage of Goods by Sea Act, 1925—Section 2 and Schedule to the Act—Civil Procedure Code 1908—Order VII Rule 11, Order V Rule 2, Section 10—Power of High Court to grant stay—Charter Party Agreement between plaintiff and defendant company—Defendant agreeing to carry on board the vessel a quantity of timber logs from various ports of Malaysia to Calcutta Port—Out of 642 logs, 578 logs lying on deck of the vessel and described as deck cargo in BOL—At Calcutta Port short landing of 456 logs lying on deck—Plaintiff filing admiralty suit in the High Court at Calcutta alleging breach of Charter Party Agreement by failing and neglecting to carry on board the vessel the agreed quantity of logs—Single Judge directing arrest of the vessel—Subsequent direction to release vessel on PNB submitting letter of intent for furnishing the bank guarantee—Defendants filing application under Order VII, Rule 11 for dismissal of suit **in limine** *alleging that Calcutta Court has no jurisdiction to entertain the suit and that the suit does not disclose any cause of action—Single Judge dismissing the application—Division Bench granting permanent stay of the suit and held that under the forum selection clause the Singapore Court alone has jurisdiction to entertain the suit—Allowing the appeal, held that since the defendant had not made out a case for stay of proceedings of the Admiralty Suit, the High Court erred in passing an order of permanent stay—However, High Court was justified in holding that the powers under Order VII, Rule 11 could not be exercised for rejection of suit.*

Admiralty Suit—Civil Procedure Code—Order VII, Rule 11 and Section 10—rejection of plaint—Scope of power—Court has to read the entire plaint as a whole to find out whether it discloses a cause of action—Plaint cannot be rejected on the basis of allegations made by the defendant—As averments made in the plaint do disclose the cause of action, the High Court was right in holding that powers under Order VII, Rule 11 could not be exercised for rejection of suit.

Admiralty Suit—Civil Procedure Code 1908, Order VII, Rule 11— Calcutta High Court (Original Side) Rule, admiralty rules 3, 4, 6, 27—Jurisdiction—Admiralty Suit claiming damages for short delivery of cargo—Defendant taking the plea of exclusion of jurisdiction under Forum selection clause in the agreement between the parties—No reference to the said clause in the plaintiff's pleading—Whether it is a case of suppression of material facts—Held, it cannot be considered a case of suppression and the question of jurisdiction ought to be adjudicated on the basis of the material placed on record at the trial. A B

Civil Procedure Code, Order VI, Rule 2—Admiralty Suit—Pleadings—Material facts—Material facts are the facts on which a party relies for his claim or defence—Plaintiff has to plead the facts on which he relies to prove his case and it is for defendant to plead the facts on which his defence stands—Plaintiff not required to plead facts on which defendant's defence stands. C

Exclusion Clause—Civil Procedure Code 1908, Order VI, Rule 2—When the Court has to decide question of jurisdiction pursuant to an ouster clause it is necessary to construe it properly to see whether there is ouster of jurisdiction of other Courts—When the clause is clear, unambiguous and specified, accepted notions of contract would bind the parties—Unless the absence of **ad idem** *can be shown, other courts should avoid exercising jurisdiction.* D E F

Civil Procedure Code 1908, Order VI, Rule 2—Admiralty Suit—Stay of suit on the ground of abuse of the process—Held defendant would be required to show very strong case in his favour—The power could be exercised by the court only if the defendant is able to show that the impugned action is frivolous, vexatious or is taken simply to harass the defendant or where there is no cause of action in law or in equity. F

Indian carriage of Goods by Sea Act, 1925—Article III clause (6), Section 2—Limitation—Forum non convenience—Transportation of goods by sea in ships from Malaysia to Calcutta port—Short landing of goods at Calcutta Port—Filing of Admiralty Suit in the High Court at Calcutta—Defendant's plea for stay of proceedings on the ground of Forum non convenience—Plaintiff's plea that if plaint now require to be filed in Singapore, it would be barred by limitation—Held, as the goods were not carried from any port in India, provisions of the Act will have no application for the purposes of limitation—However, there is no substance on record to G H

A *show that there is other Forum having jurisdiction in which the case may be tried more suitably for the interest of all the parties and for ends of justice.*

Plaintiff is a company incorporated in Hong Kong and engaged in the business of export and import of timber logs. Defendant is a company incorporated in Singapore and carrying on shipping business. Defendant
B agreed to carry on board a quantity of timber logs from different ports of Malaysia to Calcutta port for sale to various buyers in West Bengal, India. As per stowage plan of the vessel, out of 642 logs, the subject matter of bills of lading, which were loaded on board the vessel, 578 logs were lying on deck of the vessel. At the time of discharge of cargo at Calcutta, it was found that
C 456 logs out of 578 logs which were lying on the deck were missing and had been short landed. Plaintiff filed admiralty suit in the High Court at Calcutta in admiralty jurisdiction alleging breach of Charter Party Agreement on the part of defendant by failing and neglecting to carry on board the vessel the agreed quantity of logs. Plaintiff also prayed for arrest of vessel along with her tackle, apparel and furniture.

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Single Judge of the High Court directed arrest of the vessel granting liberty to defendant for release of the vessel on furnishing a bank guarantee. The vessel was directed to be released on PNB submitting a letter of intent for furnishing the said bank guarantee. Defendant filed an application under Order VII, Rule 11, CPC alleging that Calcutta High Court has no jurisdiction
E to entertain the suit and the suit does not disclose any cause of action as liability for deck cargo was excluded by clause 9 of BOL. Single Judge dismissed the application. On appeal, Division Bench of the High Court granted permanent stay of the suit and directed discharge of the bank guarantee holding that under the forum selection clause the Singapore Court alone will
F have jurisdiction to entertain the suit. It was also held that the goods lost being the deck cargo, the carrier ship has no liability as per clause 9 of BOL and plaintiffs made abuse of the process of the court by not pleading clause 3 and 9 in their suit. Appeal is preferred to this Court by the plaintiff.

Allowing the appeal, the Court

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HELD : 1.1 Under Order VII Rule 11 of the Code, the Court has jurisdiction to reject the plaint where it does not disclose a cause of action, where the relief claimed is undervalued and the valuation is not corrected within a time as fixed by the Court, where insufficient court fee is paid and the additional court fee is not supplied within the period given by the Court,
H and where the suit appears from the statement in the plaint to be barred by

any law. [874-C, D] A

1.2. The plaint cannot be rejected on the basis of the allegations made by the defendant in his written statement or in an application for rejection of the plaint. The Court has to read the entire plaint as a whole to find out whether it discloses a cause of action and if it does, then the plaint cannot be rejected by the Court exercising the powers under Order VII Rule 11 of the Code. B Essentially, whether the plaint discloses a cause of action, is a question of fact which has to be gathered on the basis of averments made in the plaint in its entirety taking those averments to be correct. A cause of action is a bundle of facts which are required to be proved for obtaining relief and for the said purpose, the material facts are required to be stated but not the evidence except C in certain cases where the pleadings relied on are in regard to misrepresentation, fraud, willful default, undue influence or of the same nature. So long as the plaint discloses some cause of action which requires determination by the court, mere fact that in the opinion of the Judge the plaintiff may not succeed cannot be a ground for rejection of the plaint. In the present case, the averments made in the plaint do disclose the cause of action D and, therefore, the High Court has rightly said that the powers under Order VII Rule 11 of the Code cannot be exercised for rejection of the suit filed by the plaintiff-appellants. [875-F-H; 876-A]

1.3. Similarly, the court could not have taken the aid of section 10 of the code for stay of the suit as there is no previously instituted suit pending E in a competent court between the parties raising directly and substantially the same issues as raised in the present suit. [876-B]

Chittaranjan Mukherji v. *Barhoo Mahto,* AIR (1953) SC 472, *Bhagat Singh Bugga v. Dewan Jagbir Sawhney,* 28 AIR (1941) Cal 670, *Hansraj Bajaj* v. *Indian Overseas Bank Ltd.,* AIR (1956) Cal 33, *Krishnan and Anr.* v. *Krishnamurthi and Ors.,* AIR (1982) Madras 101, *M/s Crescent Petroleum Ltd.* v. *" MONCHEGORSK" and Anr.,* AIR (2000) Bom 161, referred to. F

T. Arivandandam v. *T.V. Satyapal and Anr.,* [1977] 4 SCC 467, *Roop Lal Sethi* v. *Nachhattar Singh Gill,* [1982] 3 SCC 487, *ITC Ltd.* v. *Debts* G *Recovery Appellate Tribunal,* [1998] 2 SCC 70, *Saleem Bhai and Ors.* v. *State of Maharashtra and Ors.,* [2003] 1 SCC 557 and *Popat and Kotecha Property* v. *State Bank of India Staff Association,* [2005] 7 SCC 510, relied upon.

2. As per law of pleadings under Order VI Rule 2 of the Code, every pleading should contain, and contain only, a statement in a concise form of H

A the material facts on which the party relies for his claim or defence, as the case may be. Thus, the facts on which the plaintiff relies to prove his case have to be pleaded by him. Similarly, it is for the defendant to plead the material facts on which his defence stands. The expression 'material facts' has not been defined anywhere, but from the wordings of Order VI Rule 2 the material facts would be, upon which a party relies for his claim or defence. The material
B facts are facts upon which the plaintiff's cause of action or defendant's defence depends and the facts which must be proved in order to establish the plaintiff's right to the relief claimed in the plaint or the defendant's defence in the written statement. Which particular fact is a material fact and is required to be pleaded by a party, would depend on the facts and circumstances of each case. As per
C the plaintiff's allegation, the logs, which were to be carried on the vessel owned by the defendants, had not been delivered at the port of destination. Thus, all the material facts on the basis of which the plaintiffs claimed the decree are alleged in the plaint. For the purpose of the cause of action, it was not necessary for the plaintiffs to plead the ouster of the jurisdiction of the Calcutta Court. Therefore, absence of reference of Clause 3 of BOL in the
D pleadings cannot be said to be suppression of the material fact as the question of jurisdiction would be required to be adjudicated and decided on the basis of the material placed on record at the trial.

[879-F-H; 880-A; 880-G-H; 881-A; 881-D]

E 2.2. Similarly under Clause 9 of BOL, the carrier was not made liable for any loss or damage resulting from any act, neglect or default of his servants in the management of animals and deck cargo. Under this clause, the carrier is excluded from making good any loss or damage to the deck cargo which has resulted from any act, neglect or default of his servants who are in the management of such deck cargo. The facts are not yet on record
F that the loss or damage to the deck cargo was the result of any act, neglect or default of the carrier's servants who were in the management of the deck cargo. In fact, this would be the defence if at all to be raised by the defendants in their written statement. It was not at all required for the plaintiffs to introduce this clause in their plaint. The liability of the defendants to pay or
G not to pay any loss or damages to the cargo, would depend on proof of certain necessary facts which could only be adjudicated upon at the trial of the suit.

[881-G, H; 882-A, B]

A.B.C.Laminart Pvt. Ltd. v. *A.P.Agencies Salem*, [1989] 2 SCC163; *S.J.S.Business Enterprises* v. *State of Bihar*, [2004] 7 SCC 166 and *R.* v.
H *General Commrs. for the purposes of the Income Tax Act for the District of*

Kensington, (1917) 1KB 486, referred to. A

3. When the court has to decide the question of jurisdiction pursuant to an ouster clause, it is necessary to construe the ousting expression or clause properly to see whether there is ouster of jurisdiction of other courts. When the clause is clear, unambiguous and specific accepted notions of contract would bind the parties and unless the absence of *ad idem* can be B shown, the other courts should avoid exercising jurisdiction. As regards construction of the ouster clause when words like 'alone', 'only', 'exclusive' and the like have been used, there may be no difficulty. Even without such words in appropriate cases, the maxim *'expressio unius est exclusio alterius'* - expression of one is the exclusion of another-may be applied. What is an C appropriate case shall depend on the facts of the case. In such a case, mention of one thing may imply exclusion of another. When certain jurisdiction is specified in a contract, an intention to exclude all others from its operation may in such cases be inferred. It has, therefore, to be properly construed. [880-C-E]

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4. The question whether the cargo transported by the carrier would be governed by the Hague Rules on account of Clause 2 (General Paramount Clause) or by Clause 9 of BOL would be a question required to be determined by the Court after parties placed all material evidence before it and could not have been decided by the Division Bench at preliminary stage. Without there being material on record, Clause 19 cannot be relied upon for absolving the E Carrier from his liability for any damage or loss caused to the goods carried on ship. [883-B, F]

5. The power of the court restraining the proceedings are to be exercised sparingly or only in exceptional cases. The stay of proceedings is a serious F interruption in the right, that a party has to proceed with the trial to get it to its legitimate end according to substantive merit of his case. The court to exercise the power to stay the proceedings has to keep in mind that the positive case has been made out by the defendant whereby the court can reach to the conclusion that proceedings, however, indicate an abuse of the process of Court. The power would be exercised by the Court if defendant could show to the G court that the action impugned is frivolous, vexatious or is taken simply to harass the defendant or where there is no cause of action in law or in equity. [884-D-F, C]

6. Under Clause (6) of Article III, of the Schedule to Indian Carriage of Goods by Sea Act, 1925, one year period was provided to file a suit against H

A the carrier or the ship for loss or damages which, by amendment in 1993, has been extended to further period of three months if allowable by the court and can also be extended for a period till the filing of the suit if the parties to the suit agree after the cause of action has arisen. Under Article I of the Schedule, 'goods' are defined and as per the substitution brought about by Act No.44 of 2000, the goods shall include any property including live animals
B as well as containers, pallets or similar articles of transport or packaging supplied by the consignor, irrespective of whether such property is to be or is carried on or under the deck. By the amended definition, the deck cargo is also included in the definition of goods provided the deck cargo is in the form of containers, pallets or similar articles of transport or packaging supplied
C by the consignor. Therefore, the goods transported on a carriage, even if it is a deck cargo, could be subject to the limitation as provided in Clause (6) of Article III, but for Section 2 of the Act which specifies that subject to the provisions of the Act, the rules set out in the Schedule shall have the effect in relation to and in connection with the carriage of goods by sea in ships carrying goods from any port in India to any other port whether in India or
D outside India. To apply the provisions of the Act and the Schedule there under, the goods should be carried by sea in a ship from any port in India to any other port in India or outside India. In the present case, admittedly, the goods in question were carried on the ship from Malaysia for discharge at Calcutta. The goods having not been carried from any port in India, Clause (6) of Article
E III of the Schedule and the provisions of the Act will have no application for the purpose of limitation. Therefore, it cannot be said that by virtue of the Act, the suit would be barred by limitation if the plaint is required to be presented in the Singapore Court. [885-C-H]

Smith Kline &French Laboratories Ltd v. *Bloch*, [1983] 2 All ER 72
F and *Spiliada Maritime Corp* v. *Cansulex Ltd.*, [1986] 3 All ER 843, referred to.

7. The principal place of business would be where the governing power of the corporation is exercised or the place of a corporation's Chief Executive Officers, which is typically viewed as the nerve center or the place designated
G as the principal place of business of the corporation in its incorporation under the various statutes. Therefore, to arrive at a finding as to which is the principal place of business, the parties would be required to place the relevant material before the Court. The Court cannot arrive at a finding of a particular place being the principal place of business at the preliminary stage of the hearing of the suit. The defendants have not placed any material before the
H Court that the Singapore Court is another available forum which is clearly

or distinctly more appropriate than the Indian Courts. The Court has not taken into consideration that the action commenced by the plaintiff-applicants in Calcutta Court founded on the facts which are most real and substantially connected in terms of convenience or expense, availability of the witnesses and the law governing the relevant transaction in the Indian Court. There is no averment in the application filed by the defendants that continuance of action in Calcutta High Court would work injustice to them because it is oppressive or vexatious to them or would be an abuse of the process of the Court. There was no material before the Court how the trial at Singapore would be more convenient to the parties *vis-à-vis* the trial of the suit at Calcutta and that justice could be done between the parties at substantially less inconvenience and expense. Nor it has been shown that stay would not deprive the plaintiffs of legitimate personal or juridical advantage available to them. In the facts of the case, this court is not satisfied that there is other forum having jurisdiction, in which the case may be tried more suitably for the interest of all the parties and for ends of justice. [889-C-G]

8. From reading of Admiralty Rules, it appears that it is a usual and common practice to issue warrant of arrest if the affidavit filed under Rule 4 contains all particulars required. Thus, it cannot be said that arrest of the ship was obtained by the plaintiffs suppressing material facts which would warrant stay of suit by the Court. [891-E, F]

9. The defendants have not made out a case for stay of the proceedings of Admiralty Suit and the High Court has committed an error in passing the order of permanent stay and discharging the bank guarantee. [891-G]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 867 of 2006.

From the Judgment and Order dated 23.8.2004 of the Calcutta High Court in A.P.O.T. No. 679/2002.

C.S. Sundaram, Rana Mukherjee, R. Misra, S. Gautam and Goodwill Indeevar for the Appellants.

R.F. Nariman, H.K. Puri, U. Banerjee, S.K. Puri, Ms. P. Puri and V.M. Chauhan for the Respondents.

The Judgment of the Court was delivered by

P.P. NAOLEKAR, J. Leave granted.

This appeal is preferred by the plaintiff-appellants challenging the judgment of the Division Bench of the Calcutta High Court dated 23.8.2004

A whereby the plaintiffs' suit filed in Admiralty jurisdiction was directed to remain permanently stayed and the bank guarantee furnished by the defendant-respondents in the suit was directed to stand immediately discharged. The plaintiff-appellants were also directed to pay the costs.

Appellant No. 1 Mayar (H.K.) Limited filed admiralty suit in the High B Court at Calcutta on 27.3.2000 in admiralty jurisdiction along with appellants Nos. 2 to 5 with whom a contract to sell the goods was entered into by plaintiff / appellant No.1, against the defendant-respondents alleging, *inter alia*, that plaintiff / appellant No. 1 (hereinafter called "A-1") is a company incorporated under the laws of Hong Kong and engaged in the business of C export and import of timber logs. By and under a Charter Party Agreement entered into on 7.1.2000 between plaintiff No. 1-Mayar (H.K.) Limited and defendant No. 2-Trustrade Enterprises PTE Ltd., a company incorporated under the appropriate laws of Singapore and carrying on business, *inter alia*, at 101, Cecil Street 10-04 Tong. Eng. Building, Singapore (description given in the plaint) an owner on behalf of the vessel M.V. "Fortune Express" D (hereinafter referred to as "the vessel"), a foreign vessel flying the flag of Singapore, the defendants agreed to carry on board the vessel a quantity of 5200 CBM Barawak Round logs or upto vessel's full capacity for discharge at the Port of Calcutta, India. In or about January 2000, A-1 purchased various quantities of Malaysian Barawak logs for the purpose of shipment to the Port of Calcutta and to sell the same to various third parties having their offices E in West Bengal, India. Under five bills of lading dated 21.2.2000, 17.2.2000, 24.2.2000, 15.2.2000 and 18.2.2000, the defendants agreed to carry on board the said vessel 1638 pieces of logs of different quality measuring 5325.2941 CBM from various ports of Malaysia to the Port of Calcutta, India. At the request of A-1, the five bills of lading were split into 17 bills of lading at the F instance of the defendants so as to facilitate sale by A-1 to various buyers in West Bengal, India. The appellants 1 to 5 are the holders in due course and/or endorsees of the six of those bills of lading which dealt with the 642 pieces of logs. As per the stowage plan of the vessel, out of 642 logs, the subject matter of bills of lading, which were loaded on board the vessel, 578 logs were lying on the deck of the vessel. The vessel arrived at the Port of G Calcutta on 7.3.2000 and started discharging the cargo lying on its deck from that date till 15.3.2000. At the time of the discharge of the cargo lying on the deck of the vessel, it was found that 456 logs out of 578 logs which were lying on the deck of the vessel were missing and had been short-landed. It has been alleged that in breach of the defendants' duty as a carrier and/or bailees H for reward and/as evidenced by the six bills of lading, the defendants have

failed to deliver 456 logs whereby the plaintiffs have suffered loss and damage. The plaintiffs have also alleged that the defendants also acted in breach of their contract entered into with A-1 being the shipper under the aforesaid six bills of lading. The defendants have acted in breach of the Charter Party Agreement entered with A-1 by failing and neglecting to carry on board the vessel from the loading point to the discharge port, the agreed quantity of logs. As the logs were not delivered, all the plaintiffs are entitled to claim from the defendants the proportionate value and expenses incurred on account of the said missing 456 logs which is approximately valued at Rs. 1,30,19,688.44p. as per the particulars stated hereinbelow :

1.	Proportionate value of 456 logs of aggregate value of Rs.1,56,87,298.44p.	Rs. 1,09,13,902.56p.
2.	Proportionate port charge and other charges paid in respect of 456 logs.	Rs. 4,14,130.72p.
3.	Proportionate custom duty paid in respect of 456 logs.	Rs. 5,00,264.73p.
4.	Proportionate insurance payment made in respect of 456 logs.	Rs. 10,91,390.43p
		Rs.1,30,19,688.44p

The plaintiffs have also claimed from the defendants interest on the aforesaid sum at the rate of 24 per cent per annum until realization of the entire sum from the defendants. The plaintiffs have prayed for the arrest of the vessel along with her tackle, apparel and furniture.

On 27.3.2000 itself, the learned Single Judge of the Calcutta High Court passed an order that it appears that the claim of the plaintiffs arises out of short-landing of the goods as mentioned in the affidavit of arrest amounting to a total sum of Rs.1,30,19,688.44p. The vessel in question is a foreign vessel and does not have any assets within the jurisdiction of the Court. The said vessel is now lying at Kidderpore Dock and if the said vessel is allowed to ply from the said dock then the decree that may have been passed in the suit in favour of the plaintiffs will frustrate the proceedings, as the defendant-respondents have no assets within the jurisdiction of the Court and in view thereof the Marshall is directed to arrest the said vessel M.V. Fortune Express along with her tackle, apparel and furniture. It was made clear in the order that if the said vessel furnishes a bank guarantee for the amount mentioned in the order, with the Registrar, Original Side, High Court, Calcutta, they will be at

liberty to apply before the Court for vacation of the order. On 12.4.2000, the Punjab National Bank, Calcutta, submitted a letter of intent before the Registrar, High Court, Original Side, Calcutta regarding furnishing of the bank guarantee on behalf of the defendant-respondents seeking order of the court for release of the vessel. On submission of the letter of intent for furnishing the bank guarantee on behalf of the owners and parties interested in the vessel, i.e., the respondents, dated 12.4.2000, the learned Single Judge of the Calcutta High Court on 12.4.2000 itself has passed an order releasing the vessel from arrest vacating the order of arrest dated 27.3.2000. The order was passed without prejudice to the rights and contentions of the owners of the vessel that the suit is not maintainable. On 17.5.2000, the Punjab National Bank furnished the bank guarantee binding itself and the defendants for the payment of the amount of Rs.1,30,19,688.44p. The guarantee incorporated a term that the defendants and the Bank do thereby submit themselves to the jurisdiction of the Court.

On 7.7.2001, the defendants filed an application purported to be under Order VII Rule 11 of the Code of Civil Procedure 1908 (for short "the Code") alleging therein that the suit filed by the plaintiffs is liable to be dismissed *in limine* and as a consequence thereof the bank guarantee is liable to be released, on the grounds that as per Clause 3 of the Bill of Lading (for short "BOL") the court having jurisdiction to entertain the suit, is the court of the carrier's country and thus the Calcutta High Court has no jurisdiction to entertain the suit; that the contract for carriage was for deck cargo and, therefore, liability of the carrier was excluded by application of Clause 2 and Clause 9 read with Clause 19 of BOL and the same being binding on the plaintiffs the defendants are not at all liable for payment of the damages; and that the suit does not disclose any cause of action. The learned Single Judge by his order dated 1.7.2002 dismissed the application filed by the defendants for dismissal of the suit relying on the decision of this Court in *Chittaranjan Mukherji* v. *Barhoo Mahto,* AIR (1953) SC 472, that the defendants having received a favourable order from the Indian court cannot turn around and challenge the jurisdiction of the very court at a later stage. It was also held that for application of Clause 9 of BOL and exonerating the carrier from its liability and responsibility, it would be necessary to prove that the loss or damage is the result of any act, neglect or default on account of any servant of the carrier who is in the management of the deck cargo, which is a matter of evidence and cannot be ascertained at the preliminary stage.

Aggrieved by the said order of the learned Single Judge, an appeal was

preferred before the Division Bench of the Calcutta High Court by the defendants which was allowed by order dated 23.8.2004 The Division Bench of the High Court has held that under the forum selection clause (Clause 3) of BOL any dispute arising therefrom shall be decided in the country where the carrier has its principal place of business governing the law of such country and, thus, the Singapore Court alone will have jurisdiction to entertain the suit. Some interesting findings have been arrived at by the Division Bench which have material bearing in deciding the present appeal and, therefore, they are referred herein. The Division Bench has said that the vessel (Fortune Express) having sailed into the Calcutta Port and the claim being of an admiralty nature the Court had jurisdiction by the laws of India in the same manner as it would have jurisdiction if a Singapore trader happened to open up a place of business within the local limits of the ordinary original civil jurisdiction of the Court. The issue is not one of possession of jurisdiction but of its exercise. If the parties have chosen a particular forum and a particular set of laws in the world to govern them, then they are, in the large majority of ordinary cases, to be held to their bargain and not to be allowed to depart therefrom only because one party finds it convenient and, therefore, chooses to do so. The finding as regards the chosen forum of Singapore Court and to be governed by the laws of Singapore has been arrived at by the Division Bench only on the basis of the plaintiffs mentioning that defendant No. 2 Trustrade Enterprises PTE Ltd. is a company incorporated under the appropriate laws of Singapore and is carrying on its business at Singapore. The Court has also observed that the Singapore law with regard to the discharge of liability is quite different. According to the Singapore Act, the Hague Rules have been somewhat amended. For voyages which start from ports of Singapore or even the goods which are first shipped from there, the Act seems to include even deck cargo as goods. There is not a single line in the plaint stating either that the Singapore law is the applicable law or that by reason of the application thereof the goods are not deck cargo. As regards the liability of the defendants, the Court has found that admittedly the goods were carried on the deck and there is no liability of the carrier if the deck cargo is lost. The Court has further held that the defendants by submitting the bank guarantee before the Court did not submit to the jurisdiction of the Court, particularly so when the order dated 12.4.2000 passed by the learned Single Judge specifically mentioned that the order was being passed without prejudice to the rights and contentions of the owners of the vessel that the suit is not maintainable. As regards the submission of the plaintiffs that compelling the plaintiffs to file a suit for damages at this late stage at Singapore Court would be most unjust because the application by the defendants for treating the

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A plaint off the record of the Court had been filed on 7.7.2001 when the order for arrest of the vessel was passed on 27.3.2000 and particularly the plaintiffs' right would be jeopardized because under Article 3(6) of the Hague Rules, 1924 the carrier and the ship had been absolved of all liability in respect of the loss or damage if suit were not brought within one year after delivery of the goods or the date when the goods should have been delivered, the Court B has opined that under Article 3, Clause 6 of the Hague Rules, 1924, the limitation had been with respect to the goods. However, Article 1(c) of the Hague Rules, 1924 mentioned that the cargo which had been carried on deck would not come under the definition of 'goods'. Except 135 logs, all others were described in BOL as deck cargo and thus the limitation prescribed for C filing of the suit would have no application. The Court has further observed that though the law of Singapore on the point had been different in the sense that even the deck cargo would be considered under the definition of 'goods', but the plaintiffs had not mentioned a single word in their plaint regarding the applicability of the Singapore law. It was further held that the plaintiffs, from the very outset of the suit, were aware of the fact regarding the appropriate D forum and hence now at this stage they could not plead to reap the benefit from their own fault. The Court held that the plaintiffs' plaint suppressed the forum selection clause relating to the law governing the contract and approached a wrong court to get an ex parte arrest order against the defendants' vessel. It has been observed that the suppression of fact regarding forum E selection was of serious nature and that would be sufficient to dismiss the suit filed by the plaintiffs.

As regards the contention of the plaintiffs that the defendants having submitted to the jurisdiction of the Court, could not challenge the jurisdiction of it at a later stage, the Court has held that the defendants raised the F objection regarding the maintainability of the suit at the first opportunity itself which is also reflected in the order. It has been held by the Court that by release of the vessel the defendants have not taken advantage of the Court's order because instead of the arrested ship lying in wait to satisfy the decree that might be passed a sufficient money equivalent provided by the owners and the parties interested in the ship lies so in wait.

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On consideration of the submissions made by the parties before the Division Bench and the relevant provisions of BOL and the provisions of the Indian Carriage of Goods by Sea Act, 1925, the Division Bench has arrived at the following findings:

H (i) The parties have chosen the Singapore Court and the Singapore

law by express contract. They should be held bound to it. A

(ii) Arrest of the ship was obtained from the Calcutta High Court in Calcutta wrongfully since it was in breach of the above clause.

(iii) The defendants never submitted to the Calcutta jurisdiction as they made reservation about the maintainability of the suit within about a fortnight of the arrest when the order for furnishing Bank Guarantee and release of the vessel was obtained on their behalf. B

(iv) Save for 135 longs, the lost logs being 456 in number are covered entirely by the exclusion clause agreed upon which excludes liability for any defaults of the shippers' servants in the management of the deck cargo. C

(v) Deck cargo is that which is described as such in the Bill of Lading and is also carried as such. The admissions in the plaint are clear as to the deck cargo nature of the said balance number of logs and the admissions in the plaint are equally clear that the loss thereof occurred due to the actions or neglect of the defendants' servants. D

(vi) The plaintiffs suppressed the jurisdiction clause and the liability exclusion clause; arrest of the ship being obtained thereupon the Court should decline to proceed any further on the improper plaint, improperly proceeded with by the plaintiffs." E

The Court has, *inter alia,* recorded a finding that Order VII Rule 11 of the Code might not in terms be applicable as the plaint discloses the cause of action fully and wholly, but that by reason of the suppression contained in it, had the exclusion clause been inserted, the cause of action would be lost with regard to the lost cargo excepting for 135 logs. Again, under the said F Rule the suit might not be held to be barred as such, because the Calcutta High Court does have the necessary admiralty jurisdiction to entertain the plaint and even cause arrest of the ship. The case is not so much on the terms of Order VII Rule 11 of the Code as upon the inherent jurisdiction of the Court, which it always possesses to reject or stay, a plaint by treating it as G complete and by notionally removing the suppression for that purpose. After treating the plaint as complete in that manner, if the Court finds that the cause of action is lacking, it can reject the plaint just as it could reject a plaint had it been properly presented along with all relevant and necessary materials. It can also similarly stay a suit permanently.

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A The aforesaid finding clearly indicates that the order of permanent stay of the suit was made by the Division Bench not because the plaint is liable to be rejected on the grounds that it falls within the parameters of Order VII Rule 11 of the Code or the suit is liable to be stayed in exercise of the powers under Section 10 of the Code or that the Court has passed an order under Order VI Rule 16 of the Code which has not been complied with. The Division B Bench, in fact, has exercised the jurisdiction for stay of the suit as the plaintiffs did not disclose the forum selection clause whereby the Court at Calcutta had no jurisdiction to entertain the suit and further suppressed the fact that the claim in the suit shall be governed by the laws applicable in the Singapore Court and that plaintiffs have no case because the claim is in C regard to deck cargo.

Under Order VII Rule 11 of the Code, the Court has jurisdiction to reject the plaint where it does not disclose a cause of action, where the relief claimed is undervalued and the valuation is not corrected within a time as fixed by the Court, where insufficient court fee is paid and the additional court fee is D not supplied within the period given by the Court, and where the suit appears from the statement in the plaint to be barred by any law. Rejection of the plaint in exercise of the powers under Order VII Rule 11 of the Code would be on consideration of the principles laid down by this Court. In *T. Arivandandam* v. *T.V. Satyapal and Anr.*, [1977] 4 SCC 467, this Court has held that if on a E meaningful, not formal, reading of the plaint it is manifestly vexatious, and meritless, in the sense of not disclosing a clear right to sue, the Court should exercise its power under Order VII Rule 11 of the Code taking care to see that the ground mentioned therein is fulfilled. In *Roop Lal Sethi* v. *Nachhattar Singh Gill,* [1982] 3 SCC 487, this Court has held that where the plaint discloses no cause of action, it is obligatory upon the court to reject the plaint F as a whole under Order VII Rule 11 of the Code, but the rule does not justify the rejection of any particular portion of a plaint. Therefore, the High Court could not act under Order VII Rule 11(a) of the Code for striking down certain paragraphs nor the High Court could act under Order VI Rule 16 to strike out the paragraphs in absence of anything to show that the averments in those G paragraphs are either unnecessary, frivolous or vexatious, or that they are such as may tend to prejudice, embarrass or delay the fair trial of the case, or constitute an abuse of the process of the court. In *ITC Ltd.* v. *Debts Recovery Appellate Tribunal,* [1998] 2 SCC 70, it was held that the basic question to be decided while dealing with an application filed by the defendant under Order VII Rule 11 of the Code is to find out whether the real cause of H action has been set out in the plaint or something illusory has been projected

in the plaint with a view to get out of the said provision. In *Saleem Bhai and Ors.* v. *State of Maharashtra and Ors.*, [2003] 1 SCC 557, this Court has held that the trial court can exercise its powers under Order VII Rule 11 of the Code at any stage of the suit before registering the plaint or after issuing summons to the defendant at any time before the conclusion of the trial and for the said purpose the averments in the plaint are germane and the pleas taken by the defendant in the written statement would be wholly irrelevant at that stage. In *Popat* and *Kotecha Property* v. *State Bank of India Staff Association,* [2005] 7 SCC 510, this Court has culled out the legal ambit of Rule 11 of Order VII of the Code in these words :

> "There cannot be any compartmentalization, dissection, segregation and inversions of the language of various paragraphs in the plaint. If such a course is adopted it would run counter to the cardinal canon of interpretation according to which a pleading has to be read as a whole to ascertain its true import. It is not permissible to cull out a sentence of a passage and to read it out of the context in isolation. Although it is the substance and not merely the form that has to be looked into, the pleading has to be construed as it stands without addition or subtraction of words or change of its apparent grammatical sense. The intention of the party concerned is to be gathered primarily from the tenor and terms of his pleadings taken as a whole. At the same time, it should be borne in mind that no pedantic approach should be adopted to defeat justice on hair-splitting technicalities."

From the aforesaid, it is apparent that the plaint cannot be rejected on the basis of the allegations made by the defendant in his written statement or in an application for rejection of the plaint. The Court has to read the entire plaint as a whole to find out whether it discloses a cause of action and if it does, then the plaint cannot be rejected by the Court exercising the powers under Order VII Rule 11 of the Code. Essentially, whether the plaint discloses a cause of action, is a question of fact which has to be gathered on the basis of the averments made in the plaint in its entirety taking those averments to be correct. A cause of action is a bundle of facts which are required to be proved for obtaining relief and for the said purpose, the material facts are required to be stated but not the evidence except in certain cases where the pleadings relied on are in regard to misrepresentation, fraud, wilful default, undue influence or of the same nature. So long as the plaint discloses some cause of action which requires determination by the court, mere fact that in the opinion of the Judge the plaintiff may not succeed cannot be a ground

A for rejection of the plaint. In the present case, the averments made in the plaint, as has been noticed by us, do disclose the cause of action and, therefore, the High Court has rightly said that the powers under Order VII Rule 11 of the Code cannot be exercised for rejection of the suit filed by the plaintiff-appellants.

B Similarly, the Court could not have taken the aid of Section 10 of the Code for stay of the suit as there is no previously instituted suit pending in a competent court between the parties raising directly and substantially the same issues as raised in the present suit.

C It is contended by Mr. R F Nariman, learned senior counsel appearing for the defendant-respondents that the court has inherent discretionary jurisdiction to stay the proceedings in appropriate matters where the court thinks fit to do so. This jurisdiction of the court to stay the proceedings in appropriate cases is not limited to the jurisdiction conferred on the court in India under Section 10 of the Code. It is distinct from the jurisdiction conferred D by the Code and for this proposition reliance was placed on *Bhagat Singh Bugga* v. *Dewan Jagbir Sawhney,* 28 AIR (1941) Calcutta 670, *Hansraj Bajaj* v. *Indian Overseas Bank Ltd.,* AIR (1956) Calcutta 33, *Krishnan and Anr.* v. *Krishnamurthi and Ors.,* AIR (1982) Madras 101 and *M/s. Crescent Petroleum Ltd.* v. *"MONCHEGORSK" and Anr.,* AIR (2000) Bombay 161. In the aforesaid matters, the Court has recognized the inherent power of the High Court to E stay the proceedings in appropriate cases. In *Bhagat Singh Bugga's* case (supra), it is said that the Code is not exhaustive and does not expressly provide a remedy in all eventualities and, therefore, the Court has in many cases where the circumstances warrant it, and the necessities of the case require it, to act upon the assumption of the possession of an inherent power F to act *ex debito justitiae* and to do real and substantial justice. In exercise of this power, the High Court can restrain a defendant by injunction in another Court in spite of provision of Section 10 of the Code. In *Hansraj Bajaj's* case (supra), the High Court put a note of caution while upholding the inherent power of the High Court to stay the suit though filed in a competent court when it said:

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> "The jurisdiction to stay an otherwise competent suit is to be sparingly exercised and within the strict limits of the rigorous condition, whose principles may be stated thus : the first principle is that a mere balance of convenience is not a sufficient ground for depriving a plaintiff of his right of prosecuting his action in or his right of access

H

to the competent Courts of the land. A

The second principle is that the Court stays an action brought within the jurisdiction in respect of a cause of action arising entirely out of the jurisdiction when it is satisfied that the plaintiff will thereby suffer no injustice whereas if the action is continued the defendant will, in defending the action, be the victim of such injustice as to B amount to vexation and oppression and which vexation and oppression would not arise for the defendant if the action were brought in another accessible Court where the cause of action arose.

In such a case the Courts have also insisted that the onus is upon the defendant to satisfy the Court, first, that the continuance of the C action would work an injustice because it would be oppressive or vexatious to him or would be an abuse of the process of the Court and, secondly, also that the stay will not cause any injustice to the plaintiff....."

In *Krishnan's,* case (supra), the Court laid down that if the ends of justice D require or it is necessary to prevent the abuse of the process of the court, the court has jurisdiction to stay the trial of a suit pending before it, but the exercise of such power would depend upon the facts and circumstances of each case. For the sake of convenience, we may reproduce certain relevant clauses of the Bill of Lading (BOL) and provisions of the Indian Carriage of E Goods by Sea Act, 1925 (hereinafter referred to as "the Act") as under :

Bill of Lading

"3. *Jurisdiction*

Any dispute arising under the Bill of Lading shall be decided in the F country where the carrier has his principal place of business and the law of such country shall apply except as provided elsewhere herein."

"9. *Live Animals and Deck Cargo*

shall be carried subject to the Hague Rules as referred to in Clause G 2 hereof with the exception that notwithstanding anything contained in Clause 19 the Carrier shall not be liable for any loss or damage resulting from any act, neglect or default of his servants in the management of such animals and deck cargo."

"19. *Optional Stowage Unitization* H

A (a) Goods may be stowed by the Carrier as received or, at Carrier's option, by means of containers, or similar articles of transport use to consolidate goods.

(b) Containers, trailers and transportable tanks whether stowed by the Carrier or received by him in a stowed condition from the Merchant, B may be carried on or under deck without notice to the Merchant.

(c) The Carrier's liability for cargo stowed as aforesaid shall be governed by the Hague Rules as defined above notwithstanding the fact that the goods are being carried on deck and the goods shall contribute to general average and shall receive compensation in general average."

C

Indian Carriage of Goods by Sea Act, 1925

"2. Application of Rules : Subject to the provisions of this Act, the rules set out in the Schedule (hereinafter referred to as "the Rules") shall have effect in relation to and in connection with the carriage of D goods by sea in ships carrying goods from any port in India to any other port whether in or outside India."

"SCHEDULE

RULES RELATING TO BILLS OF LADING

E Article I

Definitions

In these Rules the following expressions have the meanings hereby assigned to them respectively, that is to say

F xxx xxx xxx

(c) "Goods" includes goods, wares, merchandises, and articles of every kind whatsoever, except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried; [*unamended clause*]

G (c) "Goods" includes any property including live animals as well as containers, pallets or similar articles of transport or packaging supplied by the consignor, irrespective of whether such property is to be or is carried on or under the deck" [*as amended by Act 44/2000*]

H

"Article III
Responsibilities and Liabilities.

XXX XXX XXX

(6) ....

In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered.

*[This period may, however, be extended if the parties so agree after the cause of action has arisen:

Provided that a suit may be brought after the expiry of the period of one year referred to in this sub-paragraph within a further period of not more than three months as allowed by the court]*.

...."

While working out the equity between the parties and directing permanent stay of the suit and release of the bank guarantee, the Division Bench was mainly impressed by two factors that (i) Clause 3 of BOL gives exclusive jurisdiction to the Singapore Court to try and decide any dispute arising between the parties under the BOL and the parties shall be governed by the law which is applicable in Singapore; and (ii) the goods lost being the deck cargo the carrier ship has no liability in respect of the loss or damage as per Clause 9 of BOL. The Division Bench has said that Clause 3 and Clause 9 of BOL are material clauses which should have been pleaded by the plaintiff-appellants in their suit and, therefore, abuse of process of the Court.

As per law of pleadings under Order VI Rule 2 of the Code, every pleading should contain, and contain only, a statement in a concise form of the material facts on which the party relies for his claim or defence, as the case may be. Thus, the facts on which the plaintiff relies to prove his case have to be pleaded by him. Similarly, it is for the defendant to plead the material facts on which his defence stands. The expression 'material facts' has not been defined anywhere, but from the wording of Order VI Rule 2 the material facts would be, upon which a party relies for his claim or defence. The material facts are facts upon which the plaintiff's cause of action or

*Added by Act 28/1993

A defendant's defence depends and the facts which must be proved in order to establish the plaintiff's right to the relief claimed in the plaint or the defendant's defence in the written statement. Which particular fact is a material fact and is required to be pleaded by a party, would depend on the facts and circumstances of each case. In *A.B.C. Laminart Pvt. Ltd.* v. *A.P. Agencies, Salem,* [1989] 2 SCC 163, this Court has considered the ambit of the exclusion B clause whereby the jurisdiction of one court is excluded and conferred upon another court by agreement of the parties and said that in a suit for damages for breach of contract, the cause of action consists of making of the contract, and of its breach, so that the suit may be filed either at the place where the contract was made or at the pace where it should have been performed and C the breach occurred. When the court has to decide the question of jurisdiction pursuant to an ouster clause, it is necessary to construe the ousting expression or clause properly to see whether there is ouster of jurisdiction of other courts. When the clause is clear, unambiguous and specific accepted notions of contract would bind the parties and unless the absence of ad idem can be shown, the other courts should avoid exercising jurisdiction. As regards D construction of the ouster clause when words like 'alone', 'only', 'exclusive' and the like have been used, there may be no difficulty. Even without such words in appropriate cases, the maxim '*expressio unius est exclusio alterius*' expression of one is the exclusion of another-may be applied. What is an appropriate case shall depend on the facts of the case. In such a case, E mention of one thing may imply exclusion of another. When certain jurisdiction is specified in a contract, an intention to exclude all others from its operation may in such cases be inferred. It has, therefore, to be properly construed.

The allegations in the plaint are to the effect that the parties have entered into a contract on 7.1.2000 to carry on board the vessel M.V. Fortune F Express under the six split bills of lading 642 logs from the port of Sarawak, Malaysia for discharge at the port of Calcutta, India. As per stowage plan, 578 logs were lying on the deck of the vessel. At the time of the discharge of the cargo lying on the deck of the vessel, it was found that 456 logs out of 578 logs were missing and had been short-landed. The plaintiffs claimed a decree for the proportionate value of 456 logs, port and other charges, G custom duty and proportionate insurance payment. As per the plaintiffs' allegation, the logs, which were to be carried on the vessel owned by the defendants, had not been delivered at the port of destination. Thus, all the material facts on the basis of which the plaintiffs claimed the decree are alleged in the plaint. As the logs were not delivered at the port at Calcutta, H the port of destination, the part of cause of action arose within the jurisdiction

of the Calcutta Court and, thus, the suit filed by the plaintiffs at Calcutta was maintainable although it may be pleaded by the defendants in their written statement that the Calcutta High Court has no jurisdiction on account of Clause 3 of BOL. For the purpose of the cause of action, it was not necessary for the plaintiffs to plead the ouster of the jurisdiction of the Calcutta Court. In fact, it was for the defendants to plead and prove the ouster of the jurisdiction of the Calcutta Court and conferment of the jurisdiction in the Singapore Court alone. On a bare reading of Clause 3 of BOL, it is clear that any dispute arising under the BOL shall be decided in the country where the carrier has its principal place of business and the law of such country shall apply except as provided elsewhere in the BOL. Therefore, the exclusion clause refers to the jurisdiction of a court where the carrier has its principal place of business. Unless and until it is established that the defendant-carrier has its principal place of business at Singapore, the exclusion clause has no application. Simply because in the cause title of the plaint, the plaintiffs have described defendant No. 2-Trustrade Enterprises PTE Ltd. to be carrying on business at Singapore, would not *ipso facto* establish the fact that the principal place of business of defendant No.2 (respondent herein) is/was at Singapore to exclude the jurisdiction of the Calcutta Court which admittedly has the jurisdiction to try the suit. Therefore, absence of reference of Clause 3 of BOL in the pleadings cannot be said to be suppression of the material fact as the question of jurisdiction would be required to be adjudicated and decided on the basis of the material placed on record at the trial.

In *S.J.S. Business Enterprises (P) Ltd.* v. *State of Bihar and Ors.*, [2004] 7 SCC 166, this Court has accepted the principle that the suppression of a material fact by a litigant disqualifies such litigant from obtaining any relief. The rule has been evolved out of the need of the courts to deter a litigant from abusing the process of court by deceiving it. But the suppressed fact must be a material one in the sense that had it not been suppressed it would have had an effect on the merits of the case. It must be a matter which was material for the consideration of the court, whatever view the court may have taken. Reliance was placed on *R.* v. *General Commrs. for the purposes of the Income Tax Act for the District of Kensington*, (1917) 1 KB 486.

Similarly under Clause 9 of BOL, the carrier was not made liable for any loss or damage resulting from any act, neglect or default of his servants in the management of animals and deck cargo. Under this clause, the carrier is excluded from making good any loss or damage to the deck cargo which has resulted from any act, neglect or default of his servants who are in the

A management of such deck cargo. The facts are yet to come on record that the loss or damage to the deck cargo was the result of any act, neglect or default of the carrier's servants who were in the management of the deck cargo. In fact, this would be the defence if at all to be raised by the defendants in their written statement. It was not at all required for the plaintiffs to introduce this clause in their plaint. The liability of the defendants to pay or not to pay any
B loss or damages to the cargo, would depend on proof of certain necessary facts which could only be adjudicated upon at the trial of the suit.

Clause 2 (General Paramount Clause) of BOL reads as under:

> "The Hague Rules contained in the International Convention for the
> C Unification of certain rules relating to Bills of Lading, dated Brussels the 25th August 1924 as enacted in the country of shipment shall apply to this contract. When no such enactment is in force in the country of shipment, the corresponding legislation of the country of destination shall apply, but in respect of shipments to which no such
> D enactments are compulsorily applicable, the terms of the said Convention shall apply.
>
> *Trades where Hague-Visby Rules apply.*
>
> The trades where the International Brussels Convention 1924 as
> E amended by the Protocol signed at Brussels on February 23rd 1968. The Hague-Visby Rules apply compulsorily, the provisions of the respective legislation shall be considered incorporated in this Bill of Lading. The Carrier takes all reservations possible under such applicable legislation, relating to the period before loading and after discharging and while the goods are in the charge of another Carrier
> F and to deck cargo and live animals."

Under this Clause of BOL, the Hague Rules contained in the International Convention for the Unification of Certain Rules Relating to Bills of Lading, Brussels, August 25, 1924 and Protocol to amend the said Convention, Brussels, February 23, 1968, as enacted in the country of shipment shall apply
G to this contract and if no such enactment is in force in the country of shipment, the corresponding legislation of the country of destination shall apply, but if no such enactments are compulsorily applicable then the terms of the Convention shall apply, that is to say, in the absence of any enactment in the country of shipment or in the country of destination, the Hague Rules
H shall apply. Under Article 1, clause (c) of the Hague Rules, the goods shall

include goods, wares, merchandise, and articles of every kind whatsoever except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried. Thus, the cargo which by the contract of carriage is carried on the deck would not be goods under the Hague Rules, whereas under Clause 9 of BOL deck cargo is also included for the purposes of the liability of the carrier if the loss or damage to the goods is not on account of the neglect or default of the servants of the carriage in the management. The question whether the cargo transported by the carrier would be governed by the Hague Rules on account of Clause 2 (General Paramount Clause) or by Clause 9 of BOL would be a question required to be determined by the Court after the parties placed all material evidence before it and could not have been decided by the Division Bench at the preliminary stage. Clause 19 of BOL permits the Carrier to stow the goods either on deck or under deck without notice to the merchant as received by him or at the Carrier's option by means of containers or similar articles of transport used to consolidate goods. Sub-clause (c) thereof provides that the Carrier's liability for the cargo stowed shall be governed by the Hague Rules as defined above notwithstanding the fact that the goods are being carried on deck and the goods shall contribute to the general average and shall receive compensation in general average. This clause has reference to Clause 14 of BOL which provides for general average and salvage in respect of goods in the event of accident, danger, damage or disaster before or after commencement of voyage. This clause has no reference to the liability, if any, of the Carrier or the cargo ship for non-delivery of the goods. In any case, without there being material on record, Clause 19 cannot be relied upon for absolving the Carrier from his liability for any damage or loss caused to the goods carried on ship.

It is urged by Shri C.S. Sundaram, learned senior counsel for the plaintiff-appellants that on 4.12.2001 reply was filed to the application filed by the defendants under Order VII Rule 11 of the Code wherein the plaintiffs have denied that 578 out of 642 logs were carried on deck or that 456 out of the said 578 logs which were carried on deck had been short-landed; that at the time of filing of the suit, information of the plaintiffs was based on the six split bills of lading contained in Annexures "A" to "F" of the plaint and the representations made on behalf of the defendant No. 2; that it subsequently transpired that the allegation that 578 logs were carried on deck is wholly incorrect and false; and that the original five bills of lading more fully referred to in paragraph 7 of the plaint did not state that the logs were carried on deck. From this, it appears that the plaintiffs are alleging and asserting that the logs

A were not carried on deck and, therefore, Clause 9 has no application. We are not recording any finding on this issue, but on the basis of the aforesaid factual questions raised, the High Court without going into the merits of the case could not have held that the plaintiffs would not be entitled to a decree on account of Clause 9 of BOL. Besides this, the Court will be required to give meaning to the words used in Clause 9 as to whether the term 'loss' in B the Clause has to be separately read or it has to be read and construed as having reference to, damage to deck cargo and whether it will cover the case of shortlanding of the goods and not to damaged goods.

To get the order of stay of a suit on the ground of abuse of process, C the applicant must show that plaintiff would not succeed but that he could not possibly succeed on the basis of the pleadings and in the circumstances of the case. In other words, the defendant would be required to show very strong case in his favour. The power would be exercised by the Court if defendant could show to the court that the action impugned is frivolous, vexatious or is taken simply to harass the defendant or where there is no D cause of action in law or in equity. The power of the court restraining the proceedings are to be exercised sparingly or only in exceptional cases. The stay of proceedings is a serious interruption in the right, that a party has to proceed with the trial to get it to its legitimate end according to substantive merit of his case. The court to exercise the power to stay the proceedings has E to keep in mind that the positive case has been made out by the defendant whereby the court can reach to the conclusion that proceedings, however, indicate an abuse of the process of Court. The High Court has granted stay of proceedings as it found plaintiffs guilty of suppression of jurisdictional clause of BOL and on the finding that plaintiffs have no case on merits, and thus it would be abuse of process of the Court if the plaintiffs are permitted F to go ahead with the trial in Calcutta Court. We are not satisfied that the defendants have made out the case on any of the counts.

It is urged by the learned senior counsel that where jurisdiction is founded on the basis of cause of action arising in Calcutta Court as non G delivery of logs are claimed to be at Calcutta, the defendants are entitled to apply to the court to exercise its discretion to stay the proceedings on the ground of *forum non conveniens*. It was urged before the High Court and by Shri C.S. Sundaram, learned senior counsel appearing for the appellants before us that the appellants will suffer irreparable injury if they are called upon to file a suit at Singapore Court after the expiry of period of one year, particularly H so when the objection to the jurisdiction of the Calcutta Court was raised by

the defendants on 7.7.2001 and, therefore, the defendants cannot claim advantage of *forum non conveniens.* A

The argument is based on the basis of Clause (6) of Article III of the Schedule to Indian Carriage of Goods by Sea Act, 1925, wherein it has been provided that in any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered. By Act No. 28 of 1993, it has been provided that this period may be extended if the parties so agree after the cause of action has arisen, and further under the proviso a suit may be brought after the expiry of the period of one year within a further period of not more than three months as allowed by the court. Under Clause (6) of Article III, one year period was provided to file a suit against the carrier or the ship for loss or damages which, by amendment in 1993, has been extended to further period of three months if allowed by the court and can also be extended for a period till the filing of the suit if the parties to the suit agree after the cause of action has arisen. Under Article I of the Schedule, 'goods' are defined and as per the substitution brought about by Act No. 44 of 2000, the goods shall include any property including live animals as well as containers, pallets or similar articles of transport or packaging supplied by the consignor, irrespective of whether such property is to be or is carried on or under the deck. By the amended definition, the deck cargo is also included in the definition of goods provided the deck cargo is in the form of containers, pallets or similar articles of transport or packaging supplied by the consignor. Therefore, on a first reading, the goods transported on a carriage, even if it is a deck cargo, could be subject to the limitation as provided in Clause (6) of Article III, but for Section 2 of the Act which specifies that subject to the provisions of the Act, the rules set out in the Schedule shall have the effect in relation to and in connection with the carriage of goods by sea in ships carrying goods from any port in India to any other port whether in India or outside India. To apply the provisions of the Act and the Schedule thereunder, the goods should be carried by sea in a ship from any port in India to any other port in India or outside India. In the present case, admittedly, the goods in question were carried on the ship from Malaysia for discharge at Calcutta. The goods having not been carried from any port in India, Clause (6) of Article III of the Schedule and the provisions of the Act will have no application for the purposes of limitation. Therefore, it cannot be said that by virtue of the Act, the suit would be barred by limitation if the plaint is required to be presented in the Singapore Court. None of the parties have placed before us the B C D E F G H

A Singapore law applicable to the facts of the present case, nor any argument has been advanced on that basis. The plaintiff-appellants on these facts cannot claim equity on the basis of the provisions of the Act and the limitation provided therein.

In *Smith Kline & French Laboratories Ltd. & Ors.* v. *Bloch,* [1983] 2 B All ER 72, the first plaintiffs (the English Company) were pharmaceutical company in England and were a wholly owned subsidiary of the second plaintiffs (the U.S. Company) The defendant was a research worker working in England. The defendant brought an action for damages in Pennysylvania against both the English and the U.S. Companies. The English Company C (plaintiff) sought an injunction in the English Court to restrain the defendant from further proceedings with his claim in Pennysylvania or from making any further claims outside the jurisdiction of English Court and further sought declarations that the proper law of agreement was that of England and that the English Company were not liable for the breaches complained of. The judge granted the injunction sought. The defendant appealed and it was held D while dismissing the appeal that "the Court had jurisdiction to grant an injunction restraining a litigant from continuing proceedings in a foreign court where the parties were amenable to the English jurisdiction and where it is satisfied (a) that justice could be done between the parties in the English forum at substantially less inconvenience and expense; and (b) that the stay of proceedings did not deprive the litigant in the foreign proceedings of any E legitimate personal or juridical advantage which would otherwise have been available to him. The jurisdiction was nevertheless to be exercised with great caution.

In *Spiliada Maritime Corp* v. *Cansulex Ltd.,* [1986] 3 All ER 843, the F House of Lords explained the ambit of the principle of *forum non conveniens* for issuing the order of stay and held:

> "(1) The fundamental principle applicable to both the stay of English proceedings on the ground that some other forum was the appropriate forum and also the grant of leave to serve proceedings out of the G jurisdiction was that the court would choose that forum in which the case would be tried more suitably for the interests of all the parties and for the ends of justice
>
> (2) In the case of an application for a stay of English proceedings the burden of proof lay on the defendant to show that the court should H exercise its discretion to grant a stay. Moreover, the defendant was

required to show not merely that England was not the natural or appropriate forum for the trial but that there was another available forum which was clearly or distinctly more appropriate than the English forum. In considering whether there was another forum which was more appropriate the court would look for that forum with which the action had the most real and substantial connection, e.g. in terms of convenience or expense, availability of witnesses, the law governing the relevant transaction, and the places where the parties resided or carried on business. If the court concluded that there was no other available forum which was more appropriate than the English court it would normally refuse a stay. If, however, the court concluded that there was another forum which was *prima facie* more appropriate the court would normally grant a stay unless there were circumstances militating against a stay, e.g. if the plaintiff would not obtain justice in the foreign jurisdiction."

In this case the Division Bench has held while considering the question of forum non conveniens as under :

"Let us see, therefore, what are the factors weighing in favour of the Indian Courts as against the Courts of Singapore. The evidence regarding shortage of goods was said to be in India. In our opinion this evidence does not justify the continuance of the action in the wrong Court, because the shortage is practically admitted; in any event the proof of it in Singapore is not a matter of any very great difficulty. The other great factor in favour of the Indian action is that the ship Fortune Express lost the goods in the very voyage in which it happened to travel to the Port of Calcutta and that by reason thereof, it could be quite clearly and easily arrested and the security obtained for the action upon the lost logs. This, in our opinion, takes a very one sided view of the matter. The arrest conventions, the decision of the Supreme Court in the case of *M.V. Elezabeth,* reported at [1993] Supp. 2 SCC page 433, and the various observations therein from, say paragraphs 75 to 85 of the judgment, no doubt show that the Fortune Express could be arrested on an admiralty claim of the present nature. That arrest makes the action of the consignee very much secure. But we are not deciding upon the issue of security; we are deciding upon the issue of appropriate commencement of the action. If the action can be appropriately commenced in Calcutta, security can be obtained and to that extent the consignee can feel

A safe. This does not mean that the reverse is true. It would be putting the cart before the horse if one were to say that because the plaintiff can commence an action and obtain security here the action should be held as appropriately commenced. This is not the correct way to look at the case at all. If that were so, parties would be encouraged not to pay the attention to solemnly agreed clauses of forum selection B and they would rush to the Admiralty Court even contrary to such a selection clause and obtain arrest, thereafter arguing, that the arrest was most convenient for them, that it produced a security from the shipper, and that if decree should be passed in their favour there would be no difficulty in its execution.

C xxx xxx xxx

The factor for leaning heavily in favour of Singapore is that the parties have chosen Singapore law. We have not had any experts on Singapore law attending the proceedings before us and indeed this choice of law was also suppressed by the plaintiffs like the choice of D Court. No doubt, arrest of a ship and the consequent obtaining of security would be of great advantage to a plaintiff if it were shown that the owners of the ship were difficult to trade or had to sue. Not so here. The owners have come forward. They can be sued in their country. There is nothing to show that they are so impecunious or E that they are such slippery customers that filing a suit against them in Singapore would be a matter of no use at all. These factors are not present in the case. We do not see why in view of these circumstances we should not hold the parties to their bargain and send them away from a Court which they had not agreed to come to."

F From the aforesaid, it is apparent that the Court has found that the Calcutta Court has jurisdiction to try the proceedings except when the forum selection clause excludes the jurisdiction of the Court. The Court has also found that the law of Singapore is not known. The case of the defendant carrier/owner of the ship, of exclusion of the Calcutta Court, is solely based G on the exclusion clause which conferred jurisdiction on the Court where the defendant has the principal place of business, which according to us has to be determined only after sufficient material is placed before the Court. In Advanced Law Lexicon, 3rd Edition 2005, by P. Ramanatha Aiyar, at page 3717, 'principal place of business' is defined as under:

H "where the governing power of the corporation is exercised, where

those meet in council who have a right to control its affairs and prescribe what policy of the corporation shall be pursued, and not where the labour is performed in executing the requirements of the corporation in transacting its business.

The place of a corporation's chief executive offices, which is typically viewed as the "nerve center".

.....the place designated as the principal place of business of the corporation in its certificate of incorporation."

From this, it appears that the principal place of business would be where the governing power of the corporation is exercised or the place of a corporation's Chief Executive Offices, which is typically viewed as the nerve center or the place designated as the principal place of business of the corporation in its incorporation under the various statutes. Therefore, to arrive at a finding as to which is the principal place of business, the parties would be required to place the relevant material before the Court. The Court cannot arrive at a finding of a particular place being the principal place of business at the preliminary stage of the hearing of the suit. The defendants have not placed any material before the Court that the Singapore Court is another available forum which is clearly or distinctly more appropriate than the Indian Courts. The Court has not taken into consideration that the action commenced by the plaintiff-appellants in Calcutta Court founded on the facts which are most real and substantially connected in terms of convenience or expense, availability of the witnesses and the law governing the relevant transaction in the Indian Court. There is no averment in the application filed by the defendants that continuance of the action in Calcutta High Court would work injustice to them because it is oppressive or vexatious to them or would be an abuse of the process of the Court. There was no material before the Court how the trial at Singapore would be more convenient to the parties *vis-a-vis* the trial of the suit at Calcutta and that justice could be done between the parties at substantially less inconvenience and expense. Nor it has been shown that stay would not deprive the plaintiffs of legitimate personal or juridical advantage available to them. In the facts of the case, we are not satisfied that there is other forum having jurisdiction, in which the case may be tried more suitably for the interest of all the parties and for ends of justice.

The Rules of the High Court of Calcutta on the Original Side, Appendix No. 5 under the caption 'Admiralty Rules', the Rules for regulating the procedure and practice in cases brought before the High Court at Calcutta

A under the Colonial Courts of Admiralty Act, 1890 were framed. The suit was defined to mean any suit, action, or other proceedings instituted in the said court in its jurisdiction under the Colonial Courts of Admiralty Act.

Rule 3 provides for institution of the suit. Under this Rule, a suit shall be instituted by a plaint drawn up, subscribed and verified according to the B provisions of the Code of Civil Procedure. Rule 4 is in relation to the arrest warrant after affidavit which reads as under:

> "In suits in rem a warrant for the arrest of property may be issued at the instance either of the plaintiff or of the defendant at any time after the suit has been instituted, but no warrant of arrest shall be issued C until an affidavit by the party or his agent has been filed, and the following provisions complied with:-
>
> (a) The affidavit shall state the name and description of the party at the whose instance the warrant is to be issued, the nature of claim or counter-claim, the name and nature of the property to be arrested, and D that the claim or counter-claim has not been satisfied.
>
> (b) In a suit of wages or of possession the affidavit shall state the national character of the vessel proceeded against; and if against a foreign vessel, that notice of the institution of the suit has been given to the Counsel of the State to which the vessel belongs, if there be E one resident in Calcutta and a copy of the notice shall be annexed to the affidavit.
>
> (c) In a suit of bottomry the bottomry bond, and in a foreign language also a notarial translation thereof, shall be produced for the inspection and perusal of the Registrar, and a copy of the bond, or of the F translation thereof, certified to be correct shall be annexed to the affidavit.
>
> (d) In a suit of distribution of Salvage the affidavit shall state the amount of Salvage money awarded or agreed to be accepted, and the name, address and description of the party holding the same.

G

Rule 6 provides that in suits in rem no service of writ or warrant shall be required when the attorney of the defendant waives service and undertakes in writing to appear and to give security or to pay money into Court in lieu of Security.

H Rules 27 provides for caveat to be filed against the arrest warrant. The Court can issue the warrant for the arrest if the affidavit contains the particulars

as required under Rule 4. A

Rule 6 permits the attorney of the defendant to ask for waiving of warrant of arrest by giving an undertaking in writing to appear and to give security. In the present case suit was instituted on 27.3.2000 and affidavit was filed for issuance of warrant of arrest of the vessel along with tackle, apparel and furniture as the same day the court directed for the arrest of the vessel. B On 12.4.2000 letter of intention regarding furnishing guarantee on behalf of the Owners & Parties, Vessel M.V. Fortune was filed and on the same date the vessel was directed to be released. In the order of release dated 12.4.2000 the court has specifically mentioned that the order of release was passed without prejudice to the rights and contentions of the owner of the vessel C that the suit is not maintainable. Thus, the maintainability of the suit filed by the plaintiff-appellants was the question raised before the court and the court was quite aware of the fact that the defendants are submitting to the jurisdiction of the court subject to their rights and contentions that the suit is not maintainable in the Calcutta High Court. Thus, it cannot be said that at the time of the filing of the letter of intention for furnishing guarantee D parties were not aware that the question of the jurisdiction of the court would be raised. Not only the parties the court was also aware that the issue of jurisdiction of the court would be in question. The defendants have not pressed for dismissal of the suit even when the bank guarantee was furnished on 17.5.2000. The defendants have not asserted dismissal of suit on the E ground of jurisdiction of the Court at the outset when letter of intention was furnished by the Punjab National Bank on their behalf nor at the time of furnishing bank guarantee and waited till 7.7.2001 to file an application. From reading of Admiralty Rules, it appears that it is a usual and common practice to issue warrant of arrest if the affidavit filed under Rule 4 contains all particulars required. Thus, it cannot be said that arrest of the ship was F obtained by the plaintiffs suppressing material facts which would warrant stay of suit by the Court.

For the reasons aforementioned, we are of the view that the defendants have not made out a case for stay of the proceedings of Admiralty Suit No. 11 of 2000 pending in the Calcutta High Court and the High Court has G committed an error in passing the order of permanent stay and discharging the bank guarantee. The appeal is allowed with costs. The order of the Division Bench of the High Court is set aside. The suit shall now proceed in the Calcutta Court in accordance with law.

K.G. Appeal allowed. H