

(2011) 02 MAD CK 0241

In the Madras High Court

Case No : O.S.A. No's. 346 and 347 of 2010

Hari and Company A partnership firm

APPELLANT

Vs

St. Antony's Traders

RESPONDENT

Date of Decision : 28-02-2011

Acts Referred:

Admiralty Courts Act, 1861 — Section 5
Constitution of India, 1950 — Article 141, 225, 4
Government of India Act, 1915 — Section 106
Government of India Act, 1935 — Section 223
High Court Original Side Rules, 1956 — Rule 2, 3
Merchant Shipping Act, 1958 — Section 139, 148(1), 3(15), 443, 444

Citation : (2011) 3 CTC 545 : (2011) 4 MLJ 209 : (2011) 8 RCR(Criminal) 2905

Hon'ble Judges : R. Banumathi, J;M.M. Sundresh, J

Bench : Division Bench

Advocate : A.V.K. Ezhilmani, for the Appellant; K. Chandrasekaran, for R1, for the Respondent

Final Decision : Dismissed

Judgement

R. Banumathi, J.—These appeals arise out of the order of learned single Judge in A. Nos. 4337 and 4810 of 2010 whereby the learned

single Judge declined to pass an order of arrest of Vessel MV Dhuvaafaru Galaxy holding that claim of supply of necessities do not constitute a maritime lien".

2. Plaintiff is an Import and Export Company and they are also engaged in the business of Clearing and Forwarding Agency which includes supply

of various necessities to Vessel in Dock. Case of Plaintiff is that Defendant in the course of business would lie anchored in the Indian Ports at

various places at various points of time, particularly in Chennai and Tuticorin Ports. When the ship is so anchored, the Plaintiff would supply

various necessities to the Defendant at the request of the Master of the Vessel. Plaintiff would raise invoices and as such, maintaining a running

Account with the Defendant. It is averred that Plaintiff has been supplying necessities to the Defendant for several years and an outstanding

amount to the credit of the Plaintiff stood at US \$270,386.56 as at 19.3.2009. Defendant confirmed the aforesaid dues by their fax letter dated

27.4.2009 sent by one Asif, affixing the seal of the company. Even after such confirmation of balance outstanding, the Defendant availed the

services of the Plaintiff for the value of US \$28,519.93. After negotiations, Defendant issued a letter of authority dated 22.7.2009 to the Plaintiff to

authorize the Plaintiff to sell Defendant's sister Vessel MV Maafaru. Plaintiff realized a sum of US \$150,000 and out of the sale proceeds, a sum

of US \$27,000 towards release of the sister Vessel from the arrest of another creditor which was settled by the Plaintiff was adjusted and interest

charges and crew charges at US \$48,669.58 and US \$23,810.07 respectively were also adjusted. After adjusting the sale proceeds of MV

Maafaru as stated above, the total outstanding of the Defendant stood at US \$248, 386.14 and the said amount is outstanding from 16.2.2010.

3. Alleging that the Defendant has not made any payment despite repeated demands, Plaintiff has filed the suit C.S. No. 708 of 2010 invoking

admiralty jurisdiction of this Court. According to Plaintiff, they supplied stores, lube oil and other essentials to Defendant and therefore, Plaintiff is

having maritime lien and an action in rem against the ship MV Dhuvaafaru Galaxy. Stating that Defendant's Vessel MV Dhuvaafaru Galaxy is now

berthed in Kannur Port, Kerala for loading cargo and it is expected to remain in the Port for another couple of days, Plaintiff has filed the suit:

(a) for recovery of a sum of Rs. 1,26,75,328.46 together with interest at the rate of 24% p.a. from the date of plaint till the date of realisation;

(b) for the arrest and sale of Defendant Vessel MV Dhuvaafaru Galaxy (Ex: MV Hikaadhoo carrier); and (c) for a direction to adjust the sale

proceeds of Defendant Vessel MV Dhuvaafaru Galaxy (Ex: MV Hikaadhoo carrier) against the suit claim.

4. On application filed by the 1st Respondent/Impleading party in A. No. 4810 of 2010, 1st Respondent was ordered to be impleaded in the suit.

Case of 1st Respondent/Impleading party is that they are carrying on the business of purchase of old Vessel for the purpose of breaking and one

such Vessel is MV Dhuvaafaru Galaxy which was registered at Maldives. According to 1st Respondent/Impleading party, Vessel MV Dhuvaafaru

Galaxy is not owned by M/s. Marine Exports and Trading Company Private Limited (METCO) and Vessel MV Dhuvaafaru Galaxy was originally

owned by Ms. Nazea Abdul Guddoos and after due negotiation, MV Dhuvaafaru Galaxy was purchased by the 1st Respondent/Impleading party

under Memo of Agreement dated 24.6.2010. 1st Respondent firm took possession of the Vessel from Male, Maldives for sailing to Kannur,

Kerala for breaking up. According to 1st Respondent/Impleading party, sale of the Vessel took place as early as on 24.6.2010 to the 1st

Respondent and 1st Respondent-Impleading party is a bonafide purchaser for value without notice of any claim for supply of the alleged essentials.

Plaintiff's agreement with METCO is for the ship MV Mafaaru and not for the ship MV Dhuvaafaru Galaxy. Further case of 1st

Respondent/Impleading party is that there is no essential or necessities supplied to MV Dhuvaafaru Galaxy and on false representation, MV

Dhuvaafaru Galaxy was wrongly arrested by the Plaintiff. There is no claim of ""maritime lien"" against MV Dhuvaafaru. If at all there is any claim, it

can only be in personam against the owner of the Vessel and no claim in rem will lie. Hence, 1st Respondent/Impleading party prayed for revoking

the order of arrest of Vessel MV Dhuvaafaru Galaxy dated 11.08.2010 passed by the learned single Judge.

5. Upon consideration of the rival contention of parties and after referring to the decision reported in Interaccess case [2009 (3) CTC 611],

learned single Judge held that Plaintiff is seeking recovery of money from the Defendant for various necessities supplied to the Defendant which

means that Plaintiff cannot seek for an order of arrest of the Vessel MV Dhuvaafaru as the claim for supply of necessities do not constitute a

maritime lien though it certainly constituted a maritime claim.

6. Challenging the impugned order of learned single Judge and placing reliance upon Liverpool and London S.P. and I Asson. Ltd. Vs. M.V. Sea

Success I and Another, , Mr. AV.K. Ezhilmani, learned Counsel for Appellant contended that to assume admiralty jurisdiction, learned single

Judge ought to have ordered arrest of the Vessel MV Dhuvaafaru Galaxy. Placing reliance upon M.V. Elisabeth and Others Vs. Harwan

Investment and Trading Pvt. Ltd., Hanoekar House, Swatontapeth, Vasco-De-Gama, Goa, learned Counsel for Appellant would contend that

when maritime claim is not defined in the Statutes, a liberal interpretation has to be given to the maritime lien and while so, the learned single judge

erroneously held that the suit is based on supply of necessities only and it does not enjoy the maritime lien. Learned Counsel for Appellant would

further contend that even assuming that supply of necessities do not give rise to maritime lien, the substantial claim of Plaintiff consists of Port dues,

pilotage, tax etc. which enjoys maritime lien and the suit is based on bonafide claim and rightful maritime lien against the Vessel MV Dhuvaafaru

Galaxy.

7. Mr. K. Chandrasekaran, learned Counsel appearing for 1st Respondent/ Impleading party has submitted that the suit claim is for trade due

payable by MV Dhuvaafaru Galaxy and by Memo of Agreement, Plaintiff was asked to sell Defendant's sister Vessel MV Maafaru and out of the

sale proceeds, Plaintiff was asked to adjust the claim. It was further contended that Plaintiff has not rendered any service to the ship MV

Dhuvaafaru Galaxy giving rise to maritime lien and the admiralty jurisdiction of the Court is abused by the Plaintiff. Learned Counsel appearing for

1st Respondent would further contend that if at all there is any claim, it can only be a claim in personam against the owner of the Vessel and no suit

or claim in rem would lie and the suit in rem is misconceived.

8. Upon consideration of the order of learned single Judge and rival contentions and materials on record, the following point arises for

consideration:

Whether the claim for supply of stores, lube oil to MV Dhuvaafaru Galaxy constitutes a maritime lien, a right in rem against the Vessel MV

Dhuvaafaru Galaxy with a right to seek an order of arrest of the Vessel?

9. Before we go into the question whether ""maritime lien"" is created infavour of Plaintiff and supply of ""necessaries"", it is necessary to briefly refer

to the nature and scope of admiralty jurisdiction, the distinction between ""maritime lien"" and ""supply of necessities"". Admiralty jurisdiction of the

High Courts in our country is coterminous with the admiralty jurisdiction of the High Court of England, as it existed at the time of the passing of the

Colonial Courts of Admiralty Act, 1890 by the British Parliament. A brief historical

background of this jurisdiction in our country is also found in the decision of the Bombay High Court reported in *Kamalakar Mahadev Bhagat Vs. Scindia Steam Navigation Co. Ltd.*, ; and the decision of Calcutta High Court in *Jayaswal Shipping Company Vs. The owners and parties interested in Steamship "S.S. Leelavati"*, ; and *M.V. Elisabeth* case 1993 Supp (2) SCC 433 and also by the single Judge of this Court in *Interaccess* case in 2009 (3) CTC 611.

10. By the Letters Patent issued under the charter of 1823, Supreme Courts were established at Bombay, Calcutta and other places in the country. The concluding portion of Cl.53 of the Letters Patent of Bombay (which is similar to the others) extract from the aforesaid decision *Kamalakar Mahadev Bhagat Vs. Scindia Steam Navigation Co. Ltd.*, reads as follows:

...the cognizance whereof doth belong to the jurisdiction of the Admiralty, as the same is used and exercised in that part of Great Britain called England, together with all the singular their incidents, emergents, and dependencies, annexed and connexed causes whatsoever; and to proceed summarily therein, with all possible despatch, according to the course of our Admiralty of that part of Great Britain called England without the strict formalities of law, considering only the truth of the fact and the equity of the case.

After the Indian High Courts Act of 1861, the High Courts of Judicature of Calcutta, Madras and Bombay superseded the Supreme Court. By the Letters Patent of 1862, the admiralty jurisdiction previously exercised by the Supreme Court was to be exercised by the High Courts. The Letters Patent of 1862 was superseded by the Letters Patent, 1865 and under the new Letters Patent also, the Admiralty Jurisdiction of the High Courts remained the same, that is, those of the Admiralty Courts in England. The jurisdiction of the Admiralty Courts in England, in respect of the offences on high seas, is of ancient origin.

11. The Admiralty Courts Act of 1840 was passed by the British Parliament to improve the practice and extend the jurisdiction of the High Court of Admiralty in England. This was the first of a series of Acts, which enlarged or defined the Admiralty jurisdiction. The next important legislation in England, regarding the jurisdiction of the High Court of Admiralty is the Admiralty

Courts Act of 1861.

12. The British Parliament also passed Colonial Courts of Admiralty (India) Act, 1891, with a view to declare certain High Courts in India to be

colonial Courts of Admiralty, as contemplated by the Colonial Courts of Admiralty Act, 1890. Section 2 of this Act mentions the various High

Courts, and the High Court of Madras is one of them. There has been no legislation affecting the Admiralty jurisdiction in India after 1860. Section

106 of the Government of India Act, 1915, Section 223 of the Government of India Act, 1935 and Article 225 of the Constitution preserved their

status and Madras High Court continues to be a Court of record, having original and appellate jurisdiction including Admiralty jurisdiction vested in

it by the Letters Patent.

13. The Merchant Shipping Act, 1958 contains various provisions to enforce territorial jurisdiction. The Act being essentially regulatory in

character, the various authorities, tribunals and Courts entrusted with the administration and enforcement of its provisions are specifically stated.

The High Court is defined u/s 3(15) of Merchant Shipping Act, 1958. The detention of a foreign ship is authorised in terms of Sections 443 and

444. relate to detention by reason of damage caused in any part of the world by a foreign ship to property belonging to the Government of India or

to an Indian citizen or company. In M.V. Elisabeth case, the Supreme Court observed that the sections are wide in terms and the expression

"damage" is not necessarily confined to physical damage. Ordinarily damage is caused by physical contact of the ship, such as in collision. But

damage can also be caused to property by breach of contract or acts of commission or omission on the part of the carrier or his agents or servants

by reason of the negligent operation and management of the vessel.

14. The practice and procedure to be followed in admiralty jurisdiction of this Court are governed by Colonial Courts of Admiralty Act, 1890,

Colonial Courts of Admiralty (India) Act, 1891, International Convention for Unification of Certain Rules Relating to Maritime Liens and

Mortgages at Brussels, 1926, Brussels Arrest (of Seagoing Ships) Convention, 1952, Merchant Shipping Act, Or.42, R.3 of High Court Original

Side Rules, 1956. Or.42, Rule 3 of High Court Original Side Rules relates to admiralty jurisdiction and the procedure to be followed which we

would refer shortly. These procedural provisions are only tools for enforcement of substantive rights.

15. In admiralty jurisdiction, rights of parties are mostly governed by custom, usage and practice that is why in M.V. Elisabeth case, the Supreme

Court observed that Indian statutes lag behind the development of International law in comparison to contemporaneous statutes in England and

other maritime countries. Although these conventions have not been adopted by legislation, the principles incorporated in the conventions are

themselves derived from the common law of nations as embodying the felt necessities of international trade and are as such part of the common law

of India and applicable for the enforcement of maritime claims against foreign ships.

16. Once a foreign ship is arrested in Indian waters by an order of the High Court, in exercise of the admiralty jurisdiction vested in it by statute or

inherent in it as a court of record, in respect of any maritime claim against its owner, wherever the cause of action may have arisen, and whether or

not the ship is subsequently released by the owner furnishing security, proceedings must continue against the owner as in any other suit. The arrest

of the vessel while in Indian waters by an order of the High Court concerned, as defined under the Merchant Shipping Act, 1958 [Section 3(15)]

attracts the jurisdiction of the competent court to proceed with the trial, as in the case of any other suit, as an action against the owner, and any

decree obtained by the Plaintiff is executable against any property of the owner available within jurisdiction, including the security furnished by him

for release of the vessel.

17. The history of admiralty jurisdiction and foundation of action in rem and action in personam has been considered in M.V. Elisabeth case, where

the Supreme Court held as under:

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 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.

48. A ship may be arrested (i) to acquire jurisdiction; or (ii) to obtain security for satisfaction of the claim when decreed; or (iii) in execution of a decree. In the first two cases, the court has the discretion to insist upon security being furnished by the Plaintiff to compensate the Defendant in the event of it being found that the arrest was wrongful and was sought and obtained maliciously or in bad faith. The claimant is liable in damages for wrongful arrest. This practice of insisting upon security being furnished by the party seeking arrest of the ship is followed in the United States, Japan and other countries. The reason for the rule is that a wrongful arrest can cause irreparable loss and damages to the ship owner; and he should in that event be compensated by the arresting party. (See *Arrest of Ships* by Hill, Soehring, Hosoi and Helmer, 1985).

49. The attachment by arrest is only provisional and its purpose is merely to detain the ship until the matter has been finally settled by a competent court. The attachment of the vessel brings it under the custody of the Marshal or any other authorized officer. Any interference with his custody is treated as a contempt of the court which has ordered the arrest. But the Marshal's right under the attachment order is not one of the possession, but only of custody. Although the custody of the vessel has passed from the Defendant to the marshal, all the possessory rights which previously existed continue to exist, including all the remedies which are based on possession. The warrant usually contains a monition to all persons interested to appear before the court on a particular day and show cause why the property

should not be condemned and sold to satisfy the claim of the Plaintiff.

50. The attachment being only a method of safeguarding the interest of the Plaintiff by providing him with a security, it is not likely to be ordered if the Defendant or his lawyer agrees to ""accept service and to put in bail or to pay money into court in lieu of bail"". (See Halsbury's Laws of England, 4th Edn., Vol.1, p.375 etc.).

51. The service of the warrant is usually effected by affixing it on the main mast or single mast of the ship. A ship which has been arrested under an order of attachment may be released by the court if sufficient bail is put in to cover the claim of the Plaintiff as well as the costs of the action. The sureties are liable for the amount entered in the bail bond.

52. If the ship or cargo under arrest before judgment has not been released by the Defendant by putting in sufficient bail, and if the property is found deteriorating, the court has the power to order the sale of the property after notice has been duly issued to the parties interested.

53. If the Plaintiff has finally obtained a decree of condemnation and sale of the ship, the court will issue an order to the competent officer commanding him to sell the property, in execution of the decree, and to bring the proceeds into court. Thereupon the officer shall issue proper notice and arrange for the sale of the property by auction. The proceeds of the sale are paid into the registry of the court and they shall be disposed of by the court according to law.

54. A personal action may be brought against the Defendant if he is either present in the country or submits to jurisdiction. If the foreign owner of an arrested ship appears before the court and deposits security as bail for the release of his ship against which proceedings in rem have been instituted, he submits himself to jurisdiction.

18. Action in rem and action in personam Action in rem is against the ship itself. The proceeding in rem is against the maritime property, that is a Vessel, Cargo or Freight. Maritime lien pertains to the action in rem and travels with the ship. Any claim of the owners of the vessel may be a maritime claim"", but everyone of them may not give rise to ""maritime lien"". Considering the action in rem and arrest of a particular Vessel and

action in personam, in M.V. Elisabeth case in Paragraphs 55 and 56, the Supreme Court held as follows:

55. An action in rem is directed against the ship itself to satisfy the claim of the Plaintiff out of the res. The ship is for this purpose treated as a

person. Such an action may constitute an inducement to the owner to submit to the jurisdiction of the court, thereby making himself liable to be

proceeded against by the Plaintiff in personam. It is, however, imperative in an action in rem that the ship should be within jurisdiction at the time

the proceedings are started. A decree of the court in such an action binds not merely the parties to the writ but everybody in the world who might

dispute the Plaintiff's claim.

56. It is by means of an action in rem that the arrest of a particular ship is secured by the Plaintiff. He does not sue the owner directly and by name;

but the owner or any one interested in the proceedings may appear and defend. The writ is issued to "owners and parties interested in the property

proceeded against. The proceedings can be started in England or in the United States in respect of a maritime lien, and in England in respect of a

statutory right in rem. A maritime lien is a privileged claim against the ship or a right to a part of the property in the ship, and it "travels" with the

ship. Because the ship has to "pay for the wrong it has done", it can be compelled to do so by a forced sale. [See *Bold Buccleugh (The)* (1851) 7

Moo PC 267]. If the owner does not submit to the jurisdiction and appear before the court to put in bail and release the ship, it is liable to be

condemned and sold to satisfy the claims against her. If, however, the owner submits to jurisdiction and obtains the release of the ship by

depositing security, he becomes personally liable to be proceeded against in personam in execution of the judgment if the amount decreed exceeds

the amount of the bail. The arrest of the foreign ship by means of an action in rem is thus a means of assuming jurisdiction by the competent court.

19. "Maritime claim" and "Maritime lien" The issue falling for consideration is applicability of "maritime lien" on supply of necessities to MV

Dhuvaafaru Galaxy. Now the issue is what is a "maritime claim" and what is a "maritime lien" and whether Plaintiff's claim is a "maritime lien" which

would warrant arrest of the vessel MV Dhuvaafaru Galaxy. In P. Ramanatha Aiyar's *Advanced Law Lexicon*, a "maritime lien" is defined as "a lien

or claim for salvage, damages or wages, made in respect of any maritime adventure charged upon the vessel."". The Law Lexicon elaborates

Maritime lien"" as under:

A maritime lien is a claim or privilege upon a maritime res. i.e., ship, freight, or cargo, which may arise ex contractu, i.e., for services rendered to

the res, such as salvage, or ex delicto, i.e., for compensation for damage by collision, and is enforced by proceeding in rem, or against the res by

arrest in Admiralty. It differs from a common law or possessory lien in that ""it does not include or require possession. The word is used in maritime

law not in the strict legal sense in which there can be no lien without possession actual or constructive, but to express as if by analogy the nature of

claims which neither pre-suppose nor originate in possession.

20. ""Maritime lien"" is defined in the Encyclopedia Britannica and the same reads as follows:

Maritime liens: although admiralty actions are frequently brought in personam, against individual or corporate Defendants only, the most distinctive

feature of admiralty practice is the proceeding in rem, against maritime property, that is, a vessel, a cargo, or "freight", which in shipping means the

compensation to which a carrier is entitled for the carriage of cargo.

Under the American maritime law, the ship is personified to the extent that it may sometimes be held responsible under no liability. The classic

example of personification is the "compulsory pilotage" case. Some State statutes impose a penalty on a ship owner whose vessel fails to take a

pilot when entering or leaving the waters of the State. Since the pilotage is thus compulsory, the pilot's negligence is not imputed to the ship owner.

Nevertheless, the vessel itself is charged with the pilot's fault and is immediately impressed with an inchoate maritime lien that is enforceable in

Court.

Maritime liens can arise not only when the personified ship is charged with a maritime tort, such as a negligent collision or personal injury, but also

for salvage services, for general average contributions, and for breach of certain maritime contracts.

21.D.R. Thomas on ""Maritime Liens"" stated it to represent a small cluster of claims which arise either out of services rendered to a maritime res or

from damage done to a res and listed five several heads of ""maritime liens"" as

under:

- (a) Damage done by a ship
- (b) Salvage
- (c) Seamen's wages
- (d) Master's wages and disbursements
- (e) Bottomry and Respondentia.

The aforesaid passage from D.R. Thomas on Maritime Lien have been referred by the Supreme Court in *Epoch Enterrepots Vs. M.V. WON FU*,

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22. In *M.V. Al Quamar Vs. Tsavliris Salvage (International) Ltd. and Others*, , the Supreme Court elaborated two attributes of the "maritime lien".

After referring to the *Encyclopaedia Britannica*, the Supreme Court held as follows:

32. A word of caution at this juncture ought to be introduced by reason of the confusion in *populas* (sic *polulus*) between a maritime claim and

maritime lien whereas claim cannot but be termed to be a genus lien is a particular species arising out of the genus and the two terms namely, claim

and lien cannot be identified with each other so as to accord same meaning.

33. Be it noted that there are two attributes to maritime line: (a) a right to a part of the property in the res; and (b) a privileged claim upon a ship,

aircraft or other maritime property in respect of services rendered to, or injury caused by that property. Maritime lien thus attaches to the property

in the event the cause of action arises and remains attached. It is, however, inchoate and very little positive in value unless it is enforced by an

action.

23. In 1993 there has been a convention known as International Convention of Maritime Liens and Mortgages to which India is a signatory. Article

4 of the said Convention gives a list of Maritime Liens. Article 4 reads as follows:

Article 4; Maritime Liens:

1. Each of the following claims against the owner, demise charterer, manager or operator of the vessel shall be secured by a maritime lien on the

vessel:

(a) claims for wages and other sums due to the master, officers and other

members of the vessel's complement in respect of their employment on the vessel, including costs of repatriation and social insurance contributions payable on their behalf;

(b) claims in respect of loss of life or personal Injury occurring, whether on land or on water, in direct connection with the operation of the vessel;

(c) claims for reward for the salvage of the vessel;

(d) claims for port, canal and other waterway dues and pilotage dues;

(e) claims based on port arising out of physical loss or damage caused by the operation of the vessel other than loss of or damage to cargo,

containers and passengers' effects carried on the vessel.

2. No maritime Lien shall attach to a vessel to secure claims as set out in subparagraphs (b) and (e) of paragraph 1 which arise out of or result

from:

(a) damage in connection with the carriage of oil or other hazardous or noxious substances by sea for which compensation is payable to the

claimants pursuant to International conventions or national law providing for strict liability and compulsory insurance or other means of securing the

claims; or (b) the radioactive properties or a combination of radioactive properties with toxic, explosive or other hazardous properties of nuclear

fuel or of radioactive products or waste.

24. Colonial Courts of Admiralty Act, 1890, Colonial Courts of Admiralty (India) Act, 1891, International Convention for Unification of Certain

Rules relating to Maritime Liens and Mortgages at Brussels, 1926, Brussels Arrest (of Seagoing Ships) Convention, 1952, Merchant Shipping

Act, Or.42, R.3 of High Court Original Side Rules, 1956 have been referred by the Supreme Court with approval in *Epoch Enterrepots Vs. M.V.*

WON FU, .

25. Observing that concept of "maritime lien" is of limited applicability and that it is not necessary that every kind of service or every kind of

damage arising in connection with a seagoing vessel would give rise to a "maritime lien" and thus the right to pursue the action in rem against the

vessel itself, in *Epoch Enterrepots Vs. M.V. WON FU*, , the Supreme Court held as under:

22. The limited applicability of such a lien thus well illustrates that not every kind

of service or every kind of damage which arises in connection with a ship gives rise to a maritime lien. We, however, hasten to add that this is apart from the statutory enactments which may further list out various other forms of maritime claims. In *The Ripon City* (1897 P 226: 1895 AER 487) (P at p.246), Gorell Barnes, J. upon appreciation of this facet of maritime lien and also, in part, to the surrounding policy considerations observed: (All ER p.499 G-H)

(A) maritime lien travels with the vessel into whosoever possession it comes, so that an innocent purchaser of a ship may find his property subject to claims which exist prior to the date of his purchase, unless the lien is lost by laches or the claim is one which is barred by the Statutes of Limitation. This rule is stated in *The Bold Buccleugh* to be deduced from the Civil law, and, although it may be hard on an innocent purchaser, if it did not exist a person who was owner at the time a lien attached could defeat the lien by transfer if he pleased.

23. As regards the issue of relationship between a maritime lien and personal liability of a res owner, Thomas has the following further to state:

The issue as to the relationship between a maritime lien and the personal liability of a res owner is therefore one which may fall to be answered

differently as between individual maritime liens. It is clear that the various maritime liens do not, in this regard, display common characteristics. The

fact that there exists this disparity may in turn be a symptom of the absence of any clearly defined theoretical framework in the development of the

law relating to maritime liens. It is also noteworthy that the emphasis on personal liability is most clearly established in relation to the damage and

disbursement maritime liens which were the last in point of time to be established.

26. From the above discussion, it is clear that action in rem is against the ship itself and that there is a clear distinction between ""maritime lien

which is an action in rem which travels with the ship. In other words, ""maritime lien"" is a privileged claim against the ship or a right to part of the

property in the ship and it travels with the ship. All cases of ""maritime lien"" are based on maritime claim but all maritime claims do not give rise to a

maritime lien on the ship. Normally a lien in the general law is a rather limited right over some one else's property. It is a right to retain possession

of that property usually to receive a claim. But a maritime lien differs from other liens in one very important respect. Liens generally require

possession of the "res" before they can come into effect. But a maritime lien does not require prior possession for its creation. In a fit and proper

case a claimant on the strength of his maritime lien can secure the arrest of a ship which then comes under the possession of the Court and she

cannot be moved without the Court's order.

27. "Supply on necessities" - As per Section 5 of the Admiralty Courts Act, 1861 the High Court of Admiralty shall have jurisdiction over any

claim for necessities supplied to any ship elsewhere than in the port to which the ship belongs, unless it is shown to the satisfaction of the court that

at the time of the institution of the cause any owner or part owner of the ship is domiciled in England or Wales: Provided always, that if in any such

cause the Plaintiff do not recover twenty pounds, he shall not be entitled to. The term has not been statutorily defined in the Act of 1861. In

Liverpool case, the Supreme Court extracted various definitions of "necessaries" which we may usefully refer to:

79. The term "necessaries" as defined in Black's Law Dictionary reads as under:

What constitutes "necessaries" for which an admiralty lien will attach depends upon what is reasonably needed in the ship's business, regard being

had to the character of the voyage and the employment in which the vessel is being used.

81. In the Canadian Law Dictionary, the term "necessaries" has been defined as follows:

In the case of ships, the term denotes whatever is fit and proper for the service on which the ship is engaged, whatever the owner of that vessel, as

a prudent man would have ordered if present at the time. *Victoria Machinery Depot Co. Ltd. v. The "Canada" and the "Triumph"* (1913) 15 ECR

136 : 14 DLR 318.

28. In USA, supply of necessities is "maritime lien" in terms of the relevant statute and has been classified in the category of subordinate to the

preferred ship mortgage. In India, there is divergent of opinion as to whether "supply of necessities" gives rise to "maritime lien".

29. Laying emphasis upon the observation in *M.V. Elisabeth* case, learned Counsel for Appellant contended that supply of "necessaries" giving rise

to ""maritime lien"". In M.V. Elisabeth case, the facts before the Supreme Court were that the Plaintiff-Respondent, a private limited company having its registered office in Goa, instituted a suit against Defendant 1 Appellant, a vessel of foreign nationality owned by a foreign company Defendant 2, in Andhra Pradesh High Court invoking its admiralty jurisdiction by means of an action in rem. The case of the Plaintiff was that the Defendants acted in ""breach of duty"" by leaving the port of Marmagao on February 8, 1984 and delivering the goods to the consignee in breach of the Plaintiff's directions to the contrary, thereby committing conversion of the goods entrusted with them. The vessel was arrested when it entered the Port of Vishakhapatnam on April 13, 1984 after returning from foreign ports. On the owner of the vessel entering appearance and providing security by furnishing a Bank Guarantee under protest, the vessel was released from detention. The Defendants raised a preliminary objection that the Plaintiff's suit against a foreign ship owned by a foreign company not having a place of residence or business in India was not liable to be proceeded against on the admiralty side of the High Court by an action in rem in respect of a cause of action alleged to have arisen by reason of a tort or a breach of obligation arising from the carriage of goods from a port in India to a foreign port. The High Court overruled the preliminary objection and held that High Court has jurisdiction which came to be challenged in the Supreme Court. Thus the question before the Supreme Court was whether Andhra Pradesh High Court had jurisdiction and whether the High Court rightly held that the suit was maintainable.

30. The issue before the Supreme Court in M.V. Elisabeth case, was one of jurisdiction viz., whether Andhra Pradesh High Court had admiralty jurisdiction to entertain a cause of action arising out of the carriage of goods from a port in India to a foreign port. In Paragraph 67, the Supreme Court held that the Andhra Pradesh High Court, as a successor to the Madras High Court, is vested with all the appellate and original jurisdiction, including admiralty jurisdiction to order the arrest and detention of a ship.

31. As held by the Supreme Court in Liverpool case, M.V. Elisabeth case is an authority for the proposition that the changing global scenario should be kept in mind having regard to the fact there does not exist any primary act touching the subject and in the absence of any domestic

legislation to the contrary; if the 1952 Arrest Convention had been applied, although India was not a signatory thereto, there is obviously no reason

as to why the 1999 Arrest Convention should not be applied. M.V. Elisabeth case is an authority for proposition that jurisdiction of Courts in India

is akin to the jurisdiction of the English Courts.

32. There are certain observations in Paragraphs 98 and 99 of M.V. Elisabeth case about the supply of "necessaries" giving rise to Maritime lien.

In Interaccess case 2009 (3) CTC 611, in Paragraphs 67 and 68 of his Judgment, Justice V. Ramasubramaniam, J referred to two Judgments of

the single Judges of Bombay High Court in (i) Sigma Coatings BV Vs. "Agios Nikolaos" and another, and (ii) Elinoil-Hellenic Petroleum Company

S.A. Vs. M.V. "ANNY L" (Ex- "ALEXIA S") and another, . In Sigma Coatings case, learned single Judge [Justice D.R. Dhanuka, J] of Bombay

High Court took the view that the observations of M.V. Elisabeth case to mean that the supplier of necessities had a maritime lien. But in Elinoil-

Hellenic case, another single Judge [Justice D.G. Deshpande, J] of Bombay High Court took the view saying that the observations in para-99 in

M.V. Elisabeth case were made in the course of tracing admiralty jurisdiction without the question i.e. whether the supply of necessities constitutes

maritime lien" directly involved, the learned Judge [Justice D.G. Deshpande, J] took the view that the observations in paras 98 and 99 is not the

ratio decidendi.

33. Similarly, in Saba International Shipping and Project Investment Pvt. Ltd. Vs. The Owners and Parties interested in the Vessel M.V. Brave

Eagle Previously known as M.V. Lima-I and Others, , the learned single Judge [Justice A.K. Ganguly, J as his Lordship then was], expressed the

similar views about the observations in para 99 of M.V. Elisabeth case which read as under:

41. In M.V. Elisabeth the issue before the Supreme Court was one of jurisdiction namely whether Andhra Pradesh High Court lacked admiralty

jurisdiction to entertain a cause of action arising out of carriage of goods from a port in India to a foreign Port. In para 7 of M.V. Elisabeth, there is

express indication on that effect.

42. The learned judges while considering the said question discussed in detail, the origin of Admiralty Jurisdiction of this Court under British India

and how the said jurisdiction is being continued and in doing so, the leading judgment has been delivered in M.V. Elisabeth by Justice T.K.

Thommen. Justice R.M. Sahai has expressly agreed with the judgment of Justice T.K. Thommen. But in the concurring judgment His Lordship,

Hon"ble Mr. Justice R.M. Sahai has made certain observations. Those observations have been made by Justice Sahai in order to (a) impress upon

the appropriate authority the urgency of enacting up to date law on Admiralty, and (b) to express agreement only on scope of 1890 Act as well as

the extensive jurisdiction enjoyed by High Courts after 1950 (This will appear from para 102 of the judgment).

43. It is therefore, clear that Justice Sahai did not want to lay down any opinion which is different from the opinion of Justice Thommen.

44. So the observations occurring in para 99 of the judgment in M.V. Elisabeth about supply of necessities giving rise to maritime lien cannot be

taken to be a declaration of law on the subject as to bind all Courts in India within the meaning of Article 141 of the Constitution, it may be noted

that in a case where necessities are supplied on Masters" disbursements with the express authority of the ship owner, a case of maritime lien may

crop up. But supply of necessities, as in the instant case, does not give rise to a maritime lien. These aspects have not been discussed in detail in

the observation of Justice Sahai. So with great respect this Court is of the view that the observations relating to necessities made in para 99 of the

judgment ought to be considered in the background of the case as a whole and not in isolation.

34. It is clear from the above discussions that there is divergence of opinion on the question whether supply of necessities constituted a maritime

lien despite the fact that it does not fall under anyone of the five categories by English Courts and listed out by D.R. Thomas on Maritime Liens. In

Paragraph-70 of the judgment in Interaccess case, Justice V. Ramasubramaniam, J also expressed the view as to the divergence of opinion on the

question whether supply of necessities constituted a ""maritime lien"".

35. Question of supply of ""necessaries"" as a "Maritime claim" came to be elaborately considered by the Supreme Court in Liverpool and London

S.P. and I Asson. Ltd. Vs. M.V. Sea Success I and Another, . As to the proposition laid in M.V. Elisabeth case, in Liverpool case, the Supreme

Court held as under:

59.M.V. Elisabeth is an authority for the proposition that the changing global scenario should be kept in mind having regard to the fact that there

does not exist any primary act touching the subject and in absence of any domestic legislation to the contrary; if the 1952 Arrest Convention had

been applied, although India was not a signatory thereto, there is obviously no reason as to why the 1999 Arrest Convention should not be

applied. ...

61. It is not correct to contend as has been submitted by Mr. Bharucha that this Court, having regard to the decision in M.V. Elisabeth, must

follow the law which is currently prevalent in UK and confine itself only to the 1952 Arrest Convention in Indian admiralty jurisprudence. The

question is as to if the 1952 Arrest Convention had been applied keeping in view the changing scenario why not the 1999 Arrest Convention also?

A distinction must be borne in mind between a jurisdiction exercised by the High Courts in India in terms of the existing laws and the manner in

which such jurisdiction can be exercised. Once the court opines that insurance is needed to keep the ship going it has to be construed as

necessaries"". The jurisdiction of the Courts in India, in view of the decision of this Court in M.V. Elisabeth is akin to the jurisdiction of the English

courts but the same would not mean that the Indian High Courts are not free to take a different view from those of the English courts. As regard

application of a statute law the Indian High Courts would follow the pre-independence statute but Indian courts need not follow the judge-made

law.

62. M.V. Elisabeth defines the jurisdiction of the court but does not limit or restrict it.

36. In Liverpool case, the Supreme Court was considering whether the arrears of insurance premium would come within the term ""necessaries"". In

Paragraphs 21 to 33, the Supreme Court considered the terms ""necessaries"" as a maritime claim. In Paragraphs 78 to 83, the Supreme Court

considered the terms ""necessaries"". and whether insurance premium would come within the term ""necessaries"". Observing that compulsory

insurance regime has come into being and keeping in view the changed situation, in Liverpool case, the Supreme Court observed that the

expression ""necessaries"" should also undergo a change. After elaborate consideration of the expression ""necessaries"" and in the light of the situation

that prudent ship owner would provide for an insurance, in Paragraphs 96 and 97, the Supreme Court held as follows:

96. The question, however, is whether a prudent ship owner would provide for an insurance. A compulsory insurance regime has come into being

and keeping in view the changed situation the definition of the expression ""necessaries"" should also undergo a change.

97. The term ""necessaries"" is a term of art but the same cannot, in our opinion, be used in a limited context of mandatory claims made for goods or

services supplied to a particular ship for her physical necessity as opposed to commercial operation and maintenance. Physical necessity and

practicality would be a relevant factor for determination of the said question. Taking insurance cover would not only be commercial prudence but

almost a must in the present-day context. The third-party insurance may not be compulsory in certain jurisdiction but having regard to the present-

day scenario such an insurance cover must be held to be intrinsically connected with the operation of a ship.

37. Since the prudent ship owner would provide for insurance, in Liverpool case, the Supreme Court observed that the term ""necessaries"" must be

construed in broad and liberal manner, in Paragraph 98, the Supreme Court proceeded that one of the relevant factors for arriving at a conclusion

as to whether anything would come within the expression ""necessary"" or not will inter alia depend upon answer to the question as to whether a

prudent owner would provide to enable a ship to perform well the functions for which she has been engaged. If getting the vehicle insured with P &

I Club would be one of the things which would enable a prudent owner to sail his ship for the purposes for which she has been engaged, the same

would come within the purview of the said term. Having regard to the changing scenario inasmuch as the field of insurance has undergone a sea

change from merely hull and machinery, the insurance companies cover various risks including oil spill damage to the port, damage to the cargo

etc., the Hon'ble Supreme Court held that P & I Insurance is necessary and in that sense the term must be construed in a broad and liberal

manner. The changing requirement of a ship so as to enable it to trade in commerce must be kept in mind which would lead to the conclusion that P

& I insurance cover would be necessary for operation of a ship.

38. In the light of the fact that compulsory insurance regime has come into being and in such factual matrix, the Supreme Court held that unpaid

insurance premium of P & I Club would come within the purview of the expression ""necessaries supplied to the ship"". In Paragraph 107, the

Supreme Court observed that having regard to the changing scenario and keeping in tune with the changes in both domestic and international law

as also the statutes adopted by several countries, a stand, however bold, may have to be taken that unpaid insurance premium of P & I Club

would come within the purview of the expression ""necessaries supplied to any ship"". Insofar as, the other types of insurance, in Paragraph 107, the

Supreme Court held that ""other types of insurance, keeping in view the existing statutes may not amount to a necessary"". Even though, Supreme

Court divided its discussion into several titles and subtitles, in Liverpool case, the Supreme Court never came to the conclusion that "" supply on

necessaries"" constituted a Maritime lien.

39. A close examination of Order 42 of High Court Original Side Rules shows that these rules only categorizes three types of claims for the

purpose of enabling the Court to issue a warrant of arrest in a suit in rem. Or.42, Rule 3 of High Court Original Side Rules, read as follows:

3. 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 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 whose instance the warrant is to be issued, the nature of the claim or counter-

claim, the name and nature of the property to be arrested, and 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 consul of the State to which the vessel belongs, if there be one resident in

Madras and a copy of the notice shall be annexed to the affidavit.

(C) In a Suit of bottomry, the bottomry bond and if 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 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 and address and description of the party holding the same.

40. As per the provisions of Section 10 of Colonial Courts of Admiralty Act, 1890, Maritime lien shall attach to a ship in six instances of the claim

indicated thereon. Section 10 of Colonial Courts of Admiralty Act reads as under:

10. Maritime liens. - (1) Maritime lien shall attach to a ship or a property in the following instances of claim and the date of such accrual of

maritime lien shall be date of which the operation giving rise to the said claims were performed:

(a) Claim for salvage of life, ship or property.

(b) Wages and other sums due to the Master or the members of the crew of the ship in respect of their employment on the ship.

(c) Port and canal and other waterway dues and pilotage dues.

(d) Loss of life or personal injury in direct connection with the operation of the ship.

(e) Claim for contribution of general average, and (f) Claim based on tort arising out of physical loss or damage caused by the operation of the ship

other than the loss or damage to cargo, containers and passengers' effects carried on the ship.

41. Referring to Or.42, Rule 3 of High Court Original Side Rules, in Interaccess case, learned single Judge [Justice V. Ramasubramaniam, J], held

as under:

96. Thus, even the procedural rules take care of only three out of five categories of maritime liens, enlisted by Thomas on Maritime Liens. Out of

the five heads of maritime liens, listed by Thomas, viz., (i) damage done by a ship (ii) salvage (iii) seamen's wages (iv) Master's wages and

disbursements and (v) bottomry, Order 42, Rule 3 deals only with three heads viz., (i) wages (ii) bottomry and (iii) salvage. I am not for a moment

drawing an inference from Order 42, that the other two claims (left out in Order 42) cannot be recognized as constituting a maritime lien. I am only

drawing attention to the fact that Order 42 explicitly recognizes that a claim for wages can be by way of an action in rem. Coupled with the

recognition in Sections 139 and 148(1) of the Merchant Shipping Z, 1958, to the lien of the seamen and the master of a ship for their wages and

the absence of any such reference or recognition to the claim of the supplier of necessities, it is clear that a claim for supply of necessities, is

neither recognized by custom or usage nor recognized statutorily as constituting a maritime lien.

42. After elaborate discussion, in *Interaccess* case, Justice V. Ramasubramaniam, J took the view that the claim for supply of necessities do not

constitute a maritime lien, though it certainly constituted a maritime claim, giving a right of action in rem with a right to seek an order of arrest of the

vessel. The learned Judge held that (i) the claim for wages made by Capt. Papaspamatiou is a "maritime lien" and (ii) that the claim for supply of

necessaries made by the Plaintiff did not constitute a maritime.

43. Referring to the decision of *Interaccess* case, in the case on hand, in the impugned order, the learned single Judge, Justice S. Rajeswaran, J

dismissed A. No. 4337 of 2010 and allowed A.S. No. 4810 of 2010. An order of arrest of a ship is a peculiar device in admiralty jurisdiction to

secure the claim of a person against the ship owner. While the ship is amenable to jurisdiction of its flag state to enforce his claim, the claimant may

have to follow the ship. When a ship is arrested, it becomes the proceedings in rem and continues to be so till the owner of the ship or person

interested submits to the jurisdiction of the Court arresting the ship. By passing an order of arrest, the ship is prevented from sailing. By the order

of arrest, ship is subjected to huge loss and damage. While a ship cannot frustrate a rightful claim/maritime lien, ship's voyage cannot be prevented

by each and every maritime claim. In our considered view that the claim for "supply of necessities" does not constitute a "maritime lien". For the

foregoing discussions, we concur with the views of the learned single Judges that the claim for "supply of necessities" does not constitute a

maritime lien" giving a right of action in rem.

44. Coming to the facts of the case, Plaintiff has averred that they have been supplying necessities to the Defendant for several years and an

outstanding amount to the credit of Plaintiff stood at US \$270,386.56 and

Defendant had also confirmed the aforesaid dues by Fax letter dated 27.4.2009. According to Plaintiff, after persistent negotiation, Defendant issued a letter of authority dated 22.7.2009 to the Plaintiff to authorize the Plaintiff to sell Defendant's sister Vessel MV Maafaru and that Plaintiff could realize only a sum US \$150,000 and after adjusting the sale proceeds, the total outstanding of the Defendant stood at US \$248,386.14. In their communication, Plaintiff has stated that the balance outstanding is as under:

Balance outstanding as on 19/03/2009

US \$270,386.56

Vessel MV Maafaru DA charges

US \$28,519.93

AMJ Shipping Claim Settlement Amount on behalf of METCO

US \$27,000.00

Vessel MV Maafaru Crew Salary Final Settlement

US \$23,810.07

Interest charges for the balance outstanding payment confirmed on 19.3.2009 in sum of US \$270386.56

US \$48,669.58

Total amount

US \$398,386.14

Less: Vessel MV Maafaru sale value amount

US \$150,000.00

After deducting all the receivables and the balance amount payable

US \$248,386.14

It is seen from the above that the suit claim is not only in respect of the services rendered to MV

Dhuvaafaru Galaxy, but also in respect of MV Maafaru.

45. It is seen that the amount claimed towards the ""supply of necessities"" like stores, water, fruits and vegetables. That apart Plaintiff himself is an

Exporter of onion and potatoes etc. Bunkering charges debited to the account is not an essential supply. By perusal of the statement, it is seen that

supply of necessities, export charges and other port charges have been claimed from the Defendant. Plaintiff has clubbed all the claims viz., supply

on necessities, export charges and lube oil, port service charges etc. Port service charges and charges for other essentials is not separately

decipherable. In the application by the 1st Respondent/Impleading party, it is averred that MV Dhuvaafaru Galaxy has been in anchorage in Male,

Maldives from 03.01.2009. The suit claim is only the charges towards supply of necessities coupled with other charges which in our considered

view does not constitute a ""maritime lien"" giving right of action in rem. It being a maritime claim and on a consideration of the facts narrated above,

we are of the considered view that the order passed by the learned single Judge does not warrant any interference, as no arrest is warranted.

46. In the result, both the appeals are dismissed. Consequently, connected, M. Ps. are closed. No costs.

47. After we have passed the order, learned Counsel for Appellant Mr.AV.K.Ezhilmani prayed to stay the order to enable the Appellant to prefer

SLP before the Supreme Court. We are not inclined to stay the order and the oral request is rejected.