

TRADING OF A SHIP UNDER ARREST

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A ship is usually arrested by an admiralty court to acquire jurisdiction over the ship owner. All the claims for which a ship may be arrested are mentioned in Article 1 of the 1952 Brussels Arrest Convention and 1999 Geneva Arrest Convention. If a claim '*in rem*' is to be pursued it must fall within the four corners of these conventions. After an order of arrest of ship is passed the possession of the ship passes to the Court Marshal, here the interesting question which arises for consideration is that whether a ship under arrest can be allowed to sail to fulfill its existing obligations.

A ship under custody is generally not allowed to sail for fear that it might accrue additional liabilities. Also it is believed that allowing an arrested ship to work will tantamount to diluting the order of arrest and the purpose of arrest is defeated. Therefore the decision whether further trading of the ship should be permitted or not is left to the discretion of the court. The Court, within whose jurisdiction the ship has been arrested while deciding not to release the ship from arrest, may permit the ship to continue trading. It is a much agreed principle that such discretion is not exercised under normal circumstances by the Courts, a ship under arrest is not allowed to sail unless a sufficient bail or other security is furnished by the owner of the vessel. The rationale behind this is that a ship under arrest is within the custody of the Court Marshal and it is his duty to keep the ship in safe custody and to preserve it, however this duty does not extend to managerial control and operation of the ship for the purpose of generating an operational profit for the ship owners and those interested in it.

In *Government of the Republic of Spain v. SS "Arantzazu Mendi"*,⁴⁰¹ Lord Atkin explained it further, "The ship arrested does not by the mere fact of arrest pass from the possession of its then possessors to a new possession of the Marshal. His right is not possession but custody. Any interference with his custody will be properly punished as contempt of the Court which ordered arrest, but, subject to his complete control of the custody, all the possessory rights which previously existed continue to exist, including all remedies which are based on possession. Once arrested, a ship cannot be moved from the place of arrest without the authority of the Marshal. To move the ship without such authority, whether to another place within the jurisdiction or to flee the jurisdiction constitutes contempt of court."

⁴⁰¹ [1939] AC 256.

The Bombay High Court in its recent decision of *Jaldhi Overseas Pvt. Ltd v. M.V. Daebo Lumut and Anr.* opened Pandora's Box by holding that such an application can be allowed only in special circumstances after providing adequate security to claims of both the parties. The Court however did not enumerate what constitutes these special circumstances; neither is there any precedent enumerating the same. What remains to be seen is that how the Indian Courts are going to interpret it. In an earlier case the Calcutta High Court allowed a ship to sail outside the territorial waters for public money would be wasted if the vessel was not allowed to carry the cargo.⁴⁰² A similar approach has been followed by foreign courts, in *Martha II* where there was an expectation that the ship will be refinanced and release of movement of ship was allowed to discharge cargo to a nearby port in accordance with its scheduled cargo operations.⁴⁰³ However this view has been highly criticized, a ship under arrest is not even allowed to move to a different port within the jurisdiction for it would dilute the jurisdiction of the arresting Court.⁴⁰⁴

In *Tai Shing Maritime Co SA v. The Ship 'Samsun Veritas'*,⁴⁰⁵ there was a real likelihood of the vessel grounding. On application by the Court Marshal, the Court allowed the ship to be moved to another port. The Court followed the decision in *Malaysia Shipyard and Engineering Sdn Bhd v Iron Shortland*,⁴⁰⁶ where orders permitting the arrested vessel to sail between Port Headland in Western Australia and Port Kembla in New South Wales were approved on grounds of public interest. The court observed, amongst other factors, that a significant public interest consideration, namely, the potential shortage of iron at the Port Kembla needed immediate consideration.

Through the analysis of these judgments it is clear that the Courts have been less inclined towards allowing an arrested ship to sail. However in circumstances which demand urgent consideration and when there is public interest involved the Courts have bypassed the general rule and held to the contrary.

⁴⁰² *Alexandros Dryron S.A. v. Owners and Parties interested in the vessel M.V. "PRAPTI"*, AIR 1998 Cal 142.

⁴⁰³ *The Martha II* (Unreported: Federal Court of Australia, Sheppard J, VG70/1996, 6/3/96).

⁴⁰⁴ Sarah C Derrington and James M. Turner: *The Law and Practice of Admiralty Matters*, Oxford University Press 2007 at [7.32] to [7.34].

⁴⁰⁵ [2008] FCA 1546.

⁴⁰⁶ (1995) 59 FCR 535.