

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 August Term, 2010

4 (Argued: January 26, 2011 Decided: February 15, 2011)

5 Docket No. 10-0976-cv

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7 EITZEN BULK A/S,

8 Plaintiff-Appellee,

9  
10 ABC,

11 Plaintiff,

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13 v.

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15 ASHAPURA MINECHEM, LTD.,

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17 Defendant-Appellant,

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21 DEF, ASHAPURA GROUP OF INDUSTRIES, ASHAPURA SHIPPING LIMITED,  
22 ASHAPURA INTERNATIONAL LIMITED, BOMBAY MINERALS LTD., ASHAPURA  
23 CLAYTECH LTD., ASHAPURA ALUMINUM LTD., EAGLE FUEL PVT. LTD.,  
24 PRASHANSHA CERAMICS LTD., PENINSULA PROPERTY DEVELOPERS PRIVATE  
25 LTD., SHARDA CONSULTANCY PRIVATE LTD., ASHAPURA CONSULTANCY  
26 SERVICE PRIVATE LTD., ASHAPURA MINECHEM UAE (FZE), ASHAPURA  
27 HOLDINGS UAE (FZE), ASHAPURA MARITIME FZE, ASHAPURA SHIPPING  
28 (UAE) FZE, ASHAPURA SHIPPING UAE, ASHAPURA FINANCE LTD., ASHAPURA  
29 INFIN PVT LTD., ASHA PRESTIGE CO., ASHAPURA VOLCLAY LTD.,  
30 ASHAPURA VOLCLAY CHEMICALS PRIVATE LTD., ASHAPURA AL-ZAWAWI  
31 MINERALS, LLC, SHANTILAL MULTIPOINT INFRASTRUCTURE PRIVATE LTD.,  
32 ASHAPURA ARCADIA LOGISTIC PRIVATE LIMITED, ASHAPURA CHINA,  
33 ASHAPURA CHINA CLAY COMPANY, MANICO MINERALS INTERNATIONAL,  
34 ASHAPURA AMCOL.,

35  
36 Defendants.

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1 B e f o r e: WINTER, SACK, and LIVINGSTON, Circuit Judges.  
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3 Appeal from an order of the United States District Court for  
4 the Southern District of New York (Alvin K. Hellerstein, Judge)  
5 denying a defendant-appellant's motion to vacate maritime  
6 attachments of electronic fund transfers entered prior to our  
7 decision in Shipping Corp. of India Ltd. v. Jaldhi Overseas Pte  
8 Ltd., 585 F.3d 58 (2d Cir. 2009). Plaintiff's claim was reduced  
9 to final judgment pre-Jaldhi but has not yet been executed  
10 against the attached funds, which were retained by the banks in  
11 suspense accounts pursuant to the Rule B attachments. We hold  
12 that the entry of a judgment upholding plaintiff's claim as to  
13 liability does not affect the retroactive applicability of Jaldhi  
14 where that judgment has not yet been executed against the  
15 attached property. Accordingly, we vacate the decision and  
16 remand with instructions to release the property.

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18 CHARLES BART CUMMINGS, Baker &  
19 McKenzie LLP, New York, New York,  
20 for Defendant-Appellant.  
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22 MICHAEL E. UNGER (Lawrence J. Kahn,  
23 Eric J. Matheson, on the brief),  
24 Freehill Hogan & Mahar LLP, New  
25 York, New York, for Plaintiff-  
26 Appellee.  
27

28 WINTER, Circuit Judge:

29 Ashapura Minechem, Ltd., appeals from Judge Hellerstein's  
30 order denying its motion to vacate maritime attachments of  
31 electronic fund transfers ("EFTs") entered pursuant to Rule B

1 of the Supplemental Rules for Admiralty or Maritime Claims and  
2 Asset Forfeiture Actions ("Rule B"). Fed. R. Civ. P. Supp. R.  
3 B. We have previously held that EFTs are not properly  
4 attachable under Rule B, Shipping Corp. of India Ltd. v. Jaldhi  
5 Overseas Pte Ltd., 585 F.3d 58 (2d Cir. 2009), and that Jaldhi  
6 applies retroactively "to all cases open on direct review."  
7 Hawknet, Ltd. v. Overseas Shipping Agencies, 590 F.3d 87, 91  
8 (2d Cir. 2009). We now hold that EFTs attached pre-Jaldhi must  
9 be released where the plaintiff obtained a final judgment but  
10 has not executed it against the attached funds that are being  
11 retained by banks in suspense accounts pursuant to Rule B  
12 attachments.

13 Accordingly, we vacate and remand with instructions to  
14 release the attached property.

#### 15 BACKGROUND

16 The underlying dispute does not concern us. It suffices  
17 to say that, in September 2008, Eitzen, the plaintiff, obtained  
18 a Rule B attachment of EFTs of which Ashapura, the defendant,  
19 was an originator or beneficiary. By early 2009, Eitzen had  
20 attached over \$1.7 million in EFTs, which the garnishee banks  
21 transferred into suspense accounts. Eitzen ultimately obtained  
22 an arbitration award in London of approximately \$36.6 million,  
23 which it moved to confirm in the Southern District. On July  
24 24, 2009, before our decision in Jaldhi, the district court  
25 entered judgment for the full amount of the arbitration award

1 and ordered the garnishee banks to turn the restrained property  
2 over to Eitzen within ten days after entry of the judgment.  
3 Ashapura did not appeal. Eitzen's collection efforts were  
4 stalled when other creditors of Ashapura asserted their own  
5 claims against the funds in the suspense accounts. By March  
6 24, 2010, however, those creditors' claims were all either  
7 voluntarily withdrawn or determined against them, leaving only  
8 Eitzen's attachment in effect.

9 On November 9, 2009, Ashapura filed a motion to vacate the  
10 Rule B attachment pursuant to Jaldhi. The district court  
11 denied the motion. Noting that this case "involve[d] actual  
12 funds, held in suspense accounts, not EFTs," and that, under  
13 Jaldhi and Hawknet, it "lacked jurisdiction to order the funds  
14 attached," the court stated that "they nevertheless were  
15 attached and plainly [the court has] jurisdiction to order  
16 their disposition." It held that neither Jaldhi nor Hawknet  
17 "confronted issues arising from an evasive judgment debtor or  
18 multiple claims of creditors, including a judgment creditor."  
19 The court then upheld the attachment as an exercise of its  
20 equity powers. Ashapura brought the present appeal.

#### 21 DISCUSSION

22 Eitzen argues that this case is not governed by Jaldhi and  
23 Hawknet because the district court's judgment and turnover  
24 order below caused the attachment to "merge" into the final  
25 judgment prior to the filing of those opinions. Eitzen further

1 contends that Hawknet's retroactive application of Jaldhi does  
2 not apply here because the case is no longer "open on direct  
3 review," Hawknet, 590 F.3d at 91, given Ashapura's failure to  
4 appeal. We find both arguments unpersuasive.

5 The attachment of EFTs between Ashapura and third parties  
6 was invalid under the rule announced in Jaldhi, 585 F.3d at 71.  
7 Because the judgment against Ashapura was not executed against  
8 the funds, its finality did nothing to alter the legal basis of  
9 the banks' retention of the funds in the suspense accounts.  
10 See Scanscot Shipping Servs. GmbH v. Metales Tracomex LTDA, 617  
11 F.3d 679, 682 (2d Cir. 2010) ("The new suspense account neither  
12 cures the jurisdictional defect nor provides a basis for  
13 reattachment of the same funds.").

14 Although the question of Ashapura's liability may no  
15 longer be "open on direct review," Hawknet, 590 F.3d at 91, the  
16 funds remaining in suspense accounts were being retained by the  
17 banks solely on the basis of the Rule B attachment and that  
18 retention was therefore open to review on a Rule E(4)(f)  
19 motion.<sup>1</sup> The reduction of Eitzen's claim to judgment

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<sup>1</sup>At oral argument, a question arose as to the existence of tension between Jaldhi's holding that EFTs "are not the property of either the originator or the beneficiary," 585 F.3d at 71, and Supplemental Rule E(4)(f), pursuant to which the present motion was brought. Rule E(4)(f) states that "any person claiming an interest in [the attached property] shall be entitled to a prompt hearing at which the plaintiff shall be required to show why the . . . attachment should not be vacated . . . ." Fed. R. Civ. P. Supp. R. E(4)(f). While Jaldhi and Hawknet state that at the time of attachment, the funds are not property of either the originator or the beneficiary for purposes of Rule B, each has an interest in the funds because the attachment affects the legal relations between them. Moreover, preventing a party such as Ashapura from moving to vacate an illegal attachment would lead to a ruling

1 eliminated all doubt as to Ashapura's liability, but neither  
2 Jaldhi nor Hawknet turned on the strength of the merits of the  
3 underlying actions brought by the attaching parties. And so  
4 far as the equities between the parties favoring Eitzen are  
5 concerned, we have specifically forbidden resort to equitable  
6 considerations in addressing motions to vacate pre-Jaldhi  
7 attachment orders. See Sinoying Logistics Pte Ltd. v. Yi Da  
8 Xin Trading Corp., 619 F.3d 207, 214 (2d Cir. 2010) ("[F]ar  
9 from encouraging district courts to apply Jaldhi selectively  
10 based on an examination of the equitable considerations in the  
11 remaining EFT-attachment cases, Hawknet requires district  
12 courts to vacate any attachment orders granted before [the]  
13 decision in Jaldhi insofar as those orders are now inconsistent  
14 with Jaldhi"). We consequently hold that the district court  
15 was obligated, pursuant to Jaldhi and Hawknet, to vacate the  
16 attachment order.<sup>2</sup>

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that while the district court has power to order an illegal attachment, it has no power to vacate it -- a result that cannot be intended by Rule E(4)(f). Finally, Hawknet itself involved a Rule E(4)(f) motion. See Hawknet, 590 F.3d at 90, 93 (relying on Jaldhi to affirm district court's vacatur of attached EFTs under Rule E(4)(f)).

<sup>2</sup>We note that this resolution is consistent with both the Federal Rules of Civil Procedure and New York law, although we rely on neither. Under the latter, it would appear that attachments may be vacated at any time before property or debts are actually applied to the satisfaction of a judgment: "Prior to the application of property or debt by a sheriff or receiver to the satisfaction of a judgment, any interested person may commence a special proceeding against the judgment creditor or other person with whom a dispute exists to determine rights in the property or debt." N.Y.C.P.L.R. 5239. This state procedural rule is operable in an execution of a federal money-judgment based on Federal Rule of Civil Procedure 69(a)(1), which provides that "[t]he procedure on execution -- and in proceedings supplementary to and in aid of judgment or execution -- must accord with the procedure of the state where the court is located, but a federal statute governs to the extent it applies."

