
(2007) 09 BOM CK 0150

In the Bombay High Court

Case No : Notice of Motion No. 3513 of 2007 in Admiralty Suit No. 36 of 2007

Crown Maritime Co. (I) Ltd.

APPELLANT

Vs

Barge Salina II and Others

RESPONDENT

Date of Decision : 24-09-2007

Acts Referred:

Admiralty Courts Act, 1840 — Section 6
Admiralty Courts Act, 1861 — Section 5, 6, 7

Citation : (2008) 1 BomCR 143

Hon'ble Judges : Dharmadhikari S.C., J

Bench : Single Bench

Advocate : Prashant Pratap and Archana Reddy, instructed by Legasisi Partners, for the Appellant; Rahul Narichania and Manoj Khatri, instructed by Santosh Shetty, for the Respondent

Judgement

Dharmadhikari S.C., J.—The defendants have filed this notice of motion seeking the following reliefs:

(a) That the order dated 3rd September, 2007 be vacated and/or set aside;

(b) The plaintiff be directed to deposit in this Hon'ble Court or furnish security in the sum of Rs. 2,80,000.00 being the losses or damages suffered by the defendants due to order dated 3rd September, 2007.

(c) Ad interim reliefs in terms of prayer Clauses (a) and (b) above;

2. Plaintiff has approached this Court by filing the above Admiralty Suit and the relief claimed therein is that the first defendant vessel be arrested by a Warrant of Arrest of this Court and, thereafter, the same be sold through Sheriff of Mumbai by orders and directions of this Court so also the sale proceeds be appropriated to the satisfaction of plaintiffs claim in the suit. The decree in favour of plaintiff and against the defendants jointly and severally in the sum of Rs. 98,23,397 has been claimed. The plaint is lodged in this Court on 3rd September, 2007. It is pointed out that on 3rd September, 2007, an order of

arrest of first defendant vessel has been made by this Court.

3. The grievance is that this Court could not have passed the order of arrest of first defendant vessel as it does not have the jurisdiction to pass any such orders against the defendants to this suit.

4. Mr. Narichania, learned Counsel appearing for defendants submits that the order of arrest is vitiated on three grounds. Firstly, this Court does not have jurisdiction to entertain and try the suit. Secondly, first defendant vessel was not seaworthy atleast on 13th August, 2007. Thirdly, on account of stowage permission not being granted by the Mercantile Marine Department, the contract stood frustrated. Finally, for the claim and quantum specified in the suit, it is clear that the defendants are not liable. He submits that the defendants have demanded refund of sum of Rs. 40 lakhs advanced by them for towing the barge. Far from the defendants being liable to pay any sum, the plaintiffs by their conduct disentitled themselves from claiming any equitable and discretionary reliefs. The claim is highly inflated and no decree can be passed in favour of plaintiffs.

He submits that the order of arrest has been passed on 3rd September, 2007. That was an ex parte order. He submits that pursuant to the order of arrest, plaintiffs addressed a letter dated 6th September, 2006 informing defendants of the substitution of Tug from Ground I to Revati which was replied on 7th September, 2007. Thereafter, a fax was received which was also replied. The order of arrest has resulted in serious loss and prejudice being caused to the defendants inasmuch as, it is suffering a loss of Rs. 80,000/- per day and the plaintiffs are liable to compensate the defendants for this loss. The loss is calculated at Rs. 32,80,000/- and that is how nothing is liable to be deposited and/or paid to the plaintiffs Jay the defendants.

5. For appreciating submissions of Mr. Narichania on the issue of jurisdiction, it would be necessary to refer to the averments in the plaint. Plaintiff is an Indian company. It is the owner of a tug m. v. Crown -I, which is Anchore Handling Tug cum supply vessel. Defendant No. 1 is a Dumb Barge with an 150 Ton Crane Sea fastened on her Deck. Defendant No. 1 is a vessel registered at Mumbai and presently lying in the port of Mumbai. Second defendant is the owner of first defendant vessel.

6. The claim of plaintiff arises under a Towcon Agreement dated 31st July, 2007 pursuant to which the plaintiffs Tug was hired by defendant No. 2 for towing first defendant vessel from Mumbai to Kakinada.

7. The plaint refers to clauses in the agreement and proceeds to allege that defendant No. 1 as hirer was required to arrange on its cost and provide to the Tug owner all necessary licenses, authorisations and permits required by the Tug and Tow to undertake and complete the contractual voyage. One such permission is that of Mercantile Marine Department, (for short MMD), Mumbai. As the towage was to be done by the plaintiffs Tug, the submission of the application to

the MMD for towage permission was to be done by the Tug on behalf of the tow. This permission was to be applied in anticipation of the contract. An application, was therefore, made on 11th July, 2007 by the plaintiffs. The permission was subject to the tow being connected and certified by the Surveyors of the defendants as well as MMD. In para 5 of the plaint, the plaintiffs state that all certificates and approvals required to ply in the Indian Territorial waters were obtained. The permission was required only with respect to the towage. This permission was to be procured by defendant No. 2 in terms of the said Towcon agreement. The defendant No. 2 had complete knowledge of the fact that the plaintiffs Tug had duly received all their permissions/approvals and certificates from the State control (MMD) on 6th June, 2007. The MMD had certified that the vessel was free of deficiencies on 10th July, 2007.

8. In paras 6 and 7 of the plaint, this is what is stated:

6. After the said Agreement was signed on 31st July, 2007, defendant No. 2 paid to the plaintiff the amount of Rs. 40 lakhs which was payable on signing of the agreement as per Clause 32(b) thereof. This amount is deemed to be fully and irrevocably earned at the moment it is due as provided in Clause 2(c) of the Agreement. Defendant No. 2 also informed the plaintiff by their letter dated 31st July, 2007 that they had arranged for the defendant No. 1 vessel to come alongside the plaintiffs Tug on 1.8.2007 at 1300 hrs. for connecting the Tow. Further, the defendant No. 2 had also paid the plaintiff Rs. 25,000/- towards the cost and expenses of the approval in compliance with their obligations under Clause 11 of the said Agreement. Only after the tow connected, would the defendants surveyors inspect the Tug and tow and issue a towing certificate, which was required to be submitted to Mercantile Marine Department for towage permission. Only then the Mercantile Marine Department surveyor boarded the Tug for inspection of the Tug and tow and the towing arrangements. In the circumstances, the first defendant vessel came alongside the plaintiffs Tug on 1.8.2007 at 1400 hrs for connecting the Tow, so that the surveyors could come and inspect both the vessels and give the certificate. The tow was connected on 1st August, 2007 at 1400 hrs. when me 24 hours free time as per Clause 2(g) of the Agreement commenced.

7. The 2nd defendants' surveyors, viz., Dhiraj Offshore Surveyors and Adjusters Pvt. Ltd. came on board on 2nd August, 2007, the same day for the necessary inspection of the said vessels. They issued their Towing Certificate dated 2.8.2007, by which they approved the Tug and the tow and the towing arrangements. Further, the said surveyors approved the towage subject to departure being in Beaufort Force-4 or less and associated sea together with favourable weather forecast. The plaintiff informed the defendant No. 2 that they were fully ready in all respects to sail out with the defendant No. 1 to Kakinada since 2nd August, 2007.

9. Thereafter, the plaintiff states that it submitted towage certificate to the MMD so that surveyor could inspect the vessel and approve the towage. Defendant No.

2 was approached by the plaintiff with a request that it should use its good offices with MMD to expedite the permissions. MMD during follow up informed plaintiff of the various discrepancies in the towing certificate issued earlier. Since the free time had already expired, the plaintiffs were entitled to demurrage as specified in Clause 39, plaintiff notified defendant No. 2 by a letter dated 8th August, 2007, of their liability to pay demurrage as per the above clause of the Agreement at Rs. 3 lakh per day. Thereafter, a fresh inspection was carried out of the Tug and Tow and certain defects were notified on 9th August, 2007. These defects were with regard to the first defendant vessel and it took longer time to comply with the requirements. Defendant No. 2's letter dated 10th August, 2007 has been relied upon by the plaintiff to allege that the defendant's case was that the clearances were to be obtained by the plaintiff and this assertion is contrary to the provisions of the Agreement. Be that as it may, when the requirements of MMD were thereafter complied with, a certificate was obtained which was found to be in order and finally on 16th August, 2007, the necessary documents to D.G. Shipping by the MMD.

On 17th August, 2007, plaintiffs called upon the defendant No. 2 to pay demurrage accumulated upto to that date failing which they stated that they would be constrained to cancel the contract and disconnect the tow. Defendants controverted the contents of this letter by their e-mail and raised several disputes including that the defects were attributable to the plaintiffs. Thereafter, further correspondence ensued claiming demand for further demurrage charges and finally it is pointed out that the D.G. Shipping denied the permission by rejecting the proposal with regard to towage permission. The decision of the D.G. Shipping is based upon monsoon conditions. In substance, the D.G. Shipping directed that the request be kept in abeyance on account of prevalent monsoon conditions. It is in such circumstances and considering the clauses in subject agreement, the claim has been raised by the plaintiffs and more particularly elaborately in paras 19 to 23 of the plaint.

10. Since emphasis has been laid by Mr. Narichania on the plaint averments and more particularly para 24 thereof, it will be convenient to reproduce the same:

24. The plaintiff submits that their claim is a maritime claim and arises out of an agreement relating to the use of hire of their Tug by the hirer defendant No. 2. The plaintiffs claim is a maritime claim under the Brussels Convention, 1952 and the Geneva Convention, 1999, both of which are applicable for the enforcement of maritime claims by an action in rem in this Hon'ble Court. The plaintiffs claim falls within the scope and ambit of the principles applied for enforcement of maritime claims in India and falls within the Admiralty jurisdiction of this Hon'ble Court. The party liable in personam in respect of the plaintiffs claim is defendant No. 2 who is the owner of the First defendant vessel and with whom the contract was entered into.

11. The submission of Mr. Narichania on the issue of jurisdiction is that all the parties in the suit are Indian. The first defendant vessel is an Indian Flag vessel.

The towage agreement/contract is entered into at Mumbai. He invites my attention to Admiralty Courts Act, 1840 and more particularly Section 6 thereof and urges that the wording is very clear inasmuch as it states This Court in its Admiralty Jurisdiction has jurisdiction to decide all claims and demands whatsoever in nature of salvage for services rendered to or damage received by any ship or sea-going vessel or in the nature of towage, or for necessities supplied to any foreign ship or seagoing vessel, and to enforce the payment thereof, whether such ship or vessel may have been within the body of a country, or upon the high seas, at the time when the services were rendered or damage received or necessities furnished, in respect of which such claim is made." His submission is that this provision pre-supposes that the jurisdiction to arrest is only restricted to foreign flag vessel in case the claim raised/demand made is for Towage. An Indian flag vessel cannot be arrested by this Court in its Admiralty jurisdiction in cases of such demands/claims. He submits that the suit claim itself is not cognisable in the Admiralty and Vice Admiralty Jurisdiction of this Court, inasmuch as, it is pure and simple breach of contract which is capable of being decided by this Court in its Ordinary Original Civil Jurisdiction. Plaintiffs cannot insist upon a security being provided for satisfying their claim inasmuch as they have other remedies under the Ordinary Civil Law. In such circumstances, the jurisdiction of this Court on its Admiralty and Vice Admiralty Side is barred and this Court must, therefore, vacate the order of Arrest and direct that the plaint be returned to the plaintiffs for presentation to this Court in its Ordinary Original Civil Jurisdiction. Mr. Narichania relies upon the Conventions viz., Brussels Convention and Geneva Convention. He submits that the same have been referred to in para 24 of the plaint deliberately by the plaintiff to mislead this Court inasmuch as the plaintiff is aware that this Court would not have jurisdiction under the abovementioned Enactment and otherwise. Thus, a reference to these Conventions by the plaintiff cannot confer jurisdiction on this Court.

12. Mr. Narichania submits that the decision of the Supreme Court in the case of M.V. Elisabeth and Others Vs. Harwan Investment and Trading Pvt. Ltd., Hanoekar House, Swatontapeth, Vasco-De-Gama, Goa, clearly states that when there is conflict between these Conventions and Municipal Law, then, the Municipal Law must prevail. He has invited my attention to paras 3 and 23 of the plaint. He submits that demurrage for delay in sailing of the Vessel is a claim which even otherwise, cannot be entertained by this Court.

13. He submits that the compilation of documents would go to show that the plaintiffs are not ready and willing to perform their obligations under the Agreement. The vessel is not seaworthy. The costs have been paid. But the Authorities refused to give permission. It is false to suggest that the Agreement could not go through because of D.G. Shipping's letter. On the other hand, the Tug was not seaworthy on the own showing of the plaintiffs inasmuch as the Inspection Report relied upon would show that the defects and deficiencies were not rectified atleast upto 13th August, 2007. It is the Surveyor who has pointed

out deficiencies. In such circumstances and when the Vessel was not seaworthy, no amount can be claimed from the defendant much less to the extent claimed.

14. Even otherwise, Mr. Narichania submits that the contract is frustrated on account of D.G. Shipping's letter/decision. It did not grant stowage permission. In the submission of Mr. Narichania whatever may be the reason for D.G. shipping refusing to consider the proposal of MMD, the fact remains that on account of its decision, there was no question of the contract being implemented. Once such is the case, then, the defendants are not liable to make good the loss suffered by the plaintiffs.

15. For all these reasons, Mr. Narichania submits that the notice of motion be allowed and order of arrest be vacated and the suit dismissed.

16. In support of his contentions Mr. Narichania relies upon the following decisions

(a) M.V. Elisabeth and Others Vs. Harwan Investment and Trading Pvt. Ltd., Hanoekar House, Swatontapeth, Vasco-De-Gama, Goa, ;

(b) Liverpool and London S.P. and I Asson. Ltd. Vs. M.V. Sea Success I and Another, ;

(c) Islamic Republic of Iran Vs. M.V. Mehrab and Others, ;

(d) m.v. Mariner IV, a Foreign Flag Vessel and another Vs. Videsh Sanchar Nigam Ltd., .

He has also relied upon the Lloyds Publication on Arrest of Ships and a Full Bench Decision of this Court reported in 2007(2) Bom.C.R 1 : 2007(2) All.M.R. 367 J.S. Ocean Liner LLC v. M.V. Golden Progress and Anr.

17. On the other hand Mr. Pratap learned Counsel appearing for plaintiffs has invited my attention to the affidavit filed in reply. He submits that the entire motion is misconceived and not maintainable. He submits that the attempt is to mislead this Court. He submits that on the issue of jurisdiction, it would be apparent that 1840 Act which is relied upon is not in force in India or abroad. It is rightly alleged by the plaintiff in the plaint that the Brussels convention must guide this Court in the matter of jurisdiction. Mr. Pratap submits that about 99 countries are signatories to the Brussels Convention. He submits that no country has ever urged that its Courts would have no jurisdiction to arrest the ship if the flag thereof is of that Country. He submits that the claim arises upon towage charges as per the Agreement. It is a maritime claim. For such a claim to be entertained and tried, there is no restriction insofar as nationality is concerned. He submits that assuming without admitting that 1840 Act is applicable and can be relied upon yet, Section 6 of the same, if read properly and in entirety would demonstrate that the only restriction placed thereby is in the case of necessities supplied. Whenever, necessities are supplied the vessel must be a foreign flag vessel.

18. Mr. Pratap has relied upon 1861 Act and more particularly Section 5 of Admiralty Courts Act, 1861. He submits that it is an Act extending jurisdiction and practice of Admiralty. The High Court of Admiralty shall have jurisdiction to try any claim of necessary supplied to any ship elsewhere than the Port to which the ship belongs, unless it is shown to the satisfaction of the Court that at the time of institution of the cause any owner or part owner of the ship is domiciled in England or Wales.

19. He submits that there is no bar to this Court entertaining the suit. Mr. Pratap's submission is that it is absurd to suggest that the admiralty and vice admiralty jurisdiction of this Court is restricted to a foreign flag vessel and whenever the claim is made against an Indian flag vessel, it should necessarily fall within the purview of its Ordinary Original Civil Jurisdiction. He has invited my attention to Clause 25 in the present contract as also the observations of Supreme Court in the case of M.V. Elizabeth (*supra*).

20. On merits Mr. Pratap's submission is that Clause 11 of the Agreement is clear. It specifies that permission/license must be obtained by the defendants. In any event, no argument at this stage is permissible with regard to the binding nature of this clause. Even consequences are set out in Clause 11. He submits that even the due diligence Clause (Clause 13) is complied with. Insofar as the delay is concerned, his submission is that permission is not rejected. The D.G. Shipping's letter/decision is that subject to weather conditions the towage cannot be permitted.

21. Mr. Narichania and Mr. Pratap both have taken me through the compilation of documents which have been tendered by the plaintiffs at the time of application for arrest. Mr. Pratap submits that if the clauses of Agreement in question and more particularly Clause 26 is perused, then, it is false to allege that the vessel was unseaworthy or that the Contract stood frustrated. He submits that the matter is of evidence. This is not a stage where this Court can go into rival contentions on merits and pronounce upon their legality and validity straight away. The suit is yet to be tried. It is not disputed that the contract is signed by both sides. Its execution is not disputed. However, both parties are in Shipping business and in such circumstances, it would be improper to hold at this stage that there is no substance in the claim of the plaintiffs. Consequently, the motion be dismissed.

22. For properly appreciating the rival contentions firstly, it would be necessary to notice plaint averments and the nature of the claim. Insofar as, the jurisdiction of this Court is concerned, in my view, after M.V. Elizabeth's case strictly speaking, that is answered totally by the Hon'ble Supreme Court. However, repeatedly it has come to the notice of this Court that said issue is raised as if this Court's jurisdiction is controlled by the English Acts and decision and Conventions.

23. It would be proper at this stage to consider the nature of the claim in the

suit. The agreement which has been the subject-matter of the suit is entitled as "Towcon Agreement". It has been executed at Mumbai. The place of business of both plaintiff who is owner and defendant No. 2 who is the hirer is Mumbai. The flag and place of registry insofar as vessel is concerned is Indian and Mumbai. The registered owners are defendant No. 2 of the barge Salina-II. The vessel or tug of the plaintiff is also an Indian flag bearing its registration in Mumbai. The agreement specifies with clarity the time and place of departure. The initial departure period was from 1st August, 2007 to 9th August, 2007. Reliance is placed upon Clause 39 by the plaintiffs which reads thus:

39. Number of additional clauses, covering special provisions if agreed. All port dues, other statutory charges and demurrage " Rs. 3,00,000/- per day on the Hirer's account.

24. Thereafter, the Towcon International Ocean Towage Agreement with standard clause has been referred to. The hirer in terms of Clause 11 has to arrange at his own cost and provide the Tug owner all necessary licences, authorisation and permissions required by the Tug and Tow to undertake and complete contractual voyage together with all necessary certification for the Tow to enter or leave all or any ports of call or refuge on the contemplated voyage. Clause 13 deals with Seaworthiness of the Tug. Liabilities are also set out in Clause 18. The lien that is contemplated is set out in Clause 21 which reads thus:

21. Without prejudice to any other rights which he may have, whether in rem or in personam, the Tug owner, by himself or his servants or agents or otherwise shall be entitled to exercise a possessory lien upon the Tow in respect of any sum howsoever or whatsoever due to the Tug owner under this Agreement and shall for the purpose of exercising such possessory lien be entitled to take and/or keep possession of the Tow, provided always that the Hirer shall pay to the Tug owner all reasonable costs and expenses howsoever or whatsoever incurred by or on behalf of the Tug owner in exercising or attempting or preparing to exercise such lien and the Tug owner shall be entitled to receive from the Hirer the Tug's Delay Payment at the rate specified in Box 29 for any reasonable delay to the Tug resulting therefrom.

25. Law and jurisdiction clause is Clause 25. The same reads thus:

25. Law and Jurisdiction. - This agreement shall be construed in accordance with and governed by English law. Any dispute or difference which may arise out of or in connection with this Agreement or the services to be performed hereunder shall be referred to the High Court of Justice in London. No suit shall be brought in any other state or jurisdiction except that either party shall have the option to bring proceedings in rem to obtain conservative seizure or other similar remedy against any vessel or property owned by the other party in any state or jurisdiction where such vessel or property may be found.

26. Reliance is placed upon the permission dated 10th July, 2007 which is prior to the date of Agreement. Thereafter, the fax transmission from defendant is

relied upon. On 1st August, 2007 for the purpose of survey, according to the plaintiffs, the defendants were requested to bring their vessel alongside the vessel Crown-I for MMD Survey and inspect both the vessels and certify them. Accordingly on 2nd August, 2007, Towing certificate is given by one Dhiraj Offshore Surveyors and Adjusters Pvt. Ltd. Thereafter, the MMD permission was applied for. Even the Authorities have examined weather conditions for granting permission and on 3rd August, 2007 itself, the plaintiff stated that the conditions are such that they do not permit sailing and a review would be undertaken on 6th August 2007. The plaintiffs raised the issue of MMD permission and that is how further development took place.

27. It is not necessary to enter into any detailed controversy on merits. Suffice it to state that the claim arises out of the Towcon Agreement and the contention of Mr. Narichania, undisputed by Mr. Pratap, is that this Court in its Admiralty Jurisdiction can decide all claims and demands whatsoever in the nature of towage. The only argument is that such claim or demand can be made only when the vessel is a foreign flag vessel and Indian Flag vessel is out of purview of the jurisdiction.

28. In the decision of *M.V. Elizabeth v. Harwan Investment and Trading Co.* (supra), a Two Judge Bench of the Supreme Court had an occasion to consider the ambit and scope of the Admiralty Jurisdiction of the High Court of Andhra Pradesh. Since the charters and Letters Patent were relied upon before the Supreme Court it referred to that of the Madras High Court. The Supreme Court traced the History of the Admiralty Jurisdiction and in paras 14, 16 and 17 held that the limited or restricted view taken by several High Courts including this Court does not correctly lay down parameters of the Admiralty Jurisdiction of the High Court. These decisions were, therefore, over-ruled. Thereafter, the contention of the petitioner before the Supreme Court, based upon the Admiralty Courts Act prevailing in England was considered. The English Statutes have been referred to in great details and in para 27, the Supreme Court held that the Jurisdiction of Indian High Courts can never be considered to be frozen and atrophied on the date of the Colonial Courts of Admiralty Act, 1890. The Supreme Court has observed that the 1840 Statute was the first in the series. It was followed by the Admiralty Courts Act, 1861, conferring larger powers on the High Court of Admiralty. Section 6 of the 1861 Act was referred to and the Supreme Court observes that the Act did not apply to outward cargo. Section 7 of the said Act was referred to and, thereafter, reference is made by the Supreme Court to the Act of 1873, which merged the High Court of Admiralty with the High Court of Justice resulting in a fusion of admiralty law, common law and equity. The Supreme Court observed in para 35 that the limited jurisdiction conferred by the 1961 Act and more particularly by Section 6 of the 1861 Act limiting the Jurisdiction of Admiralty Court to claims respecting inward cargo was discarded by Administration of Justice Act, 1920 which extended jurisdiction of the High Court. Para 35 of this decision reads thus:

35. The Admiralty Court Act, 1840 was the first of a series of statutes extending and defining the jurisdiction of the High Court of Admiralty in England. This Act was followed by the Admiralty Court Act, 1861 conferring larger powers upon the High Court of Admiralty. Section 6 of this Act empowered the High Court of Admiralty to assume jurisdiction over foreign ships in respect of claims to cargo carried into any port in England or Wales. Significantly, the Act did not apply to outward cargo. Section 7 of the Act, however, conferred jurisdiction on the High Court of Admiralty "over any claim for damage done by any ship". This Act was followed by the Judicature Act of 1873, which came into force in 1875 and which merged the High Court of Admiralty with the High Court of Justice resulting in a fusion of admiralty law, common law and equity. It is of interest to note that the provision contained in Section 6 of the Admiralty Court Act, 1861 limiting the jurisdiction of the Admiralty Court to claims respecting inward cargo was discarded by the Administration of Justice Act, 1920 which extended the jurisdiction of the High Court to (a) any claim arising out of an agreement relating to the use or hire of a ship; (b) any claim relating to the carriage of goods in any ship, and (c) any claim in tort in respect of goods carried in any ship. The Act thus applied to both inward and outward cargoes.

29. Thereafter, the Supreme Court refers to the Administration of Justice Act in details and in paras 45 to 47 makes the following observations:

45. Admiralty Law confers upon the claimant a right in rem to proceed against the ship or cargo as distinguished from a right in personam to proceed against the owner. The arrest of the ship is regarded as a mere procedure to obtain security to satisfy judgment. A successful plaintiff in an action in rem has a right to recover damages against the property of the defendant. The liability of the shipowner is not limited to the value of the res primarily proceeded against.... An action...though originally commenced in rem, becomes a personal action against a defendant upon appearance, and he becomes liable for the full amount of a judgment unless protected by the statutory provisions for the limitation of liability". (Roscoe's Admiralty Practice, 5th ed. p.29)

46. The foundation of an action in rem, which is a peculiarity of the Anglo-American law, arises from a maritime lien or claim imposing a personal liability upon the owner of the vessel. A defendant in an admiralty action in personam is liable for the full amount of the plaintiffs established claim. Likewise, a defendant acknowledging service in an action in rem is liable to be saddled with full liability even when the amount of the judgment exceeds the value of the res or of the bail provided. An action in rem lies in the English High Court in respect of matters regulated by the Supreme Court Act, 1981, and in relation to a number of claims the jurisdiction can be invoked not only against the offending ship in question but also against a "sistership" i.e., a ship in the same beneficial ownership as the ship in regard to which the claim arose. "The vessel which commits the aggression is treated as the offender, as the guilty instrument or thing to which the forfeiture attaches, without any reference whatsoever to the

character or conduct of the owner....

Per Justice Story, *The United States v. The Big MalekAdhel, etc.* 43 US (2 How.) 210, 233 (1844).

47. Merchant ships of different nationalities travel from port to port carrying goods or passengers. They incur liabilities in the course of their voyage and they subject themselves to the jurisdiction of foreign States when they enter the waters of those States. They are liable to be arrested for the enforcement of maritime claims, or seized in execution or satisfaction of judgments in legal actions arising out of collisions, salvage, loss of life or personal injury, loss of or damage to goods and the like. They are liable to be detained or confiscated by the authorities of foreign States for violating their customs regulations, safety measures, rules of the road, health regulations, and for other causes. The coastal State may exercise its criminal jurisdiction on board the vessel for the purpose of arrest or investigation in connection with certain serious crimes. In the course of an international voyage, a vessel thus subjects itself to the public and private laws of various countries. A ship travelling from port to port stays very briefly in any one port. A plaintiff seeking to enforce his maritime claim against a foreign ship has no effective remedy once it has sailed away and if the foreign owner has neither property nor residence within jurisdiction. The plaintiff may therefore detain the ship by obtaining an order of attachment whenever it is feared that the ship is likely to slip out of jurisdiction, thus leaving the plaintiff without any security.

30. The power of Arrest has been discussed in great details in the subsequent paras including as to what is the meaning of the term "Action in Rem". Paras 58 and 59 of this decision so also paras 61 and 63 are relevant. They read thus:

58. The real purpose of arrest in both the English and the Civil Law systems is to obtain security as a guarantee for satisfaction of the decree, although arrest in England is the basis of assumption of jurisdiction, unless the owner has submitted to jurisdiction. In any event, once the arrest is made and the owner has entered appearance, the proceedings continue in personam. All actions in the civil law - whether maritime or not - are in personam, and arrest of a vessel is permitted even in respect of non-maritime claims, and the vessel is treated as any other property of the owner, and its very presence within jurisdiction is sufficient to clothe the competent Tribunal with jurisdiction over the owner in respect of any claim. (See D.C. Jackson, *Enforcement of Maritime Claims*, (1985) Appendix 5). Admiralty actions in England, on the other hand, whether in rem or in personam, are confined to well defined maritime liens or claims and directed against the res (ship, cargo and freight) which is the subject-matter of the dispute or any other ship in the same beneficial ownership as the res in question.

59. Maritime law is as much a part of the general legal system as any other branch of the law. With the merger of the Admiralty and Common Law Courts in England in 1875 and the fusion of their legal precepts and concepts, this branch

of the law, despite its peculiarities about actions in rem, is no longer treated as a separate and independent branch. It is not the exclusive preserve of the English High Court, for certain county courts in that country are specially authorised to exercise this jurisdiction. This is much more true of the civil law system where no distinctions drawn between maritime law and other branches of the law, and they are administered alike by the same courts or Tribunals.

61. Remedy for enforcement of maritime liens was available prior to the introduction of statutes. "Admiralty law was derived from the laws of Oleron, supplemented by the civil law" Per Lord Halsbury, L.C; *Currie v. M. Knight* 1897 A.C. 97. For a long time the Admiralty Court developed the law independently fighting its battles with the Common Law Courts on the question of jurisdictional boundaries. By statutory intervention the Court structure came to be unified and substantive rights and remedies became available without regard to jurisdictional boundaries. Although statutes now control the field, much of the admiralty law is rooted in judicial decisions and influenced by the impact of civil law, common law and equity. The ancient maritime codes like the Rhodian Sea Law, the Basilika, the Assizes of Jerusalem, the Rolls of Oleron, the Laws of Visby, the Hanseatic Code, the Black Book of the British Admiralty, Consolato del Mare, and others are, apart from statute, some of the sources from which the law developed in England. Any attempt to confine admiralty or maritime law within the bounds of statutes is not only unrealistic but incorrect. Although this branch of the law in England is now governed generally by statutes, the law in all its aspects can be understood only by viewing it in the context of decisions of courts and the general principles which are common to common law and equity.

63. In tracing the history of admiralty law in India, it is likewise misleading and incorrect to confine it to statutes. Statutes have been codifications of rules of law as developed by usage, practice and custom. As stated by Westropp, C.J., of the Bombay High Court in *Bardot and Anr. v. The American Ship Or Vessel "Augusta"*,

...If we have jurisdiction to entertain this suit, it must be sought for in the general maritime law administered by Courts of Admiralty...we must hold it to be quite clear that the Statutes 3 and 4 Vict. c. 65 (1840), 24 Vict. c. 10 (1861), and 26 and 27 Vict. c. 24 (1863), do not increase or in any wise affect our jurisdiction either in Admiralty or Vice-Admiralty, and that if we have jurisdiction to entertain this cause, that jurisdiction must be sought for outside those Statutes.

31. The Supreme Court has very aptly observed that where Statutes are silent and remedy has to be sought by recourse to basic principles itself, it is the duty of the Court to devise procedural rules by analogy and expediency. The Court observed that it is within the competence of the appropriate Indian Courts to deal, in accordance with the general principles of Maritime Law and the applicable provisions of Statutory law, with all persons and things found within their jurisdiction. The power of the Court is plenary and unlimited unless it is expressly or by necessary implication curtailed.

32. The submission of Mr. Pratap is that there is no such express bar in the 1940 Act or other statutes. The settled principle is that, unless there is a conflict between the Conventions which have been adopted to which all countries have been signatories and the Municipal Law prevailing in these countries, Convention must be given effect to. That apart, the Supreme Court analyses and restates the well settled principle that the English Statutes and the decisions rendered thereunder would not control the authority, power and jurisdiction of the Indian Courts. Something more is required to take out matters from the purview of these Courts' jurisdiction. The Jurisdiction is plenary and extensive, if there is no curtailment of jurisdiction and remedies which are available to Courts to administer justice, are available to a claimant against a foreign ship and its owners found within the jurisdiction of the concerned High Court.

33. Merely because the observations have been made in the context of the power of arrest of a foreign vessel does not mean that this Court would lose its jurisdiction, merely because the vessel is flying Indian Flag. I am of the opinion that all controversies on this aspect stand concluded as the last word is spoken by the Supreme Court. The Supreme Court in para 66 of its decision very clearly holds that High Courts in India are superior courts of records, they have Original and Admiralty Jurisdiction, they have inherent and plenary powers and unless expressly or impliedly barred and subject to the Appellate or Discretionary Jurisdiction of the Supreme Court, the High Courts have unlimited jurisdiction, including jurisdiction to determine their own powers. Such being the Authority and the jurisdiction of this Court as enunciated in the decision of *M.V. Elizabeth* (supra), the Supreme Court naturally turned down the request before it to hold that the Andhra Pradesh High Court would have no jurisdiction. It has referred in para 71 to the Geneva Convention on Territorial Sea and in paras 72 and 73 to the Foreign Vessel passing out and in Territorial waters. Thereafter in para 74 this is what is observed:

74. All foreign merchant ships and persons thereon fall under the jurisdiction of a coastal State as they enter its waters. Subject to the right of "innocent passage", the coastal State is free to exercise jurisdiction over such ships in respect of matters the consequence of which extend beyond the ships. Such ships are subject to the local jurisdiction in criminal, civil and administrative matters. This jurisdiction is, however, assumed only when, in the opinion of the local authorities, the peace or tranquillity of the port is disturbed, when strangers to the vessel are involved or when the local authorities are appealed to. Questions which affect only the internal order and economy of the ship are generally left to the authorities of the flag State. Coastal States are entitled to assume jurisdiction in respect of maritime claims against foreign merchant ships lying in their waters. These ships are liable to be arrested and detained for the enforcement of maritime claims. The courts of the country in which a foreign ship has been arrested may determine the cases according to merits, provided they are empowered to do so by the domestic law of the country or in any of the cases recognised by the International Convention relating to the Arrest of

Seagoing Ships, Brussels, 1952.* The maritime claims in respect of which the power of arrest is recognised in law include claims relating to damage caused by any ship either in collision or otherwise; claims relating to carriage of goods in any ship whether by charter party or otherwise, loss of or damage to goods etc. These principles of international law, as generally recognised by nations, leave no doubt that, subject to the local laws regulating the competence of courts, all foreign ships lying within the waters of a State, including waters in ports, harbours, roadsteads, and the territorial waters, subject themselves to the jurisdiction of the local authorities in respect of maritime claims and they are liable to be arrested for the enforcement of such claims.

34. Although the Supreme Court in para 76 on which reliance is placed by Mr. Narichania has observed that Conventions relied upon by Mr. Pratap are not adopted by Legislature, according to Supreme Court itself, that does not in any way restrict the jurisdiction conferred upon this Court. It is in this context the observations in paras 81 and 82 are made. In para 84 the recognition is granted to the Brussels Convention. In paras 85, 88 and 89 this is what is observed:

85. It is important to remember that the Brussels Convention on Arrest of Ships merely restricts or regulates the power of the coastal States and is not intended to confer power which they did not otherwise have as sovereign States. "Arrest" to which the convention refers is detention of a ship to secure a maritime claim, and not seizure of a ship in execution or satisfaction of judgment.

88. Admiralty jurisdiction is an essential aspect of judicial sovereignty which under the Constitution and the laws is exercised by the High Court as a Superior Court of record administering justice in relation to persons and things within its jurisdiction. Power to enforce claims against foreign ships is an essential attribute of admiralty jurisdiction and it is assumed over such ships while they are within the jurisdiction of the High Court by arresting and detaining them.

89. All persons and things within the waters of a State fall within its jurisdiction unless specifically curtailed or regulated by rules of international law. The power to arrest a foreign vessel, while in the waters of a coastal State, in respect of a maritime claim, wherever arising, is a demonstrable manifestation and an essential attribute of territorial sovereignty. This power is recognised by several international conventions. These conventions contain the unified rules of law drawn from different legal systems. Although many of these conventions have yet to be ratified by India, they embody principles of law recognised by the generality of maritime States, and can therefore be regarded as part of our common law. The want of ratification of these conventions is apparently not because of any policy disagreement, as is clear from active and fruitful Indian participation in the formulation of rules adopted by the conventions, but perhaps because of other circumstances, such as lack of an adequate and specialised machinery for implementation of the various international conventions by coordinating for the purpose the concerned Departments of the Government. Such a specialised body of legal and technical experts can facilitate adoption of

internationally unified rules by national legislation. It is appropriate that sufficient attention is paid to this aspect of the matter by the concerned authorities. Perhaps the Law Commission of India, endowed as it ought to be with sufficient authority, status and independence, as is the position in England, can render valuable help in this regard. Delay in the adoption of international conventions which are intended to facilitate trade hinders the economic growth of the nation.

35. In this behalf, paras 90 and 91 are also eloquent enough. The Supreme Court observes that all persons and things within the waters of the State shall fall within the Court's jurisdiction, unless specifically curtailed or regulated by Rules or International Law. The observations of the Supreme Court cannot be read out of context. The Supreme Court never meant that its observations should be construed so as to take away jurisdiction of the Admiralty Court to proceed against Indian Flag vessel.

36. Even otherwise, relying upon the Division Bench decision of this Court, to which my attention has been invited by Mr. Narichania and Mr. Pratap, I find nothing in the 1840 Act which would take away the jurisdiction of this Court to proceed against an Indian Flag vessel. There is substance in the contention of Mr. Pratap that the provisions have to be read as a whole and in their entirety. If so read, Section 6 of the 1840 Act does not create any bar on this Court's jurisdiction to arrest nor does it restrict its power to arrest an Indian Flag vessel. The provisions cannot be read in the manner suggested by Mr. Narichania. The Legislature intended that all claims and demands are brought within the Admiralty Jurisdiction. The words "Any Ship" and not restricting the powers to its location is indicative of the intent. Even otherwise, after the Authoritative Pronouncement of the Supreme Court in M.V. Elisabeth there should be no doubt about the jurisdiction of this Court. A Division Bench of this Court in a decision reported in M/s. CNA Peejay Exports Pvt. Ltd. Vs. M.V. Nikolay Maksinov and others, . has held that after this decision of the Supreme Court there is no real distinction between the Ordinary Original Civil Jurisdiction and Admiralty Jurisdiction as contended. Thus, in the absence of any express bar and in the light of clear pronouncement of the Supreme Court, to my mind, there is no substance in the contention of Mr. Narichania on the issue of jurisdiction of this Court.

37. The plaint cannot be thrown out only on this ground. What is obvious cannot be stated and need not be stated. It would be absurd to suggest that this Court cannot proceed against a vessel of its own nationality and in its own territorial waters, even if ownership of the same is of parties within its jurisdiction. If that was the intention of Legislature, the same would have been expressed clearly and unambiguously. There is nothing which would permit me to hold that this Court in its Admiralty and Vice Admiralty jurisdiction must make a compartmentalisation of the claim and whenever the Indian Flag Vessel is sought to be proceeded against, the claim must be necessarily entertained in its Ordinary and Original Civil Jurisdiction and not otherwise. Once there is nothing

stated expressly and the decision taking a rather contrary view, the first contention of Mr. Narichania fails. The decisions relied upon by him are not on this particular aspect and therefore of no assistance to him.

38. Insofar as the merits of the controversy are concerned, each of the statement in the affidavit in support not only with regard to seaworthiness of the vessel but the liability so also the conduct of the plaintiff has been denied by them in their reply to the affidavit in support of notice of motion. It is not possible to agree with Mr. Narichania and hold straight away that the contract stood frustrated on account of decision rendered by D.G. Shipping. As to whether it is a mere postponement of operations or whether the operations have been frozen completely must be gone into at the trial and when both sides have sufficient and equal opportunity to place their rival cases. It is not as if that relying upon the statement in affidavit and contents of some letters to which my attention has been invited that a conclusion can be recorded that the contract has been frustrated. Similar is the position with regard to delay and to my mind these are all matters which must be gone into at the time of trial. This is not a stage where evidence has to be recorded. That stage is yet to reach. It is not as if the defendants would have no opportunity to place their case and such material as they wish to rely upon in support thereof. That opportunity would be admittedly available. In such circumstances, it cannot be held that the plaintiff is guilty of mis-representation and/or fraudulent representation with regard to the vessel being ready, fit and seaworthy to perform towage. It is also not possible to hold at this stage that the contract is vitiated by misrepresentation, disentitling the plaintiffs from making any claim against the defendants. Thus, on the un seaworthiness of the vessel, frustration of the contract, validity of the claim and quantum it will not be possible to render any decision at this stage.

39. In the result, I am of the view that the objection to the jurisdiction of this Court raised by the defendants is not well-founded. In the absence of the defendants satisfying me with regard to jurisdiction of this Court, notice of motion will have to necessarily fail. Before dismissing, it will have to be held that the order or arrest is not vitiated on the ground that this Court has no jurisdiction to proceed against the Indian Flag Vessel.

40. In the result, Notice of Motion is dismissed with no costs. Needless to state that dismissal of this motion does not mean that the defendants are precluded from raising all pleas as are raised in the affidavit in support and urging on that basis that the suit must fail. Equally needless to add that the defendants are not precluded from leading oral or documentary evidence, in addition to relying upon compilation of documents produced by them during the hearing of this motion. All this material as would be placed by the defendants before this Court together with the version of the plaintiff would be considered and the final Judgment rendered in accordance therewith by this Court. Therefore, the apprehension of Mr. Narichania that observations made during the Course of disposal of this motion would bind the Court at the hearing of the suit is totally without any basis

and not well-founded. It is clarified that all observations are prima facie and tentative and shall not influence the Court while trying the suit. However, the issue of jurisdiction being agitated and raised on the basis of the plaint averments and decisions of the Supreme Court so also statutory provisions, cannot be agitated and raised again.

41. At this stage Mr. Narichania submits that without prejudice to his rights and contentions to challenge this decision in Appeal and such further proceedings as are permissible in law, defendants would furnish security to the satisfaction of the Prothonotary & Senior Master of this Court securing claim of the plaintiffs herein. He further requests that upon such security being furnished to the satisfaction of the Prothonotary and Senior Master, first defendant vessel be allowed to sail. Needless to state that upon Prothonotary and Senior Master being satisfied with regard to the security furnished, necessary consequences in law would follow and needless therefore to further state that the Prothonotary & Senior Master to take further steps in accordance with the Rules after the Security is furnished.

42. The Prothonotary is directed to proceed in accordance with the Rules necessarily means that if the Rules so contemplate, vessel will be allowed to sail. Prothonotary and Senior Master shall also dispense with the requirement of instrument of release upon being satisfied that the claim of plaintiff in this suit is fully secured and that there is no caveat against release of the first defendant vessel.

C.C. expedited. All concerned to act on an authenticated copy of this order. No costs.