

(2016) 01 BOM CK 0114
In the Bombay High Court
Case No : Admiralty Suit No. 43 of 2012

Murmansk Shipping Company	Vs	APPELLANT
Adani Power Rajasthan Ltd. and Others		RESPONDENT

Date of Decision : 08-01-2016

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 1, Order 23 Rule 1(4), Section 11
Constitution of India, 1950 — Article 143, Article 253
Delhi Laws Act, 1912 — Section 7
Major Port Trusts Act, 1963 — Section 116
Mercha

Citation : (2016) 2 AIRBomR 630 : (2016) 3 BCR 204

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

Bench : Single Bench

Advocate : Atul Rajadhyaksha, Senior Advocate, Zarir Bharucha, Shivam Singh, Archit Dhir and Rahul Rajpurohit, i/b. Bimal Rjasekhar, for the Appellant; Nevroz Seervai, Rahul Narichania, Senior Advocates, Amitava Mazumdar, Shiv Kumar Iyer, Siddharth Ranka, Ramya Dhar

Final Decision : Disposed Off

Judgement

S.C. Gupte, J.—1. This admiralty suit is filed by a ship-owner seeking constitution of a limitation fund in connection with the operation of the vessel for claims falling under Section 352-A of the Merchant Shipping Act, 1958 ("MS Act").

2. The Plaintiff is a company incorporated under the laws of Russia, and was at all material times and still is the owner of the vessel M.V. YURIY ARSHENEVSHKY ("the vessel"), which flies Russian flag and is registered at the port of Murmansk in Russia. The suit was originally filed against two defendants. Defendant No. 1, an Indian company registered under the Companies Act, 1956, was a consignee of cargo on board the vessel, whose cargo was lost during the voyage, and who has lodged a formal claim for loss of cargo. Defendant No. 2 is described as "all persons claiming or entitled to claim damages by reason of or arising out of loss/damage to cargo carried on board" the vessel from Tianjin and Shanghai in China

to Mundra and Mumbai in India in August-November 2011.

3. The vessel, which was chartered under an amended NYPE charter-party dated 14 April 2011 and subsequently sub-chartered, was ordered to load project cargo at the Chinese Ports of Tianjin and Shanghai for carriage to Mundra and Mumbai in India. On 22 July 2011, the vessel arrived at Tianjin for loading. It was birthed on 24 July 2011 and commenced loading. The loading was completed on 27 July 2011, but the vessel did not sail immediately as it needed lashing of cargo. After accomplishing the requisite lashing, the vessel departed for Shanghai, with 2388 MT of project cargo loaded at Tianjin. It arrived in Shanghai on 20 July 2011 and loaded further 6322 MT of cargo there. The cargo was loaded in holds and also as deck cargo. During the loading, the deck officers, who checked the condition of the cargo, made adverse comments about its condition and packaging. This led to the causing of the shipping orders in respect of the cargo to the effect that the vessel was not to be responsible for any loss caused by carriage of the deck cargo (identifying such cargo specifically). After loading the cargo, the lashing of the deck cargo took some time. In the meantime, the Master of the vessel received a communication from the sub-charterer's agents engaged for weather routing of the voyage from China to India that typhoon "Muifa" was developing en route. The Master was advised not to set sail for sometime till the vessel was expected to be out of the gale radius. A decision was made thereupon by the Master to move the vessel to Chejndo island in South Korea and remain in the shelter of the island until the typhoon passed. This was with the agreement of the owners and sub-charterers. After obtaining further updates on weather conditions, the vessel departed from Shanghai, heading towards Chijndo island on 5 August 2011. Whilst the voyage was underway, on 6 August 2011, the weather reports showed that the typhoon had changed to a more northerly direction and would miss Shanghai and the track adjacent to the Chinese coast. After additional lashing of the cargo, modifying the vessel's movement and making course/speed adjustments to ensure clearance from the typhoon, the vessel kept sailing. It, however, experienced heavy rolling and pitching, sometimes even upto 50 degrees. In the process, despite best efforts to reduce the rolling and pitching, the deck cargo stowed on hatches 1, 2, 3 and 4 and one stack of cargo at hatch 5 was lost. The vessel thereafter altered its course. It was thereupon advised by the sub-charterer to go to Xiamen in China, where the vessel was birthed and the cargo in the holds was re-lashed. The defects noticed in the vessel from the damage caused by shifting of cargo during the typhoon were rectified. Thereafter the Port State Control Officers inspected the vessel and certified that all deficiencies had been rectified. Before the vessel could set sail post such certification, she was arrested by two cargo interests for cargo meant to be discharged at Mumbai and Mundra. The vessel was released upon the Plaintiff posting security and thereafter continued her voyage to India. During the course of the voyage, on 22 December 2011, the Plaintiff applied to the Xiamen Maritime Court of People's Republic of China for constituting a fund for limitation of liability, under Chapter 11 of the Maritime Code of the People's Republic of

China. The measure of the limitation fund claimed by the Plaintiff was 3,185,358 SDR together with interest, which translated to an aggregate of USD 4.94 million. The Xiamen Court issued public notices in that behalf. (The condition of the order of the Chinese Court for deposit of the amount of the fund within 3 days was not complied with by the Plaintiff and as a result, the application was eventually treated as withdrawn.) In the meantime, whilst the vessel was on its voyage to Mundra, a communication dated 3 November 2011 was received by the Plaintiff from Defendant No. 1 claiming damages for loss of 100% of the cargo stored on the deck. The claim of USD 10.66 million made by Defendant No. 1 was far in excess of the applicable limitation fund of USD 4.94 million and also more than the vessel's market as well as insured value. The vessel arrived at Mundra on 25 November 2011, but it had to remain at the outer anchorage as the port did not permit birthing due to the refusal of the consignees including Defendant No. 1 to take delivery of the cargo. Upon the Plaintiff's payment of USD 679,000 and furnishing of a bank guarantee of USD 200,000 and also issuing in addition Letters of Undertaking ("LOUs") to Defendant No. 1 and another consignee (who is arraigned as Defendant No. 1A) for an amount upto approx USD 10.66 million, the vessel was allowed to be birthed at Mundra on 10 February 2012. After completing discharge on 18 February 2012, the vessel departed for Mumbai and arrived in Mumbai Port on 21 February 2012.

4. Whilst at Mumbai, awaiting discharge of cargo, the Plaintiff filed the present suit, for limitation of liability by constituting a limitation fund. The suit was filed on 2 March 2012. On the same day, a suit was filed by Jhajjar Power Limited seeking a decree in rem against the vessel for loss of cargo, being Admiralty Suit (Ldg.) No. 554 of 2012. Subsequently, on 6 March 2012, and 7 March 2012, actions in rem were initiated by Essar Power Gujarat Limited and Essar Oil Limited, respectively, against the vessel. The vessel was arrested on the application of these plaintiffs. Essar Steel India Limited filed a caveat against release of the vessel. These four parties were, thereupon, joined as Defendant Nos. 1B to 1E to this suit. The arrest orders were vacated upon posting of securities by the Plaintiff. Subsequently, the Plaintiff partly/fully settled the claims of Defendant Nos. 1B to 1E, whereupon Defendant No. 1B was dropped from the array of parties and the securities posted by the Plaintiff in cases of Defendant nos. 1C, 1D and 1E were allowed to be reduced. The respective defendants also correspondingly dropped or reduced their claims in their admiralty suits, as the case may be.

5. On 28 July 2014, this Court framed the following eight issues in the suit :

"(1) For the maintainability of the suit as claimed in the suit is it a pre-condition that legal proceedings ought to have been instituted in this Court by any claimant against the vessel - m.v. Yuriy Arshenevskiy and/or its Owner?

(2) If the answer to the issue No. 1 is in the affirmative, what is the consequence of such legal proceedings not having being instituted in this Court?

(3) Whether the present Admiralty Suit is barred by the principles of issue estoppel or res judicata?

(4) Whether the Plaintiff proves that under the Merchant Shipping Act, 1958, the ship-owner's right to limit liability is absolute as long as the claims in respect of which limitation is sought, are claims capable of being limited under Section 352-A of the Act?

(5) If the answer to issue No. 4 is in the affirmative, is the Plaintiff entitled to limit liability under Part XA of the Merchant Shipping Act, 1958 and if so, whether the figures of limitation are to be calculated on the basis of the convention on Limitation of Liability for Maritime Claims, 1976 or the 1996 Protocol?

(6) If the 1996 Protocol applies, then whether the present Suit, which is filed on the basis of the limits set up by the Limitation of Liability for Maritime Claims, 1976, is liable to be dismissed?

(7) If the answer to issue No. 4 is in the negative, whether the Defendants prove that the alleged loss arose due to the personal act or omission of the Plaintiff and arose recklessly and with knowledge that such loss would probably result?

(8) What decree? What order?"

6. The parties choose not to lead any evidence on Issue Nos. 1 to 6, all of which are really speaking questions of law. The parties are agreed that in the event this Court comes to a conclusion on Issue No. 4 in the negative, evidence would have to be led on Issue No. 7, which is a mixed question of law and fact with the onus to prove being on the Defendants. The parties, in the premises, jointly propose that the Court should hear Issue Nos. 1 to 6 as preliminary issues (and depending on such hearing, Issue No. 8), and only in the event of Issue No. 4 being decided against the Plaintiff, proceed to record evidence and hear Issue No. 7. The course suggested seems to be in order and in the interest of justice. I proceed accordingly.

7. The issues noted above involve four legal aspects of the controversy, namely:

"(i) Whether institution of a prior legal proceeding in this Court against the concerned vessel or its owner is a pre-condition for maintainability of a suit for constitution of limitation fund and whether the present suit is bad for non-fulfillment of such pre-condition ? (Issue Nos. 1 and 2);

(ii) Whether the suit is barred on the principles of issue estoppel or res judicata or under Order 23 Rule 1 ? (Issue No. 3);

(iii) Whether the ship-owner's statutory right to limit liability under Part XA is absolute and without reference to any proof of loss resulting from a personal act or omission of the ship-owner (referred to in admiralty parlance as "conduct barring limitation")? (Issue No4); and

(iv) Whether Convention on Limitation of Liability for Maritime Claims, 1976

("1976 Convention") or Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime Claims of 19 November 1976 ("1996 Protocol") applies for fixing the quantum of limitation fund in the present case and whether the suit for constituting the fund on the basis of 1976 Convention is bad ? (Issue Nos. 5 and 6)."

8. Let us first dispose of the objection to the maintainability of the suit on the grounds of issue estoppel or res judicata or bar under Order 23 Rule 1. The objection is based on the Plaintiff's prior application to constitute a limitation fund in China. It is submitted that this application, the condition of which (as per the Chinese Court ruling) for deposit of fund within 3 days not having been met, was treated as withdrawn and this constitutes an issue estoppel/res judicata/constructive res judicata or operates as a bar under Order 23 Rule 1 of the Code of Civil Procedure to the filing of a fresh suit.

9. In the first place, the application before the Chinese Court was treated as withdrawn and therefore, was not a matter "heard and finally decided" by a Court. There is, thus, no question of application of the rule of Section 11 of the Code or the principle behind it. As held by the Supreme Court in *Sarguja Transport Service v. State Transport Appellate Tribunal, Gwalior*, AIR 1987 Supreme Court 88, the rule of res judicata applies to a case where the suit or the issue has already been heard and finally decided by a Court, whereas the case of abandonment or withdrawal of the suit or claim without the permission of the Court, where there is no adjudication involved, is covered by Rule 1(4) of Order 23. If the suit or any part of the claim is abandoned or withdrawn without permission of the Court referred to in sub-rule (3), no second suit lies under Sub-rule (4) of Rule 1. We need to, therefore, consider whether by the reason of the Plaintiff having abandoned or withdrawn its application before the Chinese Court, the present suit is barred. For the bar under Sub-rule (4) to apply, it must be shown that either sub-rule (1) which refers to abandonment of the suit or a part of the claim, or Sub-rule (3) which refers to the permission to be granted by the Court for withdrawal of a suit or part of a claim, applies to the first suit or claim, which is abandoned or withdrawn, as the case may be. Neither of the provisions can possibly apply to the application made in the present case before the Chinese Court. The Code has no extra-territorial application. (We do not know if the law of the People's Republic of China has any provision similar to sub-rules (1) or (3). There is no pleading on this. Anyway, it is doubtful if that has any significance from the point of view of the present case.) There is, thus, no case for applying the bar under sub-rule (4) to the present suit. Issue No. 3 is, accordingly, answered in the negative.

10. Let us now consider the objection to the maintainability of the present suit on the ground of want of institution of a prior legal proceeding in this Court against the vessel or the Plaintiff. The Defendants' argument is based on Section 352-C(1) of the MS Act. It is submitted that as per Section 352-C(1), a party applying for setting up a limitation fund must satisfy two pre-requisites set out therein,

namely, (i) a liability must be alleged to have been incurred by a person referred to in sub-section (1) of Section 352-A in respect of claims arising out of an occurrence and (ii) legal proceedings must have been instituted in respect of claims which are subject to limitation. It is submitted that admittedly, at the time of filing of the present admiralty suit, no legal proceeding was filed in respect of any claim against the Plaintiff or the vessel and therefore, condition (ii) is not satisfied.

11. Section 352-C(1) provides as follows :

"(1) Where any liability is alleged to have been incurred by a person referred to in sub-section (1) of section 352A in respect of claims arising out of an occurrence, and legal proceedings are instituted in respect of claims subject to limitation, then such person may apply to the High Court for the setting up of a limitation fund for the total sum representing the amounts set out in the Convention or the rules made in this behalf under this Part applicable to claims for which that person may be liable together with interest thereon from the date of occurrence giving rise to the liability until the date of the constitution of the Fund."

No doubt, as even a bare reading of Section 352-C(1) also suggests, a person referred to in sub-section (1) of Section 352-A (i.e. Shipowner, insurer, etc.) can apply under S. 352-C(1) for setting up a limitation fund, when any liability is alleged to have been incurred by him in respect of claims arising out of an occurrence and legal proceedings are instituted in respect of claims which are subject to limitation. Three questions, which directly arise out of this provision, are : (a) who must allege incurring of a liability or institute legal proceedings in respect of claims mentioned therein, (b) what kind of legal proceedings are contemplated - whether proceedings only for enforcement of claims or any proceedings concerning such claims which may even include proceedings for limiting liability in respect of such claims, and (c) are such legal proceedings to be brought in India or in the particular court where limitation fund is sought to be constituted or any other court or anywhere in the world. The Plaintiff submits that there need not be any liability action at all by a third party against the plaintiff who seeks to constitute a fund or indeed no third party needs to actually allege incurring of a liability on the part of such plaintiff. It may even be the plaintiff's own case that a liability has been incurred by him. So also, it may be the plaintiff's own legal proceedings in respect of the claims, e.g. his own suit for a declaration that such claims are subject to limitation and that he is entitled to limit his liability concerning them. The Defendants contend otherwise.

12. There is indeed nothing in Section 352-C(1) to require the plaintiff to show that either any third party has actually alleged that the plaintiff has incurred liability in respect of claims arising out of a marine occurrence or has actually instituted a liability action against the plaintiff in respect of any such claim. All that the Section requires is that the plaintiff must have allegedly incurred a liability in respect of claims arising out of the occurrence. This may be the

plaintiff's own case. Even as regards the second requirement, namely, institution of legal proceedings, there is nothing in Section 352-C to imply that such proceeding ought to be instituted against the plaintiff. It may well be proceeding instituted by the plaintiff himself. There is nothing to show that the proceedings must be for enforcement of a claim or a liability action. It may well be proceedings for avoiding enforcement of a claim or an action for limiting liability towards such claim. After all, the words used are general, namely, legal proceedings in respect of claims arising out of the occurrence.

13. There is no other reason either why the Court must read the provisions of Section 352-C(1) in the manner suggested by the Defendants. In fact, the 1976 Convention, on which the provisions of Part XA including Section 352-C are based, also suggests otherwise. Under the 1976 Convention, a shipowner is entitled to limit his liability (Article 1.1) in accordance with the rules of the Convention for claims set out in Article 2. It has two separate provisions for claiming such limitation of liability : (1) Article 10, which provides for limitation of liability without constitution of a limitation fund and (2) Article 11, which provides for constitution of limitation fund, read with Article 13, which provides for a bar to other actions when such limitation fund is constituted. On the face of it, the shipowner's very right to limit and his further right to invoke such right to limit do not depend upon the constitution of a limitation fund. If a claimant brings an action to enforce a claim against the shipowner which is subject to limitation, the shipowner may plead limitation of liability by way of defence, without constituting a limitation fund. Likewise, where the shipowner wants to avoid enforcement of a claim which is subject to limitation, he may invoke such limitation by applying for a suitable declaration in respect of his right to limit liability, once again without constituting a limitation fund. There is no need for him to show to the Court that an action is actually brought against him by a claimant to enforce a claim subject to limitation. No doubt the 1976 Convention gives liberty to the State parties to provide in their national laws that a person liable may only invoke the right to limit liability if a limitation fund has already been constituted or is constituted when such right to limit liability is invoked. That, however, does not make any difference to our discussion. What we are concerned with here is that the Convention does not, as a matter of principle, require either that the right to limit liability is invoked as a defence or an offence, or that the constitution of a limitation fund is a pre-condition for such invocation.

14. The English judgment in the case of *Seismic Shipping Inc. v. Total E & P UK PLC* [2005] EWCA Civ 985, where the Court of Appeal discussed this particular aspect of the 1976 Convention, is a case in point. There, the registered owners of the vessel *Western Regent* brought an action for limiting their liability to the defendant in respect of claims arising out of the collision of streamers towed by their vessel resulting into damage to the defendant's installation. The action was under the 1976 Convention set out in Schedule 7 to the English Merchant Shipping Act (Merchant Shipping Act, 1995). Incidentally, there is no provision in the English Act for constitution of a limitation fund as a condition for invoking the

right to limit liability. The defendant opposed the action. The defendant contended that the 1976 Convention was a jurisdictional convention, which conferred jurisdiction to commence a limitation claim only in circumstances where the claimant can constitute a limitation fund under Article 11, and since Article 11.1 contemplates the setting up of a fund only in a state in which legal proceedings have been instituted in respect of a claim which is subject to limitation and no such proceedings have been instituted in English jurisdiction by the defendant, owners cannot bring a limitation claim before an English Court. In short, the submission was that neither the 1976 Convention nor the English Act of 1995 contemplated the possibility of a pre-emptive strike brought by shipowners before any proceedings have been brought by a person with a claim against them arising out of a particular incident. The trial judge rejected the submission. The Court of Appeal confirmed that judgment, holding as follows :

"14. I consider first the wording of the 1976 Convention itself. It seems to me that the language of the Convention supports the claimants' submissions and the conclusions of the judge. Articles 1 and 2 identify the persons entitled to limit liability and identify the claims which are subject to limitation. It is those articles which confer the right to limit on the owners in this case. That right can be invoked in two ways, either without constituting a limitation fund under article 10 or after constituting such a fund under article 11. The Convention distinguishes between those two different means of invoking limitation and treats them differently. Thus, for example, it is only where a limitation fund has been constituted that article 13 applies to bar actions in the courts of other Contracting States.

15. There is no general jurisdiction provision in the Convention stating where the right of limitation must be invoked. It therefore appears to me that in principle the Convention permits a party to seek to limit its liability in any contracting state which has personal jurisdiction over the defendant. Since there is no express restriction in the Convention restricting the invocation of the right to limit in any way, if there is such a restriction it must be implied in the Convention. To my mind there is nothing in the Convention to lead to the implication of such a restriction.

16. Neither article 10 nor article 11 contains such a restriction, either expressly or by necessary implication. Article 10, which (as stated above) is in chapter II and not chapter III of the Convention, contains a clear statement that limitation of liability may be invoked notwithstanding that a limitation fund has not been constituted. It thus appears on the face of the Convention that the shipowners' right to limit is stated in article 1.1 and that, by article 10.1, the right to invoke that right to limit does not depend upon the constitution of a limitation fund. This seems to me to be entirely unsurprising because there may only be one claim arising out of a particular casualty."

15. Once it is granted that the right to invoke limitation is available to a shipowner without reference to actual constitution of a limitation fund and he can

seek a decree of limitation even in circumstances where there is no claim (as yet) brought against him, it follows that the 1976 Convention does not per se prevent a suit such as the present suit at least insofar as prayer (c) is concerned. Prayer clause (c) is in the following terms :

"(c) That this Hon"ble Court may be pleased to declare that if the Plaintiff is found liable in damages in respect of property claims and other consequential losses claimed to be, inter alia, arising out of any alleged loss/damage to cargo on board the said vessel on its journey from Tianjin and Shanghai to Mundra and Mumbai in August-November 2011, the aggregate liability for all such claims, is the limitation amount in respect of the said vessel of Rs. 24,32,14,322, (USD\$4.94 million, approx), and no more, being the INR equivalent of 3,183,358 SDR, as prescribed by Part XA of the Merchant Shipping Act, 1958."

16. Faced with this conclusion, Mr. Tulzapurkar, learned Senior Counsel for the Defendants, suggests that at the highest prayer (c) of the present suit may be asked for but not the other prayers. But then if the Plaintiff was within its rights to file this suit asking for prayer clause (c), nothing would prevent him from later applying in the same suit for other prayers, since the twin requirements as suggested by Mr. Tulzapurkar would have been satisfied in such a case. There is a liability alleged to be incurred by the Plaintiff in respect of claims arising out of an occurrence and there is a legal proceeding instituted in respect of claims subject to limitation. If the other reliefs could be brought in subsequent to the filing of such suit, there is no reason whatsoever why such suit cannot in the first place include such other reliefs including the relief for constitution of a limitation fund.

17. There is, thus, nothing either in Section 352-C(1) or the 1976 Convention suggesting any pre-condition of institution of legal proceedings for enforcement of a claim subject to limitation before a suit such as the present could be filed. If anything, the Convention suggests otherwise.

18. Let us now see, if there is any case law supporting the Defendants. The Supreme Court, in the case of World Tanker Carrier Corporation v. SNP Shipping Services Pvt. Ltd. , (1998) 5 Supreme Court Cases 310, considered the nature of a limitation action and the jurisdiction of the Court in such action. (The case considered the provisions of Part XA as it stood before the amendments of 2002.) The Supreme Court considered the nature of a limitation action in the following words :

"14. Describing the nature of a limitation action, Baer in his book Admiralty Law of the Supreme Court at p.154 traces the historic origins of limitation of liability as follows :

""[M]en would be deterred from employing ships, if they lay under the perpetual fear of being answerable for the acts of their masters to an unlimited extent." Thus wrote the renowned Dutch jurist, Hugo Grotius, in 1625. To impose liability on shipowners for acts of their masters would be "neither consonant to natural

equity ... nor ... conducive to the public good". Referring to the law of his own nation, Grotius continued, "[I]t is an established rule that no action can be maintained against the owner for any greater sum than the value of the ship and cargo."

Although by no means uniform, some sort of rule of limited liability on the part of the shipowner has been the law of the leading maritime nations of continental Europe since the middle ages...."

15. In 1924 several leading nations adopted the International Convention for the Unification of Certain Rules relating to the limitation of liability of owners of sea-going vessels. This is commonly referred to as the Brussels Convention of 1924. In 1957 a new convention on Limitation of Liability of Sea-Going Vessels was drafted to replace the Brussels Convention of 1924. The new convention, commonly referred to as the Brussels Limitation Convention of 1957 was signed by many leading maritime nations of the world. It is also signed by India. The convention fixes the limit of liability of an owner of a sea-going vessel on the basis of the tonnage of the vessel without regard to the vessel's value. It was to incorporate this Convention in our statute law that Part X-A was inserted in the Merchant Shipping Act, 1958.

16. The right of an owner to bring a limitation action is governed by Part X-A of the Merchant Shipping Act, 1958. The whole purpose of limitation of liability is to protect an owner against large claims, far exceeding the value of the ship and cargo, which can be made against him all over the world in case his ship meets with an accident causing damage to cargo, to another vessel or loss of personal life or personal injury. A limitation action, though it is normally filed in the admiralty jurisdiction of a court, is somewhat different from an ordinary admiralty action which normally begins with the arrest of the defaulting vessel. The vessel itself, through its master, is a party in the admiralty suit, and the plaintiff must have claims provable in admiralty against the vessel. In the case of an action for limitation of liability, it is the personal right of the owner of the vessel to file a limitation action and to use it as a defence to an action against him for liability. It is a "defensive" action against claims in admiralty filed by various claimants against the owner of the vessel and the vessel. A limitation action need not be filed in the same forum as a liability action. But it must be a forum having jurisdiction to limit the extent of such claims and whose decree in the form of a limitation fund will bind all the claimants."

On the jurisdiction of a Court to entertain a limitation action, this is what the Court had to say :

"32. A limitation action as in the present case, falls under the High Court's admiralty jurisdiction. But a limitation action, though filed in admiralty, is not against vessel. It is a protective action against claims which may be filed by others against the owner of the vessel in admiralty jurisdiction. Therefore, a plea of limitation can be taken as a defence by the owner in an action in admiralty

filed against him by the claimant against him and his ship. Hence, the court having jurisdiction to entertain an admiralty action against the vessel of the owner has jurisdiction to set up a limitation fund for the owner. Similarly, if the owner initiates the "defensive" action in limitation, the court which has jurisdiction to entertain a liability claim will have jurisdiction to entertain the limitation action. If a liability claim is already filed, that court will have jurisdiction over limitation action also. But claims may be several, and they may be actually filed or may be apprehended. Any court where such a claim is filed or is likely to be filed will have jurisdiction to entertain a limitation action. The court of domicile of the owner and the ship is a court where such a claim is likely to be filed. Therefore, that court will also have jurisdiction. Out of these, the owner has the option to choose his court for filing a limitation action."

Obviously, the Supreme Court did not consider filing of prior legal proceedings to be a pre-requisite for initiating a limitation action in India. It in fact countenanced filing of a limitation action simply on an apprehension that such proceedings are likely to be initiated in respect of the incident.

19. Learned Counsel for the Defendants, however, submits that the Supreme Court in *World Tanker Carrier Corporation* (supra) was dealing with the pre-amendment MS Act; there was no requirement of "legal proceedings" in the pre-amendment Section 352-C(1). Section 352 C(1), before the 2002 amendment, stood as follows :

"352-C(1) Where any liability is alleged to have been incurred by the owner of a vessel in respect of claims arising out of an occurrence and the aggregate of the claims exceeds or is likely to exceed the limits of liability of the owner under Section 352-B, then the owner may apply to the High Court for the setting up of a Limitation Fund for the total sum representing such limits of liability."

It is submitted that amendment of Section 352-C(1) by the Parliament, in the light of *World Tanker Carrier Corporation* judgment, in fact re-affirms the intention of the Parliament to make filing of legal proceedings a pre-requisite for initiating a limitation action in India.

20. There is nothing to show any conscious act on the part of the Parliament to make the prior initiation of legal proceedings a condition precedent for an application to constitute a limitation fund. In the first place, as noted above, the language of the 2002 amendment does not support any such conclusion. Secondly, whereas the original provisions of Chapter X-A of the MS Act are based on the Convention on Limitation of Liability for Maritime Claims, 1957 (1957 Convention), the 2002 amendments are avowedly introduced to bring into force the 1976 Convention, after India ratified the same. There is nothing in the two Conventions to suggest that any requirement of a prior initiation of legal proceedings, which was absent in the 1957 Convention, forms part of the 1976 Convention. As noted above, the 1976 Convention, as much as the 1957 Convention, clearly and unequivocally envisages an action for constitution of a

limitation fund without reference to any legal proceedings for enforcing the liability of the shipowner. In the premises, it cannot be suggested that anything in the 1976 Convention led the Parliament to introduce the alleged condition precedent. In fact, Section 352-C(1) (after the 2002 amendment) broadly echoes Article 11 of the 1976 Convention. The Convention has the following provision concerning the application for limitation fund :

"11.1 Any person alleged to be liable may constitute a fund with the Court or other competent authority in any State Party in which legal proceedings are instituted in respect of claims subject to limitation."

Section 352-C(1), based on this Article, provides as follows :

"(1) Where any liability is alleged to have been incurred by a person referred to in sub-section (1) of section 352A in respect of claims arising out of an occurrence, and legal proceedings are instituted in respect of claims subject to limitation, then such person may apply to the High Court for the setting up of a limitation fund "

There is, therefore, nothing to suggest that there is any deliberate departure of the Parliament in the 2002 amendment to introduce a condition precedent of prior initiation of legal proceedings for the shipowner's action for constitution of a limitation fund.

21. The English Court of Appeal in *Saipem S.p.A. v. Dreding VO2 B.V. ("VOLVOX HOLLANDIA")* (1988) Vol.2 Lloyd's Law Reports 361 made following observations whilst discussing the right of shipowners to claim limitation :

"This right is ancient and recognized internationally, but there is no need to consider its history or the reasons for its existence. We are only concerned with its procedural aspects. Its classic form is an action by the shipowners claiming a decree of limitation against all actual and potential claimants, commonly called a limitation action. For present purposes this right is founded on ss. 503 and 504 (as amended) of the Merchant Shipping Act, 1894. These were repealed as from Dec. 1, 1986 by an order made under the Merchant Shipping Act, 1979, but they remain in force for present purposes because the occurrence took place before that date. I have already referred sufficiently to s. 503 in the context of art. 1(1) of the 1957 Convention. Section 504 provides as follows, so far as material:

Where any liability is alleged to have been incurred by the owner of a British or foreign ship in respect of any occurrence in respect of which his liability is limited under section 503... and several claims are made or apprehended in respect of that liability, then the owner may apply to the High Court and that court may determine the amount of the owner's liability and may distribute that amount rateably among the several claimants, and may stay any proceedings pending in any other court in relation to the same matter...

The procedure governing limitation actions is set out in O. 75, and it is clear from rr. 1, 2 and 37 onwards that only a shipowner (or persons within the extended

definition of that term) can bring a limitation action. However, O. 18, r. 22 provides that nothing in O.75 -

.....shall be taken as limiting the right of any shipowner... to rely by way of defence on any provision of the Merchant Shipping Acts 1894 to 1981 which limits the amount of his liability in connection with a ship or other property.

It is therefore long been clear that in the alternative to bringing a limitation action a shipowner may plead limitation by way of defence. This will not secure him a decree of limitation which is good against the world. But that will not matter if there is only one potential claimant, the plaintiff in the liability action. Alternatively, if all potential claimants are either plaintiffs or joined as defendants to counterclaim, a shipowner could no doubt obtain an effective decree by way of counterclaim. But problems arise if there is more than one claimant and more than one action, as discussed earlier on in the context of the present position in this case. However, there is no need to go back to that. What matters for present purposes is, first, that the right to claim limitation, whether by action or defence and/or counterclaim, is a right which belongs to the shipowner alone. Secondly, a shipowner is not obliged to plead limitation by way of defence and/or counterclaim, but is generally entitled to bring a separate limitation action if he is held liable in damages, whether by action or arbitration, at any rate once he has given security by the payment into Court of the appropriate limitation fund."

(Emphasis supplied.)

22. Whilst discussing the scheme of the 1976 Convention, this is what the Federal Court of Australia had to say in the case of *Strong Wise v. Esso Australia Resources PTY Ltd. (THE "APL SYDNEY")* [2010] FCA 240:

"The Scheme of the Convention

11. A person who apprehends that a claim for compensation under the Limitation of Liability for Maritime Claims Act may be made against that person by some other person may apply to this court under section 25 of the Admiralty Act to determine the question whether the liability of the first person in respect of the claim may be limited under the Convention."

The Court further discussed the matter as follows :

"50. A significant purpose of the Convention is to protect international trade and commerce conducted through the operation of seagoing ships. Because ships may be arrested or attached in most maritime stages, unless the international community provided a regime limiting shipowners' liability a ship, or sister ship, could be arrested at every port in each jurisdiction at which she called. The shipowner would be required to put up security each time his ship was arrested for the full amount claimed. A shipowner, demise charterer, insurer or P&I club ordinarily will be required to pay up to the value of the ship into court as security for any claim that might be made against her in order to arrange for their release.

51. The general law of the sea that has for centuries informed the exercise of Admiralty jurisdiction has recognized that absent a means for limitation of claims, a ship would be susceptible to an unlimited number of arrests arising from one casualty, or attachments arising out of one occurrence : *Luke v Lyde* (1750) 2 Burr 882 at page 887 per Lord Mansfield CJ; *The Tolten* [1946] P 134 at pages 155 and 156 per Scott LJ; *The Stream Fisher* [1927] P 73 at pages 80 and 81 per Bateson J. The consequence would be that claimants could obtain security up to the total value of their claims on each arrest or attachment. The security so obtained may far exceed the monetary limits fixed in the Convention or the value of the ship. If this were readily permitted it would be likely that once the ship was first arrested or attached, the shipowner may have little practical choice but to leave her where she lay. In the absence of the protection to a ship and those interested in her offered by the Convention, substantive insurance and protection and indemnity arrangements would also be discouraged. These have proved vital in the conduct of international maritime trade and commerce."

23. It is clear from the foregoing discussion, that not only is there no conscious decision on the part of the Parliament to make any such requirement a condition precedent, but there is no reason whatsoever in the 1976 Convention or the maritime law generally for the existence of such condition precedent. In fact, such a condition would defeat the very purpose of the right given to the shipowner to limit his liability and constitute a fund for the same. The *raison d'être* of an action of limitation of liability is that without such means of limitation of claims, a ship would be susceptible to an unlimited number of arrests at unlimited number of locations across the globe for claims arising from a single casualty or occurrence. The purpose of this right of shipowners is to avoid arrests of their ships. If that is so, to make invocation of this right depend on actual initiation of a liability action by a claimant, that is to say, by arrest of the ship (since it has been characteristic of admiralty law that a liability action in rem commences with arrest of the ship), does not stand the test of reason.

24. It is lastly submitted by the Defendants that a learned Single Judge of this Court in *m.v. "ELENI"*¹ has in terms held that a free standing action for setting up a limitation fund cannot be filed in India and limitation of liability can be invoked only in the event legal proceedings are instituted in respect of claims subject to limitation. In *m.v. ELENI*, a Korea based Insurance Company sued (as a subrogee upon payment of cargo claims) the defendant vessel before this Court for total loss of cargo in a collision allegedly caused due to owners' negligence. Owners, in turn, had, before the insurer's action was filed, initiated an admiralty action in Hong Kong to limit their liability arising out of the incident. The Hong Kong Court decreed the limitation action and a limitation fund was accordingly established in Hong Kong. Thereafter, the owners of the defendant vessel moved before this Court a motion in the plaintiff's admiralty action for dismissal of the action. Their case was that the limitation fund having been created, parties world over, including the plaintiff before this Court, could only have a claim against the fund. The learned Single Judge rejected the motion

principally on the ground that the Port of Hong Kong, where the limitation fund had been constituted, was not a port identified in Section 352-D(6) of the MS Act and therefore, the owners of the defendant vessel could not restrict the plaintiff's right to claim damages from the defendant vessel in India or require the plaintiff to only proceed against the fund. Whilst rejecting the motion, the learned Single Judge did find that the 1976 Convention permitted a free standing action for setting up of a limitation fund and that there was, therefore, nothing wrong with the Hong Kong Court setting up a limitation fund without there being any action for enforcement of a claim already initiated against the shipowners. In passing, however, the learned Single Judge observed that such a free standing action would not be possible in India, since the Indian domestic law (i.e. MS Act) had not adopted the 1976 Convention in its entirety and a prior initiation of legal proceedings for enforcement of a claim arising out of the incident was necessary in India for maintaining an action for setting up a limitation fund. This statement of law does not in any sense form part of the ratio of the judgment of the learned Judge in *m.v. ELENI*. The point did not arise for the consideration of the learned Judge in that matter and his observation regarding the same is merely obiter. From the order, it does not even appear that the point was even canvassed before the learned Judge in *m.v. ELENI*. (In fact, both sides before me contend that it was indeed not so canvassed.)

25. In sum, institution of a prior legal proceeding in this Court against the concerned vessel or its owner cannot be said to be a precondition for maintainability of a suit for constitution of a limitation fund for claims against the vessel which are subject to limitation. There is, thus, no question of the present suit being bad for non-institution of a prior legal proceeding. Issue No. 1 and 2 are, accordingly, answered in the negative.

26. That brings us to the nub of the controversy in the present suit, namely, whether the shipowner's right to limit liability is absolute and without reference to any proof of loss resulting from his personal act or omission. The controversy may be briefly outlined thus: The 1957 convention allowed the shipowners to limit liability (Article 1.1) in respect of claims arising from certain occurrences "unless the occurrence giving rise to the claim resulted from the actual fault or privity of the owner". It further provided (Article 1.6) that the question upon whom lied the burden of proving whether or not the occurrence resulted from the actual fault or privity of the owner would be determined by the *lex fori*. India Law, whilst adopting these Articles, i.e. the MS Act as it stood prior to the 2002 amendments, provided (Section 353 A(1)) that the owner of a sea-going vessel may limit his liability in respect of claims arising from named occurrences "unless the occurrence giving rise to the claim resulted from the actual fault or privity of the owner". It also provided (Section 352 A(2)) that the burden of proving that the occurrence did not result from his actual fault or privity shall be on the owner. The 1976 convention makes a departure from the earlier convention. It provides (Article 4) that a person liable shall not be entitled to limit his liability "if it is proved that the loss resulted from his personal act or omission, committed

with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result". In other words, the 1976 convention does two things. In the first place, it casts a very heavy onus (or indeed, an almost impossible one, as some English judgments describe it), namely, to show that not only did the loss result from the owners' personal act or privity, but that such act or omission was committed either (a) with intent to cause such loss or (b) recklessly and with knowledge that such loss would probably result. Secondly, it does not leave the incidence of the onus of proof on the *lex fori*, but, going by the very nature of the proof required, it casts that onus squarely on the defendant or claimant asserting a claim for loss against the shipowner. Indian Law, on the other hand, i.e. the MS Act after the 2002 amendments, does not make any express provision for defeating the right to limit liability upon proof that the shipowner's personal act or omission was responsible for the loss or for addressing the question of incidence of such onus. The Plaintiff claims that since there is no reference to any proof that the loss resulted from the owner's personal act or omission in Indian Law now, the shipowner's right to limit is absolute or without reference to any such proof. The Defendants, on the other hand, contend that such proof is implicit in Indian Law. The Defendants submit that since the MS Act, as amended, refers (Section 352B) to the amount to which the owner may limit his liability in accordance with the provisions of the contention, it incorporates by reference all provisions of the 1976 convention including, of course, Article 4 thereof, which refers to the proof of the owner's act or omission causing the loss. In other words, the Defendants' case is that by reason of this reference in Section 352B, Indian Law, i.e. the MS Act as amended, is on par with the 1976 convention and restricts the owner's right to limit liability if the proof referred to in Article 4 of the 1976 convention is offered against the owner. Issue No. 4 requires me to decide who is right - whether the Plaintiff contending in favour of the shipowner's absolute right to limit or the Defendants rooting for such right being subject to the proof of the loss resulting from the shipowner's act or omission.

27. We have already noted that unlike the unamended Part XA of the MS Act which made a specific provision in Section 352A about the shipowner's entitlement to limit being subject to a proof that the occurrence did not result from his actual fault or privity, the amended part XA has no such specific provision. We only have to see if the words "in accordance with the provisions of the Convention" used in amended Section 352B incorporate Article 4 of the 1976 convention restricting the right to limit upon proof of a personal act or omission referred to therein, in amended part XA. Incorporation of an existing law into a later Act is a legislative device often adopted by the legislature. When an earlier Act or certain provision/s of the Act is/are incorporated by reference into a later Act, the provisions so incorporated become part or parcel of the later Act. This is broadly referred to as legislation by incorporation. Sometimes, instead of incorporating a particular previous statute or any provision of it, the later Act simply refers to the earlier statute on the subject generally. The distinction

between a mere reference or citation of one statute into another and incorporation is well known. In the case of the latter, the earlier statute or provision becomes a part and parcel of the later Act as if it had been "bodily transposed into it" so that a repeal or amendment of the earlier statute or provision does not affect the later Act. The incorporated earlier Act remains frozen in the later Act to what it was when it was incorporated. In the former case, however, any modification, repeal or re-enactment of the earlier statute (referred to or cited) will also have effect for the later statute (in which it is referred). This distinction, however, need not bother us in the present case, since the word "convention" in the expression "in accordance with the provisions of the convention" in Section 352B is defined in the MS Act as "the Convention on Limitation of Liability for Maritime Claims, 1976 as amended from time to time". Thus, irrespective of whether it is termed as incorporation, or a mere reference or citation, amendments in the convention would also have effect insofar as Section 352B is concerned. What we simply need to consider in this case is whether, by means of reference to the 1976 Convention in Section 352B of the MS Act, Article 4 of the 1976 Convention is, as suggested by the Defendants, made part of Part XA of the MS Act. If it is so made, there is no denying that amendments made from time to time to that Article would also form part of the MS Act.

28. The arguments of the Defendants in support of incorporation of Article 4 of the 1976 Convention by reference in Section 352 B may be summed up as follows :

"(i) On a plain reading of S. 352 B, it is clear that Article 4, along with Article 6 of 1976 Convention, is incorporated in it. There is no warrant or justification to whittle down the plain language of S. 352 B to exclude Article 4.

(ii) Article 4, which deals with the well-known concept of "conduct barring limitation" which has been a part of the admiralty law for a long time, is a substantive and crucial provision of the 1976 Convention. The Convention itself does not countenance (Article 18(1)) any exception or reservation by any State party to the substantive provisions of the Convention other than Article 2, paragraphs 1(d) and (e). In accordance with Article 18(1), our Parliament, whilst incorporating Article 2(1) in the domestic law, did exclude Articles 2(1)(d) and (e). It is inconceivable that the Parliament, whilst legislating the amendments of the MS Act expressly to implement and give effect to the 1976 Convention, would exclude Article 4.

(iii) The intention of the Parliament is manifest in this behalf from the Statement of Objects and Reasons (SOR) of Bill No. LXVI of 2002 (which was finally enacted into the Amendment Act 63 of 2002 which inter alia amended Part XA of the MS Act). The SOR expressly refers to barring of limitation of liability upon proof that the loss resulted from a personal act or omission of the shipowner.

(iv) In any event, the Court must interpret the MS Act in a manner so as to give

full effect to the 1976 Convention. In interpreting domestic statutes the Court must avoid confrontation with the comity of nations and choose an interpretation which accords with an international convention to which the country is a party. Even if there were to be a lacuna or ambiguity in the law adopting the Convention, such lacuna must be filled or ambiguity cleared so as to make the domestic law accord with the Convention."

29. Let us first see, if the plain language of Section 352B suggests incorporation of Article 4. Section 352 B is worded as follows :

"352B Limitation of liability.- The amount to which any person referred to in sub-section (1) of section 352A may limit his liability in accordance with the provision of the Convention and in cases where the provision of the Convention are not applicable, the limit shall be in accordance with the rules made in this behalf prescribe."

At the outset it needs to be noted that Section 352B, though somewhat inelegantly worded and contains obvious grammatical errors, deals with the amount or limit of liability which a shipowner (or other person referred to in Section 352A) may ask for, whilst constituting a limitation fund. It does not deal with the entitlement to limit liability, but only the quantum of the limitation fund. It has nothing to do with claims which can be subjected to limitation or the exceptions to them, which are matters dealt with in Section 352A. It also does not deal with when and how a limitation fund is constituted. That is dealt with by Section 352C, whilst Section 352E deals with the scope of an application for constitution of a fund, the provisions of which inter alia bear on the jurisdiction of the Court constituting a fund. (Article 4, on the other hand, deals with circumstances in which the person liable cannot limit his liability.) Secondly, it is plain that Section 352B deals with two situations, whilst determining the quantum of the fund : (a) Where the provisions of the 1976 Convention apply and (b) where they do not apply. The first part of the Section, namely, the words "The amount to which a person may limit his liability in accordance with the provisions of the Convention" applies to cases covered by (a). The second part, quite obviously, applies to cases covered under (b). In cases covered by (a), the amount of the fund (i.e. the amount to which a person may limit his liability) shall be determined in accordance with the Convention, whilst in cases under (b) the amount shall be determined in accordance with the rules made in that behalf. The plain language of Section 352B, thus, does not suggest incorporation of Article 4. What it instead does is to incorporate the provisions of Chapter II of the Convention, which provide for the manner of working out limits of liability, into the MS Act.

30. Apart from the considerations noted above, there are several other internal aids offered by the provisions of Part XA themselves for this particular interpretation of Section 352B. Part XA, as noted above, evidently seeks to make 1976 Convention a part of our municipal law with such modifications as the Parliament deems fit. Chapter I of the 1976 Convention deals with "the right of

limitation". It has four Articles : (1) Article 1 providing for "persons entitled to limit liability", (2) Article 2 dealing with "claims subject to limitation", (3) Article 3 dealing with "claims excepted from limitation" and (4) Article 4 which provides for "conduct barring limitation" or circumstances in which liability cannot be limited. Section 352A comprehensively deals with "the right of limitation". It is an amalgam of Articles 1, 2 and 3. Notably, Article 4 is excluded. In contrast to Article 2 of the Convention, which makes the right to limit liability inter alia subject to Article 4 (namely, conduct barring limitation), Section 352A does not make limitation subject to any conduct barring limitation. This may at once be contrasted with the unamended Section 352A which expressly provided for the entitlement of shipowners to limit liability being subject to the exception, namely, where "the occurrence giving rise to the claim resulted from the actual fault or privity of the owner." Section 352A as amended refers to Section 352B insofar as "limits of liability" are concerned. "Limits of Liability", which are dealt with in Chapter II of the Convention, notably Articles 6 to 9 thereof, are comprised in Section 352B of the MS Act. In cases to which the Convention applies, such limits shall be in accordance with the Convention. A further indication that Section 352B merely deals with limits, that is to say, the quantum, comes in Section 352D of the MS Act. Section 352D provides that, "Where a vessel or other property is detained in connection with a claim which appears to the High Court to be founded on a liability to which a limit set by Section 352B applies." A clear indication that what Section 352B does is to prescribe or set the limit. Lastly, it is important to note that if the expression "may limit his liability in accordance with the provisions of the Convention" in Section 352B were to be read as an omnibus clause incorporating all provisions of the Convention, all other Sections of Part XA would simply be regarded as redundant, for then every provision of the Convention could effectively get incorporated into the MS Act by that simple expedient. A plain reading of the provisions of Part XA would militate against such an interpretation. The Parliament has taken care to incorporate specific provisions of the Convention regarding particular aspects of limitation of liability by enacting them fully with modifications and used advisedly, as I have explained below, the device of incorporation by reference only in respect of "limits of liability".

31. Another important internal aid in the MS Act, is Part XB of that Act introduced by the same amending Act, namely, Amendment Act 63 of 2002. Part XB which was substituted by the Amendment Act 63 of 2002, was to enact the provisions of International Convention on oil pollution damage which India was party to, into the MS Act. That convention had provisions on "conduct barring limitation" similar to the 1976 convention. In contradistinction with Part XA, the Amending Act enacted the particular provisions of "conduct barring limitation" forming part of the relevant corresponding Articles of the International Convention on Civil Liability for Oil Pollution Damage, 1992 into Part XB of the MS Act. Sections 352I (6) and 352J(2) of Part XB provides that no claim for compensation for pollution damage against persons referred to therein may be

made "unless the incident causing such damage occurred as a result of their personal act or omission committed or made with intent to cause such damage or recklessly and with knowledge that such damage would probably result". The conspicuous absence of a similar provision in Part XA, amended by the same Amending Act, clearly supports the view that the corresponding provision of "conduct barring limitation" contained in the 1976 convention is not enacted into our law.

32. The net result of the foregoing discussion is that the plain reading of the provisions of the MS Act (as amended) does not suggest incorporation of Article 4. It rather suggests exclusion of Article 4.

33. Let us now consider the argument that the Parliament could not have meant exclusion of Article 4. We must, at the outset, note that whilst interpreting a statute, the intention of the legislature must be gathered, so far as is practicable, from the words used in the statute itself. If the meaning of the statute is plain and clear, nothing further needs to be considered. "The first and primary rule of construction", as Gajendragadkar, J. said in *Kanailal Sur v. Paramnidhi Sadhukhan*, 1958 SCR 360 "is that the intention of the legislature must be found in the words used by the legislature itself." If, on the other hand, the language used in the statute is ambiguous or capable of two meanings, then the Court is called upon to use various aids of interpretation and invoke other rules of construction. This is so even for a law enacted to give effect to an international convention or treaty such as Part XA of the MS Act. The primary guide for interpreting the provisions of amended Part XA of the MS Act is the language employed in it and not the provision of the 1976 Convention, to give effect to which the amendments were introduced in Part XA. The Supreme Court in *V/O Tractoro expert, Moscow v. M/s. Tarapore and Co.*, AIR 1971 Supreme Court 1 had this to say:

"16. Now, as stated in Halsbury's Laws of England Vol. 36, p. 414, there is a presumption that Parliament does not assert or assume jurisdiction which goes beyond the limits established by the common consent of nations and statutes are to be interpreted provided that their language permits, so as not to be inconsistent with the comity of nations or with the established principles of International Law. But this principle applies only where there is an ambiguity and must give way before a clearly expressed intention. If statutory enactments are clear in meaning, they must be construed according to their meaning even though they are contrary to the comity of nations or International Law.

17. We may look at another well-recognised principle. In this country, as is the case in England, the treaty or International Protocol or convention does not become effective or operative of its own force as in some of the continental countries unless domestic legislation has been introduced to attain a specified result. Once, the Parliament has legislated, the Court must first look at the legislation and construe the language employed in it. If the terms of the legislative enactment do not suffer from any ambiguity or lack of clarity they

must be given effect to even if they do not carry out the treaty obligations. But the treaty or the Protocol or the convention becomes important if the meaning of the expressions used by the Parliament is not clear and can be construed in more than one way. The reason is that if one of the meanings which can be properly ascribed is in consonance with the treaty obligations and the other meaning is not so consonant, the meaning which is consonant is to be preferred. Even where an Act had been passed to give effect to the convention, which was scheduled to it, the words employed in the Act had to be interpreted in the well established sense which they had in municipal law (See *Barras v. Aberdeen Steam Trawling and Fishing Co. Ltd.* 1933 AC 402.)"

The principle, which holds good even in England, is expressed by Diplock L.J. in *Salomon v. Commissioners of Customs and Excise* (1967) 2 QB 116 in following words:

"Where, by a treaty, Her Majesty's Government undertakes either to introduce domestic legislation to achieve a specified result in the United Kingdom or to secure a specified result which can only be achieved by legislation, the treaty, since in English law it is not self-operating, remains irrelevant to any issue in the English courts until Her Majesty's Government has taken steps by way of legislation to fulfil its treaty obligations. Once the Government has legislated, which it may do in anticipation of the coming into effect of the treaty, as it did in this case, the court must in the first instance construe the legislation, for that is what the court has to apply. If the terms of the legislation are clear and unambiguous, they must be given effect to, whether or not they carry out Her Majesty's treaty obligations, for the sovereign power of the Queen in Parliament extends to breaking treaties (see *Ellerman Lines V. Murray: White Star Line and U.S. Mail Steamers Queanic Steam Navigation Co. Ltd. v. Comerford*), and any remedy for such a breach of an international obligation lies in a forum other than Her Majesty's own courts."

As I have indicated above, the words of the statute, i.e. provisions of Part XA, are plain and clear on whether or not Article 4 is incorporated therein. The following discussion is on a demurrer, that is to say, assuming without admitting that the provisions have an ambiguity and call for such interpretational exercise.

34. The thrust of the Defendants' submissions is this : Article 4 is a substantive and crucial provision of 1976 Convention; India is a party to the Convention and has sought to implement and give effect to it under the amendments to the MS Act; 1976 Convention sets out the exceptions/reservations which alone a state party can adopt and no other; Article 4 is not a provision that a state party can derogate from under such exclusions/reservations; the Parliament, in such a case, could not have intended exclusion of Article 4; the ambiguity in Section 352B or lacuna, even if we may choose to so call it, needs to be resolved or supplied in a manner so as to make our domestic law accord with the Convention, on the principle that Courts must avoid a conflict or confrontation with comity of nations; and even the Statement of Objects and Reasons of the

Bill, which was finally enacted by the Parliament into Amendment Act 63 of 2002, expressly refers to barring of limitation of liability upon proof that the loss resulted from a personal act or omission of the shipowner, that is to say, the provisions covered by Article 4.

35. Under Article 253 of the Constitution of India, Parliament has power to make any law for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, etc. By such law, the Parliament makes the provisions of such treaty, convention, etc. a part of the municipal law of the country. But the question is whether any legislation is at all necessary to implement any international treaty or convention. Before the advent of the Constitution, the position was expounded by the Judicial Committee in *Attorney General for Canada v. Attorney General for Ontario and others* [1937] A.C. 326 in the following words :

"Within the British Empire there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations if they entail alteration of the existing domestic law, requires legislative action. Unlike some other countries, the stipulations of a treaty duly ratified do not within the Empire, by virtue of the treaty alone, have the force of law. If the national Executive, the Government of the day, decide to incur the obligations of a treaty which involve alteration of law they have to run the risk of obtaining the assent of Parliament to the necessary statute or statutes. * * Parliament, no doubt, * * * has a constitutional control over the Executive; but it cannot be disputed that the creation of the obligations undertaken in treaties and the assent to their form and quality are the function of the Executive alone. Once they are created, while they bind the State as against the other contracting parties, Parliament may refuse to perform them and so leave the State in default."

In *Maganbhai Ishwarbhai Patel v. Union of India* , 1970(3) SCC 400, Shah J held these observations to be valid in the context of our constitutional setup, observing as follows:--

"By Article 73, subject to the provisions of the Constitution, the executive power of the Union extends to the matters with respect to which the Parliament has power to make laws. Our Constitution makes no provision making legislation a condition of the entry into an international treaty in times either of war or peace. The executive power of the Union is vested in the President and is exercisable in accordance with the Constitution. The Executive is qua the State competent to represent the State in all matters international and may by agreement, convention or treaties incur obligations which in international law are binding upon the State But the obligations arising under the agreement or treaties are not by their own force binding upon Indian nationals. The power to legislate in respect of treaties lies with the Parliament under Entries 10 and 14 of List I of the Seventh Schedule. But making of law under that authority is necessary when the treaty or agreement operates to restrict the rights of citizens or others or modifies the laws of the State. If the rights of the citizens or others which are

justiciable are not affected, no legislative measure is needed to give effect to the agreement of treaty."

36. Obviously, the 1976 Convention operates to restrict the rights of citizens and others and also modifies the existing municipal law of India. Making of a law, therefore, under the authority of Entry Nos. 10 and 14 of List 1 of the Seventh Schedule read with Article 253, by the Parliament is necessary to give effect to the Convention. The Convention would apply in India only to the extent and subject to such modifications as the Parliament may provide whilst giving effect to the Convention by amending our municipal law, namely, the MS Act. Once this is clear, it must be held as a necessary corollary that the Parliament is not bound to follow the restricted mandate reserved in the Convention itself for the member states to derogate from its provisions. The Parliament may certainly overstep and disregard that mandate. Any such conscious overstepping or disregard will have its full play. There is no principle of statutory interpretation which requires us to then interpret the legislation of the Parliament so that it accords with the Convention.

37. The Defendants contend that absurd consequences would result from the absence of Article 4 in Indian law. They submit that in the absence of Article 4, a shipowner could go scotfree and get to limit his liability despite having caused loss through a personal act or omission committed either (a) with intent to cause such loss or (b) recklessly and with knowledge that such loss would probably result. This may, at the first blush, seem an attractive argument. A closer scrutiny, however, dispels such impression. If one compares the provisions of the two Conventions, i.e. the 1957 Convention (on which the original Part XA of the MS Act was based) and the 1976 Convention (on which the amended provisions of Part XA are based), three striking features emerge : Firstly, the quantum of limitation in 1957 Convention is raised manifold in the 1976 Convention. Secondly, persons seeking to limit liability are given what is described by Courts as a virtually unbreakable right to limit. Whereas, for defeating the right to limit, the inquiry under the 1957 Convention envisaged whether or not the occurrence (giving rise to the loss) resulted from the actual fault or privity of the owner, the 1976 requires a proof not only that the loss resulted from a personal act or omission of the person seeking to limit but that such act or omission was committed (a) with intent to cause such loss, or (b) recklessly and with knowledge that such loss would probably result. It is not hard to imagine that this would be a near impossible onus for a person opposing the owner's application to limit liability. Thirdly, the right to limit under the 1976 Convention is clearly a presumptive right so that the onus (and an extremely heavy one at that, as noted above) is cast upon those seeking to defeat that right, unlike in the case of the 1957 Convention where the onus was to be determined by *lex fori* (the Indian law casting a negative onus, i.e. onus to show that the loss was not caused by his fault or privity, indubitably on the person seeking to limit). These three features together form a distinct pattern and contain each other's rationale. Based on these, courts in various jurisdictions have given summary

judgments and limitation decrees to shipowners and others.

38. The Queen's Bench Division in *The Bowbelle* (1990) 3 All ER 476 considered the effect of 1976 Convention in the following words :

"I return to consider the 1976 convention, under which shipowners agreed to a higher limit of liability in exchange for an almost indisputable right to limit their liability. The effect of arts 2 and 4 is that the claims mentioned in art 2 are subject to limitation of liability unless the person making the claim proves (and the burden of proof is now on him) that the loss resulted from the personal act or omission of the shipowner committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result. This imposes on the claimant a very heavy burden.

But, regardless of whether a claimant contends that he can prove that the shipowner was guilty of conduct barring limitation, the combined effect of arts 2 and 13 is that a shipowner can only be compelled to constitute one fund in accordance with art 11. Article 2 sets out the categories of claims which are subject to limitation of liability. The claims against the owners of the *Bowbelle* come within para 1(a). I turn now to art 13. It is clear that any claimant may bring a claim against the limitation fund in court. Therefore by virtue of para 3 the rules set out in paras 1 and 2 apply.

Paragraph 1 makes it clear that any person who has made a claim against the fund in court is not entitled to arrest any ship in the same ownership as the *Bowbelle*.

Any person who has a claim against the owners of the *Bowbelle* (but has not yet made a claim against the fund) has "a claim which may be raised against the fund". The fund has been constituted in London, which is "the port where the occurrence took place". Accordingly, if one of the ships named in the praecipe were to be arrested the court would be bound to order its release. The fund has been constituted by the owners of the *Bowbelle* in accordance with art 11 in "respect of claims subject to limitation". Those last six words clearly refer to the categories set out in art 2. The draftsman has omitted the words "which appears to the court to be founded on a liability to which a limit is set" which led to the decision in *The Wladyslaw Lokietek* [1978] 2 Lloyd's Rep 520. The court is not required to investigate the question whether the shipowner has been guilty of conduct barring limitation. In these circumstances common sense dictates that there should be some machinery by which warning can be given to would-be arresters that they should not arrest any of the ships belonging to the owners of the *Bowbelle*. The current Rules of the Supreme Court have not made provisions for this situation. Until such provision is made, shipowners who wish to provide some protection against unnecessary dislocation of trade caused by the arrest of their ships should file in the Admiralty and Commercial Registry a praecipe which must be signed by their solicitor who must undertake to acknowledge service of the writ in any action which may be begun against the owners of the ship in

question and state that a limitation fund in respect of damage arising from the relevant incident has been constituted by payment into court of the appropriate amount.

Any person who has a claim arising out of the same incident and who wishes to contend that the conduct of the shipowner bars his right to limitation may nevertheless pursue that allegation but he will not have the security provided by the arrest of a ship."

In the "MSC Rosa M" (2000) 2 Lloyd's Rep 399, the Court reiterated these aspects of the 1976 Convention and gave a summary decree to the shipowners, disallowing the cargo claimants' application to keep the issue of conduct barring limitation alive pending the outcome of the liability trial. This is what the Court held :

"12. As stated by Mr. Justice Sheen in the *Bowbelle*, [1990] 1 Lloyd's Rep. 532, the effect of the Convention was to afford to shipowners, in exchange for a higher limit, an almost indisputable right to limit their liability. The only exception is provided by art. 4 which provides that :

A person liable shall not be entitled to limit his liability if it is proved that the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result.

13. As is immediately apparent, the burden imposed by art. 4 is an onerous one. Indeed, there are no examples in English law of the defence being successfully run in the maritime context. There are even fewer examples in the parallel aviation field, despite the fact that art. 25 of the Warsaw Convention disapplies limitation where it is proved that the damage resulted not only from such an act or omission on the part of the carrier himself but also his servants or agents."

In *The "Leerort"* (2001) 2 Lloyd's Rep 291, the English Court of Appeal, whilst dealing with a summary decree of the trial Court, prefaced its discussion on the merits of the case in the following words :

"13. The limitation provisions in relation to merchant shipping provide even greater protection than those in relation to carriage by air. It is only the personal act or omission of a shipowner which defeats the right to limit. A shipowner is defined in art. 1 as the owner, charterer, manager or operator of a seagoing ship. Thus, to defeat the right to limit, it is necessary to identify the causative act or omission on the part of such a person that caused the loss. Furthermore, it is only conduct committed with intent to cause such loss, or recklessly with knowledge that such loss would probably result, that defeats the right to limit. It seems to me that this requires foresight of the very loss that actually occurs, not merely of the type of loss that occurs. That certainly appears to have been the conclusion of Mr. Justice Steel in *The MSC Rosa M* [2000] 2 Lloyd's Rep. 399 at p. 401, where he held:

The authorities make it plain that, absent as in the present case, any allegation

of intent, the person challenging the right to limit must establish both reckless conduct and knowledge that the relevant loss would probably result.

14. Mr. Teare submitted that the words "such loss" meant loss of the type suffered and that, to identify the type of loss, it was necessary to refer back to art. 2, which sets out the various types of loss in respect of which a right to limit arises. Thus, in the instant case, the claims advanced are in respect of "loss of or damage to property", so that the only foresight required to defeat the right to limit was of the likelihood of loss of or damage to property.

15. This submission runs counter to the clear meaning of the wording of art. 4. The words "such loss" in that article clearly refer back to the loss that has actually resulted and which is the subject matter of the claim in which the right to limit is asserted.

16. It seems to me that where the loss in respect of which a claim is made resulted from a collision between ship A and ship B, the owners of ship A, or cargo in ship A, will only defeat the right to limit liability on the owner of ship B if they can prove that the owner of ship B intended that it should collide with ship A, or acted recklessly with the knowledge that it was likely to do so.

17. The alternative, which is perhaps arguable, is that the claimant merely has to prove that the owner of ship B intended that his ship should collide with another ship or acted recklessly with the knowledge that it was likely to do so.

18. On the facts of this case it is not necessary to decide which alternative is correct. In either event the reality is that when damage results from a collision the shipowner will only lose his right to limit if it can be proved that he deliberately or recklessly acted in a way which he knew was likely to result in the loss of or damage to the property of another in circumstances where, inevitably, the same consequences would be likely to flow to his own vessel. Maritime history has many instances of scuttling, but I am not aware of one involving deliberate collision with another vessel. More pertinently Mr. Teare has been unable to point to any collision case in any jurisdiction where the right to limit under the 1976 Convention has been successfully challenged.

19. These considerations demonstrate that when a claim is made for damage resulting from a collision, it is virtually axiomatic that the defendant shipowner will be entitled to limit his liability. With those observations, I revert to the facts of the present case."

In the light of these observations, after dealing with the facts of the case, the Court upheld the summary decree granted by the Admiralty Judge.

39. In the light of this position, if the Indian Parliament decides to do away completely with the breaking of limitation and thereby, make the shipowner's right to limit liability absolute and enforceable without reference to any proof of loss resulting from personal act or omission, it cannot be suggested that it would lead to absurd consequences. If nearly forty years (to be precise, more than

twenty five years before the Indian Parliament enacted the amendments to the MS Act in 2002) of the regime of 1976 Convention has not thrown up a single instance throughout the world of successful breaking of limitation, it would not be unwise for the Indian Parliament to do away completely with the very concept of breaking of limitation.

40. There is yet another reason why our law could be said to have consistently eschewed the idea of breaking of limitation whilst enacting the amendments of 2002. Our procedural law for setting up a limitation fund is consistent with the substantive law for setting up such fund contained in the amended MS Act. Unlike the English law, which provides (CPR part 61 Admiralty claims) alternatively for a restricted limitation decree where one or more named defendants admit the plaintiff's right to limit or a general limitation decree where all defendants admit the plaintiff's right to limit liability and in either case, provides for establishment of a limitation fund, leaving objectors to the limitation fund to apply for setting aside the general limitation decree later if they have a case on personal act or omission of the plaintiff, the Indian procedural law applicable in the present case (Bombay High Court (Original Side) Rules, Rule Nos. 927 to 968) does not provide for any restricted or general limitation decree at the outset on a claim to limit liability, to be defeated later upon the application of an objector to the limitation fund. The Indian law would require a limitation decree to be granted only at the hearing of the admiralty suit. This would create serious difficulties if the Court, at the instance of an objector to the limitation fund, were to finally consider the question whether or not the occurrence giving rise to the loss was the result of a personal act or omission of the claimant committed either with intent or knowledge as described in Article 4 of the 1976 Convention, before granting any limitation decree. For one, the shipowner's right to limit would have to await an entire trial involving of necessity an elaborate witness action, thus making the vessels of the shipowner susceptible to arrests all over the world in the meanwhile. And secondly, the named defendant/s may not be interested in contesting the claimant's action and actually concede his right to limit resulting into constitution of a limitation fund as a final decree in the admiralty suit, but leaving all objectors high and dry without any opportunity to them to establish that the loss actually occurred by reason of a personal act or omission of the claimant. Neither of the situations is conducive to justice -the first from the point of view of the shipowner (i.e. claimant of a limitation decree) and the second from the point of view of the objector(who may have a liability claim against the shipowner). A feeble attempt was made before me, surprisingly at the instance of the Plaintiff, to suggest that since our procedural law (Rule 967) requires this Court to use forms used in the Admiralty division of the Supreme Court (in England) for the time being in force with such variations as the circumstances of each case may require, the Rules of Supreme Court in England, i.e. CPR Part 61 Admiralty Claims, could be followed. The suggestion is clearly untenable. This is not a matter of a mere form, but an entire procedure of the Court. Besides, it reflects significantly on the substantive rights of parties. It

is impossible to invoke this entire elaborate procedure, which is really a matter of law, only on the ground that English admiralty forms could be used in an appropriate case.

41. Learned Counsel for the Defendants relies upon the Statements of Objects and Reasons ("SOR") of Bill No. LXVI of 2002, which culminated into the Amendment Act 63 of 2002, to contend that the Parliament intended to incorporate Article 4 providing for conduct barring limitation. The SOR states as follows :

"STATEMENT OF OBJECTS AND REASONS

The Merchant Shipping Act, 1958 governs matters relating to shipping in India. The main objective of the Act is to ensure development and efficient maintenance of the Indian mercantile marine. The Act has been amended from time to time in the light of experience gained in its implementation and also to give effect to the provisions of various International Conventions to which India has acceded.

2. As an active member of the International Maritime Organisation (IMO), India has acceded to a number of International Conventions and Protocols adopted by the IMO. Suitable provisions are required to be made in the Merchant Shipping Act, 1958 to enable the Government of India or its agencies to give effect to those Conventions and Protocols. Besides, amendments of certain provisions of the Act are also required to enable the maritime administration to meet its operational requirements.

3. The Conventions and Protocols for implementation of which provisions are required to be made in the Merchant Shipping Act, 1958 are outlined as under:--

The International Maritime Organisation has adopted the International Convention on Limitation of Liability for Maritime Claims (LLMC, 1976 on 19 November, 1976 under which the limitation tonnage is the gross tonnage of the vessel as calculated under the universal measurement system in accordance with the Tonnage Measurement of Ships Convention, 1969. The limitation of liability has been extended to any person for whose neglect or default the shipowner or salvor is responsible. Limitation of liability will be barred if it is proved that the loss resulted from any personal act or omission committed by the shipowner or the salvor with the intent to cause such loss or committed recklessly and with the knowledge that such loss would probably result. The Safety of Life at Sea (SOLAS) Convention, 1974 was amended in 1988 to streamline and harmonise the survey of ships and their equipment to ensure safety of ships proceeding on sea voyages. The Convention on Load Lines, 1966 as amended in 1988 deals with harmonised system of survey of ships and their certification. The Civil Liability Convention (CLC), 1992 mainly deals with payment for oil pollution damages by any ship in the Indian waters up to limits of exclusive economic zone and by any Indian ship abroad. The Fund Convention, 1992 provides a second tier of compensation regime where a claimant can proceed against the Fund

located in London that pays for damages.

4. The Bill seeks to amend various provisions of the Act, which, inter alia, include the following, namely-

(i) Sections 76 and 87 are being amended to empower the Central Government to prescribe different manning scales for different types of ships and section 95 is being amended to redefine the role of seamen's employment offices to control and regulate the manning agents and recruitment and placement service instead of controlling and regulating the employment of seamen. Section 97 is being amended to bring the unions within its purview to enable curbing of malpractices by the seamen's unions and a new section 97 A is being inserted to prohibit any discrimination in recruitment of seafarers;

(ii) Sections 299, 299A, 300, 301, 303 and 307 are being amended to include the changes made in SOLAS Convention, 1974 as amended in 1988. Section 317 is being amended to implement the provisions of the Load Lines Convention, 1966 as amended in 1988 to harmonise the survey and certification procedures with those of SOLAS Convention, 1974 as amended in 1988;

(iii) Section 344 is being amended to empower the Central Government to prescribe the record of equipment and the manner of surveys to be made in respect of ships;

(iv) Sections 352, 352A, 352B, 352C, 352D and 352E are being amended to enable the Central Government to implement the provisions of the LLMC, 1976. A new section 352 FA is being added to empower the Central Government to frame rules;

(v) Sections 352H, 352-I, 352J and 352R are being amended to implement the provisions of CLC, 1992;

(vi) New sections 352S to 352ZA are being inserted for implementation of the provisions of the Fund Convention, 1992;

(vii) Consequent to amendment to section 352A, section 116 of the Major Port Trusts Act, 1963 is being amended to provide for recovery of damage to the port properties in accordance with the provisions of Part XA of the Merchant Shipping Act, 1958;

(viii) The Indian ships which carry country's commercial trade to the outside world are subjected to control of the Port State which has the right to inspect such ships. Hence, the Indian ships are required to carry internationally valid survey certificates issued in accordance with the procedures established by the International Maritime Organisation but for which they will be required to undergo surveys at foreign ports at the time they call at those ports. The proposed amendments of the Merchant Shipping Act, 1958 will enable the Government of India to take care of these aspects.

5. The Bill seeks to achieve the above objects."

The Defendants submit that after expressly referring to conduct barring limitation upon proof of loss resulting from a personal act or omission (that is to say, the provisions of Article 4 of 1976 Convention), the SOR states that Sections 352, 352A, 352B, 352C, 352D and 352E are being amended to enable the Central Government to implement the provisions of the 1976 Convention. It is submitted that whilst interpreting the statute, the Court has to ascertain the will and policy of the legislature as discernible from the object and scheme of the enactment and S. 352 B being capable of more than one interpretation, the SOR and the manifest legislative intent expressed therein ought to be looked at as an aid of interpretation. It is submitted that Section 352B, so interpreted, must be held to incorporate Article 4.

42. Originally, in *Aswini Kumar Ghose v. Arabinda Bose* , AIR 1952 SC 369, the Supreme Court had held that SOR merely sought to explain what reasons induced the mover to introduce the bill in the House and what objects he sought to achieve, but that those objects and reasons might or might not correspond to the objective which the majority of members had in view when they passed it into law. The Supreme Court observed that there was no guarantee that the reasons which led to its introduction and objects thereby sought to be achieved have remained the same throughout till the Bill emerges from the House as an act of the legislature, for they do not form part of the Bill and are not voted upon by the members. In the considered view of the Supreme Court then, the SOR should be ruled out as an aid to the construction of a statute. This rule, however, as noted later by the Supreme Court in the case of *A. Manjula Bhashini v. Managing Director, Andhra Pradesh Women's Cooperative Finance Corporation Ltd.* , (2009) 8 SCC 431, was not strictly followed in the subsequent judgments. In *A. Thangal Kunju Musaliar v. M. Venkatchalam Potti* , AIR 1956 SC 246, the SOR was used for judging reasonableness of the classification made in an enactment to see if it infringed or was contrary to the Constitution. In *Central Bank of India v. Workmen* , AIR 1960 SC 12 it was held that the SOR could be used for the limited purpose of understanding the background and antecedent state of affairs leading up to the legislation. This view was reiterated in a large number of subsequent judgments. Later, in *K.P. Varghese v. ITO* , (1981) 4 SCC 173, the Supreme Court held that the SOR and the speech of the mover of the Bill can certainly be referred to "for the purpose of ascertaining the mischief sought to be remedied by the legislation and the object and purpose for which the legislation is enacted." The Court noted the recent trend in juristic thought that for interpretation of a statute, "everything which is logically relevant should be admissible". In *Utkal Contractors and Joinery (P) Ltd. v. State of Orissa* , (1987) 3 SCC 279, the Court said that "a statute is best understood if we know the reasons for it", and for discovering such reasons, SOR is one of the external aids to be used. In *Gurudevdatla VKSSS Maryadit v. State of Maharashtra* , (2001) 4 SCC 534, the Court observed that SOR needs to be looked into, though not by itself a necessary aid, as an aid to construction only if necessary and that when faced with an imperative need to appreciate the proper intent of the

legislature, the SOR may be looked into but not otherwise. The result of all these judgments is summarized pithily by the Supreme Court in one of its latest judgments on the point, Manjula Bhashini's case (supra), in the following words :

"40. The proposition which can be culled out from the aforementioned judgments is that although the Statement of Objects and Reasons contained in the Bill leading to enactment of the particular Act cannot be made the sole basis for construing the provisions contained therein, the same can be referred to for understanding the background, the antecedent state of affairs and the mischief sought to be remedied by the statute. The Statement of Objects and Reasons can also be looked into as an external aid for appreciating the true intent of the legislature and/or the object sought to be achieved by enactment of the particular Act or for judging reasonableness of the classification made by such Act."

In the light of these statements of law, we may examine the Defendants' arguments in the present case. In the first place, there is no imperative need to appreciate the proper intent of the legislature in enacting Section 352B (as amended). The Section clearly provides for the limits of liability which must be in accordance with the 1976 Convention (as amended from time to time) wherever the Convention applies and not for the right to limit itself, namely, to provide for the circumstances in which that right can be exercised and those in which it cannot be so exercised. The object and purpose of the legislature is clear, which is to provide for suitable provisions regarding the subject "limits of liability" dealt with in Chapter II of the 1976 Convention. Article 4 forming part of Chapter I, namely, "the right of limitation", has no place in it. There is, thus, no imperative need to explore an external aid, and that too the SOR of the Bill, to appreciate the intent of the legislature. It can clearly be gathered from the amending statute itself. Secondly, if in spite of the clear purport of the provisions of the amending statute, Article 4 were to be construed as having been incorporated in Section 352B by relying on the SOR, such reliance would probably be the only or sole basis of doing so. That clearly is impermissible.

43. The ship-owner's statutory right to limit liability under Part XA of the MS Act, thus, cannot be defeated upon proof that the particular loss resulted from a personal act or omission of the ship-owner, whether committed with intent to cause such loss, or recklessly and with knowledge that such loss would probably result. So long as the claims in respect of which limitation is sought are capable of being limited under Section 352A of the MS Act, the right to limit can be claimed absolutely and without reference to the question of how such loss resulted, whether by any act or omission on the part of the claimant of such right to limit or otherwise. The claims in the present case are covered under Section 352A. It is nobody's case that they are not. The Plaintiff is, therefore, entitled to limit liability. Issue No. 4 is, accordingly, answered in favour of the Plaintiff, namely, in the affirmative.

44. That brings us to Issue No. 5, which concerns the quantum of the limitation

fund, namely, whether the amount of the fund should be calculated on the basis of the 1976 Convention or the 1996 Protocol. It is the Plaintiff's case that the basis should be the 1976 Convention, whereas the Defendants submit that it should be the 1996 Protocol. The controversy surrounds the expression "as amended from time to time" used in the definition of the "Convention". Clause (b) of Section 352 of the MS Act defines the convention to mean "the Convention on Limitation of Liability for Maritime Claims, 1976 as amended from time to time". The Defendants submit that the expression "as amended from time to time" is meant to capture all future amendments to the Convention. Once an amendment comes into force it gets incorporated into Part XA of the MS Act automatically. The Plaintiff, on the other hand, submits that the expression "as amended from time to time" should be restricted so as to include all those amendments which are made and which came into force between the date of introduction of the Bill by the Parliament and the date on which the Act is brought into force. Thus, it applies, according to the Plaintiff, only to those amendments which have come into force on or before 1 February 2003, on which date the Amending Act 63 of 2002 came into force.

45. A few dates, which are not a matter of contest, may be noted before we assess the relative merits of the rival contentions in this behalf. The 1976 Convention was signed on 19 November 1976, but came into force on 1 December 1986. On 2 May 1996, the 1996 Protocol was signed, but did not internationally have the force of law then. That happened on 17 February 2004. In the meantime, India gave effect to the 1976 Convention by amending the MS Act. On 1 February 2003, the Amending Act 63 of 2002 was brought into force in India. On 17 February 2004, the 1996 Protocol came into force internationally. On 28 March 2011, it was acceded to by India and on 21 June 2011 it came into force in India. In 2012, the 1996 Protocol was further amended. The amended Protocol has come into force worldwide on 8 June 2015. India, however, has not still acceded to that amendment. On these facts, and in the light of the definition of "Convention" in the MS Act, we have to consider what the position in India is as far as the measure of limits under the 1976 Convention is concerned - whether it is frozen as of 1 February 2003 or includes further amendments and if so, which of them.

46. In the first place, the interpretation suggested by the Defendants, namely, that the word "Convention" implies the 1976 Convention as it stands on the date when we seek to apply it to the facts of the case on hand, seems to be more natural. The expression "as amended from time to time" should include, by itself and without anything more, all amendments in future to the Convention. There is no lexicological need to restrict such amendments to only those that exist as of the date of coming into force of the Amending Act which introduced that expression. It is more natural for the Parliament to use the expressions "as amended upto the date of the coming into force of the Amending Act" or simply "as amended" rather than "as amended from time to time" if the intention of the Parliament was to restrict the amendments as suggested by the Plaintiff. The

words "from time to time" are clearly intended to be open-ended, to take within their fold amendments made to the 1976 Convention in future. Secondly, it can safely be said that when the Parliament passed the Amending Act, the 1996 Protocol was already in the pipeline, and was likely to be brought into force. Obviously, the Parliament appears to have used the word "Convention" in the sense of Convention amended from time to time, so as to include amendments some of which were actually in contemplation when the Parliament passed the law, namely, the Amending Act 63 of 2002. The word "Convention" is used in the Amending Act mainly in connection with "limits of liability" in respect of which the 1996 Protocol was signed, though India had yet to accede to the same by the time the Amending Act was passed. In Section 352A(3)(c), the word "Convention" is used in connection with the "amount" to which the applicant is permitted to limit his liability. Section 352B also talks of the provisions of the Convention in the context of the "amount" to which a person may limit his liability. Even in Section 352C(1), the word "Convention" is used whilst referring to the total sum of a limitation fund representing the amounts set out in the Convention. Besides, these references, the other references to the "Convention" are in the context of "Convention country" (a country in which the Convention as amended from time to time is for the time being in force, referred to in Section 352D) and state (which is a party to the Convention, referred in Section 352E), and the rules to be made by the Central Government (having regard to the provisions of the Convention, referred to in Section 352F). All these references show that they naturally deal with the provisions of the Convention for the time being in force, i.e. as they may exist, when sought to be applied, in such amended form as the case may be. Besides, the fact that the 1996 Protocol was deemed to have immediate effect is also evident from the notification of the Ministry of Shipping of 20 April 2012 notifying the Merchant Shipping (Regulation of Entry into Ports, Anchorages and Offshore Facilities) Rules, 2012, which mandate that the insurance for a ship per incident shall not be less than the maximum amount for the limitation of liability as laid down in the 1996 protocol amending the 1976 Convention. These Rules constitute an administrative construction by the Executive of an existing Indian statute, a construction to which this Court may attach some weight and which the Court may not overturn unless it is demonstrably wrong. The following passage from the judgment of the Supreme Court in *Desh Bandhu Gupta and Co. v. Delhi Stock Exchange Association Ltd.*, (1979) 4 SCC 565 may be instructive in this connection.

"9. It may be stated that it was not disputed before us that these two documents which came into existence almost simultaneously with the issuance of the notification could be looked at for finding out the true intention of the Government in issuing the notification in question, particularly in regard to the manner in which outstanding transactions were to be closed or liquidated. The principle of *contemporanea exposition* (interpreting a statute or any other document by reference to the exposition it has received from contemporary authority) can be invoked though the same will not always be decisive of the

question of construction. (Maxwell 12th Edn. p. 268). In Crawford on Statutory Construction (1940 Edn.) in para 219 (at pp. 393-395) it has been stated that administrative construction (i.e. contemporaneous construction placed by administrative or executive officers charged with executing a statute) generally should be clearly wrong before it is overturned; such a construction, commonly referred to as practical construction, although not controlling, is nevertheless entitled to considerable weight; it is highly persuasive. In *Baleshwar Bagarti v. Bhagirathi Dass* the principle, which was reiterated in *Mathura Mohan Sana v. Ram Kumar Saha* has been stated by Mukerjee J. thus:

It is a well-settled principle of construction that courts in construing a statute will give much weight to the interpretation put upon it, at the time of its enactment and since, by those whose duty it has been to construe, execute and apply it. I do not suggest for a moment that such interpretation has by any means a controlling effect upon the Courts; such interpretation may, if occasion arises, have to be disregarded for cogent and persuasive reasons, and in a clear case of error, a Court would without hesitation refuse to follow such construction.

Of course, even without the aid of these two documents which contain a contemporaneous exposition of the Government's intention, we have come to the conclusion that on a plain construction of the Notification the proviso permitted the closing out or liquidation of all outstanding transactions by entering into a forward contract in accordance with the rules, bye-laws and regulations of the respondent."

47. There is the well-known concept of legislation by reference, where the legislature refers to a statute by a mere reference or citation, which makes any modification, repeal or re-enactment of that statute to have effect on the referring statute. Unlike in the case of legislation by incorporation, where the incorporated statute becomes an integral part of the incorporating statute and remains frozen as of the date of the incorporation, in the former case the referred statute applies in its amended form for the time being in force as and when its application is invoked. Though we are not strictly concerned with this difference in the present case (since, as I have noted above, what may be said to be incorporated or referred, as some may put it, here is the Convention "as amended from time to time"), the discussion is only in the context of legitimacy of the legislative device of applying any particular statute (which is outside the incorporating or referring statute) as amended for the time being. Legislatures frequently adopt this device. That clearly appears to be the case here too. It is but natural for the Parliament to leave the question of quantum to be decided by Convention countries in a future amendment, provided, of course, India is party, or accedes to, it.

48. The Plaintiff contends that if the Defendants are right that means what the Parliament has done is to make future amendments to the Convention directly applicable in India, i.e. without the Parliament having to vote on them, in which case there is an abdication of the essential legislative function of the Parliament.

The Plaintiff submits that in that case Part XA would be vulnerable to a constitutional challenge on that ground. The Plaintiff contends that that would give a carte blanche to an undefined and unknown group of countries to amend our domestic legislation, namely, the MS Act, and that too without any guidelines, principles, standards or safeguards. This would amount to non-application of mind and an abdication of what the Parliament is constitutionally enjoined to do, that is to say, legislate Indian municipal law. It is, the Plaintiff would argue, an impermissible delegation of the Parliament's authority. Learned Counsel for the Plaintiff relies on the Supreme Court judgment *In Re Delhi Laws* , AIR 1951 SC 332 case, followed by *Rajnarain Singh v. The Chairman, Patna Administration Committee* , (1955) 1 SCR 290, *B. Shama Rao v. The Union Territory of Pondicherry* , (1967) 2 SCR 650, *Gwalior Rayon Silk Mfg.(Wvg.) Co. Ltd. v. Assistant Commissioner of Sales Tax* , (1974) 2 SCR 879 and more recently *Manoj Narula v. Union of India* , (2014) 9 SCC 1, in support of his contentions.

49. Before we take up this discussion, we may at once make one clarification. It is not even the Defendants' case that amended provisions of the Convention would apply straightway without any ratification by the Indian Government. Amended Convention, which is ratified by the Country, would alone apply. That must evidently be so. A treaty, or any alteration of it, may have effect so far as India is concerned only if India is party to it or accedes to it. There is, thus, no question of any unidentified or unknown group of nations directly amending our domestic legislation. Before giving any effect, such amendment would have to have the accession of the executive government of the country. That, however, still leaves the question as to whether the Union Government could itself be delegated the power to amend the domestic law.

50. The Parliament, in making a referential legislation, that is to say, a statute by reference providing for application of any law for the time being in force outside the referring statute, does not really delegate its power to legislate. When it makes such legislation, it actually expresses its legislative will and lays out a legislative policy to the effect that a certain rule of conduct provided by a particular law or dispensation for the time being in force, would be binding in stated circumstances.

51. Even if we were to consider Part XA of the Amended MS Act as containing a delegation to the executive Government to bring about a change in the particular rule of conduct and in that sense, a change in the applicable law, the delegation is clearly permissible and cannot be described as excessive. The Plaintiff's reasons for calling the delegation impermissible or excessive are that such authorisation in effect gives the power to the delegate to repeal a law in force or substitute the same with or without modification and that would be *ultra vires*; and that such authorisation would be delegation of an essential legislative function and therefore, *ultra vires*.

52. Learned Counsel for the Plaintiff relies on *Delhi Laws* case (supra) and its

follow-up in later judicial pronouncements in this behalf. In *Delhi Laws*" case, seven separate opinions were rendered by the learned judges of the Supreme Court in an advisory opinion under Article 143 of the Constitution of India. The Court's opinion was sought in the reference on three questions, which related to the vires of (i) Section 7 of the *Delhi Laws Act, 1912*, (ii) Section 2 of the *Ajmer-Merwara (Extension of Laws) Act, 1947* and (iii) Section 2 of the *Part C States (Laws) Act, 1950* - whether and to what extent were these provisions ultra vires the legislatures which passed them. Kania C.J. held all three Sections to be unconstitutional and ultra vires the legislatures, whilst Fazl Ali J, Patanjali Sastri J, and Das J held that none of the provisions were ultra vires. Mahajan J held these provisions to be ultra vires only in certain respects or particulars. Mukherjea J and Bose J held Section 7 of the *Delhi Laws Act* and Section 2 of the *Ajmer-Merwara (Extension of Laws) Act* to be intra vires, but Section 2 of the *Part (States (Laws) Act* to be ultra vires to a certain extent. The learned Judges came to their decisions by diverse reasons. Even those that arrived at the same answers did not entirely concur with each other on the reasons for such answers. In particular, they did not agree on the question of limitation upon the exercise of the power of delegation by the Indian legislature, with which we are directly concerned in the present matter. For example, Fazl Ali J, who concluded that Section 7 of the *Delhi Laws Act* and Section 2 of the *Ajmer-Merwara Act* (along with Section 2 of *Part C States Act*) to be intra vires, held as follows (para 74) :

"(74) The conclusions at which I have arrived so far may now be summed up:---

(1) The legislature must normally discharge its primary legislative function itself and not through others. (2) Once it is established that it has sovereign powers within a certain sphere, it must follow as a corollary that it is free to legislate within that sphere in any way which appears to it to be the best way to give effect to its intention and policy in making a particular law, and that it may utilize any outside agency to any extent it finds necessary for doing things which it is unable to do itself or finds it inconvenient to do. In other words, it can do everything which is ancillary to and necessary for the full and effective exercise of its power of legislation. (3) It cannot abdicate its legislative functions, and therefore while entrusting power to an outside agency, it must see that such agency, acts as a subordinate authority and does not become a parallel legislature. (4) The doctrine of separation of powers and the judicial interpretation it has received in America ever since the American Constitution was framed, enables the American courts to check undue and excessive delegation but the courts of this country are not committed to that doctrine and cannot apply it in the same way as it has been applied in America. Therefore, there are only two main checks in this country on the power of the legislature to delegate, these being its good sense and the principle that it should not cross the line beyond which delegation amounts to "abdication and self-effacement".

On the other hand, Mukherjea J. who came to the same answer on the two provisions, indicated his reasons as follows (Para 262) :

"On a consideration of all these decisions I have no hesitation in holding that as regards constitutionality of the delegation of legislative powers the Indian Legislature cannot be in the same position as the prominent British Parliament and how far delegation is permissible has got to be ascertained in India as a matter of construction from the express provisions of the Indian Constitution. It cannot be said that an unlimited right of delegation is inherent in the legislature power itself. This is not warranted by the provisions of the Constitution and the legitimacy of delegation depends entirely upon its being used as an ancillary measure which the legislature considers to be necessary for the purpose of exercising its legislative powers effectively and completely. The legislature must retain in its own hands the essential legislative functions which consist in declaring the legislative policy and laying down the standard which is to be enacted into a rule of law, and what can be delegated in the task of subordinate legislation which by its very nature is ancillary to the statute which delegates the power to make it. Provided the legislative policy is enunciated with sufficient clearness or a standard laid down the courts cannot and should not interfere with the discretion that undoubtedly rests with the legislature itself in determining the extent of delegation necessary in a particular case. These, in my opinion, are the limits within which delegated legislation is constitutional provided of course the legislature is competent to deal with and legislate on the particular subject-matter. "

Das J, who came to the same conclusion as Fazl Ali J, observed that short of self-effacement, the legislative power may be as freely and widely delegated as the legislature may think fit and choose, in the following words (Para 329) :

"The only rational limitation upon the exercise of this absolute power of delegation by the Indian Legislature as by any Dominion Legislature is what has been laid down in the several privy council and other cases from which relevant passages have been quoted above. It is that the legislature must not efface itself or abdicate all its powers and give up its control over the subordinate authority to whom it delegates its law-making powers. It must not, without preserving its own capacity intact, create and arm with its own capacity a new legislative power not created or authorised by the instrument by which the legislature itself was constituted. In short, it must not destroy its own legislative power. There is an antithesis between the abdication of legislative power and the exercise of the power of legislation. The former excludes or destroys the latter. There is no such antithesis between the delegation of legislative power and the exercise of the legislative power, for however wide the delegation may be, there is nothing to prevent the legislature, if it is so minded, from, at any time, withdrawing the matter into its own hands and exercising its law-making powers. The delegation of legislative power involved an exercise of the legislative power. It does not exclude or destroy the legislative power itself, for the legislative power is not diminished by the exercise of it. A power to make law with respect to a subject must, as we have seen, include within its content, the power to make a law delegating that power. Having regard to entry No. 97 in the Union List and article

248 of our Constitution, the residuary power of our Parliament is wide enough to include delegation of legislative power of a subject-matter with respect to which Parliament may make a law. Apart from that consideration, if a statute laying down a policy and delegating power to a subordinate authority to make rules and regulations to carry out that policy is permissible then I do not see why an Act merely delegating legislative power to another person or body should be unconstitutional if the legislature does not efface itself or abandon its control over the subordinate authority. If the legislature can make a law laying down a bare principle or policy and commanding people to obey the rules and regulations, made by a subordinate authority, why cannot the legislature without effacing itself but keeping its own capacity intact, leave the entire matter to a subordinate authority and command people to obey the Commands of that subordinate authority ? The substance of the thing is the command which is binding and the efficacy of the rules of conduct made by the subordinate authority is due to no other authority than the command of the legislature itself. Therefore, short of self-effacement, the legislative power may be as freely and widely delegated as the Dominion Legislature, like the British Parliament, may think fit and choose. "

53. As submitted by learned Counsel for the Defendants, it has repeatedly been held by several subsequent benches of the Supreme Court, including those which were comprised by some of the very judges who gave opinions in the Delhi Laws" case, that there is no discernible ratio that can be gathered from the opinions of the judges even though certain definite conclusions have been arrived at by majority. The observations of Patanjali Sastri J in *Kathi Raning Rawat v. State of Saurashtra* , AIR 1952 SC 123 (para 9), of Bose J in *Rajnarain Singh* (supra) (P.298) and Shelat J in *B. Shama Rao* (supra)(P.567) are some of the instances. Finally, we have the latest judgment of Supreme Court in *Keshavlal Khemchand & Sons Pvt. Ltd. v. Union of India* , AIR 2015 SC 1168, which quotes the following words of Patanjali Sastri, J. in *Kathi Raning Ravat* (supra) (para 53) :

"While undoubtedly certain definite conclusions were reached by the majority of the Judges who took part in the decision in regard to the constitutionality of certain specified enactments, the reasoning in each case was different, and it is difficult to say that any particular principle has been laid down by the majority which can be of assistance in the determination of other cases."

In particular, the Supreme Court in *Keshavlal Khemchand & Sons* (supra) held that none of the judgments of the Supreme Court so far has laid down any principle as to what exactly constitutes "essential legislative function". The Supreme Court in *Keshavlal Khemchand & Sons* laid down the following propositions, as a result of all earlier decisions of the Supreme Court on the subject :

"63. An examination of the above authorities, in our view leads to the following inferences;

(i) The proposition that essential legislative functions cannot be delegated does not appear to be such a clearly settled proposition and requires a further examination which exercise is not undertaken by the counsel appearing in the matter. We leave it open for debate in a more appropriate case on a future date.

For the present, we confine to the examination of the question:

(a) Whether defining every expression used in an enactment is an essential legislative function or not?

(ii) All the judgments examined above recognize that there is a need for some amount of delegated legislation in the modern world.

(iii) If the parent enactment enunciates the legislative policy with sufficient clarity, delegation of the power to make subordinate legislation to carry out the purpose of the parent enactment is permissible.

(iv) Whether the policy of the legislature is sufficiently clear to guide the delegate depends upon the scheme and the provisions of the parent Act.

(v) The nature of the body to whom the power is delegated is also a relevant factor in determining "whether there is sufficient guidance in the matter of delegation."

54. The upshot of the above discussion is that as a matter of principle, application of a future amendment to the referred or cited law as a governing rule of conduct per se does not amount to excessive delegation of legislative power. The referring or citing statute may consist of sufficient guidance for the delegate. This may be in the form of a clear enunciation of the legislative policy in the parent statute for carrying out its purpose. In our case, the Parliament has indicated that so far as limit of liability, or in other words, the quantum of limitation fund, is concerned, the Parliament would rather go with the measures forming part of the international convention on the subject to which India is a party or which is acceded to by India, i.e. the 1976 Convention as amended from time to time. The quantum of the fund is, by its very nature, an international standard and there is nothing excessive about adopting that standard even for future periods so long as India accedes to the same. By its very nature, it is a matter to be left to the executive government. Such delegation does not change the basic legislative will expressed by the Parliament in the Amending Act 68 of 2002, but rather reflects, and accords with, that will.

55. In the premises, the limits of liability have to be in accordance with the 1976 convention as amended from time to time. The amended limits of liability in terms of the 1996 Protocol acceded to by India are, thus, applicable in the present case. Issue No. 5 is, accordingly, answered in favour of the Defendants.

56. All that remains now is to calculate the limit of liability as per Article 6 of the 1976 convention as amended by the 1996 Protocol. The amended Article provides that in respect of claims other than for loss of life or personal injury, the

limit is to be fixed at 1 million Units of Account (SDR) for tonnage not exceeding 2000 tons and thereafter, for each ton from 2,001 to 30,000 tons at the rate of 400 Units of Account (SDR). The tonnage of the vessel calculated in accordance with the tonnage measurement rules in Annexure 1 of the International Convention on Tonnage Measurement of Ships, 1969 works out to 18,754 tons, as per the Plaintiff's own estimate. The limit calculated accordingly would work out to 7,629,600 total units (SDR). That is the principal amount to be comprised in the fund. There is no dispute between the parties thus far. There is also no dispute that interest would have to be calculated on this principal amount from the date of the occurrence, namely, 7 August 2011, and upto the date of actual constitution of the Limitation Fund and that SDR to INR conversion must be applied as at this latter date. The rate of interest itself is also not a matter of serious contest. The PLR is of 14.75 per cent, and the parties agree that the interest ought to be pegged around this rate. And so is the SDR to INR conversion rate of today. What is contested is whether or not the Limitation Fund ought to be actually constituted or should this Court simply grant a decree for constitution of a Limitation Fund, leaving the matter of actual constitution by depositing the amount in Court to the Plaintiff. The Plaintiff seeks a decree in the present suit, in the first place, for a declaration that the aggregate liability of the Plaintiff for claims arising out of the particular occurrence, namely, alleged loss/damage to cargo on board the vessel M.V. YURIY ARSHENEVSHKY on its journey from Tianjin and Shanghai to Mundra and Mumbai in August - November 2011, is the limitation amount decreed and no more. Secondly, it seeks directions for setting up of the Limitation Fund accordingly. Thirdly, it seeks a declaration that upon the constitution of such Fund by deposit of the requisite amount, the Plaintiff is not liable in damages over and above the amount of such Fund. In other words, what the Plaintiff gets, if its suit is decreed, is a decree for constitution of Limitation Fund and protection from claims against it arising out of the occurrence upon actual constitution of the Fund. The Plaintiff's ships and other properties are not liable to be proceeded against; the claimants must restrict their claims only against the Fund so constituted. The Plaintiff is entitled, as I have noted above, to a declaration of limitation of liability and a decree for constituting a Limitation Fund. Actual constitution of the Fund is a matter of implementation of this decree. If and so long as the Plaintiff does not actually constitute the Fund by depositing the amount of limitation in Court, the Plaintiff is not entitled to the protections in terms of declarations granted by the Court; as and when it does, the protections must follow.

57. The scheme of Part XA of the MS Act makes it clear that the High Court to which application under sub-section (1) of Section 352C is made, in the first place, determines the amount of the owner's liability. After determining such amount, that is to say, the limit of liability, in accordance with the provisions of the 1976 Convention as amended from time to time, the Court requires the Plaintiff to deposit such amount or produce a satisfactory guarantee. The amount so deposited or guarantee so given constitutes the Limitation Fund for the

purpose of all claims referred to in sub-section (1) of Section 352C. The effect of constitution of such fund is that no person entitled to claim against the fund can exercise any right against any other assets of the owner in respect of a claim against the fund, if that fund is actually available for the benefit of the claimant. The fund has to be distributed rateably amongst the several claimants having claims against the owner. Upon constitution of such fund or furnishing of security in lieu thereof, any arrested ship or security given by the owner is required to be released. That is the broad scheme. The benefits of a limitation decree, such as immunity from claims against all other assets and release of ships or security, follow only after the shipowner actually constitutes a fund pursuant to the decree and not until then. In this scheme, there is no scope for this Court to compel the Plaintiff to actually constitute the fund or furnish the security. A limitation decree is a peculiar defensive remedy available to a shipowner to prevent claimants from exercising their rights against the shipowner otherwise than under Part XA. It is of essence that the fund is constituted and the amount is actually available to the claimants. Conversely, without constituting the fund or making the amount actually available, immunity from claims cannot be availed of by the shipowner. Any decree of a court is available for execution subject to the law of limitation. Ditto for the decree of limitation.

58. In the premises, the suit is decreed in terms of the following order:

"(i) It is ordered and decreed that the aggregate principal liability of the Plaintiff for all claims of damages including property claims and other consequential losses arising out of any loss of, or damage to, cargo occurring on board or in direct connection with the operation of the vessel M.V. YURIY ARSHENEVSHKY on its journey from Tianjin and Shanghai to Mundra and Mumbai, shall be the sum of Special Drawing Rights ("SDR") 7,629,600;

(ii) It is ordered and declared that the principal amount of SDR 7,629,600 shall carry an interest of 14.75 per cent per annum from 7 August 2011 and till actual constitution of Limitation Fund or furnishing of security acceptable to this Court as provided hereinbelow;

(iii) It is ordered and decreed that the Plaintiff shall set up and constitute a Limitation Fund in the sum of SDR as provided in clause (i) and (ii) above and converted as mentioned below for meeting all claims referred to in clause (i) above or alternatively furnish a bank guarantee of a nationalized bank in respect of the amount of the fund in such form as may be acceptable to the Prothonotary and Senior Master;

(iv) The fund or security provided hereinabove shall be constituted or furnished by the Plaintiff at his option in USD or INR at the conversion rate of SDR to USD or SDR to INR, as the case may be, applicable on the date of constitution of the fund or giving of the security;

(v) Upon constitution of such fund or furnishing of such security, the Plaintiff shall be entitled to seek stay of further proceedings in any claim against the

Plaintiff arising out of the occurrence referred to in clause (i) above and other appropriate orders as to release of any res or security posted therein, subject to the following;

(vi) Upon constitution of the fund or furnishing of the security, as the case may be, the Plaintiff shall give individual notices to parties whose suits for enforcement of claims against the Plaintiff or the vessel M.V. YURIY ARSHENEVSHKY are pending in this Court or any other Court and also place advertisements in three local newspapers, two in English and one in local language, specifying a period of ninety days for filing of claims against the fund;

(vii) The claims received in pursuance of such notices and advertisements shall be placed before the Court and directions shall be sought for distributing the amount constituting the fund rateably amongst the claimants;

(viii) No order as to costs."

1Notice of Motion No. 769 of 2014 decided on 5 January, 2015.