

(2007) 08 BOM CK 0114

In the Bombay High Court

Case No : Notice of Motion No. 2728 of 2007 and Chamber Summons No. 1125 of 2007 in Admiralty Suit No. 32 of 2007

New Era Shipping Ltd. and Hatimi Steels

APPELLANT

Vs

m.v.P. Express and Others

RESPONDENT

Date of Decision : 21-08-2007

Acts Referred:

Admiralty Courts Act, 1861 — Section 25, 33, 35
Bombay High Court (Original Side) Rules, 1980 — Rule 941, 949
Merchant Shipping Act, 1958 — Section 3(55)
Ports Act, 1908 — Section 3(7)
Supreme Court Rules, 1965 — Rule 11, 4(3)

Citation : (2008) 1 ALLMR 556 : (2007) 6 BomCR 138 : (2007) 109 BOMLR 1875

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

Bench : Single Bench

Advocate : Sunip Sen and V.U. Seth, instructed by Ashwin Shankar, for the Appellant; F. Sethna, instructed by Dunmorr Sett, for the Respondent

Judgement

S.C. Dharmadhikari, J.—This chamber summons and the notice of motion in this Admiralty Suit can be disposed of by a common order, inasmuch as they were heard together so also similar contentions were canvassed by parties.

2. The plaintiff has instituted this suit in the Admiralty & Vice Admiralty jurisdiction of this Court for the following reliefs:

(a) For an order of Arrest of the 1st Defendant vessel for a sum of Rs. 42,60,000/-as per the particulars of claim shown in Exh.N hereto;

(b) That the defendants be ordered to permit the plaintiff's a survey of the first defendant vessel;

(c) For an order and decree in favour of the plaintiffs and against the first and second defendants for Rs. 42,60,000/ as per the particulars of claim shown in Exh.N hereto;

3. It is the case of plaintiff that it is a company engaged in business of owning barges and ships. The first defendant vessel is a foreign flag ship presently lying at Port Alang, Gujarat. The plaint proceeds on the basis that the vessel owners are unknown and she is presently on her final voyage for ship breaking operations. Second defendants are the representatives of the owners of the vessel. They are responsible and instrumental in vessel sailing into Alang for the proposed breaking of the same. Third defendants are Gujarat Maritime Board, a Statutory authority in the State of Gujarat, established, inter alia, to supervise and control ship breaking activities in that State.

4. It is contended that the vessel is currently under the jurisdiction of the third defendant. The suit has been filed seeking damages against the first and second defendants on account of collision of first defendant vessel with that of the vessel by name m.v.KINSHIP MODESTY. This vessel viz., KINSHIP MODESTY was chartered by the plaintiffs.

5. The vessel of plaintiffs was in Gujarat for charterers operations. She had completed discharge of her cargo at Port Bhavnagar and was waiting at the anchorage outside Bhavnagar port for her next cargo assignment. Her engines were off and her anchor was dropped as required for the vessel that would be waiting for her position to receive cargo.

6. At about 05.15 hrs. on 6th July 2007, the first defendant vessel came in physical contact with the plaintiff's vessel. The first defendant vessel was on her journey to Alang and was on duty to look out for the vessels that are in anchor. Whilst the first defendant vessel was making her approach, the plaintiff's Master apprehended that first defendant vessel was moving too close to the plaintiff's vessel. He and the Chief Officer called on the first defendant vessel on VHF Channel No. 16 and 17 and tried to get his attention by flashing lights. This was intended to warn the Master and crew of the first defendant vessel of their manoeuvre to avoid plaintiff's vessel. Notwithstanding the same, the first defendant crew paid no heed to the warning signals and made unfortunate contact with plaintiff's vessel arising out of their negligent and reckless navigation.

7. As a result of this contact, plaintiff's vessel suffered damage and investigations revealed the extent of the same. The same is disclosed in a statement, a copy of which is annexed as Annexure "E" to the plaint. Plaintiffs' vessel was, therefore, required to be repaired and the cost estimated for the same was Rs. 25 lakhs. Plaintiff's vessel will lose its six days before she enters her dry dock and, thereafter, it is likely that the vessel will undertake repairs for 14 days in dry-dock after which only she will be able to undertake any commercial employment. Consequently, she will not be entitled to charter hire assignments for this period. The vessel was fixed for charter at Rs. 88,000/-per day and it is expected to lose a sum of Rs. 17,60,000/- towards loss of income and that is how the claim for damages has been made.

8. In paras 11 and 12 of the plaint, this is what is stated:

11. In view of the foregoing, the plaintiff respectfully submits that this Hon''ble Court is entitled to invoke and exercise its Admiralty jurisdiction under the Admiralty Courts Act, 1840 and 1861, the Brussels Arrest Convention Act, 1852, the Geneva Arrest Convention 1999 read with the various High Court and and Supreme Court Judgments. This Hon''ble Court, therefore, has jurisdiction to entertain, try and dispose of the present suit. The plaintiffs are based within the Court''s jurisdiction and have suffered their loss here. The collision took place within the Admiralty jurisdiction of this Hon''ble Court.

12. The first defendant vessel is presently in the port and harbour Alang and has come for the purpose of demolition/breaking, after which she will be lost forever. Consequently an ad-interim order of arrest of the first defendant vessel is necessary, failing which grave, irretrievable loss and injury will be caused to the plaintiffs. In the absence of an order of arrest, the plaintiff''s suit will be rendered infructuous as the first defendant vessel is the only substantial asset, owned by first and second defendant. Moreover, there is no other equally alternative, efficacious remedy available to the plaintiff.

It is therefore contended that the arrest of first defendant vessel is the only manner in which plaintiff''s lien/claim against the first defendant vessel and the second defendant can be secured, failing which any decree passed against them will be impossible to be executed.

9. The above mentioned prayers and reliefs are based upon these averments in the plaint.

10. An application for arrest of first defendant vessel was made and this Court passed an order of arrest of first defendant vessel on 12th July 2007.

11. The notice of motion is on behalf of applicants/proposed defendant No. 4 praying for vacation of the order of arrest dated 12th July 2007, either on the basis of erroneous averments in the plaint or that this Court lacks jurisdiction to pass the same.

12. Further relief is that the plaintiff be directed to compensate the applicant-proposed defendant No. 4 " Rs. 75,000/- per day with effect from 12th July 2007 until the date the demolition activity at Floor No. 24-A (55) in respect of first defendant vessel can occur or commence.

13. The facts upon which the chamber summons, which claims relief of intervention and the above notice of motion are based are as follows.

14. The vessel m.v.P.EXPRESS was not lying afloat in port Alang on the date of verification/affirmation of the plaint, since she had been beached on July 7, 2007, which was the matter of public knowledge and/or within the knowledge of the plaintiffs and/or deemed to be within the constructive knowledge of plaintiffs. For these reasons, the order dated July 12, 2007 was obtained on the basis of

false and/or erroneous pleadings, as also the fact that the vessel m.v.P.EXPRESS was not a "Ship", i.e. legally capable of navigation and amenable to an action in rem, and therefore, not amenable to the Admiralty and Vice admiralty jurisdiction of this Court. Consequently the order dated July 12, 2007 is liable to be revoked, recalled and/or modified or set aside.

15. The applicant having contracted vide a memorandum of agreement dated 8th June 2007 for the purchase of the m.v.P. EXPRESS, intended for demolition at Alang, accepted physical delivery of the m.v.P.EXPRESS from her then owners Attar Ltd. of Kingstown, Saint Vincent & the Grenadines, vide Physical Delivery Certificate, at about 1640 hrs. on 6th July 2007. The applicants further state that in pursuance of an application dated 6th July 2007 for beaching of the m.v.P. EXPRESS, permission was granted by the office of the Port Officer, Ship Recycling Yard, Alang in relation to the beaching of the m.v.P.EXPRESS. The applicant deposited Import Duties in relation to the m.v.P.EXPRESS with the local customs authorities. Following payment of requisite customs duties, requisite No objection for beaching was accorded by the Superintendent of Customs, Bhavnagar. Consequently, beaching of m.v.P.EXPRESS occurred at around 0900 hrs. on July 7, 2007. Upon beaching, m.v.P.EXPRESS ceased to be a "ship" and was boarded by demolition labourers employed by the applicant for purpose of "breaking" for scrap purposes. The m.v.P.EXPRESS on beaching, has been rendered permanently incapable of being re-floated. The m.v.P.EXPRESS is also no longer registered as a "ship", having been deleted from her flag-state registry. The applicant further submits that the applicant is a bonafide purchaser without notice of any alleged collision as has been alluded to in the plaint. As such bonafide purchaser without notice, the applicant is entitled to be compensated for the loss and damage sustained by the applicant, which has been quantified at the rate of Rs. 75,000/- per day as per particulars annexed to the affidavit in support of notice of motion.

16. It is thus contended that as owner of the movable property that comprise the erstwhile m.v.P.EXPRESS and whose demolition was interrupted by virtue of the order of arrest dated 12th July 2007 made by this Court, correspondence was entered into with the plaintiff pointing out the above facts. Plaintiffs were called upon to take steps to raise the order of arrest. But they having neglected to do so, the above proceedings have been initiated. Insofar as, the loss caused to the applicant is concerned, it is contended thus:

9. I say that the applicant is a bona fide purchaser without notice of any alleged collision as has been alluded to in the plaint. As such bona fide purchaser without notice, the applicant is entitled to be compensated for the loss and damage sustained by the applicant, which has been quantified at the rate of Rs. 75,000/- per day as per the particulars appended. I submit that the plaintiff has furnished an undertaking to provide damages for wrongful arrest at the time of the filing of the present suit, which is thus liable to be invoked, and the loss of the applicant be thus compensated in the sum of Rs. 75,000/- per day with effect from 12th

July 2007 through until the date when the order of lifting of arrest is duly conveyed to the competent authorities, such that will permit for breaking/ demolition activities in respect of the movable property lying beached on Plot No. 24-A(55), Alang. Additionally, the applicant submits that all legal costs incurred in defending this wrongful action instituted by the plaintiff, are liable to be reimbursed by the plaintiff to the applicant and prays for appropriate reliefs in this regard, in addition to the particulars appended hereto.

It is in these circumstances that a prayer is made that the applicant be compensated for the loss in the sum of Rs. 75,000/- per day with effect from 12th July 2007 till the date on which the order is lifted or raised. A further sum for incurring legal expenses and costs should also be paid.

17. Upon the notice of motion and chamber summons being served, plaintiffs filed an affidavit in reply urging that both proceedings are misconceived and not maintainable. There is misrepresentation of facts and it is falsely urged that this Court's jurisdiction under the Admiralty & Vice Admiralty jurisdiction cannot be invoked. The argument is that the application itself is not maintainable. There is no document evidencing transfer of ownership or acquisition of title with regard to defendant No. 1 vessel. The authenticity of the documents produced is disputed. Documents are anti-dated and executed to set up a transaction. Presuming that they are genuine, it is contended that no Letter of Credit has been opened, no Bill of Sale has been executed, no Commercial Invoice has been issued and no certificate of first defendant being free from liens/encumbrances is placed on record. It is contended that the documents establishing payment of customs duty GMB charges and filing of IGM/Bill of entry would falsify the case of applicant assuming the same are genuine.

18. With regard to the basic submission on jurisdiction, it is contended thus:

It is denied that defendant No. 1 is not a ship. Defendant No. 1 was a ship at the time the proceedings were instituted. Defendant No. 1 was a ship when the order of arrest was obtained. Defendant No. 1 was a ship when the order was communicated and/or served. Defendant No. 1 is a ship even today. The factum of her alleged importation for breaking and the fact that her bottom rests on a mud flat at low tide do not retract therefrom.

19. It is denied that the defendant vessel was beached on 7th July 2007. The record panchanama and communications addressed by the plaintiffs and/or their Advocates to the Gujarat Maritime Board indicate that no beaching had taken place till 11th July 2007. It is in such circumstances that it is denied that the applicant has any right to intervene in the proceedings. Consequently, when there is no evidence of any right being created in the vessel, the order of arrest cannot be set aside at the behest of the applicants.

20. There are further Affidavits in support of the chamber summons and Compilation of Document is tendered on behalf of the Applicants. Copies of the same have been served on the plaintiffs Advocate.

21. Ms. sett appearing for the applicant submits that the legal position cannot be brushed aside. She submits that Rule 949 of High Court (O.S) Rules permits intervention. Therefore, and when valuable right of the applicant in the vessel is being adversely affected so also the documents proving that the applicant is a bonafide purchaser for value without notice, both, the chamber summons and notice of motion are maintainable. She submits that the plaint must be read as a whole. She submits that the vessel has not come as a navigating ship which is capable of carrying cargo and passengers. She has not come on any specific voyage. On the other hand, it has been brought to the shipyard where demolition and destruction activities are undertaken. She submits that Alang is a place where ship dismantling and demolition activities are undertaken on large scale and, thereafter, the vessel/ship is sold as scrap. She submits that at the time of filing of the suit, the vessel had already been beached. She submits that its status is that of a vessel already beached, it is boarded by Customs Authorities, dismantling activities are going on. It has ceased to be a ship or vessel and, therefore, not amenable to the jurisdiction of this Court.

22. It is further contended that notwithstanding the fact that the applicant had put forth incontrovertible evidence in support of the fact that the m.v.P.EXPRESS had been imported for demolition and was beached on 7th July 2007 at 0900 hrs. as detailed in the affidavit dated 21st July 2007 filed by Mr.Mathai to which photographs evidencing the P.Express had been beached, coupled with Tide tables are annexed. She submits that the denial by plaintiffs of the above facts is thus malafide.

23. It is further submitted by Ms.sethna that the m.v.P.EXPRESS by virtue of her having been admittedly beached on 7th July 2007 ceased to be amenable to the Admiralty & Vice Admiralty Jurisdiction of this Court and, therefore, the order of arrest dated 12th July 2007 is liable to be vacated. In support of her contentions she has placed reliance upon the following judgments of this Court:

a) The unreported judgment of this Court in the case of Communications and Commerce International v. m.v.SAABA and Ors., of Learned Single Judge and a Division Bench dated 28th July 2001 and 16th July 2001 respectively.

(b) North End Oil Limited Vs. m.v. "Kim An" and another, decided on 25th February 1999;

(c) AIR 1999 Bom. 18 in the case of Ocean Marine Mutual Insurance Association Ltd. v. m.v.WONFU and Ors. decided on 24th August 1998;

(d) Unreported judgment of Gujarat High Court in Western Ship Breaking Industry v. Laiki Bank (Hellas) S.A. dated July 2006;

(e) M.V. Elisabeth and Others Vs. Harwan Investment and Trading Pvt. Ltd., Hanoekar House, Swatontapeth, Vasco-De-Gama, Goa, Ms.Sethna has also relied upon Definitions of the Term "ship"/"Vessel" in several statutes including Admiralty Courts Act, 1861, Merchant Shipping Act, 1958, Major Port Trusts Act,

1963, Indian Ports Act, 1908, as also the Dictionary meaning cited in the judgment of this Court pronounced in the case of *m.v.SAABA* (supra).

24. In support of her abovementioned submissions, Ms.sethna has relied upon the following propositions from the afore-referred judgments viz.

(a) That in view of plaintiffs being in the business of shipping, a presumption must arise that plaintiffs knew about beaching of the P.Express (and such other anterior acts as were liable to be performed by the applicant, including payment of Customs Duties, securing permission for beaching, etc.)

(b) That once the vessel owner (in this case the applicant) has declared his intention to the local customs authorities to demolish the arrived vessel through having effected payment of import duties, the vessel ceases to be legally capable of navigation and is thus no longer amenable to arrest and/or admiralty jurisdiction. In this regard she specifically relied upon Clause 11 of the Memorandum of Agreement dated 8th June 2007 which stipulates that the sale shall occur for demolition only.

(c) That upon the beaching of the vessel, she ceases to be legally and mechanically capable of navigation and accordingly, does not remain a ship liable to arrest.

25. Ms. sett has relied upon Judgment of this Court *Vohra Agencies v. M.V. Irni and Ors.* dated 1st February 1993 in support of her contention that applicant has a right to intervene as also that the case of applicant regarding purchase of the vessel for purposes of demolition is required to be accepted even at the prima facie stage in view of documents filed supporting such case.

26. In support of her submissions, she relies on various documents to establish transfer of "title" in the "property".

27. On the other hand Mr.Sen learned Counsel appearing for plaintiffs submits that the proposed interveners have failed to show valid title over the vessel. Exhibit 15 to the affidavit of Mr.Amit Jain in support of the chamber summons includes a letter from plaintiff's Advocate asking for proof that Attar Ltd. (Sellers) were the registered owners of the first defendant vessel. That proof is not produced.

28. Mr.Sen learned Counsel for plaintiffs submits that the whole argument is based upon misconception in law. He submits that there is no substance in the contentions inasmuch as the jurisdiction of this Court under the Admiralty & Vice Admiralty jurisdiction is not restricted to "Ship". He submits that the word "Jurisdiction" should not be confused with the powers and authority of the Court. In any event, the powers extend to hold/arrest any property. He has invited my attention to the Admiralty Courts Act 1861 and more particularly Section 25, 33 and 35 thereof. He has also invited my attention to the Colonial Courts of Admiralty Act 1890 and Section 2(2) thereof. He submits that prior thereto, the Admiralty Jurisdiction was being exercised under the Letters Patent. After 1890

Act was enacted, Jurisdiction extended to whole Presidency of Bombay. He submits that reliance upon the decision *m.v.ELIZABETH* is misplaced. He submits that the Jurisdiction also extends to enforcement of Maritime Lien. He submits that Rule 941 of the Bombay High Court (OS) Rules also would be of assistance and guidance in construing the powers and authority of this Court so also its jurisdiction. He submits that the word "property" and the words "if the property is a ship", appearing in Rule 941 of O.S. Rules are considered in the backdrop of the jurisdiction of this Court, then, it is clear that the moment a ship is taken for destruction or demolition does not mean that this Court loses jurisdiction straightway. This is assuming without admitting that a ship being taken for demolition is not Navigating vessel as contended.

29. Mr.Sen further submit that the notice of motion is founded on a belief that nothing other than a navigating ship can be arrested. This submission is based entirely on the judgments of *SAABA* and *Kim An* which are per incuriam and proceed on a wrong basis/assumption that only a ship can be arrested and then proceed to consider whether a ship which is imported for breaking up (or which has been broken up) is a ship. Since the question is wrong, the answer is also wrong. There are two aspects to consider, according to Mr.Sen, i.e. jurisdiction and power. If there is jurisdiction then what powers can be exercised in rem Jurisdiction depends on two facts (i) the type of causes of action irrespective of where it arose or the place of residence of the defendant (ii) presence of the res within the territory of the sovereign under whom the Courts sits.

30. In the present case, at the time when the cause of action arose, the *P.Express* was definitely a ship navigating on its own steam. Consequently, jurisdiction attaches. Once attached, it cannot be lost by alleged change in character of the res.

31. Once the jurisdiction is established there is no further reference to "ship". On the contrary the Court is given full civil powers in addition to the power of arrest specifically granted by the Letters Patent. The 1861 Admiralty Courts Act sets out the types of causes of action over which the Admiralty Court has jurisdiction. It defines the word "Ship" but uses that word only in the context of the types of causes of action over which the Court will have jurisdiction e.g. necessities supplied to a ship, damage done by a ship, damage to goods carried in a ship etc.

32. The authorities relied upon by the proposed interveners in support of their case that the right of arrest extends only to existing ship must, thus, be disregarded for failure to have analyse and consider the abovementioned statutory provisions.

33. The proposed intervener's case is based on implied knowledge of the plaintiff that the ship has been beached at the time of the arrest and the assertion that the ship having been imported, is not "Goods" and cannot be arrested. The case on implied knowledge is founded on the observation in *SAABA* where the plaintiff had knowledge of that vessel's beaching. In *SAABA* the arrest was by the very

managers of the SAABA itself. In this case knowledge is sought to be imputed on the basis that the plaintiffs are in the shipping business and therefore, ought to have had the knowledge. It is one thing to say that a vessel's manager should know the exact status of his own vessel and completely another to say that a local barge owning company based in Goa ought to know exactly where an allegedly Deregistered ship was, in Gujarat is, merely because it is in the same business. Of course, there is one link missing; as long as the vessel P.EXPRESS is within jurisdiction, there is no duty to know its exact location and no such duty is pleaded. The plaintiff has disclosed that the vessel is brought in for the purposes of breaking up.

34. The right to intervene under the High Court Rules is restricted to a party having an interest in the property capable of being arrested. It is improper for the proposed interveners to seek to intervene claiming to have interest in the property (P.EXPRESS) and also argue in the same breath that it is not property for the same purpose of arrest.

35. The proposed interveners had relied upon the judgment of North End Oil Limited Vs. m.v. "Kim An" and another, . The plaintiffs submit that this decision is not applicable to the present case since the Court was not concerned with the issue of arrest of property other than ship. Secondly, the demolition of the KIM AN had already commenced. Thirdly, there is no maritime lien for a claim of unpaid bunkers supplied to m.v.KIM AN. Fourthly, the test laid down by it was for the plaintiffs to prove, using photographs or affidavits to show that the wreck was intact in existence and not demolished to such an extent so as to get converted into goods. In the present case, plaintiffs have satisfied this test. The Bailiff has filed his report on 20th July 2007 wherein it is stated that "We found the vessel was intact condition". Photographs taken on 13th July 2007 showing the vessel P.EXPRESS in water at the time of service of warrant of arrest, are also annexed. The proposed interveners had relied upon the decision of Gujarat High Court in Western Shipbreaking Industries v. Laiki Bank (Hellas) SA. This decision has been stayed by the Division Bench Appeal Court of Gujarat High Court.

36. The test laid down for an application under Order VII Rule 11 should be followed for determining the present motion. If security is released, the suit is rendered infructuous and without meaning. There would be injustice and irreparable harm and injury caused, if the Court eventually comes to a conclusion at the final hearing, after considering all evidence that the P.EXPRESS was correctly arrested. The plaintiffs do not admit the facts as averred by the proposed interveners.

37. The averments in the plaint make out a valid case for arrest. The standard to be applied by the Court whilst determining an interim application such as the present one taken out by the proposed interveners is to determine whether the plaintiffs have established a prima facie case. The P.EXPRESS had been imported under a caption different from that which the SAABA had been imported. The

SAABA considered a vessel to cease to be one if she were being imported as goods. In the case of P.EXPRESS, the proposed interveners have not sought to import her under the caption of goods, but instead under the category of EXIM Code 89.08 being vessels and other floating structures for breaking up.

38. Thus, from the averments in the plaint, this Court will have to determine as to whether the order of arrest needs to be vacated. It will also have to consider this aspect in the backdrop of the pleas raised on behalf of the interveners that the ship was not on any voyage and thus in a navigable state but it being brought for destruction and demolition at Alang ship yard, it is not a ship which is capable of being arrested.

39. For that purpose, the averments in the plaint to which a reference has already been made are crucial. The plaint proceeds on the basis, which is now incapable of being disputed, that the first defendant vessel is a foreign flagged ship lying at port Alang in the State of Gujarat. She is presently on her way for ship breaking operations on her final voyage (see para 1 of the plaint). It is also clear from the averments in this para that the impleadment of second defendant is on the basis that they are responsible and instrumental in selling the same in Alang for the purpose of proposed breaking. The third defendant Gujarat Maritime Board is also impleaded on the basis that it is the Statutory Authority established for supervising and controlling ship Breaking Activities in Gujarat.

40. It is true that the claim in this suit arises out of the contact by the first defendant vessel with plaintiff's vessel and damage suffered by the plaintiff's vessel due to the same. Thus, the claim is of damages on account of collision of the first defendant vessel with the plaintiff vessel. It is on this basis that this Court's jurisdiction under the Admiralty & Vice Admiralty Act is invoked.

41. I have reproduced para 12 of the plaint for the purpose of noticing the undisputed position viz., that first defendant vessel came to the port and Harbour of Alang for purpose of demolition and breaking, after which she will be lost forever. Therefore, arrest was sought on the basis that if the vessel is broken up, it would not be available at all. It is the only substantial asset and if the same is not arrested, the claim of plaintiffs would be in complete jeopardy and incapable of being secured.

42. The short question, therefore, before me is whether, when such is the nature of pleadings can this Court in its Admiralty & Vice Admiralty Jurisdiction proceed to arrest first defendant vessel?

43. Reliance is placed upon several definitions. Ms.Sethna urges that the definition of the word "Vessel" as defined in Indian Ports Act, 1908 is relevant for the present proceedings. The said term is defined in Section 3(7) thus:

3(7): Vessel includes anything made for the conveyance (mainly) by water of Human beings or of property.

Ms. sett submits that the first defendant is a vessel but in its present state when

it is not on a regular voyage but brought for breaking, it can hardly satisfy the test reproduced above. She then invites my attention to the term "Vessel" as defined in the Major Port Trusts Act, 1963 and submits that the definition there also is identical. She submits that the term "Ship" is defined in the Merchant Shipping Act to mean as not including a sailing vessel. The word sailing vessel is defined thus:

Sailing Vessel means any description of vessel provided with sufficient sail area for navigation under sails alone, whether or not fitted with mechanical means of propulsion, and includes a rowing boat or canoe but does not include a pleasure craft.

She submits that all these definitions have been found to be relevant. Assuming that the claim is arising out of Maritime Lien, yet, the concept is clear. The above concept is applicable to maritime lien on a vessel on the voyage during which the claim giving rise to the lien arises and on the accessories of the vessel and freight accrued since commencing of the voyage. She submits that the controversy is fully covered by the Judgment of this Court.

44. In AIR 1999 Bom. 18, the Chamber Summons that was taken out was for impleadment of respondent as party defendant to the suit. The suit was filed by the plaintiffs which was a insurance company and which had insured the defendant vessel.

45. The argument was that the defendant vessel was covered by insurance with the plaintiff to avail of the cover of protection, Indemnity, Freight, Demurrage etc. Plaintiffs raised debit notes against defendants and also sent a demand notice. When plaintiffs came to know that the vessel was lying at Port Alang, they approached the Court and obtained warrant of arrest dated 3rd April 1998. This Court after perusing the pleadings and bailiff's report was of the view that substantial part of the vessel was already demolished. It is in these circumstances, that this Court held that the Chamber Summons is not maintainable. The Court was of the view that no security can be sought in respect of the vessel which ceased to be a "Ship". In paras 5 and 6 of this decision the above definitions have been referred to and applied.

46. Another decision on identical lines is rendered by a learned Single Judge of this Court in the case of North End Oil Limited v. m.v.KIM AN and Anr. This Court was considering a request for vacating an order of Arrest of the Defendant vessel on the ground that the applicant substantiated its plea that the vessel was purchased by it for purpose of ship breaking much prior to the order of arrest before service of arrest of warrant. The demolition activities which were underway came to stand still. The Court accepted the case of applicant that the applicant had purchased the vessel for demolition. Reliance was placed upon certain decisions and this is what is observed in paras 7 to 11:

7. However, crucial question is, firstly, whether the defendants vessel was a vessel as contemplated under the definitions of aforesaid two Acts i.e. Admiralty

Court Act, 1861 and Merchant Shipping Act, 1958 and secondly on whom the burden of proving the existence of res at the time of arrest warrant lies?

8. So far as first aspect is concerned, the ship has been defined under the Admiralty Court Act, 1861 as "Ship" shall include any description of vessel used in navigation not propelled by oars" and the expression vessel has been defined u/s 3(55) of the Merchant Shipping Act, 1958 as "vessel" includes any ship, boat, sailing vessel, or other description of vessel or other description of vessel used in navigation.

9. If both these definitions are considered, navigability of the ship is a dominant factor in deciding whether it is a ship or vessel. The navigability of the vessel or ship is dependent not only on the mechanical navigability but also legal navigability because whether the vessel can be legally put to use for navigation is an important question. If this aspect of legal navigability is considered, and if the case of the applicant is accepted that he had imported vessel for demolition, that he had completed all the legal formalities as stated above and obtained demolition permission on 27/10/1998, then it is clear that on the date of the order of the Court regarding arrest of the vessel, the same was not navigable because of having purchased the vessel for destruction. The applicant could not have found the vessel fit for navigation. Therefore, the arguments of Mr.Dwarkadas in this regard cannot be accepted.

10. The second aspect of the matter is, what was the condition or res of the vessel on the date of the arrest of the vessel or on the date of service of the warrant of vessel. Mr.Dwarkadas contended that there was nothing with the applicant to show that on 5/11/1998 the destruction of the vessel had gone to such an extent, that it no longer remained as a vessel and it stood converted into goods. I am in disagreement with the submission made by Mr.Dwarkadas because Author Thomas in his Maritime Liens in para 34 under the title "Property Incumbered" has observed: "The fundamental principle is that a maritime lien attaches only to the res in respect of which the claim arises. It is only the particular res which perpetrates the damage or the particular res to the benefit of which services are rendered which is incumbranced.

The Author has further in paragraph No. 62 observed:

The fundamental legal nature of an action in rem, as distinct from its ulterior object, is that it is a proceeding against a res. Thus, when a ship represents such a res, as is frequently the case "the action in rem is an action against the ship itself.

Further in paragraph No. 63, it is observed:

The action in rem, being a proceeding against a res and whereunder the res may be appropriated to the satisfaction of the plaintiff's claim, is patently distinct from an action in personam

Further in paragraph No. 66 the Author has observed:

The action in rem as a unique and distinct proceeding against a res is most plainly manifest when the classical pattern of arrest followed by judicial sale prevails.

11. From all these discussions regarding res and action in rem it is clear that when the plaintiff files for an action in rem and arrest of vessel, he must prima facie prove that the res was in existence on the date of its arrest. If the defendant denies the existence of res and contends that res was demolished, the burden is still on the plaintiff to prove that on the date of arrest the res was intact in existence and not demolished to such an extent so as to get converted in to goods.

47. The third decision is of another learned Single Judge of this Court, (D.K.Deshmukh, J). in Notice of Motion No. 1302 of 2001 in Admiralty Suit No. 14 of 2001 dated 28th June 2001. After considering the rival contentions in paras 7 and 8 this is what is observed by the learned Single Judge:

7. Now if in the light of these rival submissions the record of the case is perused, it is clear that when the plaint that is filed in the present suit was drafted, the plaintiffs were aware that the defendant No. 1 vessel is at present lying at the port and harbour at Mumbai. The plaintiffs were also aware that she is scheduled to be beached on 19th May, 2001. The plaintiffs have stated in the plaint that they are carrying on business of managers of merchant vessels. If the plaintiffs on 19th May, 2001 were aware that the vessel is in Mumbai and that it is to be beached on 19th May, 2001 for the purpose of demolition, then in my opinion, considering the business which the plaintiffs carry on, the plaintiffs must have made enquiries with the port authorities. In my opinion, therefore, it would be safe to assume that the plaintiffs were aware of the purpose for which the vessel has been brought to Mumbai. It is clear from the bill of entry produced by the defendants that the defendant No. 1 vessel was imported into India for the purpose of demolishing and that because the vessel was brought in India for the purpose of demolition, the Importer was held liable for payment of customs duty on the vessel and it became goods which were being imported in India. In fact, the caption of the bill of entry is "Bill of Entry for Home Consumption". The bill of entry further shows that by 10th May, 2001, customs duty had already been paid for importing the vessel, but the plaintiffs chose not to disclose this in the plaint. It is difficult to believe that a plaintiff who know even the exact date on which the vessel is to be beached for demolition, was not in a position. On enquiry to find out the purpose for which the vessel has been imported and as to whether any payment have been made for that purpose. Considering that the plaintiffs are in the business of managing the vessels, it would be safe to assume that, it knew that, for demolition of a vessel, the owners have to take a plot on lease, have to pay customs duty on the vessel, therefore it cannot be believed that the plaintiffs, who knew that the vessel is scheduled to be beached for demolition on 19th May, 2001, did not know that customs duty has been paid on 8th May, 2001, that a plot has been taken on lease for the purpose of beaching the vessel.

But the plaintiffs have chosen not to disclose these facts in the plaint. It is further pertinent to note, according to the agreement between the plaintiffs and the owners of the vessel, the crew of the vessel was to be engaged by the plaintiffs and the defendants have stated in the affidavit, that when the vessel reached Mumbai, the crew of the vessel was Pakistani and the plaintiffs are also a Pakistani Company. In any case, from the bill of entry and documents produced by the defendants, it is clear that the vessel was imported in India for the purpose of breaking it. Perusal of provisions of Clause 2 of Admiralty Act, 1861 shows that a ship includes any description of vessel used in navigation. Thus, the Admiralty Act does not define the word "Ship". In the admiralty jurisdiction of this Court, this Court can entertain an action in rem against a ship. The General Clauses Act also defines the term "Ship" but it also gives inclusive definition. Therefore, so far as the meaning of the term "Ship" is concerned, we will have to go back to the meaning attached to the term in common parlance. Dictionary meaning of the term "Ship" is a vessel employed in navigation. Thus navigability of the vessel is a dominant factor in deciding whether it is a ship or not. The navigability of a vessel will depend not only on its mechanical navigability but also on its legal navigability. It appears, that once the defendants, declared their intention to the authorities in India, that they are importing the vessel as goods in India and they want to discontinue its use as a ship for carrying cargo and paid customs duty on the vessel as goods. Legally, the owners became disentitled to navigate the vessel, and therefore, from that moment the vessel ceased to be a ship. The defendant No. 1 vessel when it was imported into India was definitely a ship but the moment the owners declared their intention to discontinue its use as ship or a vessel and not only declared their intention but acted pursuant to that intention and made declarations before the authorities and paid amounts and took further actions like taking a patch on lease for breaking of the ship, their intention was manifest that they want to discontinue the use of the defendant No. 1 vessel as a ship. A ship like any other thing remains entitled to its description until facts are established to show that it has become disentitled to its ordinary name or description. On import of the defendant No. 1 vessel into India as goods and payment of customs duty pursuant to that, disentitled the owners to use the defendant No. 1 as a ship or a vessel. In any case, when at 9.45 a.m. on 19th May, 2001, the vessel was beached for the purpose of demolition or breaking up, it could not have been described as a ship or a vessel. In my opinion, therefore, the defendant No. 1 was not amenable to an action in rem on 19th May, 2001 and therefore, obviously it could not have been arrested.

8. In so far as the judgments referred to above relied on by the learned Counsel for the plaintiffs are concerned, I have gone through the judgments. Those judgments cannot be said to be authority for the proposition that a ship continues to be treated as a ship either till its registration continues or till it looks like a ship. On the other hand, in my opinion, the judgment relied on by the learned Counsel for the plaintiffs go to show that in determining whether a ship

can be continued to be treated as a ship or not, the intention of the persons in control of the ship is material inasmuch as though a vessel or a ship may be incapable of being used as a ship or vessel temporarily either because it has met with an accident or because extensive repairs are necessary to it, but if the owners of the vessel intend to continue to use it as a ship; or a vessel and for that purpose, takes actions, then, the vessel can still be treated as a vessel. The judgments referred to above do not support the case of the plaintiffs.

48. My attention is also invited by Ms.Sethna to the fact that against this decision an Letters Patent Appeal was preferred and the Division Bench of this Court dismissed the said Appeal on 16th July 2001 concurring with the view of the learned Single Judge. The observations reproduced above have been reproduced by the Division Bench in its order and it has concurred with the same.

49. In the present case, the set of documents that are relied upon are copy of physical delivery dated July 6, 2007, copy of memorandum of agreement dated 8th June 2007 from Attar Ship Ltd., copy of import challan, copy of application for beaching dated 6th July 2007, copy of NOC for beaching and copy of certificate confirming beaching. Copies of bill of entries filed with the Customs Authorities dated July 5, 2007 and Panchanama reflecting destruction of radio equipment of first defendant on 11th July 2007.

50. Insofar as the title to the ship is concerned, what is relied upon is correspondence in addition to the Letter of Credit and payment evidenced thereby so also copy of bill of sale dated 6th July 2007 and the commercial invoices. My attention is also invited to the report of bailiff dated 20th July 2007 and the photographs which would evidence that vessel had been imported for demolition and was beached on 7th July 2007 at 09.00 hrs.

51. I have perused with the assistance of Ms. Sethna and Mr.Sen the chamber summons and notice of motion and all affidavits filed in support by the applicants so also opposition by the plaintiffs. I have also perused the compilation of documents tendered by the applicant and it has been taken on record by consent. The applicants relied upon the Physical Delivery Certificate which shows that the vessel has been delivered at 16.40 hrs. on 6th July 2007 at Alang Anchorage to the applicants. A copy of the Memorandum of Agreement dated 8th June 2007 is also perused which clearly shows that the property in the same has passed on to the applicants, M/s.Hatimi Steels. In Clause 11 of the agreement, it is clearly stated that Physical delivery of the vessel should be made by the Sellers (M/s.Attar Ltd) to M/s.Hatimi Steels (Applicants) or their nominated representatives for demolition. Thereafter, it is clear that this agreement is signed by both sides. The vessel was ready for delivery for the aforesaid purposes as is evidenced by the notice of readiness. The documents which evidence payment of Import Duty and Ship charges in relation to m.v. P.EXPRESS are annexed as Exh.4 to the affidavit in support of the chamber summons. There is also a No Objection for beaching which was accorded by Superintendent of Customs, Bhavnagar. That is evidenced by an application made for beaching,

copy of which is at Exh.5. Copy of the order/permission along with beaching and allotting of plot at the Alang ship yard is annexed as Exh.6 to the affidavit in support. The vessel is permitted to be beached on 7th July 2007 at 8.10 hrs. The certificate of De-registration from the Republic of Sierra Leone is also annexed as Exh.8. All these documents are to the knowledge of plaintiffs" Advocate.

52. Thereafter, for demonstrating that payment in respect of the vessel has been made as per the agreement dated 8th June 2007, copies of Telex from Indian Overseas Bank, HongKong to Oriental Bank of Commerce, Mumbai is also produced. Copy of permission from Gujarat Maritime Board dated 23rd July 2007 is also produced which shows that the vessel is beached for the purpose of its journey to the ship yard for breaking and is unfit for sea navigation. Copies of Letters of Credit established through Oriental Bank of Commerce and negotiating telex by this bank are also produced by way of further compilation. In the compilation of documents, relied upon by the applicants dated 21st July 2007 copy of Bill issued by the Gujarat Maritime Board evidencing payment of premium charges of Rs. 3,03,750/- is produced. The plot development fees have been deposited by the applicants with the Gujarat Maritime Board upto September 2007 is evidenced by the Challan for Rs. 10,46,253/-. The Plot Rent is also paid so also water/electricity charges. The various expenses which have been incurred towards the vessel are also sought to be proved by producing bills and vouchers so also the fact that the ship is beached is corroborated by the Bailiff's report. A perusal of this material would clearly go to show that arrangement is made for demolition of the vessel. In such circumstances, there is much substance in the contention of Ms. Sethna that the first defendant vessel has ceased to be a ship within the meaning of the said definition. There is also substance in the contention that the title in the vessel has passed on to the applicants herein. There is an affidavit also filed by one Mr. Phillipos Mathai from Bhavnagar who claims to be in the employment of applicants. He is vested with the charge of billing, excise and customs formalities in relation to the ship breaking activities of the applicant. He has confirmed that waterfront Plot No. 55 is under lease to the applicants from Gujarat Maritime Board for the purpose of carrying out ship demolition activities from time to time. It is in these circumstances that I proceed to place reliance upon the statement on affidavit which are corroborated and supported by the documents referred to above.

53. It is pertinent to note that in the affidavit of the plaintiffs in para 6, a dispute is raised about ownership or interest of the applicant in the first defendant vessel. The statement is that no evidence has been adduced to show transfer of title or payment having been made by the applicants to the original property owner Attar Ltd. Normal customary documents that are executed when the sale in normal course takes place, according to plaintiffs are not in existence. A dispute is raised about the request for inspection. The statement made in para 6 deals with some of the documents.

54. It is pertinent note that there are further affidavits filed on 24th July 2007 on

behalf of the applicants. There is also an additional affidavit filed on 25th July 2007 and there is further compilation of documents filed on 23rd July 2007. It is not disputed that all the documents are duly received by the plaintiffs but they chose to deal with only some of them whereas nothing is commented upon other documents.

55. It is, therefore, clear that having got sufficient and adequate opportunity to inspect originals or the copies so also meet the contents thereof by filing appropriate reply/rejoinder, the plaintiffs did not choose to avail of that opportunity. No time was sought on their behalf. Plaintiffs chose to rest their case on denials contained in their affidavit in reply. In such circumstances and when the bills of entry and relevant documents clearly evidencing that the vessel was brought for the purpose of demolition, beaching permission was sought on that basis, then, it is not possible to discard the documents in that behalf. Some of them are issued by the Statutory Authorities. I cannot agree with Mr.Sen that the documents produced are not genuine but suspicious. It is in this light that Ms.Sethna would urge that I should follow the decisions of this Court as they are applicable on law as well as on facts.

56. Mr.Sen's submission that this Court has jurisdiction to even attach and proceed against "goods" and the word "property" must be construed accordingly, needs to be considered in this context. His submission, therefore, presupposes that the decisions of this Court take a view that if the vessel is not a navigating one but brought in Indian seas for demolition, then, a warrant of arrest in respect thereof cannot be issued. The expression "Ship" as defined in the Enactments referred to above has been specifically relied upon by the learned Single Judges of this Court and their view has prima facie been accepted by the Division Bench. Mr.Sen, therefore, very strongly urges that these decisions do not lay down a correct law. In his submission, they are per incuriam inasmuch as they have been rendered ignoring the provisions regarding Admiralty jurisdiction of this Court. His submission is that provisions of the Act which confer jurisdiction on this Court have been ignored so also some Authoritative pronouncements, including that of this Court. He submits that this Court in Admiralty & Vice Admiralty Jurisdiction has not only powers to arrest a ship but also proceed against "goods". The view taken by these learned Single Judges is on incorrect assumption and has no basis in law.

57. Mr.Sen submits that assuming that the ship is brought for destruction, if it is not a navigating vessel, yet, it is "Goods" within the meaning of the said term and, therefore, applying Rule 941 of High Court (O.S) Rules and the phraseology therein so also the provisions of the Colonial Courts of Admiralty Act, this Court can proceed against the same.

58. Mr.Sen's submissions on this issue have been referred by me hereinabove. It would be necessary to consider them if the Averments in the plaint had been that the 1st defendant vessel is "Goods" as well. In other words had any alternate plea been raised the occasion to consider all these submissions would have

arisen. There is neither any alternate plea nor relief set up in the plaint. If any foundation had been laid in the facts and circumstances of this case I could have considered the submissions. The plaint is not at all proceeding on the basis that the ship, which the plaintiffs are aware of being brought for demolition, is "Goods" and capable of being proceeded against for recovery of the claim of damages. The plaint, despite noticing the above, is projecting the claim against first defendant vessel on the basis that it is Navigating and is in India on a voyage. In such circumstances, when complete factual foundation is lacking, there is no occasion for me to consider larger issues raised for my consideration.

59. I would prefer to leave them open for being considered in an appropriate case. Suffice it to state that Mr.Sen has placed heavy reliance on the decisions of the Supreme Court in the case of Union of India and others Vs. M/s. Jalyan Udyog and another, . Therein, the controversy was whether two vessels imported in the year 1968 were liable for Import Duty or not. The vessels were registered in India and they were used as ocean going vessel upto 1982. Later on the owners decided to scrap them for which permission of Director General Shipping was granted on 1st October 1983. A Division Bench of this Court held that the ships having been imported in the year 1968, duty was liable to be paid at the rate of the value prevailing on the date of purchase of ship and not at the rate or value prevailing at the time of their breaking up. The Union of India went in Appeal and the Supreme Court held that the Division Bench was in error. It is in this context that reliance is placed on the discussion in the Supreme Court judgment as to whether a ship brought for breaking up can be broken up as contended or that permissions and approvals being necessary, they would not cease to be ships till the same are granted. In my view, as to what impact this decision interpreting relevant provisions of Customs Act and Exemption Notification thereunder, would have on the provisions which are subject matter of consideration by me, is something which must be gone into in an appropriate case.

60. For the time being, it is not possible for me to read the observations of the Supreme Court in the case of M.V. Elisabeth and Others Vs. Harwan Investment and Trading Pvt. Ltd., Hanoekar House, Swatontapeth, Vasco-De-Gama, Goa, in the manner suggested by Mr.Sen. The Supreme Court observes in this decision thus:

41. 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. See Order 75, Rule 4(3) of the Rules of the Supreme Court, 1965.

42. The Civil Jurisdiction and Judgments Act, 1982 enacted into English Law and Scottish Law the EEC Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters.

43. Describing the unified court structure in England, Jackson sums up: "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 rights and remedies." [D.C. Jackson, *Enforcement of Maritime Claims*, (1985) p. 8}

44. The law of admiralty, or maritime law,...(is the) corpus of rules, concepts, and legal practices governing...the business of carrying goods and passengers by water." (Gilmore and Black, *The Law of Admiralty*, page (1). 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.

45. ...In admiralty the vessel has a juridical personality, an almost corporate capacity, having not only rights but liabilities (sometimes distinct from those of the owner) which may be enforced by process and decree against the vessel, binding upon all interested in her and conclusive upon the world, for admiralty in appropriate cases administers remedies in rem, i.e., against the property, as well as remedies in personam, i.e., against the party personally...". Benedict, *The Law of American Admiralty*, 6th ed. Vol. I p.3.

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

47. 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 plaintiff's established claim. Likewise, a defendant acknowledging service in an action in rem is liable to be saddled with full liability even when the amount of the judgment exceeds the value of the res or of the bail provided. An action in rem lies in the English High Court in respect of matters regulated by the Supreme Court Act, 1981, and in relation to a number of claims the jurisdiction can be invoked not only against the offending ship in question but also against a "sister ship" i.e., a ship in the same beneficial ownership as the ship in regard to which the claim arose. "The vessel which commits the aggression is treated as the offender, as the guilty instrument or thing to which the forfeiture attaches, without any reference whatsoever to the character or conduct of the owner..."

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

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

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 the United States, Japan and other countries. The reason for the rule is that a wrongful arrest can cause irreparable loss and damages to the

shipowner; and he should in that event be compensated by the arresting party. (See Arrest of Ships by Hill, Soehring, Hosoi and Helmer, 1985).

56. An action in rem is directed against the ship itself to satisfy the claim of the plaintiff out of the res. The ship is for this purpose treated as a person. Such an action may constitute an inducement to the owner to submit to the jurisdiction of the court, thereby making himself liable to be proceeded against by the plaintiff in personam. It is, however, imperative in an action in rem that the ship should be within jurisdiction at the time the proceedings are started. A decree of the court in such an action binds not merely the parties to the writ but everybody in the world who might dispute the plaintiff's claim. 1042

57. It is by means of an action in rem that the arrest of a particular ship is secured by the plaintiff. He does not sue the owner directly and by name; but the owner or any one interested in the proceedings may appear and defend. The writ is issued to "owners and parties interested in the property proceeded against." The proceedings can be started in England or in the United States in respect of a maritime lien, and in England in respect of a statutory right in rem. A maritime lien is a privileged claim against the ship or a right to a part of the property in the ship, and it "travels" with the ship. Because the ship has to "pay for the wrong it has done", it can be compelled to do so by a forced sale. See *The Bold Buccleugh* (1851) 7 Moo. PC 267. 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.

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 county 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. No doubt, the Supreme Court decision speaks about the wide sweep of the jurisdiction conferred upon this Court and the issue raised before me is, therefore, arguable and debatable. Ms. Sethna also has relied upon some of the above observations. Additionally, Mr. Sen also relied upon the decision "*NEPTUNE*"

and that of Marten J. in *Freeman v. S.S. Calanda and Capt. Yanovsky* reported in AIR 1923 Bom 51. This decision also traces the History of Admiralty Jurisdiction conferred on this Court.

62. However, to take a view that the three Single Judges of this Court were in error with regard to the issue of Jurisdiction, Authority and power of this Court in Admiralty & Vice Admiralty Jurisdiction and, therefore, their decisions be held as per incuriam, would not be permissible in the absence of proper foundation being laid before me. In this context it is necessary to bear in mind the principle of Per Incuriam. In the case of *M/s. Fuerst Day Lawson Ltd. Vs. Jindal Exports Ltd.*, , the Supreme Court observes thus:

18. In *Mamleshwar Prasad and Another Vs. Kanhaiya Lal (Dead) through L. Rs.*, reflecting on the principle of judgment per incuriam, in paras 7 and 8, this Court has stated thus:

7. Certainly of the law, consistency of rulings and comity of courts - all flowering from the same principle - coverage to the conclusion that a decision once rendered must later bind like cases. We do not intend to detract from the rule that, in exceptional instances, where by obvious inadvertence or oversight a judgment fails to notice a plain statutory provision or obligatory authority running counter to the reasoning and result reached, it may not have the sway of binding precedents. It should be a glaring case, an obtrusive omission. No such situation presents itself here and we do not embark on the principle of judgment per incuriam.

8. Finally it remains to be noticed that a prior decision of this Court on identical facts and law binds the Court on the same points in a later case. Here we have a decision admittedly rendered on facts and law, indistinguishably identical, and that ruling must bind.

19. This Court in *A.R. Antulay Vs. R.S. Nayak and Another*, in para 42 (of SCC): AIR 44 Cri LJ has quoted the observations of Lord Goddard in *Moore v. Hewitt* (1947) 2 All E.R. 270 and *Penny v. Nicholas* (1950) 2 All E.R. 89 to the following effect:

Per incuriam are those decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the Court concerned, so that in such cases some part of the decision or some step in the reasoning on which it is based, is found, on that account to be demonstrably wrong....

20. This Court in *State of U.P. and Another Vs. Synthetics and Chemicals Ltd. and Another*, in para 40 has observed thus:

40. "incuriam" literally means "carelessness". In practice per Incuriam appears to mean per ignoratium. English Courts have developed this principle in relaxation of the rule of stare decisis. The "quotable in law" is avoided and ignored if it is rendered, "in ignoratium of a statute or other binding authority". (*Young V.*

Bristol Aeroplane Co. Ltd.)....

22. A prior decision of this Court on identical facts and law binds the court on the same points of law in a latter case. This is not an exceptional case by inadvertence or oversight of any judgment or statutory provisions running counter to the reason and result reached. Unless it is a glaring case of obtrusive omission, it is not desirable to depend on the principle of judgment "per incuriam". It is also not shown that some part of the decision based on a reasoning which was demonstrably wrong, hence the principle of per incuriam cannot be applied....

This principle is further elaborated in Central Board of Dawoodi Bohra Community and Another Vs. State of Maharashtra and Another, . In para 7 it is observed thus:

7. Per incuriam means a decision rendered by ignorance of a previous binding decision such as a decision of its own or of a Court of co-ordinate or higher jurisdiction or in ignorance of the terms of a statute or of a rule having the force of law. A ruling making a specific reference to an earlier binding precedent may or may not be correct but cannot be said to be per incuriam.

If I have to go merely by presumptions that this Court can also proceed against "goods" in Admiralty Jurisdiction, then, that is not permissible. A binding precedent cannot be ignored by merely raising such presumptions and creating doubts. If the decision is per incuriam, then, it must be demonstrated that its applicability to the given set of facts will not be correct and proper because it ignores completely the law, which must be applied thereto or the law laid down in the decision of a coordinate bench is rendered ignoring a statutory provision or a binding precedent. For that conclusion to be reached, the necessary material must be placed on record and in the absence of the same, I decline to consider the submissions of Mr.Sen on the question of the decisions being per incuriam.

63. In my view, the pleadings in the present case are on par with the decisions which have been rendered by learned Single Judges of this Court (D.G. Deshpande, J. and D.K. Deshmukh, J). These decisions are squarely applicable to the facts of this case. The law laid down therein, therefore, applies with full force. In such circumstances, the request made by Ms.sett to accept the ratio of these cases deserves to be accepted.

64. In these circumstances, I am of the view that a case is made out for vacating the order of arrest dated 12th July 2007. A case is also made out for intervention by the applicants. Accordingly, the request for Intervention is allowed and the application made in that behalf viz., Chamber Summons No. 1125 of 2007 is made absolute. Applicant's request to vacate the order of arrest being based upon the right and interest created in its favour in first defendant vessel so also defendant vessel ceasing to be a "ship" within the meaning of the said term as observed by this Court, even the Notice of Motion being Notice of Motion No. 2728 of 2007 deserves to succeed. Accordingly, the order issuing warrant of arrest is set aside and vacated. Notice of Motion is made absolute in terms of

prayer Clause (b).

65. Insofar as the claim for damages at Rs. 75,000/-per day, what I find from the affidavit in support of notice of motion is that barring stating that the applicant is a bonafide purchaser without notice of any alleged collision and quantifying the loss and damage at Rs. 75,000/-per day, the particulars of loss and damage sustained at Exh.1 are not substantiated, save and except proof of payment of customs duty and charges paid to Gujarat Maritime Board. The miscellaneous cost for acquisition and beaching etc. are sought to be supported by some documents which are filed with a compilation. In this view of the matter, I am of the view that it will not be proper to follow the course adopted by this Court in Single Judge's decision (D.K.Deshmukh, J) as that direction was also modified by the appellate bench. In such circumstances, the claim for damages at Rs. 75,000/-per day as made cannot be granted in these proceedings. More so, when that consists of loss of profit per day and skeleton labour deployment cost per day plus block administrative expenses per day. The various components comprising of the damages is distinct from that which was considered by the learned Single Judge. The payment per day to the Port Authorities alone was considered and granted. Such a request is not made by Ms.sett. Therefore, the claim cannot be entertained at this stage. Liberty is reserved to the applicants to apply for damages and re-imburement of the Necessary expenses by Instituting appropriate proceedings. All contentions in that behalf are kept open.

66. In the circumstances, there shall be no order as to costs.

67. After this judgment was pronounced, learned Advocate for plaintiffs sought stay of the order vacating arrest to enable plaintiffs to challenge the same in appeal. This request is opposed on behalf of the applicant proposed defendant No. 4 on the ground that the applicant have already lost very precious days and would be incurring further losses and damages. Therefore, in her submission, request to continue the order arresting the ship be rejected.

68. Taking an over all view of the matter and considering that the pleas raised are regarding jurisdiction of this Court, the order passed today stand stayed for a period of one week from today.

69. All concerned to act on an authenticated copy of this order. In the peculiar facts of this case, Instrument of release be dispensed with.