

(1997) 12 BOM CK 0052

In the Bombay High Court

Case No : Appeal No. 298 of 1997 in Notice of Motion No. 285 of 1997 in Admiralty Suit No. 113 of 1996

m.v. Mariner IV, a Foreign Flag Vessel and another

APPELLANT

Vs

Videsh Sanchar Nigam Ltd.

RESPONDENT

Date of Decision : 15-12-1997

Acts Referred:

Administration of Justice Act, 1956 — Section 3(4)
Admiralty Courts Act, 1861 — Section 6
Civil Procedure Code, 1908 (CPC) — Order 38 Rule 5
Constitution of India, 1950 — Article 225, 3(1), 51
Merchant Shipping Act, 1958 — Section 443, 444

Citation : (1998) 2 ALLMR 755 : (1998) 5 BomCR 312 : (1998) 1 MhLj 751

Hon'ble Judges : V.P. Tipnis, J; R.P. Desai, J

Bench : Division Bench

Advocate : George A. Rebello and Ms. E. Marker, for the Appellant; Vasant Kotwal, Sunip Sen, V. Dhond and A.Wani, instructed by Little and Co., Venkateshwaran and Sunip Sen, instructed by V.K. Ramabhadran, for the Respondent

Judgement

V.P.Tipnis, J.—This appeal by the original defendants impugns the order dated 27th February, 1997, passed by the learned Judge in Notice of Motion No. 285 of 1997 in Admiralty Suit No. 113 of 1996. The notice of motion was moved by the defendants inter alia for a relief that the order of arrest of the first defendant vessel be vacated and the plaintiffs be directed to pay costs by way of damages at the rate of U.S.\$ 5,000/- per day.

2. The plaintiffs Videsh Sanchar Nigam Ltd. filed an Admiralty Suit No. 113 of 1996 against (1) m.v. Mariner IV a foreign vessel, and (2) AI-Fatah Shipping Co. incorporated under the laws of U.A.E. for recovery of U.S. \$ 77,21,133.583 together with interest by way of damages for the loss suffered by the plaintiffs due to the damage caused to the plaintiffs property by the vessel m.v. Mariner II. The plaintiffs alleged that they have two under water submarine optical fibre telecommunication cables laid by them (i) stretching from Singapore to Marseille

(France) and branching at Bombay (known as SEA-ME-WE-2) and (ii) stretching from Bombay to Fijurah (U.A.E.) (known as India-U. A.E.J. The said cables are sheathed in extremely strong tinsels armoring with high breaking strength and buried 1.3 meters below the sea bed. The said cables are used for high volume voice (sic) and data transfer/communication. In view of their importance, the precise location of the said cables is shown on the Admiralty Charts of the Approaches to Bombay Port, which are mandatory required to be kept on board all ships coming to Bombay Port. The area proximate to the route of the cables is therefore a non anchoring zone and so shown on the said chart. All ships are therefore, required to stay sufficiently clear of the said cables and not drop anchor in their vicinity and/or in the said non-anchoring zone.

3. On 18th and 19th June, 1996, the cables were broken causing disturbance in the communication. The plaintiffs contacted the Coast Guard Authority to investigate into the matter. The services of surveyor M/s. Ericson Richards were also taken and the investigation revealed and clearly indicated that the vessel m.v. Mariner II was in the close proximity at the place of occurrence where damage to the cables was caused. It was found that the anchor of the offending vessel i.e., m.v. Mariner II was got detached and it was entangled in the cables which were damaged. The report of the surveyor pointed out involvement of the vessel m.v. Mariner II in the damage caused to the cables.

4. On the basis of the material on record the learned Judge held that the plaintiffs have succeeded in making out a prima facie case justifying order of arrest. On this reasoning the learned Judge dismissed the notice of motion for vacating the order of arrest.

5. It is an admitted position that the vessel arrested was not a m.v. Mariner II but m.v. Mariner IV, the defendant No. 1 to the suit and although there is absolutely nothing in the order to indicate why m.v. Mariner IV which was not the offending ship was arrested, it is obvious that the learned Judge confirmed the arrest of the m.v. Mariner IV being a sister ship of m.v. Mariner II meaning thereby both the ships were owned by the same owner.

6. The question in this appeal which is raised is whether this Court has jurisdiction to order arrest of the sister ship in an Admiralty suit.

7. Shri Rebello the learned Counsel for the appellants contended that admittedly the ship arrested is not the offending vessel. Shri Rebello submitted that though such a provision is found in the international Convention for the unification of certain rules relating to the arrest of sea-going ships, Brussels, 10th May, 1952, it is not applicable to India as India is not a signatory to the convention nor any Act is passed by the Parliament empowering the courts to arrest the sister ship in the like manner. Shri Rebello submitted that the decision of the Apex Court in the matter of M.V. Elisabeth and Others Vs. Harwan Investment and Trading Pvt. Ltd., Hanoekar House, Swatontapeth, Vasco-De-Gama, Goa, , m.v. Elisabeth v. Harwan Investment and Trading Pvt. Ltd. Hanoekar House, Swatontapeth, Vasco

De Gama, Goa, cannot help the plaintiffs as in the said case there was no issue before the Apex Court as to whether the sister ship doctrine is applicable or could be adopted by Indian Courts and as such the said decision or observations therein, cannot be an authority for the proposition that the Indian Courts have jurisdiction to order arrest of a sister ship. Shri Rebello emphasized that in the case before the Apex Court the cause of action was in respect of the offending ship. Shri Rebello relied upon the judgment and order dated 9-11-1993 delivered by Justice Variava in the Admiralty Suit No. 39 of 1993 in support of his submission that despite the decision of the Apex Court in *m.v. Elizabeth*, there is no jurisdiction in the Indian Courts to direct arrest of sister ship. Shri Rebello therefore submitted that the order of the learned Judge is incorrect, the order of arrest ought to have been vacated and the appeal is required to be allowed. Shri Rebello also adopted the submission of Shri Venkateshwaran learned Counsel for the Interveners.

8. Shri Venkateshwaran learned Counsel for the Interveners supported the appellants. Shri Venkateshwaran pointed out that till about 1993, the High Court of Bombay did not arrest the sister ship in admiralty jurisdiction. Thereafter there have been several contradictory orders under some arrest of sister ship is directed while on other occasions arrest of sister ship has been declined. Shri Venkateshwaran submitted that the decision of the Apex Court in *m.v. Elizabeth* cannot be construed as a division vesting jurisdiction in the High Court to arrest a sister ship. He further submitted that some observations of the Apex Court concerning this aspect in the said judgment are neither a ratio decidendi nor a obiter dicta so as to make those observations binding on this Court. He further submitted that the observations of the Apex Court in the matter of *m.v. Elizabeth* to the extent they make Brussels Convention applicable to India are contrary to the decision of a larger Bench of the Apex Court reported in *V.O. Tractoroexport, Moscow Vs. Tarapore and Company and Another*, . Shri Venkateshwaran contended that the only issue before the Apex Court as is evident from paragraphs 5 and 6 of the judgment in *m. v Elizabeth*, was whether the Admiralty Court in India had jurisdiction to arrest a ship on an action in tort in regard to cargo in a outgoing ship. Shri Venkateshwaran took us through several parts of the judgment of the Apex Court in *m.v. Elizabeth* and contended that it does not support the convention that the Indian Courts have jurisdiction to direct arrest of a sister ship. He in fact contended that although Brussels Convention was passed in May, 1952, the English Courts exercised jurisdiction of arrest of sister ship only from 1956. He further contended that section 443 of the Merchants Shipping Act, clearly indicates that it is only the offending ship which could be arrested. He further contended that though the Merchants Shipping Act, was enacted in 1958 i.e. much after the Brussels Convention of 1952 and although the Act was amended 14 times, no amendment was carried out in the Act to bring it in consonance with the Brussels Convention which clearly shows that the Parliament never intended to adopt the same. Shri Venkateshwaran did not support the reasoning of Justice Variava in the matter of *M.T. Leontas* to the

effect that the judgment of the Apex Court in *m.v. Elizabeth* merely expands the powers of the Court within the existing jurisdiction and does not expand the jurisdiction. Shri Venkateshwaran relied upon the decision of the Division Bench of this Court reported in *Mohandas Issardas and Others Vs. A.N. Sattanathan and Others*, , as also the decision of the Apex Court reported in *Amar Nath Om Prakash and Others Vs. State of Punjab and Others*, , to explain what is the ratio decidendi of a case and what is obiter dicta and contended that certain observations of the Apex Court in *m.v. Elizabeth* cannot be treated either as ratio decidendi or as an obiter dicta. Shri Venkateshwaran also relied upon the decision of the Apex Court reported in *The State of U.P. Vs. Ram Chandra Trivedi*, , in support of his submission that *m.v. Elizabeth* is two Bench decision whereas the decision reported in *V.O. Tractoroexport, Moscow Vs. Tarapore and Company and Another*, is three Bench decision and in case of conflict the High Court is bound to follow the decision of the larger Bench of the Apex Court. Shri Venkateshwaran submitted that unless the International Conventions are incorporated by appropriate legislation by the Indian Parliament the International Conventions cannot be applied by Indian Courts and in case of conflict it is always the Act of Parliament which is to be implemented as against the International Conventions. Shri Venkateshwaran in this behalf relied upon the decision of the Apex Court reported in *Jolly George Varghese and Another Vs. The Bank of Cochin*, and *V.O. Tractoroexport, Moscow Vs. Tarapore and Company and Another*, . In support of his contention that even in England arrest of sister ship was resorted to only in the year 1956, he relied upon the decision reported in 1957 (2) All ER 374, *Schwarz and Co. (grain) Ltd. v. St. Elefterio ex Arion (owners)*.

9. Shri Kotwal, learned Counsel appearing for the respondents took us through the provisions of section 2(2) of the Colonial Courts of Admiralty Act, 1890, as also 1861 Act. Shri Kotwal contended that the decision of the Apex Court in *m.v. Elizabeth* clearly shows that the High Courts of Coastal Indian State has enough jurisdiction to direct arrest of a sister ship. Shri Kotwal submitted that at one particular time there was a dualistic theory prevailing when the courts insisted that the Rules of Maritime Law generally recognised by civilized nations are statutorily incorporated by their respective Municipal laws before the same could be applied. However, according to Shri Kotwal the dualistic theory is given a go-by in the year 1977, by Lord Denning in the matter of *Trendtex Trading v. Bank of Nigeria*, 1977 C.A. 553 and the said decision in *Trend/axis* specifically followed in the decision of the Apex Court in *Gramophone Company of India Ltd. Vs. Birendra Bahadur Pandey and Others*, . In the submission of Shri Kotwal the decision of the Apex Court in *m.v. Elizabeth* treats the provisions/principles contained in the Convention as principles recognized by the civilized nations as the source of maritime law. Shri Kotwal submits that in numerous cases in England, Australia and Panama ratified but unincorporated conventions or ungratified and unincorporated conventions or indirectly incorporated conventions are referred to the Supreme Court of Canada in 1889 (2) S.C.R. 689

Canada has taken a similar approach to one which is taken by the Apex Court in *m. v. Elizabeth*. Shri Kotwal submitted that the arrest of a ship is a matter of power and remedy; that arrest of any property was permissible in England. Shri Kotwal submits that the High Courts in India as superior courts and as repositories of all the judicial sovereignty and judicial powers of a coastal State have inherent and plenary powers (including power to determine their own powers) and unless expressly barred, unlimited jurisdiction and can assume jurisdiction over (1) all maritime and admiralty matters or disputes in respect of all maritime claims or questions (2) all persons who are within the territory or who submit to jurisdiction, (3) all things/ships within Indian waters or within Indian territory irrespective of the nationality or place of residence of owners or the place where cause of action arose. Shri Kotwal submitted that the High Court has power to administer general maritime law whether derived by virtue of statute or otherwise. While so administering the Maritime Law the High Court shall have regard to the International law and comity. In this behalf the High Court can exercise powers which it possesses for the purpose of its other civil jurisdiction including the power to grant interim reliefs and attachment. The High Court can devise, adapt, adopt procedural remedies by analogy, expediency and by drawing from other system of law, practice including the power to arrest in accordance with general maritime law a ship or other property to found jurisdiction or to obtain security. Shri Kotwal submitted that without limiting aforesaid the extent and quality of admiralty jurisdiction and the manner of exercise thereof was assimilated to that which was exercised or was or is capable of being exercised in respect of a maritime claim by the High Court of England administering English maritime law whether by virtue of statute or otherwise.

10. Shri Kotwal next submitted that the Court will also have jurisdiction to arrest a sister ship on the basis of the common maritime law in India. In this behalf he referred to the Supreme Court of Judicature of Bombay, Letters Patent British Act, of 1840, Letters Patent of 1852, British Act of 1861. He referred to several other observations of the Apex Court in the judgment of *m.v. Elizabeth*.

11. Shri Kotwal further contended that the jurisdiction can also be traced on the basis of English Admiralty Law (otherwise than statutes). The Act of 1890, entitles the High Court to exercise the jurisdiction as English High Court "whether existing by virtue of any statutes or otherwise". According to Shri Kotwal under the English Law or general law of the sea as recognized in England arrest of any property was permissible. (*Banco*) 0, 1971 (1) L.L.R. 49 per Lord Denning and *Rasu Maritima S.A.*, 1978 (1) W.L.R. 657 (per Lord Denning) show that Admiralty Court could arrest any property within its jurisdiction. Shri Kotwal relied upon the following observations of Lord Denning in *Banko*:

"Long year ago in the 17th and 18th centuries the ordinary mode of commencing a suit in admiralty was by arrest, either of the person or of the defendant or his goods. Not only could the offending ship be arrested but the other ships of the defendant could be arrested also, any other goods that belonged to him, so long

as they were within its jurisdiction. The object was to make the defendant put up bail or provide fund for securing compliance with the judgment....."

In *Rasu Maritima S.A.*, 1978 (1) Q.B. 644 Lord Denning observed as under:

"It is said that this new procedure (of seizure of assets) was never known to the law of England. But that is no correct... it was much use in the city of London by a process called foreign attachment. It was originally used so as to compel the defendant, to appear and to give bail to attend but it was extended to all cases when he was not within the jurisdiction."

The learned Judge then quoted from 1842 edition on laws, custom....of London by Pulling where it is observed as under:

"This customary mode of proceeding still exists in other ancient cities and towns of England, as Bristol, Exeter, Lancaster, as well as in Scotland, and Jersey, and in most maritime towns on the continent in Europe"

. Shri Kotwal submitted that in the light of the observations of Thommen, J., in *m.v. Elizabeth* the fact that such power was exercised or was capable of being exercised is sufficient. Shri Kotwal also submitted that the powers to arrest a sister ship is a matter of procedure. It is irrelevant as to whether the Court has jurisdiction in respect of particular res or not. The power to arrest any property to secure a claim does not raise any question of jurisdiction as the power to seize or require a peon to secure a claim is a matter of power and procedure. It is merely a matter of remedy for a violation of a plaintiff's right. He again referred to the several observations of the Apex Court in the decision of *m.v. Elizabeth*.

12. Shri Kotwal next submitted that it is misnomer to hold that the High Court has different jurisdictions like original civil, equity and admiralty. The High Court as a superior Court had always unified structure having consolidated/concurrent jurisdiction in civil, equity, admiralty and other subject matters or fields. In this Shri Kotwal relied upon paragraphs 6 and 7 of the decision of the Division Bench of this Court reported in *M/s. CNA Peejay Exports Pvt. Ltd. Vs. M.V. Nikolay Maksinov and others*, the learned Judges have with reference to the observations of the Apex Court in *m.v. Elizabeth* observed as under:

.....The Supreme Court further observed in paragraph 90 that admiralty jurisdiction is an essential aspect of judicial sovereignty which under the Constitution and the laws is exercised by the High Court as a superior Court of record administering justice in relation to persons and things within its jurisdiction. The power to enforce claims against foreign ships is an essential attribute of admiralty jurisdiction and it is assumed over such ships while they are within the jurisdiction of the High Court by arresting and detaining them. In paragraph 94 the Supreme Court observed :

"Once a foreign ship is arrested in Indian waters by an order of the High Court in exercise of the admiralty jurisdiction vested in it by statute, or inherent in it as a Court of record, in respect of any maritime claim against its owner, wherever the

cause of action may have arisen, and whether or not the ship is subsequently released by the owner furnishing security, proceedings must continue against the owner as in any other suit".

. Shri Kotwal therefore submitted that even while dealing with the maritime claim the Court has ample power of exercising its normal Original Civil Jurisdiction which enables the Court to apply admiralty principles side by side with common law principles and adopt the remedies available in exercising jurisdiction in other fields and systems of law. Shri Kotwal submitted that the basis of international law evidenced by the 1952, Convention which represent a compromise between the rigid common law rule that only offending vessel can be arrested and the civil law system that any property could be arrested. Shri Kotwal further submitted that the development of maritime law has shown that it was never created as a definite all inclusive body of law. It has been developed over a period of many centuries and is still in continuous process of development. It does not require perpetuation of all historically characteristic principles, rules and practices only. The necessities of international trade and commerce have dictated that the development should be along uniform lines in the several maritime nations and the expression admiralty or maritime should be construed in contemporary context.

13. Shri Kotwal submitted that the purpose of the arrest of a ship could be to obtain security simpliciter where jurisdiction exists or for acquiring jurisdiction and obtaining security. According to Shri Kotwal the Court can arrest a sister ship in both the aforesaid cases. Shri Kotwal pointed out that the attachment of property belonging to the defendant as a security for satisfaction of the claim of the claimant is the principle which is already not only known but statutorily recognized in the Code of Civil Procedure, by way of Order XXXVIII, Rule 5 thereof. Shri Kotwal submitted that the decision of Justice Variava in *Leontas* is not correct as Justice Variava has not correctly interpreted the decision and observations of the Apex Court in *m.v. Elizabeth*. Shri Kotwal submitted that therefore the proper way is to apply general maritime law, Civil law principles as applicable in admiralty matters and by international law and conventions as source of law or as evidencing an accepted principle of international law. Shri Kotwal submitted that the decision in *Leontas* is not correct as the summary of what was canvassed and upheld in *m.v. Elizabeth* is contrary to what was in fact submitted and upheld by the Supreme Court. According to Shri Kotwal the learned Judge has mixed up "assumption of jurisdiction" and "exercise of power on assumption". According to Shri Kotwal claimant must satisfy firstly that the subject matter or the claim is maritime or admiralty matter and secondly the Court can assume jurisdiction on the basis which is usually adopted in admiralty jurisdiction i.e (a) that the defendant resides/carries on business within the jurisdiction (b) cause of action arose within the coastal State or waters, (3) the offending involved ship or the sister ship is within the waters in which case it is irrelevant where cause of action arose or defendant resides or carries on business or nationality of the ship. According to Shri Kotwal the effect of the

Supreme Court holding in *m.v. Elizabeth* that the High Court has unlimited jurisdiction, is that the High Court can entertain any and every question of claim which could be regarded as maritime or admiralty claim. The words "maritime" and "admiralty" should be interpreted within the modern context of commerce and shipping. It is neither common law context nor civilian context. It is international context in which both tradition may play a part. Shri Kotwal submitted that the Court has jurisdiction in all cases in which a claim for relief is made or a remedy is sought or by virtue of general maritime law relating to any matter coming within the class or subject of navigation and shipping or in relation to admiralty or maritime matters, except to the extent that jurisdiction has been otherwise specially assigned. Shri Kotwal submitted that if the jurisdiction could be exercised in respect of the offending ship even if no part of cause of action has arisen within the jurisdiction and the defendant neither resides nor carries on business within the jurisdiction then equally any other property of the owner or the sister ship could be so arrested. In the submission of Shri Kotwal this proposition is amply supported by the decision of the Apex Court in *m.v. Elizabeth*, and also general practice reflected in statutes and the practice adopted by other countries. According to Shri Kotwal admiralty jurisdiction is not dependant on the place where the cause of action arose whether in the coastal State waters or in high seas or in foreign port territory. The basis of jurisdiction is maritime and commercial expediency. Shri Kotwal submitted that the decision of the Court of Appeal in "*iaws*" make it clear that the cause of action may arise anywhere. Even under Brussels Convention of 1952, there is no restriction as to place where the cause of action arise. Shri Kotwal submitted that the jurisdiction or power of the High Court to arrest a sister ship is on the basis of the sovereignty of a coastal State over all things within its territory or territorial waters, and general maritime law which is the operative law in the absence of any express statutory provision in respect of sister ship arrest. Shri Kotwal submitted that the general maritime law as to arrest of a sister ship is to be ascertained on the basis of the interpretation of section 2(2) comparative statutory provision in other countries, Civil law principles which permits arrest of any property for maritime or non maritime claims.

14. So far as the submission of Shri Venkateshwaran regarding the provisions of the section 443 of the Merchant Shipping Act, is concerned, Shri Kotwal submitted that the Merchant Shipping Act, cannot be construed as a repository of all the admiralty or other jurisdiction of the Court. In fact the Merchant Shipping Act, does not deal with the jurisdictional questions. Shri Kotwal submits that this is amply recognized by the Apex Court in paragraph 63 of the judgment in *m.v. Elizabeth*.

15. Before dealing with the main controversy and the decisions of various courts specifically cited in that behalf by the learned Counsel, it may be convenient to first deal with some other submissions and decisions cited before us.

16. Shri Venkateshwaran referred to the decision of the Apex Court reported in

A.I.R. 1976 S.C. 2547 and especially the following portion in paragraph 22 thereof:

".....It is also to be borne in mind that even in cases where a High Court finds any conflict between the views expressed by larger and smaller Benches of this Court, it cannot disregard or skirt the views expressed by the larger Benches. The proper course for a High Court in such a case, as observed by this Court in *Union of India v. K.S. Subramanian*, Civil Appeal No. 212 of 1975, decided on July 30, 1976, to which one of us was a party, is to try to find out and follow the opinion expressed by larger Benches of this Court in preference of the Court which practice, hardened as it has to a rule of law is followed by this Court itself.

Shri Venkateshwaran also relied upon the head note B of the decision reported in A.I.R. 1955 Bom. 113 which is as under:

"Precedents.---Obiter dicta (Civil Procedure Code, 1908) An obiter dictum is an expression of opinion on a point which is not necessary for the decision of a case. This very definition draws a clear distinction between a point which is necessary for the determination of a case and a point which is not necessary for the determination of the case. But in both cases points must arise for the determination of the tribunal. Two questions may arise before a Court for its determination. The Court may determine both although only one of them may be necessary for the ultimate decision of the case. The question which was necessary for the determination of the case would be the ratio decidendi, the opinion of the tribunal on the question which was not necessary to decide the case would be only an obiter dictum. It cannot be suggested that the doctrine of obiter dicta was so far extended as to make the courts bound by any and every expression of opinion either of the Privy Council or of the Supreme Court whether the question did or did not arise for the determination of the higher judicial authority, Obiter dicta must lay down a rule. It is not sufficient that they should be merely dicta of superior Court, but from the dicta one must be in a position to deduce a rule laid down by the higher authority."

Shree Venkateshwaran also relied upon the head note B of the decision of the Apex Court reported in *Amar Nath Om Prakash and Others Vs. State of Punjab and Others*, which is as under:

"Judgments of courts are not to be construed as statutes. To interpret words, phrases and provisions of statute, it may become necessary for judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret words of statutes their words are not to be interpreted as statutes :"

Relying upon this judgment Shri Venkateshwaran submitted that the issue regarding arrest of a sister ship did not arise before the Apex Court in the matter of *m.v. Elizabeth* and in law several observations on which reliance is placed by the respondents cannot be held to be obiter dicta of the Apex Court so as to be binding on this Court.

17. In support of the submission that the International conventions have to be ignored and Municipal law has to be respected Shri Venkateshwaran relied upon the decision of the Supreme Court in Jolly George Varghese and Another Vs. The Bank of Cochin, as especially to the following observations in paragraph 6 thereof:

".....India is now a signatory to this Covenant and Article 51(c) of the Constitution, obligates the State to "foster respect for international law and treaty obligations in the dealings of organized peoples with one another". Even so, until the municipal law is changed to accommodate the Covenant what binds the Court is the former, on the latter A.H. Robertson in "Human Rights --- in National and International Law" rightly points but that international conventional law must go through the process of transformation into the municipal law before the international treaty can become an international law.

From the national point of view the national rules alone count with regard to interpretation however, it is a principle generally recognized in national legal system that in the event of doubt, the national rule is to be interpreted in accordance with the State's international obligations."

Shree Venkateshwaran next relied upon the decision of the Apex Court reported in V.O. Tractoroexport, Moscow Vs. Tarapore and Company and Another, and especially paragraph 17 thereof which reads is as under:

"We may look at another well recognized 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 A.C. 402."

18. Shri Kotwal on the other hand in this behalf relied upon the decision of the Apex Court reported in *Gramophone Company of India Ltd. Vs. Birendra Bahadur Pandey and Others*, which is also a three Bench decision similar to the bench which gave the decision reported in *V.O. Tractoroexport, Moscow Vs. Tarapore and Company and Another*, . In the aforesaid decision it is observed as under:

"There can be no question that nations must march with the international community and the municipal law must respect rules of International Law even as nations respect international opinion. The comity of nations requires that Rules of International law may be accommodated in the Municipal law even without express legislative sanction provided they do not run into conflict with Acts of Parliament. But when they do run into such conflict, the sovereignty and the integrity of the Republic and the supremacy of the constituted legislatures in making the laws may not be subjected to external rules except to the extent legitimately accepted by the constituted legislatures themselves. The doctrine of incorporation also recognizes the position that the rules of international law are incorporated into national law and considered to be part of the national law, unless they are in conflict with an Act of Parliament. Comity of nations or no municipal law must prevail in case of conflict. National Courts cannot say yes if Parliament has said no to a principle of international law. National Courts will endorse international law but not if it conflicts with national law. National Courts being organs of the national State and not organs of international law must perforce apply national law if international law conflicts with it. But the Courts are under an obligation within legitimate limits, to so interpret the municipal statute as to avoid confrontation with the comity of nations or the well established principles of international law. But if conflict is inevitable the latter must yield."

Shri Kotwal also relied upon the decision reported in 1977 App Cas 548, *Trendtex Trading v. Bank of Nigeria C.A.*, wherein Lord Denning has observed as under:

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

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

cannot develop as international law develops.

(i) The doctrine of incorporation. The doctrine of incorporation goes back to 1737 in *Buvot v. Barbut*, 1736 (3) Burr. 1481 : 4 Burr. 2016; sub nom., *Barbuit*'s case in Chancery 1737 Forr. 280, in which Lord Talbot L.C. (who was highly esteemed) made a declaration which was taken down by young William Murray (who was of Counsel in the case) and adopted by him in 1764, when he was Lord Mansfield, C.J., in *Triquet v. Bath*", 1764 (3) Burr. 1478.

"Lord Talbot declared a clear opinion - That the law of nations in its full extent was part of the law of England..... that the law of nations was to be collected from the practice of different national and the authority of writers". Accordingly he argued and determined from such instances, and the authorities of Grotius, Barbeyrac, Binkershoek, Wiquefort, etc, there being no English writer of eminence on the subject".

That doctrine was accepted not only by Lord Mansfield himself but also by Sir William Blackstone, and other great names, too numerous to mention. In 1853 Lord Lyndhurst in the House of Lords, with the concurrence of all his colleagues there, declared that....." the law of nations, according to the decision of our greatest Judges, is part of the law of England", see Sir George Lewis's book. *Lewis on Foreign Jurisdiction* (1859) pp. 66-67.

(ii) The doctrine of transformation. The doctrine of transformation only goes back to 1876 in the judgment of Cockburn, C.J. in *Reg. v. Keyn*, 1876 (2) Ex. D.63.

"For writers on international law, however, valuable their labours may be in elucidating and ascertaining the principles and rules of law cannot make the law. To be binding, the law must have received the assent of the nations who are to be bound by it.... Nor, in my opinion, would the clearest proof of unanimous assent on the part of other nations be sufficient to authorise the tribunals of this country to apply, without an Act of Parliament, what would practically amount to a new law. In so doing we should be unjustifiably usurping the province of the legislature."

To this I may add the saying of Lord Atkin in *Chung Chi Cheung v. The King*, 1939 A.C. 160:

"So far, at any rate, as the courts of this country are concerned, international law has no validity save in so far as its principles are accepted and adopted by our own domestic law."

And I myself accepted this without question in *Reg. v. Secretary of State for the Home Department Ex-parte Thakrar*, 1974 Q.B. 684.

(iii) Which is correct? As between these two schools of thought, I now believe that the doctrine of incorporation is correct. Otherwise I do not see that our courts could ever recognize a change in the rules of international law. It is certain that international law does change. I would use of international law the

words which Galileo used of the earth : "But it does move". International law does change, and the courts have applied the changes without the aid of any Act of Parliament. Thus, when the rules of international law were changed (by the force of public opinion) so as to condemn slavery, the English Courts were justified in applying the modern rules of international law see the "statement of opinion" by Sir R. Phillimore, Mr. M. Bernard and Sir H.S. Maine appended to the report of the Royal Commission on Fugitive Slaves (1876) p. XXV, paras 4 and 5. Again, the extent of territorial waters varies from time to time according to the rules of international law current at the time and the Courts will apply it accordingly; see *Reg. v. Kent Justices, Ex-parte Lye*", 1967 (2) Q.B. 153. The bounds of sovereign immunity have changed greatly in the last 30 years. The changes have been recognised in many countries, and the courts of our country and of theirs have given effect to them, without any legislation for the purpose, notably in the decision of the Privy Council in *The Philippine Admiral*, 1977 A.C. 373.

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

Shri Kotwal then relied upon the decision of the Court of Appeal in the matter of *United Africa Co. Ltd v. Owners of M.V. Tolten*, reported in 1946 (2) All. ER 372 which reads as under:

"I do not in any way suggest that the contents of the two conventions to which I have more particularly referred, afford any direct logical support for the particular principles of law about English maritime liens which I am expressing in this judgment, but the fact that so many nations with different systems of law have subscribed to those principles does go someway to showing that those principles are consonant with that "general law of the sea" on which our own Admiralty Judges have so often relied. At any rate, it is satisfactory to note that the conclusions, which I have reached as to our Admiralty law, involve no departure from the terms of international conventions so widely agreed."

Shri Kotwal also referred to the Article by J.G. Collier on *International and Comparative Law Quarterly* Vol. 38, October, 1989, entitled "International Law as English Law" wherein after taking a review of the entire historical background of several cases, the Ld. author has observed as under:

"However, there is one simple solution to the whole problem discussed in this

article. Rather than saying that international law is part of the law of England, a kind of sub-division thereof, it is more accurate to regard it as a source of English law. Some rules of English law, such as those concerning State Immunity Act, 1978, have been consciously derived from what were regarded as rules and principles of international law and have been modelled upon them. That is to say that the English Court does what it is supposed to do and applies English law as such. This was all pointed out by the late J.L. Brierly many years ago. There is really no mystery about it at all and there is no need for doctrinal squabbles to enter into the matter."

19. In our opinion the aforesaid judgments make it clear that in case of a conflict between the municipal law and the international law or conventions, the Court will have to apply the municipal law. However, when there is no conflict between the two then all just principles of international law or conventions could be legitimately applied unless either they are in conflict with any statute or are prohibited by any Municipal law.

20. Coming to the principal question regarding jurisdiction and power of this Court to arrest a sister ship both sides referred to several paragraphs and almost entire judgment in the matter of *m.v. Elizabeth*. As stated earlier Shri Rebello also relied upon the decision of Justice Variava in *Leontas*. Before dealing with these two judgments it may be convenient to deal with the judgment cited by Shri Venkateshwaran reported in 1957 (2) All ER 374 wherein with reference to section 3(4) of the Administration of Justice Act, 1956, it is observed as under:

"The defendants" argument is founded on the proposition that section 3(4) of the Act of 1956, introduces a new restriction on the right to proceed in rem, and that a plaintiff cannot arrest a ship under that sub-section unless he can prove at the outset that he has a cause of action sustainable in law. In my judgment that proposition rests on a misconception of the purpose and meaning of section 3(4). As it appears to me, that sub-section so far from being a restrictive provision is a sub-section introduced (or the purpose of enlarging the Admiralty jurisdiction of the Court. As in view, it, its purpose is to confer for the first time in England the right to arrest either the ship in respect of which the cause of action is alleged to have arisen or any other ship in the same ownership. That is an entirely new right so far as the law of England is concerned, although it previously existed in other countries including Scotland. The reason for conferring that right now is for the purpose of bringing this Country into line with other countries as a result of an international convention."

Shri Kotwal on the other hand relied upon the decision of the Supreme Court of Canada reported in 1989 (2) S.C.R. 689 wherein it is observed as under:

"Maritime law, to a large extent is international law. It is important for commercial reasons that the courts in interpreting its principles, have regard where appropriate to the broader backdrop of international law. For this reason, I would resist the suggestion that international and civilian traditions can be no

role to play except in those areas where the English Court of Admiralty actually exercised jurisdiction, prior to 1934. Finally, I do not read this Court's decision in *I.T.O.--International Terminal Operators Ltd. v. Mida Electronics Inc.*, 1986 (1) S.C.R. 752 as precluding the consideration of civil law principles in areas of Canadian maritime law where there is no precedent in the English Court of Admiralty prior to 1934. At page 774, McIntyre, J., emphasizes that Canadian maritime law cannot be regarded as having been frozen as of 1934. He goes on to say : On the contrary the words Maritime and admiralty should be interpreted within the modern context of commerce and shipping. That context, I venture to suggest is neither a common law context, nor a civilian context, it is an international context in which both traditions may play a part."

"I would be of the opinion then that the term "Canadian maritime law" includes all that body of law which was administered in England by the High Court on its Admiralty side in 1934, as such law, may from time to time have been amended by the federal Parliament and as it has developed through judicial precedent to date.

As concerns the second category McIntyre, J., Noted the following [n my view the second part of the section 2 definitions of Canadian maritime law was adopted for the purpose of assuring that Canadian maritime law would include an unlimited Jurisdiction in relation to maritime and admiralty matters. As such, it constitutes statutory recognition of Canadian maritime law as a body of federal law dealing with all claims in respect of maritime and admiralty matters. Those matters are not to be considered as having been frozen by The Admiralty Act, 1934. On the contrary the words "maritime and admiralty" should be interpreted within the modern context of commerce and shipping. In reality the ambit of Canadian maritime law is limited only by the constitutional division of powers in the Constitution Act, 1867."

21. Shri Kotwal also relied upon the judgment of the learned Single Judge of the Gujarat High Court delivered on 12-5-1997 in Civil Application No. 36 of 1977 in Admiralty Suit No. 1 of 1997. This judgment directly decides the point i.e. whether the High Court of Gujarat in exercise of its admiralty jurisdiction has the power and/or jurisdiction to order arrest of a sister ship. Even before the learned Judge as, was the case before us, the decision of the Supreme Court in *m.v. Elizabeth* was read and reread by the Counsel to buttress their contentions. After referring to several paragraphs of the said judgment the learned Judge came to the conclusion that it is abundantly clear that in the absence of general maritime Code principles accepted and recognized under the international common law or Brussels convention could be resorted to. The Court in filling up the lacuna in Merchant Shipping Act, can override the procedural technicalities. The learned Judge observed that this has been said by the Apex Court after recognizing the fact that India has not adopted various Brussels Conventions, and that non signing of the Brussels convention therefore should not block the jurisdiction and power of the Court in its admiralty jurisdiction. The learned Judge held that the

provisions contained in sections 443 and 444 of the Merchant Shipping Act, 1958, cannot be said to be the repository of the powers of arrest of a foreign ship. The said Act of 1958, cannot be recognised as self contained Code or a Code perfect in itself. The learned Judge observed that after reading the decision of the Supreme Court in *m.v. Elizabeth* it was clear to him that in the absence of specific statutory provisions in the Indian Statute the Court can fill up the lacuna and while doing so the regard could be had to be Brussels Conventions and known principles of international law under statutes or common law. The learned Judge held that it is not in dispute that, now since 1956, the English Administration of Justice Act, 1956, statutory grants the jurisdiction to the English High Courts for arrest of a sister ship, if our statutory provisions are found to be having lacuna and falling short the principles as obtainable under the Statutes of other countries recognized in the International statutorily common law and/or under the Brussels Convention can be made applicable by the Indian High Courts. The learned Judge expressly referred to the judgment of Variava, J., in *Leontas* case. The learned Judge observed that despite the said judgment in view of the decision in *m.v. Elizabeth* of the Apex Court the Gujarat High Court exercising the admiralty jurisdiction has the power and jurisdiction to arrest a sister ship. The learned Judge observed that it should not be overlooked that the High Court of Bombay in various other suits have in fact ordered the arrest of sister ships. Accordingly the learned Judge held that the High Court of Gujarat in exercise of its admiralty jurisdiction has the power and jurisdiction to order arrest of a sister ship.

22. This brings us to the consideration of the judgment of our brother Variava, J., dated 9-11-1993 in Admiralty Suit No. 39 of 1993 in the matter of *Fal Oil Company Ltd. v. M. T. Leontas*. In our opinion as far as the arrest of a sister ship is concerned, the issue clearly and directly arose in the said case. However, the decision of Justice Variava on the issue is completely an obiter dicta, which is clear from the following;

23. In the very first paragraph the learned Judge has observed as under:

"It must however be stated that for purpose of this order the Court has proceeded on the footing that the law now permits arrest of a sister ship. The subsequent discussion on law has no real application to the facts or the result in this application. They are set out as the point has been fully argued and as it involves an important point of law which will affect a lot of other cases. Of course, to the extent that the Court is holding that a sister ship cannot be arrested, the plaintiffs are affected. However, as is set out hereinafter, in my view the plaintiffs are not entitled to any relief even if law permits sister ships to be arrested. The plaintiffs application is rejected on that ground itself."

Secondly we are of the clear opinion that several submission which were made before us were not made and emphasized before Variava, J. What was argued before Justice Variava was that by virtue of the decision of the Apex Court in *m.v. Elizabeth*, Brussels Convention of 1952, although India is not a signatory to

the same and although it has not been incorporated in any statute of the Parliament, becomes applicable automatically. This is clear from the submissions to which reference has been made in the judgment. On pages 8, 10 and 11 of the judgment the learned Judge has observed as under:

"Based upon these observations it has been urged that even though India is not a signatory to the convention still the Courts in India must treat the convention as law of India and apply the provisions of the convention in India."

"Based on Article 3(1) it is urged that any other ship owned by the person who was the owner of the particular ship can also be arrested. It is claimed that this now permits arrest of sister ships owned by the same person or company and also ships of which the beneficial owner is the same. Mr. Mehta denies that this is the position in law. As set out hereinafter, I am in agreement with Mr. Mehta. However, for the present I proceed on the assumption that a sister ship can be arrested."

24. After referring to the observations in *m.v. Elizabeth*, the learned Judge observed as under:

"It is not disputed before me that so far as India is concerned, there is no provision in law by which a sister ship can be arrested. However, it has been urged that by this judgment judgment of the Apex Court in *m.v. Elizabeth* the courts in India are now given unlimited powers. It has been urged that by reason of this judgment, the convention has been made applicable in its entirety toto to India. As stated above this on the basis of the observations of the Supreme Court set out in para 3 above it is submitted that the above mentioned observations of the Supreme Court make it very clear that all the provisions of the International convention relating to arrest of seagoing ships are now applicable to India. It is submitted that this Court is bound by what is laid down by the Supreme Court and this Court is therefore, bound to apply the convention even though the same has not been ratified by India. It is submitted that the Supreme Court has clearly laid down in para 78 of the judgment that even this convention has not been adopted by the legislation still it is part of the common law of India and is applicable and by reason of the law as laid down by the Supreme Court and by reason of Article 3 of the convention now even a sister ship can be arrested by the courts in India.

"On a careful analysis of the judgment of the Supreme Court, in my view, it is clear that the Supreme Court has in fact widened the Admiralty powers of this Court. But it is one thing to say that the powers of the Court has been widened in respect of matters which already well within the jurisdiction of the Court. It is another thing to say that the law has been changed and aspects not covered earlier are brought within the jurisdiction of the Court. The first is a matter of interpretation of the various legal provisions and a matter of applying the existing powers. The second strictly speaking is a matter of legislation and it amounts to vesting powers which did not exist. In my view, the plaintiffs are

seeking to draw the observations of the Supreme Court completely out of context. What the plaintiffs are seeking today is not just widen the existing powers of the Admiralty Court. What the plaintiffs are seeking today is to confer on the Admiralty Court powers which the Admiralty Court did not have and does not enjoy. In my view the Supreme Court has not sought to do any such thing. It must be noted that this judgment arose on a question of jurisdiction arising out of section 6 of the Admiralty Courts Act, 1861, It is in this context and on the facts of that particular case that the observations have been made by the Supreme Court and the law has been extended. While considering this question of jurisdiction arising by virtue of claim u/s 6 of the Admiralty Courts Act, the Supreme Court has undoubtedly widened the Admiralty powers of the Court. However, it is clear on reading of the judgment that the Supreme Court is in no way legislating and/or conferring power in respect of matters where the Court did not have power. So far as the question before us is concerned, i.e. whether a sister ship can be arrested or not, the question never arose for consideration by the Supreme Court. In fact, in paras 78 and 100 of the judgment the Supreme Court notes that an action in rem would require the arrest of that particular ship and that it is the ship which has to pay for the wrong that it has done. Thus the Supreme Court was very conscious of the fact that so far as the Admiralty law in India is concerned, it is only that particular ship which can be arrested. If this aspect of the law was to be changed, the Supreme Court would have expressly stated so.

Relying upon the observations quoted above in paras 76, 78 and 86, Mr. Kapadia sought to submit that if the Supreme Court desired that the entire convention was not to apply to India, the Supreme Court would have said so. He submitted that the wording of the judgment make it clear that the entire convention is to apply to India. What Mr. Kapadia forgets is that no where has the Supreme Court said that provisions of the convention now apply to India. What the Supreme Court has in paras 78 and 86 laid down that the principles incorporated in the convention must be deemed applicable for enforcing maritime claim against foreign ships. In my view it is entirely different thing to say that the principles laid down in the convention can be used by the courts in India in furtherance and enhancement of their existing powers. It is another thing to say that the entire convention is now applicable in India. Thus the Admiralty courts whilst using the principles of the convention can only use those principles which govern matters within the existing powers of the courts in India. So far as the matters within the powers of the courts in India are concerned, so long as there is no other legislation which prohibits this Court's power, the power of the High Court sitting as an Admiralty Court is now untrammelled and very wide."

However, the Judge ultimately held that these questions were not before the Supreme Court and have not been dealt with by the Supreme Court. The learned Judge held that thus it is clear that this judgment is not laying down the Court must apply the provisions of the convention which have not been and are not made law in India. The learned Judge also referred to the judgment of the Apex

Court reported in *Jolly George Varghese and Another Vs. The Bank of Cochin*, . Ultimately the learned Judge has observed as under:

"This Court is well aware that normally a Court should be extremely slow in denying the jurisdiction and should guard in retaining the jurisdiction. However, an arrest has serious consequences. Apart from disrupting trade and commerce by sea it entails an enormous daily loss, every day that the ship remains under arrest. The Court must not open a floodgate of litigation. The Court must guard against arrest being sought as a means to pressurize owners. In my view, the observations of the Supreme Court have to be seen in the context of the facts of that case. The Supreme Court was dealing with the interpretation of section 6 of the 1861 Act. In my view the Supreme Court is not making the convention applicable to India as is sought to be contended by the plaintiffs. In my view the Supreme Court is laying down that in interpreting and applying the existing law as it stands, the Admiralty Court should apply and keep in mind such of the principles of the convention as are applicable to the existing law. The Supreme Court is undoubtedly widening the powers of the Admiralty Court. It is for the purposes of widening these powers that the Supreme Court has in effect observed that the principles of the convention would apply. This cannot be drawn out of context to mean that the convention applies in its entirety to India. As seen earlier, it is an admitted position that under the Admiralty law as it stood in India, the courts in India have no powers or authority to arrest sister ships. This judgment *m.v. Elizabeth* has not made any change to that position in law. It is only in respect of a claim for damages arising out of the provision of the existing law that the powers of the Court have been enhanced."

25. With great respect to the learned Judge we find it difficult to share his opinion. We hasten to add that probably the learned Judge's opinion was influenced by the submission which is referred to at several places as already indicated that the judgment of the Apex Court in *m.v. Elizabeth* now makes Brussels Convention applicable in its entirety despite the fact that India is neither a signatory to the same nor has it been incorporated by any legislation. Indeed the learned Judge is right in holding that *m.v. Elizabeth* does not lay down that the Court must apply the provisions of the convention. However, we fail to appreciate the learned Judge's observations that by seeking an order of arrest of a sister ship what the plaintiffs are seeking is not just widen the existing powers of the Admiralty Court but they are seeking to confer on the Admiralty Court the powers which the Admiralty Court did not have and does not enjoy. Indeed the question is whether the Court has jurisdiction to arrest a sister ship. In our opinion the learned Judge has not adverted to several other parts of the judgment of the Apex Court which are clearly relevant to the issue obviously because the learned Counsel before the learned Judge has not drawn the attention of the learned Judge to those several relevant parts of the judgment in the case of *m.v. Elizabeth*. Secondly as is clear from the observations in the last paragraph of the judgment of Variava, J., that it was an admitted position before the learned Judge that under the Admiralty law as it stood in India, the Courts in

India have no power or authority to arrest a sister ship. What has been argued before us is exactly other way round that not only as per the principles enunciated in the Brussels Convention but also under the original inherent jurisdiction of the Court as a superior Court and under Original Civil Jurisdiction and by virtue of the fact that even English Courts and several Courts of other countries are exercising this jurisdiction and as there is no municipal law prohibiting the same the High Courts always had the power, authority and jurisdiction to arrest a sister ship. We are of the opinion that there is no question of legislating or otherwise but the Supreme Court has explained in *m.v. Elizabeth* the jurisdiction which the superior Courts in India do have and not that any jurisdiction is vested or the powers are expanded by the decision of the Supreme Court. For the aforesaid reasons we find it extremely difficult to concur with the observations made by Justice Variava in the aforesaid case.

26. That takes us to the judgment of the Apex Court in *m.v. Elizabeth*. In this behalf we find it extremely relevant to notice that in paragraph 14 of the judgment the Apex Court has observed as under:

"The High Court as a Court of Admiralty is thus treated as a separate entity exercising a distinct and specific or prescribed or limited jurisdiction. This reasoning is based on the assumption that the continuance in force of the Colonial Courts of Admiralty Act, 1890, as an existing law carves out a distinct jurisdiction of the High Court limited in ambit and efficacy to what has been granted by the Admiralty Court Act, 1861 and that jurisdiction has remained stultified ever since. This restrictive construction is in our view, not warranted by the provisions of the Constitution. The fact that the High Court continues to enjoy the same jurisdiction as it had immediately before the commencement of the Constitution as stated in Article 225, does not mean that a matter which is covered by the Admiralty Court Act, 1861, cannot be otherwise dealt with by the High Court subject to its own Rules, in exercise of its manifold jurisdiction which is unless barred, unlimited to the extent not barred expressly or by necessary implication the judicial sovereignty of this country is manifested in the jurisdiction vested in the High Court as superior Courts."

This is extremely relevant because this clearly indicates that when the High Court entertains an Admiralty Suit it is not divested of its unlimited and manifold jurisdiction. In paragraph 18 the Apex Court expressly overrules the narrow view adopted by certain decisions of the Calcutta High Court and Bombay High Court regarding the source and ambit of the Admiralty jurisdiction of the High Courts. In paragraph 20 the Apex Court particularly notices that the Colonial Courts of Admiralty were vested with some admiralty jurisdiction which was vested in the High Court of England" whether existing by virtue of any statute or otherwise" and they are entitled to exercise the same jurisdiction in like manner and to the same extent as the High Court in England. In para 20, after referring to sub-section (2) of section 2 of the Colonial Courts of Admiralty Act, 1890, the Supreme Court has observed as under:

"The Colonial Courts of Admiralty were, in relation to their respective territories, invested with the same jurisdiction "over places, persons, matters and things" as in the case of the English High Court in respect of England and Wales..... What the Colonial Courts of Admiralty Act, 1890, did was not to incorporate any particular English Statute into Indian law for the purpose of conferring admiralty jurisdiction, but to assimilate the competent Courts in India to the position of the English High Court in the exercise of admiralty jurisdiction. It would therefore appear that any expansion of Admiralty jurisdiction of the High Court in England was intended likewise to expand the jurisdiction of the Colonial Courts of Admiralty. This should have been regarded as the position with respect to a Colonial Court of unlimited jurisdiction."

In paragraph 25 the Apex Court has observed as under:

"It was because of the unlimited civil jurisdiction that was already vested in these High Courts that they were declared to be Colonial Courts of Admiralty having the same jurisdiction in extent and quality as was vested in the High Court of England by virtue of any statute or custom, The High Courts were declared to be competent to regulate their procedure and practice in exercise of admiralty jurisdiction in accordance with the Rules made in that behalf. There is therefore, neither reason nor logic in imposing a fetter on the jurisdiction of these High Courts by limiting it to the provisions of an imperial statute of 1861 and freezing any further growth of jurisdiction. This is all the more true because the Admiralty Court Act, 1861 was in substance repealed in England a long time ago."

In paragraph 26 the Apex Court observed as under:

"..... What the Act of 1890 did was, as stated earlier, not to incorporate any English statute into Indian law, but to equate the admiralty jurisdiction of the Indian High Court over places, persons, matters and things to that of the English High Court. As the admiralty jurisdiction of the English High Courts expanded with the progress of legislation, and with the repeal of the earlier statutes, including in substance the Admiralty Court Acts, of 1840 and 1861, it would have been reasonable and rational to attribute to the Indian High Courts a corresponding growth and expansion of admiralty jurisdiction during the pre-independence era. But a restrictive view was taken on the question in the decision of the High Courts cited above."

In paragraph 27 the Apex Court observed as under:

"There is no reason why the jurisdiction of the Indian High Courts should have been considered to have frozen and atrophied on the date of the Colonial Courts of Admiralty Act, 1890. If this had not been considered to have happened and a liberal construction had been adopted by courts, the admiralty jurisdiction of the High Court would in any case have been considered to have progressed upto the level of the English Administration of Justice Act, 1928, which was the last of a series of enactments in England on the subject prior to 1947, and consequently the Indian High Court would have been treated as a consolidated Court on the

basis of the (English) Supreme Court of Judicature (Consolidation) Act, 1925, exercising identical and unlimited jurisdiction and not a distinct or prescribed admiralty jurisdiction limited and confined to the Admiralty Court Act, 1861."

In paragraph 41 of the said judgment the Apex Court has observed as under:

"The whole jurisdiction of the English High Court is now vested in all the divisions alike. All divisions of the High Court and all the Judges of that Court have equal power, authority, and jurisdiction although admiralty actions are assigned to the Queen's Bench Division and taken up by the Admiralty Court. The special requirements of an action in personam, namely the habitual residence or place of business of the defendant or the cause of action having their nexus with England and Wales or the determination of a connected matter in the English High Court or the submission of the defendant to the jurisdiction of that Court, are not applicable to a proceeding commenced as an Admiralty action in rem."

In paragraph 43 the Apex Court has referred to the observations of Jackson describing the unified Court structure in England which are as under:

"The Admiralty Court developed independently, having its own battle with common law courts over jurisdictional boundaries. During the 18th and early 19th centuries its influence and power decreased, but through statutes of 1840 and 1861 the Court received a firm foundation on which it has built since. It came in from the cold into the general union of courts in 1873-5 and is now integrated into the High Court being a branch of the Queen's Bench Division..... Once under the umbrella of the unified Court structure, common law and equitable principles became directly available in the Admiralty Court. No longer need claimants have to seek these elsewhere and no longer did jurisdictional boundaries necessarily indicate the availability of substantive right and remedies."

In Paragraph 44 it is observed as under:

".....The vital significance and the distinguishing feature of an admiralty action in rem is that this jurisdiction can be assumed by the coastal authorities in respect of any maritime claim by arrest of the ship, irrespective of the nationality of the ship or that of its owners, or the place of business or domicile or residence of its owners or the place where the cause of action arose wholly or in part."

In paragraph 46 the Apex Court has observed as under:

"..... The arrest of the ship is regarded as a mere procedure to obtain security to satisfy judgment. A successful plaintiff in a action in rem has a right to recover damages against the property of the defendant. The liability of the ship owner is not limited to the value of the res primarily proceeded against.... An action..... though originally commenced in rem, becomes a personal action against a defendant upon appearance and he becomes liable for the full amount of a judgment unless protected by the statutory provisions for the limitation of liability."

In paragraph 47 it is observed as under :

"The foundation of an action in rem, which is a peculiarity of the Anglo-American law, arises from a maritime lien or claim imposing a personal liability upon the owner of the vessel. A defendant in an admiralty action in personam is liable for the full amount of the plaintiffs established claim. Likewise, a defendant acknowledging service in action in rem is liable to be saddled with full liability even when the amount of the judgment exceeds the value of the res or of the bail provided. An action in rem lies in the English High Court in respect of matters regulated by the Supreme Court Act, 1981, and in relation to a number of claims the jurisdiction can be invoked not only against the offending ship in question but also against a "sister ship" i.e. a ship in the same beneficial ownership as the ship in regard to which the claim arose."

In paragraph 48 it is observed as under:

"Merchant Ships of different nationalities travel from port to port carrying goods or passengers. They incur liabilities in the course of their voyage and they subject themselves to the jurisdiction of foreign States when they enter the waters of those States. They are liable to be arrested for the enforcement of maritime claims, or seized in execution or satisfaction of judgments in legal actions arising out of collisions, salvage, loss of life or personal injury, loss of or damage to goods and the like..... A ship travelling from port to port stays very briefly in any one port. The plaintiff seeking to enforce his maritime claim against a foreign ship has no effective remedy once it has sailed away and if the foreign owner has neither property nor residence within jurisdiction. The plaintiff may therefore detain the ship by obtaining an order of attachment whenever it is feared that the ship is likely to slip out of jurisdiction, thus leaving the plaintiff without any security."

Paragraphs 49 and 51 are extremely relevant wherein the Apex Court has observed as under:

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

"51. The attachment being only a method of safeguarding the interest of the plaintiff by providing him with a security, it is not likely to be ordered if the defendant or his lawyer agrees to "accept service and to put in bail or to pay money into Court in lieu of bail"."

In paragraph 56 it is observed as under:

"An action in rem is directed against the ship itself to satisfy the claim of the plaintiff out of the res. The ship is for this purpose treated as a person. Such an action may constitute an inducement to the owner to submit to the jurisdiction of the Court, thereby making himself liable to be proceeded against by the plaintiff in personam. It is, however, imperative in an action in rem that the ship should be within jurisdiction at the time the proceedings are started."

In paragraph 57 it is observed as under:

"It is by means of an action in rem that the arrest of a particular ship is secured by the plaintiff. He does not sue the owner directly and by name but the owner or any one interested in the proceedings may appear and defend..... In addition to maritime liens, a ship is liable to be arrested in England in enforcement of statutory rights in rem (Supreme Court Act, 1981). If the owner does not submit to the jurisdiction and appear before the Court to put in bail and release the ship, it is liable to be condemned and sold to satisfy the claims against her. If however, the owner submits to jurisdiction and obtains the release of the ship by depositing security he becomes personally liable to be proceeded against in personam in execution of the Judgment if the amount decreed exceeds the amount of the bail. The arrest of the foreign ship by means of an action in rem is thus a means of assuming jurisdiction by the competent Court."

In paragraphs 58 it is observed as under:

"The admiralty action in rem, as practised in England or in the United States is unknown to the civil law. In countries following the civil law, all proceedings are initiated by actions in personam.

.....According to French laws arrest of a ship is allowed even in respect of non-maritime claims and whether or not the claimant is a secured or unsecured creditor. A vessel may be arrested either for the purpose of immobilising the vessel as security or in execution of a judgment whether or not the claim has any relation to the vessel. Arrest of the vessel has the advantage of forcing the owner to furnish security to guarantee satisfaction of any decree that may be passed against him. On furnishing sufficient security with the Court he is usually allowed to secure the release of the vessel. Maritime law is part of the general law of French and other civil law countries and is dealt with by the ordinary courts or tribunals. The presence of any property belonging to the defendant within the territorial jurisdiction confers jurisdiction on the French Court."

Then in paragraphs 59, 60, 61, 64, 65, 66, 67, 70, 75, 77, 80, 82, 83, 85, 87, 89, 90, 91, 92, 93 the Apex Court has observed as under:

"59. The real purpose of arrest in both the English and the Civil Law systems is to obtain security, as a guarantee for satisfaction of the decree, although arrest in England is the basis of assumption of jurisdiction unless the owner has submitted to jurisdiction. In any event, once the arrest is made and the owner

has entered appearance, the proceedings continue in personam. All actions in the civil law whether maritime or not -- are in personam, and arrest of a vessel is permitted even in respect of non-maritime claims and the vessel is treated as any other property of the owner, and its very presence within jurisdiction is sufficient to clothe the competent tribunal with jurisdiction over the owner in respect of any claim (see D.C. Jackson *Enforcement of Maritime Claims*, (1985) App 5. Admiralty actions in England, on the other hand whether in rem or in personam are confined to well defined maritime liens or claims and directed against the res (ship, cargo and freight) which is the subject matter of the dispute or any other ship in the same beneficial ownership as the res in question."

"60. Maritime law is as much a part of the general legal system as any other branch of the law. With the merger of the Admiralty and Common Law Courts in England in 1875 and the fusion of their legal precepts and concepts, this branch of the law, despite its peculiarities about actions in rem, is no longer treated as a separate and independent branch. It is not the exclusive preserve of the English High Court, for certain country courts in that country are specially authorised to exercise this jurisdiction. This is much more true of the civil law system where no distinction is drawn between maritime law and other branches of the law, and they are administered alike by the same courts or tribunals."

"61. It may not be correct to say that the admiralty jurisdiction of the English courts is dependent entirely on statutes. It may be true in a very limited sense as regards the jurisdiction of the High Court after the merger of the High Court of Admiralty with the High Court of Justice by the Supreme Court of Judicature Act, 1873, which came into force in 1875; See Supreme Court of Judicature (Commencement) Act, 1984. Even so, statutes are codifications of legal principles developed by the decisions of courts and those principles remain the lifeblood of the statutes. The observation of Lord Diplock in *The Jade*, 1976 (1) All. E.R. 920, on which much reliance is placed by Mr. Ramachandran in support of his arguments, has to be so understood (See also Halsbury's Laws of England Vol. 1, para 307)."

64. In tracing the history of admiralty law in India, it is likewise misleading and incorrect to confine it to statutes. Statutes have been codifications of rules of law as developed by usage, practice and custom. As stated by Westropp, C.J., of the Bombay High Court in *Bardot v. The American Ship or Vessel Augusta*, 1873 (10) Bom 113

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

65. Where statutes are silent and remedy has to be sought by recourse to basic

principles, it is the duty of the Court to devise procedural rules by analogy and expediency. Actions in rem, as seen above, were resorted to by courts as a device to overcome the difficulty of personal service on the defendant by compelling him to enter appearance and accept service of summons with a view to furnishing security for release of the res or, in his absence, proceed against the res itself, by attributing to it a personality for the purpose of entering a decree and executing the same by sale of the res. This is a practical procedural device developed by the courts with a view to rendering justice in accordance with substantive law not only in cases of collision and salvage, but also in cases of other maritime liens and claims arising by reason of breach of contract for the hire of vessels or the carriage of goods or other maritime transactions, or tortious acts, such as conversion or negligence, occurring in connection with the carriage of goods. Where substantive law demands justice for the party, aggrieved, and the statute has not provided the remedy, it is the duty of the Court to devise procedure by drawing analogy from other systems of law and practice. To the courts of the "civil law countries" in Europe and other places, like problems seldom arise for all persons and things within their territories (including their waters) fall within their competence to deal with. They do not have to draw any distinction between an action in rem and an action in personam.

"66. It is likewise within the competence of the appropriate Indian Courts to deal in accordance with the general principles of maritime law and the applicable provisions of statutory law, with all persons and things found within their jurisdiction. The power of the Court is plenary and unlimited unless it is expressly or by necessary implication curtailed. Absent such curtailment of jurisdiction all remedies which are available to the courts to administer justice are available to a claimant against a foreign ship and its owner found within the jurisdiction of the concerned High Court. This power of the Court to render justice must necessarily include the power to make interlocutory orders for arrest and attachment before judgment."

67. The High Courts in India are superior courts of record. They have original and appellate jurisdiction. They have inherent and plenary powers. Unless expressly or impliedly barred, and subject to the appellate or discretionary jurisdiction of this Court, the High Courts have unlimited jurisdiction, including the jurisdiction to determine their own powers; see *Naresh Shridhar Mirajkar and Others Vs. State of Maharashtra and Another*, . As stated in Halsbury's Laws of England 4th edition, vol. 10, para 713 :

"Prima facie, no matter is deemed to be beyond the jurisdiction of a superior Court unless it is expressly shown to be so, while nothing is within the jurisdiction of an inferior Court unless it is expressly shown on the face of the proceedings that the particular matter is within the cognizance of the particular Court."

"70. In equating the admiralty jurisdiction of the Indian High Court to that of the English High Court, the Colonial Courts of Admiralty Act, 1890, significant refers

to the admiralty jurisdiction of the High Court in England "whether existing by virtue of any statute or otherwise. This is an enabling statute, and not a statute of limitation of power. It aids, and does not fetter, the growth of jurisdiction. There is no reason why the words "statute or otherwise" should be so construed as to exclude the various sources, from which the admiralty jurisdiction in England developed. Apart from statute, the powers of that Court, as seen above were derived from custom and practice and the principles developed by common law and equity as well as by the generally recognized principles of civil law developed and practised in Europe. There is no reason, as rightly stated by Westropp, C.J., of the Bombay High Court in *Bardot* 1873 (10) Bom. H.C.R. 110 (supra) why the expression "statute or otherwise" should be so construed as to exclude all these vast areas of legal principles which enriched and strengthened the maritime laws of England. Likewise, there is no reason why those principles should also not be drawn upon to enrich and strengthen the jurisprudence of this country, even if the jurisdiction of our courts were to be, by compulsions of history considered to be curtailed and dovetailed to the colonial past -- a proposition which is neither correct nor consistent with our status as a sovereign republic. It is time to take a fresh look at the old precedents". "

75. All foreign merchant ships and persons thereon fall under the jurisdiction of a coastal State as they enter its waters. Subject to the right of "innocent passage", the coastal State is free to exercise jurisdiction over such ships in respect of matters the consequences of which extend beyond the ship..... Coastal States are entitled to assume jurisdiction in respect of maritime claims against foreign merchant ships lying in their waters. These ships are liable to be arrested and detained for the enforcement of maritime claims. The courts of the country in which a foreign ship has been arrested may determine the cases according to merits, provided they are empowered to do so by the domestic law of the country or in any of the cases recognized by the International Convention relating to the Arrest of Sea-going Ships. Brussels 1952 (see also the International Conventions for the Unification of Certain Rules relating to Maritime Liens and Mortgages of 10th April, 1926 and May 27, 1967). The maritime claims in respect of which the power of arrest is recognised in law include claims relating to damage caused by any ship either in collision or otherwise claims relating to carriage of goods in any ship whether by charterparty or otherwise, loss of or damage to goods etc. These principles of international law, as generally recognized by nations, leave no doubt that, subject to the local laws regulating the competence of courts, all foreign ships lying within the waters of a State, including waters in ports, harbours, roadsteads, and the territorial waters, subject themselves to the jurisdiction of the local authorities in respect of maritime claims, and they are liable to be arrested for the enforcement of such claims."

"77..... India has also not adopted the international convention relating to the arrest of Sea-going Ships, Brussels, 1952. Nor has India adopted the Brussels Conventions of 1952 on civil and penal jurisdiction in matters of collision, nor the

Brussels Conventions of 1926 and 1967 relating to maritime liens and mortgages. India seems to be lagging behind many other countries in ratifying and adopting the beneficial provisions of various conventions intended to facilitate international trade. Although these conventions have not been adopted by legislation, the principles incorporated in the conventions are themselves derived from the common law of nations as embodying the felt necessities of international trade and are as such part of the common law of India and applicable for the enforcement of maritime claims against foreign ships."

Thereafter in paragraph 79 the Apex Court has reproduced the text of sections 443 of the Merchant Shipping Act, 1958.

"80..... These procedural provisions are but tools for enforcement of substantive rights which are rooted in general principles of law, apart from statutes, and for the enforcement of which a party aggrieved has a right to invoke the inherent jurisdiction of a superior Court."

"82. The Merchant Shipping Act, empowers the concerned High Court to arrest a ship in respect of a substantive right. A right conferred by the Indian Carriage of Goods by Sea Act, 1925, in respect of outward cargo is one of those rights which can be enforced by arrest and detention of the foreign ship in order to found jurisdiction over the vessel and its owners, just as it can be done in respect of inward cargo by reason of the substantive rights conferred by the Admiralty Court Act, 1861, read with the Colonial Courts of Admiralty Act, 1890, and other rules of law. The same principle must hold good for carriage under a charterparty. These and other laws, such as the law of contract, tort, crime, mortgage, marine insurance, customs, port operations, etc., and the Civil and Criminal Procedure Codes, as well as the relevant rules of Court regulating procedure and practice together constitute the body of substantive and procedural law governing claims relating to inward and outward cargo, and such claims are enforceable against foreign ships by recourse to arrest and detention when found within jurisdiction. Viewed in this light, and by this reasoning, the Andhra Pradesh High Court, as a successor to the Madras High Court, does not lack admiralty jurisdiction in respect of claims relating to outward cargo.

"83. The admiralty jurisdiction of the High Court is dependent on the presence of the foreign ship in Indian waters and founded on the arrest of that ship. This jurisdiction can be assumed by the concerned High Court, whether or not the defendant resides or carries on business, or the cause of action arose wholly or in part, within the local limits of its jurisdiction. Once a foreign ship is arrested within the local limits of the jurisdiction of the High Court, and the owner of the ship has entered appearance and furnished security to the satisfaction of the High Court for the release of the ship, the proceedings continue as a personal action."

After referring to the Merchant Shipping Act, 1958 and Indian Bills of Lading Act, 1956 and the Indian Carriage of Goods by Sea Act, 1925, the Supreme Court in

para 84 of the judgment observed as under :

"84..... But the jurisdictional questions concerning arrest of foreign ships for enforcement of claims against the shipowner as a transporter of goods, which in England are regulated by the Supreme Court Act, 1981, are in many respects left unregulated by Indian legislation. While the provisions of various international conventions concerning arrest of ships, civil and penal jurisdiction in matters of collision, maritime liens and mortgages etc. have been incorporated into the Municipal laws of many maritime States, India as stated above, lags behind them in adopting these unified rules (See, for example, the Brussels Conventions listed above; See also the Administration of Justice Act, 1956 and the Supreme Court Act, 1981 incorporating the international rules into English law). By reason of this void, doubts about jurisdiction often arise, as in the present case, when substantive rights, such as those recognized by the Carriage of Goods by Sea Act, are sought to be enforced. The remedy lies, apart from enlightened judicial construction, in prompt legislative action to codify and clarify the admiralty laws of this country. This requires thorough research and investigation by a team of experts in admiralty law, comparative law, and public and private international law. Any attempt to codify without such investigation is bound to be futile." "

85. No Indian statute defines a maritime claim. The Supreme Court Act, 1981 of England has catalogued maritime claims with reference to the unified rules adopted by the Brussels Convention of 1952, on the Arrest of Seagoing Ships. Although India has not adopted the various Brussels Conventions (see the Conventions listed above), the provisions of these Conventions are the result of international unification and development of the maritime laws of the world and can, therefore, be regarded as the international common law or transnational law rooted in and evolved out of the general principles of national laws, which, in the absence of specific statutory provisions, can be adopted and adapted by courts to supplement and complement national statutes on the subject. In the absence of a general maritime Code, these principles aid the courts in filling up the lacunae in the Merchant Shipping Act and other enactments concerning shipping. "Procedure is but a handmaiden of justice and the cause of justice can never be allowed to be thwarted by any procedural technicalities. S.P. Gupta Vs. President of India and Others, :

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

"89. Admiralty jurisdiction is an essential aspect of judicial sovereignty which

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

"90. All persons and things within the waters of a State fall within its jurisdiction unless specifically curtailed or regulated by rules of international law. The power to arrest a foreign vessel, while in the waters of a coastal State, in respect of a maritime claim wherever arising, is a demonstrable manifestation and an essential attribute of territorial; sovereignty. This power is recognized by several international conventions. (See the conventions referred to above. See also Nagendra Singh, International Maritime Conventions, British Shipping Laws, Vol. 4). These conventions contain the unified rules of law drawn from different legal systems. Although many of these conventions have yet to be ratified by India, they embody principles of law recognized by the generality of maritime States, and can therefore be regarded as part of our common law. The want of ratification of these conventions is apparently not because of any policy disagreement, as is clear from active and fruitful India participation in the formulation of rules adopted by the conventions, but perhaps because of other circumstances, such as lack of an adequate and specialised machinery for implementation of the various international conventions by co-ordinating for the purpose of the concerned Departments of the Government. Such a specialised body of legal and technical experts can facilitate adoption of internationally unified rules by national legislation..."

"91. The British statute assimilating India High Courts to the position of the English High Court in respect of admiralty jurisdiction is an enabling legislation and it is but one of the strands of jurisdiction vested in the High Court by virtue of the constitutional provisions. The jurisdiction of the High Court is governed by the Constitution and the laws, and the continuance in force of the existing laws is not a fetter but an additional source of power. Access to Court for redressal of grievance being an important right of every person, it is essential that the jurisdiction of the courts is construed harmoniously and consistently with its vital function in that respect, so that absence of legislation will not jeopardise that right.

92. Admiralty jurisdiction, despite the peculiarities of its origin and growth rooted as it is in history and nurtured by the growing demands of international trade is nevertheless a part of the totality of jurisdiction vested in the High Court as a superior Court of record, and it is not a distinct and separate jurisdiction as was once the position in England before the unification of courts. The 1890 and 1891 Acts, specifically conferred admiralty jurisdiction on the Indian High Courts by reason of their being courts of unlimited jurisdiction. These Acts did not create any separate or distinct jurisdiction, but merely equated the Indian High Courts to the position of the English High Court (united and consolidated as that Court

has been since 1875) for the exercise of admiralty powers within the jurisdiction of the former. The contrary view expressed in some of the decisions of the High Courts referred to earlier is clearly wrong."

"93. Once a foreign ship is arrested in Indian waters by an order of the High Court, in exercise of the admiralty jurisdiction vested in it by statute, or inherent in it as a Court of record, in respect of any maritime claim against its owner, wherever the cause of action may have arisen, and whether or not the ship is subsequently released by the owner furnishing security, proceedings must continue against the owner as in any other suit. The arrest of the vessel while in Indian waters by an order of the concerned High Court, as defined under the Merchant Shipping Act, 1958, section 3(15) attracts the jurisdiction of the competent Court to proceed with the trial, as in the case of any other suit, as an action against the owner, and any decree obtained by the plaintiff executable against any property of the owner available within jurisdiction, including the security furnished by him for release of the vessel."

In paragraph 98 after referring to section 2(2) of the Colonial Courts of Admiralty Act, 1890, Sahai, J., observed as under :

"98..... Each part of the sub-section is inclined towards expanding jurisdiction. It not only declared those over which the Court could exercise jurisdiction but it also amplified the manner and extent of exercise of jurisdiction. It was made co-extensive with the jurisdiction exercised by the High Court in England. Use of the expression, "existing by virtue of any statute or otherwise, widened the operative field extending the limit and authority to exercise jurisdiction beyond any existing statute, to custom practice or in any other manner in which it could be exercised. It was recognition of wide jurisdiction exercised by the High Court of England.

100. From what has been narrated above it is apparent that law of Admiralty progressed gradually from ordinary Courts, to courts of Admiralty and ultimately to High Court commencing in commercial expediency, equity and justice and ending with statutory enactments covering entire field from collision on ships to cargo even. All this was existing when 1890, Act was enacted. But the statutes of 1840 and 1861 were not exhaustive and English Courts could take cognizance for various wrongs either in tort or contract. Therefore when Colonial Courts were conferred jurisdiction it was not restricted or confined to statutes, as the power was being conferred on High Courts which were, then and even now, not only courts of unlimited civil jurisdiction but Higher Courts possessed of every jurisdiction which was not expressly or impliedly conferred on other courts. The word "otherwise" literally means in a different way. Effect of its use in 1890, Act in law, was to confer not only statutory jurisdiction possessed of by English Courts but all that which was being exercised or was capable of being exercised either under custom and practice or for sake of equity and justice..... Basis of Maritime Law has been necessity to provide remedy for wrong done on high seas. Inclusion or expansion of jurisdiction was in relation to any cause which

could have been cognisable under ordinary law. Bottomry, salvage, seaman wages or towage are all causes for which action could be brought in Court of law but their enforcement was rendered illusory with disappearance of the person beyond territorial waters. To overcome this difficulty this jurisdiction was created making it actionable against person and finally the res itself. What was basic was the existence of cause of action arising out of tort or contract in relation to the master or owner of the ship."

101.Entertaining a claim arising out of breach of contract in relation to cargo taken out of any Indian port pertains to jurisdiction. It must arise out of statute. But the power to direct arrest of a ship in exercise of the jurisdiction is one relating to competency. The High Courts in India being courts of unlimited jurisdiction, repository of all judicial power under the Constitution except what is excluded are competent to issue directions for arrest of foreign ship in exercise of statutory jurisdiction or even otherwise to effectuate the exercise of jurisdiction.

27. Reading the aforesaid decision of the Apex Court in *m.v. Elizabeth* we have no manner of doubt that the Apex Court has exhaustively dealt with the jurisdiction of the High Courts of Coastal State over foreign ships. The aforementioned passages from the Apex Court judgment in *m.v. Elizabeth*, in our opinion clearly show that the High Court of Coastal State has jurisdiction not only to arrest the offending ship but also a sister ship of the offending ship. In particular, paragraph 26 of the aforesaid judgment explains the ambit of Colonial Courts of Admiralty Act, 1890. It does not incorporate any English statute into Indian Law but equates the admiralty jurisdiction of Indian High Court over places, persons, matters and things to that of the English High Court. As the Admiralty jurisdiction of English High Court expanded with the progress of the legislation, it is reasonable and rational to attribute to the Indian High Court corresponding growth and expansion of admiralty jurisdiction.

28. In paragraph 47 of the aforesaid judgment it is observed that an action in rem lies in English High Court in respect of matters regulated by the Supreme Court Act, 1981, and in relation to a number of claims the jurisdiction can be invoked not only against the offending ship in question but also against a sister ship i.e. a ship in the same beneficial ownership as the ship in regard to which the claim arose. In paragraph 48 it is observed that Merchant Ships of different nationalities travel from port to port carrying goods or passengers. They incur liabilities in the course of their voyage and they subject themselves to the jurisdiction of foreign States when they enter the waters of those States. They are liable to be arrested for the enforcement of maritime claims, or seized in execution of satisfaction of judgment in legal actions arising out of commissions, salvage, loss of life or personal injury, loss of or damage to goods and the like. A ship travelling from port to port stays very briefly in any one port. The plaintiff seeking to enforce his maritime claim against a foreign ship has no effective remedy once it has sailed away and if the foreign owner has neither property nor

residence within jurisdiction. In paragraph 49 the Apex Court has clearly stated that a ship may be arrested (i) to acquire jurisdiction; or (ii) to obtain security for satisfaction of the claim when decreed. In paragraph 51 it is observed that the attachment being only a method of safe guarding the interest of the plaintiff by providing him with a security, it is not likely to be ordered if the defendant or his lawyer agrees to accept the service and to put in bail or to pay money into Court in lieu of bail. In paragraph 57 it is clearly mentioned that the arrest of a foreign ship by means of an action in rem is thus a means of assuming jurisdiction by the competent Court. In paragraph 59 it is observed that the admiralty actions in England on the other hand whether in rem or in personam are confined to well defined maritime liens or claims and directed against the res (ship, cargo and freight) which is the subject matter of the dispute or any other ship in the same beneficial ownership as the res in question. In paragraph 65 it is observed that where statutes are silent and remedy has to be sought by recourse to basic principles, it is the duty of the Court to devise procedural rule by analogy and expediency. Actions in rem, as seen above, were resorted to by courts as a device to overcome the difficulty of personal service on the defendant by compelling him to enter appearance and accept service of summons with a view to furnishing security for the release of the res, or in his absence, proceed against the res itself, by attributing to it a personality for the purpose of entering a decree and executing the same by sale of the res. This is a practical procedural device developed by the courts with a view to rendering justice in accordance with substantive law not only in cases of collision and salvage but also in cases of other maritime liens and claims arising by reason of breach of contract for the hire of vessels or the carriage of goods or other maritime transactions or tortious acts, such as conversion or negligence occurring in connection with the carriage of goods. Where substantive law demands justice for the party, aggrieved and the statute has not provided the remedy, it is the duty of the Court to devise procedure by drawing analogy from other systems of law and practice. In paragraph 66 it is clearly mentioned that it is like wise within the competence of the appropriate Indian Courts to deal in accordance with the general principles of maritime law and the applicable provisions of statutory law, with all persons and things found within their jurisdiction. The power of the Court is plenary and unlimited unless it is expressly or by necessary implication curtailed. Absent such curtailment of jurisdiction all remedies which are available to the courts to administer justice are available to a claimant against a foreign ship and its owner found within the jurisdiction of the concerned High Court. This power of the Court to render justice must necessarily include the power to make interlocutory orders for arrest and attachment before judgment. In paragraph 83 it is observed that the admiralty jurisdiction of the High Court is dependent on the presence of the foreign ship in Indian waters and founded on the arrest of that ship. This jurisdiction can be assumed by the concerned High Court, whether or not the defendant resides or carries on business or the cause of action arose wholly or in part, within the local limits of its jurisdiction. Once a foreign ship is arrested within the local limits of the jurisdiction of the High Court, and the owner of the

ship has entered appearance and furnished security to the satisfaction of the High Court for the release of the ship, the proceedings continue as a personal action. In paragraph 85 it is clearly mentioned that although India has not adopted the various Brussels Conventions the provisions of these conventions are the result of international unification and development of the maritime laws of the world, and can, therefore, be regarded as the international common law or transactional law rooted in and evolved out of the general principles of national laws, which in the absence of specific statutory provisions can be adopted and adapted by courts to supplement and complement national statutes on the subject.

29. The aforesaid observations of the Apex Court in our opinion very clearly suggest that unless there is any prohibition by the municipal laws the principles of trans- national law or international conventions could be applied for affording remedy for the satisfaction or realisation of maritime claim. It is clear that every person, thing and foreign vessel entering Indian waters comes within the jurisdiction of the High Court of coastal state by the very act of its entering the Indian territorial waters. In such a case if any one has any maritime claim against the owner of offending ship then not only the offending ship but also any other property or ship belonging to such a person within Indian territorial waters, can be attached or arrested by the High Court of the coastal state. Such a course is not only not prohibited by any municipal laws but in our opinion the provisions of Order XXXVIII and particularly Rule 5 thereof clearly shows acceptance of such principle by the municipal laws.

30. The observations of Lord Denning in *Banko* (1977) 1 L.L.R. 49 and in *Rasu Maritima* clearly shows that the arrest of other ships of the defendants so long as they are within its jurisdiction was in vogue in England. The observations of Lord Denning in the case of *Trendtex Trading* and the conclusion reached by the learned Judge i.e. "that the rules of international law have changed and do change and that the Court have given effect of the changes without the aid of any Act of Parliament, it follows that the rules of international law, as existing from time to time do form part of our English law" also support the proposition that without specific adoption by the Municipal law, applicable rules of International law could be legitimately adopted by the Court to further the remedy and cause of justice.

31. In view of the aforequoted decisions and especially the decision of the Apex Court in *m.v. Elizabeth*, we are of the clear view that the High Court does have jurisdiction to arrest a sister ship for securing any maritime claim of the plaintiff.

32. In the result we do not find any merit in the appeal and the appeal is dismissed. However, there shall be no order as to costs.

Certified copy expedited.

33. Appeal dismissed.