

(2002) 07 BOM CK 0102
In the Bombay High Court
Case No : Appeal No. 917 of 2001

Islamic Republic of Iran

APPELLANT

Vs

M.V. Mehrab and Others

RESPONDENT

Date of Decision : 09-07-2002

Acts Referred:

Colonial Courts of Admiralty (India) Act, 1891 — Section 2

Citation : AIR 2002 Bom 517 : (2002) 4 BOMLR 785 : (2002) 4 MhLj 584

Hon'ble Judges : Nishita Mhatre, J;A.P. Shah, J

Bench : Division Bench

Advocate : Vasant Kotwal, G.A. Rebello, Vishal Sheth Ashwin Sheth, R.A. Fernandes and M.R. Khatri, instructed by E.D. Market, for the Appellant; Farishte Sethna, instructed by Dummor Sett, for the Respondent

Judgement

A.P. Shah, J.—This is an appeal by the plaintiffs from an order of Deshmukh J. by which he dismissed the Notice of Motion moved by the plaintiffs for arrest of the ship M.V. Mehrab to provide security for payment of an award which they may obtain in arbitration proceedings instituted in London. The learned Judge was of the opinion that a suit of this nature to arrest a ship in order to force security for a future arbitration award is not maintainable in view of the decision of the Supreme Court in M.V. Elisabeth and Others Vs. Harwan Investment and Trading Pvt. Ltd., Hanoekar House, Swatontapeth, Vasco-De-Gama, Goa, .

2. The matter arises as follows. The plaintiffs were the owners of cargo shipped on the second defendant's vessel M.V BRAVO under charter party dated 19th June 2000. The vessel M. V. BRAVO loaded cargo at the nominated load port. The second defendant and the said vessel M.V. BRAVO were unable to fulfill the voyage as a result of which the plaintiffs had to discharge the cargo and have It transhipped on another vessel called VAHDAT thereby incurring heavy loss and damage. The charter party contains an arbitration clause. The plaintiffs invoked the arbitration clause on 1st March 2001 and the arbitration proceedings are pending in London. The plaintiffs have filed the present suit for arrest of vessel to

secure the enforcement of the award that the arbitrator may pass in the arbitration proceedings. The Notice of Motion moved by the plaintiffs was dismissed by the learned Judge holding that the power of the court to order an arrest of the vessel is for providing a security for the decree that the admiralty court may pass against the defendant and not to secure plaintiffs' claim in arbitration proceedings.

3. Mr. Kotwal, learned Counsel appearing for the plaintiffs submitted that the judgment of the learned trial Judge is based on total misreading of the decision of the Supreme Court in *M.V. Elizabeth*'s case, that it is wholly contrary to the manner in which it has been read by the judgments of this Court in *M.V. Mainer IV v. Videsh Sanchar Nigam Ltd.*, 1998 (1) Mah LJ 751 and *M. V. Sea Success 1 v. Liverpool and London Steamship Protection and Indemnity Association Ltd.* (Appeal No. 226 of 2001 decided on 28-11-2001 : (reported in AIR 2002. Bom 151). The learned Judge failed to notice that the question of admiralty court's jurisdiction to order arrest of a vessel in order to force security for future arbitration award was not in issue in *M.V. Elizabeth*. The Issue before the Supreme Court as evident from paragraphs 5 and 6 of the judgment In *M.V. Elizabeth* was whether the admiralty court In India had jurisdiction to arrest a ship on an action in tort in regard to cargo in a outgoing ship. The judgment in *M.V. Elizabeth* does not in any manner limit admiralty jurisdiction of the High Court. On the other hand the entire endeavour of the Supreme Court in *M.V. Elizabeth* was to align and modernize the law by inter alia introducing into admiralty jurisdiction the International law including principles underlying Arrest of Sea going Ships, Brussels, 1952. The learned Counsel submitted that Article 7(3) of 1952 Convention clearly confers jurisdiction on the admiralty court to order arrest of a vessel to secure the award that may be passed in arbitration proceedings. He submitted that a vast majority of trading nations that is over 70 in number has given effect to 1952 Convention and, therefore, the said Convention has never universal acceptance and can be regarded as international common law, which includes admiralty court's power to arrest a vessel for the purpose of obtaining security for the future arbitration award, which the arbitrator may grant. Although India is not a signatory to the numerous international conventions, in view of the dictum in *M.V. Elizabeth*, principles can be adopted into our local context. The learned Counsel took us through the relevant portions of the judgment in *M.V. Elizabeth* to show that the Supreme Court has categorically held that 1952 Convention, though not ratified by India, can be the basis for exercise of jurisdiction by admiralty court in India. The learned Counsel urged that In today's modern shipping context and the expansive jurisdiction trend recommended by the Supreme Court in *M.V. Elizabeth* the admiralty courts in India can also exercise jurisdiction to arrest ship for the purpose of securing the claim of the plaintiff in future or pending arbitration. The High Court has power to administer general maritime law whether derived by virtue of statute or otherwise. While so administering the maritime law the High Court shall have regard to the International law and

comity.

4. Per contra, it was submitted by Ms. Sethna, learned Counsel appearing for the respondents that the decision of the Supreme Court in *M.V. Elizabeth* cannot be construed as a decision vesting jurisdiction in the High Court to arrest a vessel to secure the claim of the plaintiffs in future or pending arbitration. She submitted that the observations of the Supreme Court concerning the 1952 Convention are neither *ratio decidendi* nor *obiter dicta* so as to make these observations binding on this Court. She submitted that the observations in *M.V. Elizabeth* to the extent of applicability of Brussels Convention of 1952 to India are contrary to the decisions of the Supreme Court in *V.O. Tractoroexport, Moscow Vs. Tarapore and Company and Another*, and *Jolly George Varghese and Another Vs. The Bank of Cochin*, . She submitted that the observations in *M.V. Elizabeth* in paras 56, 57, 65 and 93 on the other hand clearly suggest that the power of the Court to arrest a ship is to provide security to the plaintiffs for satisfaction of a decree that the Court may pass against the defendant and not to secure the plaintiffs claim in arbitration proceedings. She submitted that though the Merchants Shipping Act was enacted in 1958 that is much after the Brussels Convention of 1952 and although the said Act was amended 14 times, no amendment was carried out in the Act to bring it in consonance with the 1952 Convention which clearly shows that the Parliament never Intended to adopt the same. Unless the International Conventions are incorporated by the appropriate legislations by the Indian Parliament, they cannot be applied by Indian Courts and in case of conflict It is always the Act of Parliament which is to be implemented as against the International Conventions.

5. The question that falls for our consideration is whether the admiralty court in exercise of *in rem* jurisdiction can order arrest of a vessel in order to force security for a future arbitration award which the arbitrator might make. The concept of using court's *In rem* Jurisdiction to arrest a vessel in order to force security for future arbitration award has bothered judges from time to time. In the *Cap Bon* (1967) 1 Lloyd's Rep 543 (Adm.) , Mr. Justice Brandon answered this question in negative pointing out at pages 546 and 547 that :

"In my view, when an action *in rem* is brought the security thereby obtained is security in respect of any judgment which may be given by the Court after hearing and determining the claim. The security so obtained also covers the payment of any sum which may become due under an agreement whereby the action is settled. But the security so obtained is not in my view available for the purpose of insuring payment of the judgment of some other court or for the purpose of insuring payment of the award of an arbitration tribunal".

Subsequently in *Rena K.* (1978) 1 L R 545 (Adm. Ct), Mr. Justice Brandon (at pages 554-555) paraphrased his reasoning in the *Cap Bon* by saying it was based on two propositions, one positive and one negative. The first and positive proposition is that the purposes of arresting a ship in an action *in rem* is to provide the plaintiff with security for the payment of any judgment which he may

obtain in action. The second and negative proposition is that it is not the purpose of arresting a ship in an action in rem to provide the plaintiff with security for payment of an award which he may obtain in an arbitration of the same claim as that raised in the action and the Court therefore has no jurisdiction to arrest a ship, or keep her under arrest, for some other purpose. In effect, the claimant was put to an election between two courses of action, either pursuing the claim in the Court which the advantage of security, or pursuing the claim through arbitration without the advantage of security. In *Rena K.* Mr. Justice Brandon considered security in the context of a stay for arbitration and the evolving case law. While he felt that the principles set out in *The Cap Bon* were correct, he also recognised that the Court had the discretion, on granting a stay in favour of arbitration, to allow existing security to remain in place, depending upon the circumstances in any particular instance.

6. The Court of Appeal in *The Vasso* (formerly *Andria*), (1984) 1 L R 235 considered the judgments of Brandon J. in the *Cap Bon* and *Rena K.* and held that plaintiffs purpose for invoking admiralty jurisdiction was irrelevant to the existence of jurisdiction and therefore, even though that purpose was simply to obtain security in arbitration proceedings the admiralty court had jurisdiction to arrest the relevant ship. However, it was held by the Appeal Court that exercise of power of arrest was discretionary, not mandatory, and could therefore be affected by the manner in which or the purpose for which the plaintiff invoked the admiralty jurisdiction. Since the admiralty Court's purpose in exercising its power of arrest was to provide security in a plaintiffs action in rem, it followed that where a plaintiff invoked the admiralty jurisdiction to arrest a ship simply to obtain security in other proceedings, such as an arbitration, the Court would exercise its discretion by refusing to issue a warrant of arrest. Furthermore, on an ex parte application for the arrest of a ship a plaintiff was under a duty to make full disclosure to the court of all the material facts. The plaintiffs failure to disclose in their affidavit that arbitration proceedings were being actively pursued and that their purpose in invoking the jurisdiction was, to obtain security for an award in those proceedings was a failure to disclose material facts that amounted to vexatious conduct and an abuse of the court's process.

7. In the *Tuyuti* (1984) 1 QB 838 the Court of Appeal on consideration of the provisions of the Arbitration Act 1950; held that the Court had no power under the said Act to permit or order arrest of a ship for the purpose of obtaining security in arbitration proceedings. However, the Court held that where it was shown by a plaintiff that an arbitration award in his favour was unlikely to be satisfied by a defendant, then the security available in the action in rem could be ordered to stand so as to remain available to enable a plaintiff to pursue his action in rem and there was nothing in Section 1 of the Arbitration Act, 1975 obliging the Court to order its release; that since the evidence disclosed that the defendants might well be unable to satisfy any award made against them, the admiralty Court had power to allow the execution of the warrant of arrest notwithstanding the mandatory stay of the plaintiffs action in rem. The Court of

Appeal endorsed its earlier decision in the *Andria* saying that "..... the mere fact that there is an arbitration agreement does not of itself generally preclude a party to the agreement from bringing an action or, in the case of an action in rem, procuring the arrest of a ship".

8. In England Section 26 of the Civil Jurisdiction and Judgments Act 1982 was amended allowing existing security to remain in place following stay pending arbitration. This provision is in accord with the 1968 Convention of Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (including the protocol annexed to that Convention), signed at Brussel's on 27th September 1968. The amended Section 26 of the Civil Jurisdiction and Judgments Act, 1982 fell for consideration before Sheen J. in *The Jalamatsya* (1987) 2 L R 164. Sheen J. was concerned with a case where disputes had arisen under a charter party. The matter was referred to arbitration. The arbitration commenced. The defendants had not given security for any award the plaintiffs might obtain in the arbitration. The defendants were the owners of *Jalamatsya*. The plaintiffs learned (sic) that it was coming into territorial waters. They issued a writ in rem against the vessel and it was arrested. The defendants applied to set aside the arrest on the grounds that the issue of writ and the arrest of the vessel were an abuse of the process of the court. Sheen J. said (pages 164-5):

"This action is properly founded upon a claim within the Admiralty jurisdiction. No complaint can be made about the issue of the writ. There is not before me an application to stay the action. But there is an application on behalf of the defendants to set aside the arrest of the ship on the grounds that the issue of the writ, and the arrest of the ship, is an abuse of the process of the Court. The defendants say that in the light of what was said by Lord Justice Robert Goff in *The Vasso*, (1984) 1 L R 235 the defendants are entitled to the release of the ship. But as was pointed out by Mr. Gaisman, the substance of what was said by Lord Justice Robert Goff was said on the basis of the law as it then stood. But the law has been changed by the bringing into force of Section 26 of the Civil Jurisdiction and Judgments Act 1982".

The learned Judge then went on to refer to the section and to a submission made to him by counsel for the defendants that the words of the English section were, "the dispute in question should be submitted to arbitration" and not "has been submitted to arbitration". After referring to the submission of Sheen J. continued (p 165) :

"If that point were valid it would follow that there would be crucial distinctions to be drawn between those cases in which an arbitration had been commenced, and those cases in which, although there was an arbitration agreement, the arbitration had not been commenced. Such a construction would place upon solicitors practicing in this field of litigation an intolerable burden. One does not have to draw very much on one's imagination to see that it would be vital before nominating an arbitrator to find out whether a ship belonging to the defendants or respondents in the arbitration, was on the verge of coming to this country.

Equally, ship owners might be tempted to divert a ship rather than come within the jurisdiction and have their ship arrested, at least until arbitration had been commenced, when they could come in with impunity. To my mind such a construction is entirely contrary to the whole concept which was envisaged when Section 26 was enacted. That section was enacted to enable claimants (I use a neutral expression) to obtain security if they proceeded by way of arbitration rather than by action. In my judgments 26 applies whether or not an arbitration has already been commenced. It follows that if an arbitration has been commenced and if the claimants in the arbitration have not obtained security for any possible award, they can quite properly issue a writ in rem if they know that a ship belonging to the respondents in the arbitration is coming within the jurisdiction, and they may arrest that ship in order to obtain security".

9. The judgment of Sheen J. was followed by the Federal Court of Australia (Sheppard J.) in *The ship "Amanda N"* 21 FCR 60. Sheppard J. referred to Section 29 of the Admiralty Act, 1988 which is similar to Section 26 of the UK Act. He held that the Court retains a discretion to decide whether to retain the vessel as security when there is evidence that the second defendant is without means. No abuse of process was involved and the Court should not exercise discretion adversely to the plaintiff so as to release the vessel.

10. The Federal Court of Canada had distinguished the English authorities in *Rena K.* and *The Andria* in order to grant security for arbitration awards and to rationalise the continuation of existing security in the face of a stay for arbitration. In *Atlantic Lines and Navigation Co. Inc. v. The Ship "Didymi"* (1985) FC 240 the Court faced with the Invocation of an arrest for the primary purpose of obtaining security for arbitration, refused either to strike out the statement of claim or to release the arrested ship without security. Instead, the Court held that the ship might be released against an undertaking as to security. The decision in *Didymi* was based on the concept that in rem proceedings flowed from the necessity of allowing a plaintiff to proceed in the jurisdiction in which the ship lay, because that was the place where an award might be satisfied and that the instances where security would be cancelled were limited, but included Instances where the loss of security would prejudice no one. In *Pictou Industries Ltd. v. Secunda Marine Services Ltd. et al* (1994) 78 FTR 78 the Court held that it is only in very rare cases that to the absence of consent, the Court will order the release of an arrested vessel without the posting of security even where the parties are pursuing arbitration of the dispute.

11. In the United State of America there is a strong federal policy that encourages maritime arbitration the Federal Arbitration Act (Title 9 USC). This Act empowers federal courts to order parties to arbitrate if they have agreed to do so in their maritime contracts. Section 8 of the Act, however, permits an aggrieved party to use the federal courts to commence a litigation in order to seize property by maritime arrest or attachment for security purposes. After the property is seized, the Court action is stayed while the parties debate the merits

of the dispute before arbitration. In *Unitramp* 1994 AMC 476 the question was as to what happens if a party to an ongoing maritime arbitration commences an action in Federal Court for the purpose of obtaining security under Supplemental Admiralty Rule B? Should the attachment be vacated? In the *Unitramp* case the foreign defendant who already had appeared in a London maritime arbitration moved to vacate a Rule B attachment that was subsequently commenced by a claimant against its property in Louisiana. The defendant argued that the primary function of Rule B is to obtain jurisdiction over a defendant through its property. Furthermore, if attachment is not necessary for jurisdiction, it cannot be maintained solely for the purpose of obtaining security. Rejecting the argument of the defendants the Court denied the defendants motion to vacate attachment. The Court made it patently clear that the Supplemental Admiralty Rule B attachment is not precluded by a prior commencement of arbitration.

12. Apart from U.K. Canada, and USA many other systems of law world over have recognized admiralty courts jurisdiction to arrest a vessel to force security in pending arbitration. Our attention was invited to the *Shipping Arrest Handbook* of 1997 to show that today a vast majority of trading nations allow arrest of ship when the final relief is not sought for from the same court but from another jurisdiction/arbitration. Our attention was also invited to Article 7(3) of the 1952 Brussels Convention which says, "If the parties have agreed to submit the dispute to the jurisdiction of a particular court other than that within whose jurisdiction the arrest was made or to arbitration, the Court or other appropriate authority within whose jurisdiction the arrest was made may fix the time within which the claimant shall bring proceedings". It is stated that Article 7(3) is similar to Section 26 of the Civil Jurisdiction and Judgments Act, 1982 relied upon by Sheen J. in *Jalamatsya*.

13. There is no decided case by the Court in India on the issue involved in the present case. Both the learned Counsel heavily relied upon the decision in *M.V. Elizabeth* in support of their respective submissions. Before we examine the decision in *M.V. Elizabeth*, it would be useful to make a brief reference to the statutory enactments in India concerning admiralty jurisdiction. The admiralty jurisdiction of the High Courts in India can be historically traced to the Charters of 1774 and 1798 as subsequently expanded and clarified by the Letters Patent of 1823, 1862 and 1865 and read with Admiralty Courts Act, 1861, Colonial Courts Admiralty Act, 1890 and Colonial Courts of Admiralty (India) Act, 1891. Section 2(1) of 1890 Act provides that the Colonial Courts of Admiralty shall have the same admiralty jurisdiction which is vested in the High Court of England whether existing by virtue of any statute or otherwise and they shall be entitled to exercise the same jurisdiction in the like manner and to the same extent as the High Court in England. The High Courts in India in general and in particular High Courts of Bombay and Calcutta were of the view that the admiralty jurisdiction of the High Court does not extend beyond the ambit of the provisions of (English) Admiralty Courts Act. 1861. Further expansion of the Jurisdiction of the English High Court under various statutes did not extend jurisdiction of the

Indian High Courts. The rationale of these decisions was that the chartered High Courts in India are Colonial Courts of Admiralty under Act 16 of 1891 exercising the same jurisdiction as was vested in the High Court of Admiralty in England under the Admiralty Court Act, 1861 and the subsequent merger of the English High Court of Justice In 1875 and the expansion of jurisdiction of that High Court under subsequent statutes did not expand the admiralty power of the Indian High Court or merge it with the its ordinary original civil jurisdiction. In *M.V. Elizabeth* the Supreme Court categorically rejected this restrictive construction adopted by the High Courts. The Court observed :

"14.....This restrictive construction is, in our view, not warranted by the provisions of the Constitution. The fact that the High Court continues to enjoy the same jurisdiction as it had immediately before the commencement of the Constitution, as stated in Article 225. does not mean that a matter which is covered by the Admiralty Court Act, 1861 cannot be otherwise dealt with by the High Court, subject to its own Rules, in exercise of its manifold jurisdiction, which is, unless barred, unlimited. To the extent not barred expressly or by necessary Implication, the judicial sovereignty of this country is manifested in the jurisdiction vested in the High Courts as superior courts".

17. It is true that the Colonial statutes continue to remain in force by reason of Art. 372 of the Constitution of India, but that does not stultify the growth of law or blinker its vision or fetter its arms. Legislation has always marched behind time, but it is the duty of the Court to expound and fashion the law for the present and the future to meet the ends of Justice,

26. Assuming that the admiralty powers of the High Courts in India are limited to what had been derived from the Colonial Courts of Admiralty Act. 1890. that Act, having equated certain Indian High Courts to the High Court of England In regard to admiralty jurisdiction, must be considered to have conferred on the former all such powers which the latter enjoyed in 1890 and thereafter during the period preceding the Indian Independence Act, 1947. What the Act of 1890 did was, as stated earlier, not to incorporate any English statute into Indian Law, but to equate the admiralty Jurisdiction of the Indian High Courts over places, persons, matters and things to that of the English High Court. As the admiralty jurisdiction of the English High Courts expanded with the progress of legislation, and with the repeal of the earlier statutes, including in substance the Admiralty Courts Acts of 1840 and 1861, it would have been reasonable and rational to attribute to the Indian High Courts a corresponding growth and expansion of admiralty jurisdiction during the pre-independence era. But a restrictive view was taken on the question in the decision of the High Courts cited above.

27. There is no reason why the jurisdiction of the Indian High Courts should have been considered to have frozen and atrophied on the date of the Colonial Courts of Admiralty Act. 1890...."

14. The Supreme Court in *M.V. Elizabeth* after tracing the history of admiralty

jurisdiction and various English statutes on admiralty jurisdiction and the powers exercised by English Courts over foreign ships observed in paragraph 65 that where statutes are silent and remedy has to be sought by recourse to basic principles, it is the duty of the Court to devise a procedural rule by analogy and expediency. Actions in rem were resorted to by Courts as a device to overcome the difficulty of personal service on the defendant by compelling him to enter appearance and accept service of summons with a view to furnishing security for the release of res or in his absence, proceed against the res itself by attributing to it a personality for the purpose of entering a decree and executing the same by sale of the res. This is a practical procedure developed by the Courts with a view to rendering justice in accordance with substantive law, not only in cases of collusion and salvage, but also in cases of other maritime Hens and claims arising by reason of breach of contract for the hire of vessels or the carriage of goods or other maritime transactions or tortious acts, such as conversion or negligence occurring in connection with the carriage of goods. Where substantive law demands justice for the party aggrieved and the statute has not provided the remedy, it is the duty of the Court to devise procedure by drawing analogy from other systems of law and practice. In paragraph 66, it is stated that the power of the Courts is plenary and unlimited, unless it is expressly or by necessary implication curtailed. Absent such curtailment of jurisdiction, all remedies which are available to the Courts to administer justice are available to a claimant against a foreign ship and its owner, found within the jurisdiction of the concerned High Court. The Court then went on to observe :

"77. It is true that Indian statutes lag behind the development of international law in comparison to contemporaneous statutes in England and other maritime countries..... India has also not adopted the international convention relating to the arrest of Sea going Ships, Brussels, 1952. Nor has India adopted the Brussels Conventions of 1952 on civil and penal jurisdiction in matters of collision, nor the Brussels Conventions of 1926 and 1967 relating to maritime liens and mortgages. India seems to be lagging behind many other countries in ratifying and adopting the beneficial provisions of various conventions intended to facilitate international trade. 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.

85. No Indian statute defines a maritime claim. The Supreme Court Act, 1981 of England has catalogued maritime claims with reference to the unified rules adopted by the Brussels Convention of 1952 on the Arrest of Seagoing Ships. Although India has not adopted the various Brussels Conventions (see the Conventions listed above), the provisions of these Conventions are the result of international unification and development of the maritime laws of the world and can, therefore, be regarded as the international common law, or transactional law rooted in and evolved out of the general principles of national laws, which in

the absence of specific statutory provisions can be adopted and adapted by Courts to supplement and complement national statutes on the subject. In the absence of a general maritime code, these principles aid the Courts in filling up the lacunae in the Merchant Shipping Act and other enactments concerning shipping. "Procedure is but a handmaiden of justice and the cause of justice can never be allowed to be thwarted by any procedural technicalities". S.P. Gupta Vs. President of India and Others, .

87. The judicial power of this country, which is an aspect of national sovereignty, is vested in the people and is articulated in the provisions of the Constitution and the laws and is exercised by courts empowered to exercise it. It is absurd to confine that power to the provisions of imperial statutes of a bygone age. Access to court which is an important right vested in every citizen implies the existence of the power of the court to render justice according to law. Where statute is silent and judicial intervention is required. Courts strive to redress grievances according to what is perceived to be principles of justice, equity and good conscience".

15. In *Trendtex Trading v. Bank of Nigeria* (CA), 1977 App Cas 548 . Lord Denning elaborately discussed the doctrine of incorporation of the rules of international law in the local laws. He said :

".... It is I think for the courts of this country to define the rule as best they can, seeking guidance from the decisions of the Courts of other countries, from the jurists who have studied the problem, from treaties and conventions and above all, defining the rule in terms which are consonant with justice rather than adverse to it. That is what the Privy Council did in the *Philippine Admiral* (1977) AC 373 see especially at pp. 402-403, and we may properly do the same.

The two schools of thought -- A fundamental question arises for decision. What is the place of international law in our English Law? One school of thought holds to the doctrine of incorporation. It says that the rules of international law are incorporated into English law automatically and considered to be part of English law unless they are in conflict with an Act of Parliament. The other school of thought holds to the doctrine of transformation. It says that the rules of international law are not to be considered as part of English law, except in so far as they have been already adopted and made part of our law by the decisions of the Judges, or by Act of Parliament or long established custom. The difference is vital when you are faced with a change in the rules of international law. Under the doctrine of incorporation when the rules of international law change, our English law changes with them. But under the doctrine of transformation, the English law does not change. It is bound by precedent. It is bound down to those rules of international law which have been accepted and adopted in the past. It cannot develop as international law develops."

"(iii) Which is correct? As between these two schools of thought, I now believe that the doctrine of incorporation is correct. Otherwise I do not see that our

courts could ever recognize a change in the rules of international law. It is certain that international law does change. I would use of international law the words which Galileo used of the earth "But it does move." International law does change, and the Courts have applied the changes without the aid of any Act of Parliament. Thus, when the rules of international law were changed (by the force of public opinion) so as to condemn slavery, the English Courts were justified in applying the modern rules of international law see the "statement of opinion" by Sir R. Phillimore, Mr. M. Bernard and Sir H.S. Maine appended to the report of the Royal Commission on Fugitive Balves (1876) p. 25, paras 4 and 5. Again the extent of territorial waters varies from time to time according to the rules of international law current at the time and the courts will apply it accordingly, see *Reg v. Kent Justices Exparte Lye* (1967) 2 QB 153. The bounds of sovereign immunity have changed greatly in the last 3 years. The changes have been recognised in many countries, and the Courts of our country and of theirs have given effect to them, without any legislation for the purpose, notably in the decision of the Privy Council in the *Philippine Admiral* (1977) AC 373 .

(iv) Conclusion on this point. Seeing that the rules of international law have changed and do change and that the Courts have given effect to the changes without the aid of any Act of Parliament, it follows to my mind inexorably that the rules of international law as existing from time to time do form part of our English law. It follows too that a decision of this Court as to what was the ruling of international law 50 or 60 years ago is not binding on this Court today. International law knows no rule of stare decisis. If this court today is satisfied that the rule of international law on a subject has changed from what it was 50 to 60 years ago it can give effect to that change and apply the change in our English law without waiting for the House of Lords to do It."

16. It will be useful to refer to the judgment of the Division Bench of this Court in *M.V. Mariner IV v. V.S.N.L.* In that case the issue was whether the Court has power to arrest a sister ship. The Bench after referring to the judgment in *M.V. Elizabeth* and also the judgments of the Supreme Court in *W. O. Tractoro Export, Moscow v. M.S. Tarapore and Co., Madras* and *Jolly George Verghese v. Bank of Cochin* which are relied upon by Ms. Sethna, held that in case of a conflict between the Municipal law and the international law on Conventions, the Court will have to apply the Municipal law. However, when there is no conflict between the two, then all just principles of international law or conventions could be legitimately applied unless they are in conflict with the statute or prohibited by any Municipal law. The Bench expressly rejected the argument that the fact that no amendment was carried out in the Merchant Shipping Act to bring it in consonance with the Brussels Convention shows that the Parliament never Intended to adopt the Convention. It was held that the Merchant Shipping Act cannot be construed as a repository of all the admiralty and other jurisdiction of the Court.

17. In a recent judgment of the Division Bench in *M.V. "Sea Success I" Vs.*

Liverpool and London Steamship Protection and Indemnity Association Ltd. and Another, held that the Geneva Arrest of Ship Convention, 1999, although not ratified by a requisite number of nations, would be applicable to the Admiralty Courts in India. The Bench held that what has been observed by the Supreme Court in M.V. Elizabeth regarding the applicability of 1952 Brussels Convention is equally applicable to the Geneva Arrest Convention, 1999. The Bench observed "India had not adopted the Brussels Arrest Convention, 1952 but the Apex Court observed that though India seems to be lagging behind many other countries in ratifying the beneficial provisions of various Conventions in India to facilitate international trade and have not adopted these conventions, yet the principles incorporated in the conference which 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 in India and applicable for the enforcement of maritime claims against foreign ships is equally applicable to the Geneva Arrest Convention, 1999 which embodies also necessities of the international trade and, therefore, is applicable for enforcement of maritime claims against foreign ships and can be regarded as part of our common law."

18. The observations of the Supreme Court In M.V. Elizabeth, in our opinion, clearly suggest that unless there is any prohibition in the Municipal law, the principles of transnational laws or international conventions could be applied for affording remedy for the satisfaction or realization of maritime claim. To quote the words of Lord Denning at the cost of repetition that"..... . . .the rules of international law have changed and do change and the Courts have given effect of the changes without the aid of any Act or Parliament, it follows that the rules of international law as existing from time to time do form part of our English law" also support the proposition that without specific adoption by the Municipal law, applicable rules of international law could be legitimately adopted by the Court to further the remedy and cause of justice. Although India has not adopted Convention relating to the arrest of sea going Ship, Brussels 1952 and the Convention on jurisdiction and the enforcement of judgments in Civil and Commercial Matters, Brussels, 1968. the principles incorporated in these Conventions are themselves derived from the common law of nations and are as such part of the common law of India and applicable for the enforcement of maritime claims against foreign ships. The development of maritime law has shown that it was not created as a definite all inclusive body of law. It has been developed over a period of many centuries and is still in continuous process of development. The necessities of international trade and commerce have dictated that the development should be along uniform lines in the several maritime nations and the expression admiralty or maritime should be construed in contemporary context. There is nothing in the statutes in India to exclude use of admiralty jurisdiction for the purpose of arresting a ship by way of security in future or pending arbitrations. The countries like USA and Canada recognised the powers of Court to order arrest of ship to force security for a future arbitration award. In England too the world has moved on. In Jalmastya the Court has

categorically held that the Court has power to arrest ship to secure claims in future or pending arbitrations. Why should the Court maintain a stance which has been discarded in England and which does not accord with the preferred judicial policy as enunciated in *M.V. Elizabeth*. We, therefore, hold that the Court in its admiralty jurisdiction has power to arrest a ship to secure a claim in future or pending arbitration.

Accordingly we set aside the impugned order of the learned Judge. Noticed of motion is remitted back to the trial Judge to consider the same afresh on merits in accordance with law. All contentions of the parties on merits are left open.

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