

(1995) 02 BOM CK 0022
In the Bombay High Court
Case No : Admiralty Suit No. 53 of 1994

Sigma Coatings BV

APPELLANT

Vs

"Agios Nikolaos" and another

RESPONDENT

Date of Decision : 08-02-1995

Acts Referred:

Admiralty Courts Act, 1840 — Section 5
Colonial Courts of Admiralty (India) Act, 1891 — Section 2
Constitution of India, 1950 — Article 141, 225, 372
Government of India Act, 1915 — Section 106
Government of India Act, 1935 — Section 223
High Courts Act, 1891 — Section 10

Citation : AIR 1995 Bom 281

Hon'ble Judges : D.R. Dhanuka, J

Bench : Single Bench

Advocate : S. Venkateswaran, instructed by V.K. Rambhadrar, for the Appellant;
S.K. Mukherjee, instructed by Ms. F.S. Krishnan, for the Respondent

Judgement

1. SIGMA COATINGS BV., a company incorporated under the laws of Netherlands has filed this action in rem on the admiralty side of this Court against a foreign flat vessel known as m.v. "AGIOS NIKOLAOS" at present lying in the part and harbour of Bombay and Cristeta Shipping Ltd., for recovery of sum Guilders (NLG) 58, 745.10 and Rs. 3,88,762.03 together with interest at the rate of 24% per annum from the date of the suit till payment. The plaintiffs have also sought an order from this Court to the effect that the 1st defendant vessel along with her engines, gears, tackles, bunkers, machinery, apparel, plant, furniture, appurtenances and paraphernalia be arrested under a warrant of arrest of this Hon'ble Court.

2. The plaintiffs have made an application for interim relief seeking arrest of the 1st defendant vessel or in alternative for an appropriate order of injunction in aid of their assertion to the effect that the plaintiffs have maritime lien over the 1st defendant vessel in respect of the suit claim.

3. It is the plaintiff's case that during the month of July 1993, August, 1993 and Sept. 1993, the plaintiffs had supplied paints (i.e. maritime necessities) to the 1st defendant vessel in pursuance of the orders placed by the defendants herein. The plaintiffs raised four invoices dated 2-7-1993, 20-7-1993, 16-8-1993 and 16-9-1993 in sum of Netherland Guilder for 2614, 2869.50, 8481.72 and 4809.72 aggregating to NLG 42,775. The plaintiffs have claimed interest on the said amount from the date of each of the above referred invoices till the date of filing of this suit and also the various amounts of costs incurred by the plaintiffs as per details set suit in para 5 of the plaint. It emerges from the annexures to the plaint that the plaintiffs have a reasonable cause of action against the defendants for recovery of the amount of the suit claim. It appears that the defendant No. 2 has virtually admitted its liability to pay the amount of suit claim during the course of correspondence annexed to the plaint. At this stage, the suit claim is not contested on merits as such.

4. On 9-12-1994, the plaintiffs filed this suit and made an application for order of arrest or for grant of an appropriate interim injunction after serving notice thereof on defendant No .1. By an order dated 9-12-1994, N.D. Yyas, J. passed an order of ad interim injunction restraining defendant No. 1 vessel from sailing. Liberty was granted to the plaintiff to move the Court further on 15-12- 1994. By an order dated 14-12-1994, the order of ad-interim injunction restraining the 1st defendant vessel from sailing was extended to 20-12-1994 till 5.00 p.m. By an order dated 19-12-1994, the said order of ad-interim injunction was further extended. By sub- sequent orders passed by this Court, the above referred of ad-interim injunction was extended until further order. The application for the arrest of vessel or grant of appropriate injunction is heard at length.

5. By his affidavit dated 19-12-1994, Capt. Praveshchand Premchand Diwan, the Master of the 1st defendant vessel, stated that the 1st defendant vessel was already sold to one Prudence Maritime Inc. for US \$ 1,300,000/-. It is stated in the said affidavit that the transaction of sale in respect of the 1st defendant vessel was evidenced by memorandum of agreement dated 3-10-1994 and the bill of sale dated 19-10-1994. Copies of these documents were annexed to the said affidavit in reply. A note is appended to the bill of sale which reads as under:

"A purchaser of a registered British Vessel does not obtain a complete title until the Bill of Sale has been recorded at the Port of Registry of the ship and neglect of this precondition may entail serious consequences."

In this context, it was further averred in the said affidavit dated 19-12-1994 that the transfer of the 1st defendant vessel had been duly registered in the port of registry of the ship. It was not stated in this affidavit as to on what date the alleged transfer of the vessel was registered in the port of registry of the vessel.

6. One Chitter Venkatrama Iyer Krishnan, constituted attorney of the plaintiffs filed his affidavit in rejoinder. Two contentions were raised by the said affidavit in rejoinder. The deponent of the said affidavit inter alia contended that the

defendant No. 2 was the owner of the 1st defendant vessel on 9-12-1994 when this suit was filed in this Honourable Court. The deponent of the said affidavit relied upon a computer print out from the Lloyd's List dated 13-12-1994 in support of his contention that even on 13-12-1994 the defendant No. 2 was shown therein as the owner of the 1st defendant vessel. The deponent of the said affidavit also relied on a copy of the certificate issued by the Commissioner for Maritime Affairs of St. Vincent and the Grenadines indicating that the defendant No. 2 was the owner of the 1st defendant vessel even on 15-12-1994 0.9 hrs. The deponent of the said affidavit submitted that in any event the alleged new purchaser i.e. Prudence Maritime Inc. was in any event not a bona fide purchaser and the alleged transaction of purchase was highly suspicious. The deponent of the said affidavit stated that the authorised capital of Prudence Maritime Inc. was merely 50,000 Dollars and the said company was incorporated only on 18-5-1994. It was further averred in para. 6 of the said affidavit that the purported agreement of sale propounded by the said alleged new purchaser was a shan and bogus document and was made with a view to defraud the creditors. The application for interim relief is defended by Prudence Maritime Inc. in name of defendant No. 1 vessel.

7. Capt. Ebrahim Hussein Modak, the constituted attorney of Prudence Maritime Inc. has filed an affidavit in surrejoinder with the leave of the Court. By the said affidavit it is contended that the transaction in relation to the purchase of the vessel was duly completed on or about 25-10-1994. By the said affidavit it was further contended that the Monaco Office of the Commissioner for Maritime Affairs had issued an official letter dated 22-12-1994 correcting the information purported to have been set out in certificate relied on by the plaintiff in affidavit in rejoinder copy whereof is annexure Exhibit 8 thereto. By para 6 of the said affidavit, it was contended that at the point of time, when the Monaco Office of the Commissioner for Maritime Affairs had issued the said certificate (Exhibit 8), it had not received the relevant information or confirmation pertaining to change of ownership of the 1st defendant vessel. By the said affidavit, it was further contended that the Commissioner for Maritime Affairs had now issued an official letter from its Geneva Office on 22-12-1994 confirming the fact of change of ownership of 1st defendant vessel from the name of the defendant No. 2 to the name of Prudence Maritime Inc. The deponent of the said affidavit relied on various documents in support of his case that Prudence Maritime Inc. was a bona fide purchaser of the vessel from a time prior to filing of this suit. In England, it appears to have been held by several judicial decisions of the English Courts that maritime lien is not available in respect of claim for supply of necessities made to the vessel and the ship could not be arrested to secure such a claim once the ownership of the vessel was changed. On merits of the suit claim, the defendant No. 1 has taken a stand to the effect that the alleged new owners Prudence Maritime Inc. have no knowledge in respect of genuineness of the suit claim. There appears to be a clause in the agreement of sale propounded by the alleged new owners that the defendant No. 2 had agreed to indemnify "Prudence

Maritime Inc." in case the new purchaser was required to discharge old liabilities of the 1st defendant vessel as more particularly set out in the above referred agreement of sale.

8. The application for arrest of the 1st defendant vessel or in alternative for confirmation of ad-interim injunction was heard by this Court on two different occasions and in detail. On 27-1-1995, two further affidavits were tendered on behalf of the 1st defendant. Along with one of the affidavit of Capt. Ebrahim Hussain Modak dated 27th January, 1995, a certificate dated 20-1-1995 issued by the Commissioner for Maritime Affairs was annexed stating therein that the bill of sale dated 19-10-1994 from defendant No. 2 in favour of Prudence Maritime Inc. pertaining to the 1st defendant vessel was duly registered at the port of registry on 16-11-1994. It is stated in the said certificate that the change of ownership to Prudence Maritime Inc. took place in the record of the registry as on 16-11-1994.

9. On 31-1-1995, the hearing of the application for interim relief was almost concluded. As desired by the parties, liberty was granted to the plaintiffs to produce documents which may throw light on genuineness on otherwise of the certificate issued by the Maritime Affairs dated 20-1-1995 stating therein that the change of ownership in respect of the 1st defendant vessel was registered on 16-11-1994. By the said order, the defendants were directed to disclose particulars of alleged payment made by the alleged purchaser of the vessel and produce documentary evidence in this behalf at the adjourned hearing of the application i.e. 8th Feb. 1995.

10. No further documents are produced on behalf of the plaintiffs. The learned counsel for Prudence Maritime Inc. and defendant No. 1 has produced extracts from certain accounts which prima facie proves payment of large amounts by Prudence Maritime Inc. to defendant No. 2. If necessary the details can be scrutinized at final hearing of the suit.

11. For the purpose of deciding this application, I shall assume that the ownership of the 1st defendant vessel was changed in favour of Prudence Maritime Inc. on and with effect from 16-11-1994 and the change of ownership of 1st defendant vessel has undergone change. This is only a prima facie view.

12. The question still arises as to whether the plaintiff has made out a strong prima facie case for interim order sought for.

13. The learned counsel for on both sides have advanced interesting arguments at the hearing of this application backed by expensive research on the subject it would be obvious from the discussion that follows.

14. The High Courts Act or the Chartered Act, 1861 in terms provided that the High Courts at Calcutta, Madras and Bombay shall continue to exercise the same jurisdiction which was here to before exercised by the Supreme Courts of Calcutta, Madras and Bombay. The admiralty jurisdiction in the High Court is of a

an ancient inheritance. Clause 26 of the Charter Act of 1774 defined the admiralty jurisdiction of the former Supreme Courts in the presidency town. The Supreme Court of Bombay had the requisite admiralty jurisdiction in terms of the above referred clause. The admiralty jurisdiction of this Court was further continued by Section 10 of the High Courts Act, 1891 by clause 31 of the Letters Patent Act 1862 and by clause 32 of the Letters Patent of 1865. The existing admiralty jurisdiction of this High Court and other concerned High Courts was further continued by Section 106 of the Government of India Act 1915, Section 223 of the Government of India Act, 1935 and Article 225 of the Constitution of India.

15. On 25-7-1890, the Colonial Courts of Admiralty Act 1890 i.e. an act to amend the law respecting the exercise of admiralty jurisdiction in Her Majesty's domain and elsewhere within the United Kingdom was passed by British Parliament. Section 2(2) of the said Act is of some relevance for our purpose. The said section reads as under:

"(2) The jurisdiction of a Colonial Court of Admiralty shall, subject to the provisions of this Act, be over the like places, persons, matters, and things, as the Admiralty jurisdiction of the High Court in England, whether existing by virtue of any statute or otherwise and the Colonial Court of Admiralty may exercise such jurisdiction in like manner and to as full an extent as the High Court in England, and shall have the same regard as that Court to international law and the comity of nations." (The underlining is done to supply emphasis)

16. Sometime in the year 1891 The Colonial Courts of Admiralty (India) Act, 1891 was passed. By Section 2 of the said Act, the High Court of Judicature at Bombay was declared to be the Colonial Court of Admiralty. After independence, the High Court of Judicature at Bombay duly constituted under the Constitution of India exercises the jurisdiction under the Constitution of India including the jurisdiction of which the High Courts exercised on eve of passing of Indian Independence Act, 1947 by the British Parliament. By virtue of Art. 372 of the Constitution of India, all the pre-existing laws whether made by British Parliament or otherwise continued to be laws in force unless the same are inconsistent with the Constitution and until the same are repealed, modified or amended by our legislations. The Admiralty jurisdiction is not restricted to statutes even in England.

17. It appears that prior to the passing of the Admiralty Courts Act 1840 3 and 4 Victoria 65, the Courts of Admiralty in England had no admiralty jurisdiction to entertain a claim concerning supply of necessities supplied to a ship. By Section 5 of the Admiralty Courts Act 1840, it was clearly provided that the High Court of Admiralty in England shall have jurisdiction to decide inter alia the claims for necessities supplied to any foreign ship or sea going vessel. On passing of the Admiralty Act, 1861, similar jurisdiction of the High Court of Admiralty concerning a claim for supply of necessities supplied to a ship was clearly recognised.

18. At one stage, there was a serious controversy as to whether the jurisdiction of Admiralty Courts in India was co-extensive with the jurisdiction of Courts of Admiralty in England as it existed on 25-7-1890 and the Admiralty Courts in India could not entertain claims on Admiralty side of the claim which were brought within purview of English Courts by statutes passed by British Parliament after 1890. During the course of years, the admiralty jurisdiction of the High Court in England has been expended as would be obvious for the provisions of law contained in Supreme Court of Judicature (Consolidation) Act, 1925. Now, the High Court of England have much larger admiralty jurisdiction. This controversy is no longer open. The jurisdictional question is already settled by our Supreme Court. It is time to refer to the recent judgment of the Hon'ble Supreme Court of India in the case of M.V. Elisabeth and Others Vs. Harwan Investment and Trading Pvt. Ltd., Hanoekar House, Swatontapeth, Vasco-De-Gama, Goa, . In this case, the plaintiff had instituted an action in rem in the High Court of Andhra Pradesh invoking its admiralty jurisdiction. It was the plaintiffs case in that suit that the 1st defendant vessel had left Marmagao Port without issuing bills of lading and had delivered the consignment to the consignee in breach of the plaintiffs direction to the contrary. The vessel was arrested when it entered the port of Vishakhapatnam and was later on released on furnishing of bank guarantee in sum of Rs 14,25,000/-. The High Court of Andhra Pradesh had the same jurisdiction which the High Court of Madras had as a successor Court. In this case it was argued by the learned counsel for the appellants vessel that the jurisdiction of the Admiralty Courts in India was freezed as on 25-7-1890 and the same was co-extensive with the jurisdiction of the Court of admiralty in England on that date only. T.K. Thommen and R.M. Shah JJ. traced the history of the admiralty jurisdiction in England and in India in detail. The Supreme Court rejected the above referred contention urged on behalf of the appellants. In para. 14 of the judgment, Thommen J. observed that Indian High Courts as a Court of admiralty could exercise its many fold jurisdiction and the judicial sovereignty of this country was not restricted or otherwise affected by the Colonial Courts of Admiralty Act 1890. The above referred British Statute undoubtedly continued to be law in force in India by virtue of the provisions contained in Art. 372 of the Constitution and no restriction on jurisdiction of High Courts in India could be spelt therefrom. In para. 26 of his judgment, Thommen J. observed that in any event, the admiralty powers of the High Courts in India were not limited to what had been derived from the Colonial Courts of Admiralty Act 1890. The learned Judge observed that in any event the High Courts in India had all the powers which the High Court of England had at the time when Indian Independence Act 1947 was passed. In para 27 of his judgment, the learned Judge observed that there was no reason as to why the jurisdiction of Indian High Court should be considered as frozen on the date when the Colonial Courts of Admiralty Act 1890 was passed. It is of considerable significance that Section 2(2) of the Colonial Courts of Admiralty Act 1890 vests the admiralty jurisdiction in Indian High Courts which was vested in the High Court of England whether existing by virtue of any statute or otherwise. Thus, the admiralty jurisdiction of

this Court is not restricted to exercise of powers which could be exercised by the High Courts of England under the British Statutes up to the year 1890. In para. 47 of his judgment, the learned Judge discussed the distinction between the action in rem and action in personam and quoted a passage from the judgment of great American Jurist Justice Story. The learned Judge discussed not merely English law but also American law on the subject. In para. 64 of his judgment, the learned Judge observed that it was misleading and incorrect to confine it to the British Statutes. The learned Judge further observed that the statutes had been codifications of rules of law as developed by usage, practice and custom. In para. 67 and 68 of his judgment, Hon^{ble} Justice Thommen observed that the High Courts in India were superior Courts of record and they had inherent and plenary powers. The learned Judge further observed that unless expressly or impliedly barred, and subject to the appellate or discretionary jurisdiction of the Courts, the High Court had unlimited admiralty jurisdiction.

19. R.M. Sahai J. the learned Judge of the Apex Court delivered an important concurring judgment. Para. 99 of the said judgment is directly relevant for our purpose. The relevant portion from the above referred para of the said judgment is extracted hereinafter for the sake of convenience.

"From the Maritime law sprang the right known as Maritime lien ascribing personality to a ship for purposes of making good loss or damage done by it or its master or owner in tort or contract. In England it grew and was developed in course of which its scope was widened from damage done by a ship to claims of salvor, wages, bottomry, supply of necessaries and even to bills of lading. Its effect was to give the claimant a charge on res from the moment the lien arose which follows the res even if it changed hands."

(The underlining is done to supply emphasis).

Various facets of Admiralty law were discussed by both the learned Judges in great detail. If this passage from the judgment of Sahai J. is to be considered as correct statement of law, without any reason, it would follow that the range of maritime lien extends to claim for supply of necessaries to the ship. The range of subjects/claims over which maritime lien extends is not crystalised by any British statute in so many words. The question as to whether claim for supply of necessaries to a ship falls within the range of claims to which maritime lien is attached or not is seriously put in issue at the hearing of this application notwithstanding the clear observations in para. 99 of the said judgment on the ground that the said observations do not constitute the "law declared" or "the obiter dicta" of the Supreme Court and the same are contrary to well settled judicial decisions holding the field at present in England.

20. The relevant statement of law in Halsbury's Laws of England Fourth Edition Vol. 1 para 311 reads as under:

"In any case where there is a maritime lien or other charge on any ship, aircraft or other property of the amount claimed, the Admiralty jurisdiction may be

invoked by an action in rem against that ship, aircraft or property. A maritime lien may be so invoked against the ship, aircraft or other property, even in the hands of an innocent purchaser."

21. The learned counsel for defendant No. 1 has submitted that according to the decisions of the House of Lords, the maritime lien does not extend to claim for supply of necessities to the ship or vessel. The learned counsel for defendant No. 1 has relied upon certain passages from *Thomas on Maritime " Liens* stating that the claims currently recognised as giving rise to maritime lien are:--

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

22. The learned counsel for the defendant No. I has heavily relied on the ratio of the judgment of House of Lords in the case of *C.& C. J. Northcote and The Owners of the Henrich Bjorn* reported in 1886 (XI) App Cas 270 : 55 LJ CP 80 : 55 LT 66. In this case, the House of Lords did hold that the maritime lien was not available in respect of the necessities supplied to a foreign ship in an English Court even though an action in rem in respect of such a claim was maintainable against the ship so long as the ownership of the vessel was not changed. The view taken by the Court was that only in limited nature of claims where maritime lien was recognised so as to cover the suit claim, the order of arrest of the vessel could be made notwithstanding change of ownership of the vessel.

23. The learned counsel for defendant No. 1 has submitted that the observations made by R.M. Sahai J. of the Supreme Court of India in para. 99 of his judgment reported in *M.V. Elisabeth and Others Vs. Harwan Investment and Trading Pvt. Ltd., Hanoekar House, Swatontapeth, Vasco-De-Gama, Goa*, do not constitute "law declared" by the Supreme Court on the subject and the said observations could not be considered even obiter dicta so as to bind this Court and this Court was therefore entitled to decide this application in light of English decisions on the subject including the judgment of House of Lords reported in (1886) 11 App Cas 270: 55 LJ CP 80 : 55 LT 66 . The learned counsel for defendant No. 1 submitted that in the above referred case decided by the Supreme Court there was no issue before the Supreme Court as to whether the maritime lien extended to a case when the suit claim was in respect of supply of necessities to the ship and as to whether the said lien was enforceable against the vessel even if there was a change of ownership. The learned counsel for defendant No. 1 submitted that the only issue which arose for decision of the Supreme Court in the above referred case was in respect of the jurisdiction of the Admiralty Court to entertain an action where the suit claim arose out of export of cargo. It appears that no such claim pertaining to export of cargo could be entertained by the Courts of

admiralty in England prior to 1925. The learned counsel for defendant No. 1 explained that the Apex Court decided this issue by holding that the jurisdiction of High Courts of Admiralty in India was not freezed as on 25th July 1980 and the High Courts of India had jurisdiction to decide all the claims which could be decided by English Courts prior to coming into force of Indian Independence Act, 1947. The Supreme Court thus held that the High Court of Andhra Pradesh had jurisdiction to entertain the sun claim arising out of export of cargo. The learned counsel for defendant No. 1 relied upon the division of Division Bench of this Court in the case of Mohandas Issardas and Others Vs. A.N. Sattanathan and Others, . In this case, Chagla C.J. observed as under:

"It would be incorrect to say that every opinion of the Supreme Court would be binding upon the High Courts in India. The only opinion which would be binding would be an expression on a question that arose for the determination of the Supreme Court, and even though ultimately it might be found that the particular question was not necessary for the decision of the case, even so, if an opinion, was expressed by the Supreme Court on that question, the opinion would be binding upon the High Court."

The learned counsel for defendant No. I contends that the opinion expressed by R.M. Shah, J. in para. 99 of the above referred judgment was not on an issue or question which arise for decision of the Court. The learned counsel for the defendant No. 1 submitted that R.M. Shah J. while tracing the history of jurisdiction of Admiralty Court in England in para. 99 of the judgment has inadvertently committed an error as to prevailing law in England in respect of range of maritime Hens. The learned counsel for the plaintiff has submitted that the view taken in the English decisions relied upon by the learned counsel for the defendant No. 1 is rather narrow, and need not be accepted by this Court as if binding on this Court. It would be obvious on reading of the judgment of House of Lords in (1886) 11 App Cas 270 : 55 LJCP 80 : 55 LT 66 that the English Courts had taken a different view on the subject in the past. The American Courts have duly recognised the range of maritime liens so as to include the claim for supply of necessaries to the ship. The learned counsel for the plaintiff has invited the attention of the Court to various passages from page 2 of the well known work of Thomas on Maritime Liens." The relevant passage from the said standard book relied on by the learned counsel for plaintiff reads as under:

"There exist nonetheless frequent differences between individual countries as to the range of claims recognised as maritime liens. In English law the concept of a maritime lien is confined to a relatively small number of claims. This is in sharp contrast to the Admiralty law of the United States where the concept of a maritime lien has been more extensively developed."

The learned counsel for the plaintiff has also invited the attention of the Court to the provisions of law contained in the Federal Maritime Lien Act enacted in United States of America whereby it is provided that any person furnishing necessaries to any vessel upon the order of the owner of the vessel shall have the maritime

lien on the vessel which , may be in force in rem. With respect, this Court is not bound to follow English decisions on the subject. No British statute prescribing the range of claims covered by maritime lien is brought to the notice of the Court. If any such statute was pointed out, the Court would have considered as to whether such statute was part of law in force in India prior to 15th August 1947 and as to whether the same was continued to be law in force in India by virtue of Art. 372 of the Constitution of India. In my opinion, in such situation, Indian Courts are expected to attach great weightage to the learned opinions of the Hon"ble Judges of the Supreme Court and normally follow the same, even if the said opinions do not amount to "law declared" under Art. 141 of the Constitution of India.

24. Thomas on "Maritime Liens" is a well known standard work on the subject. I have gone through the relevant passages from the said work having bearing on the subject with the assistance of learned counsel on either side. It is always helpful to look into formulation of proposition of law from Hulsbury's law of England. In *M.V. Elisabeth and Others Vs. Harwan Investment and Trading Pvt. Ltd.*, Hanoekar House, Swatontapeth, Vasco-De-Gama, Goa, , our Supreme Court has traced the history of development of admiralty law in England, America and other countries and has interpreted and applied the relevant British statutes and concepts of maritime law somewhat differently from the prevailing view of English Courts. In the said judgment, the Supreme Court has not approved the earlier narrow view taken by some of our High Courts and has held that the jurisdiction and powers of Indian High Courts are much wider than the jurisdiction and powers of British Courts of Admiralty. No question arose before the Supreme Court in the above referred case as to range of subjects to which the maritime lien extended. Nevertheless the learned Judges of the Supreme Court have expounded and explained various facets of Admiralty law while tracing the development of law in great detail. It is a possible view that the observations made by the Supreme Court in para. 99 of its judgment in respect of maritime lien extending to claim for supply of necessities to the ship/vessel and the same being enforceable against a ship/vessel by an action in rem against the ship/vessel in the hands of the new owner of the ship/vessel do not constitute law declared or obiter dicta as contemplated under Article 141 of the Constitution of India. Nevertheless I am persuaded to respectfully follow the opinion of R. M. Sahai, J. of the Apex Court expressed in para. 99 of the said judgment in preference to the decision of House of Lords in the case of *Henrich Bjron* reported in (1886) 11 App Cas 270 : 55 LJCP 80 : 55 LT 66 which decision, with respect, is also not binding on this Court. Some of the British Statutes concerning Admiralty law continue to be law in force in India by virtue of Art. 372 of the Constitution of India. It does not follow therefrom that the interpretation and application of these statutes on Maritime law in general or interpretation of allied concepts like maritime lien by English Courts would bind this Court in preference to the opinion of the Supreme Court or the Indian jurists.

25. With the above background, I shall now summarise the relevant propositions

of law deduced from the relevant legal literature and case law on the subject.

(1) The historical derivation and development of maritime liens is a subject of great uncertainty (page 6, Thomas). The concept of maritime lien has been authoritatively defined by Lord Tenterden as a claim or privilege upon a maritime res to be carried into effect by legal process. The expression "maritime lien" was probably first coined in English law by Shri John Jarvis while delivering the judgment of the Privy Council in the *Bold Buccleugh* (1851) 7 Moo PC 267.

(2) A maritime lien is distinct from both a common law and equitable lien. It is distinct from a common law lien in that it is not dependent on possession. It may be invoked by an action against the ship, aircraft or other property, even in the hands of an inherent purchaser.

(3) The Admiralty jurisdiction of the Courts is not restricted to entertain claims based on maritime lien. A claim for supply of necessities to a foreign ship is maintainable on Admiralty side of the High Court in India by instituting an action against in rem as well as action in personam.

(4) In an Admiralty action, the Admiralty Court may direct arrest of a ship in aid of a claim for supply of necessities even if the claim is held to be not based on "maritime" lien" as such. When a claim is based on maritime lien, it is enforceable even if the ship/vessel in the hands of a bona fide innocent purchaser and the ownership of the ship/vessel has undergone a change prior to filing of the action.

(5) There exists no system of registration and public notice by which charges in the nature of maritime liens may be rendered overt and visible. The purchaser of a ship may not be aware of incumbrances on the ship with maritime liens. In practice, a purchaser protects himself by insisting on an indemnity from the vendor in respect of claims which may have accrued against the res prior to sale and purchase. (P. 18 Thomas on "Maritime Lien" -- British Shipping Laws volume 14-1980 edition)

Range of claims to which Maritime extends.

26. The English decisions have undergone a change. According to some of the old decisions, the maritime lien extended to claim for supply of necessities to the ship which could be recognised on admiralty side of the High Court. In *The Henrich Bjorn* (1886) 11 App Cas 270 : 55 LJ CP 80 : 55 LT 66 the House of Lords took a different view and held that the supply of goods and material to a ship did not confer a maritime lien and virtually overruled several contrary decisions on the subject. According to decisions of English Courts prevailing now, the range of maritime lien is rather restricted to a relatively small number of claims. This is in sharp contrast to the admiralty law of United States where the concept of a maritime lien has been more extensively developed. No English statute enumerates the range of claims to which the maritime lien extends. In United States apart from the decisions of the Courts and views of jurists, a

statute has been enacted so as to specify that the maritime lien extends also to claim for supply of necessaries to the ship. Our Supreme Court has expressed its own view on the subject in para 99 of its judgment in Elisabeth's case while discussing the development of admiralty in India and comparing the same with English and American law on the subject. I respectfully take the same view. I am not prepared to hold that any error has crept in judgment of R. M. Sahai, J. inadvertently or otherwise while tracing the history of English law on the subject and formulating his learned opinion on the subject in para 93 of his judgment. The view expressed by the Supreme Court on the issue under consideration may not be in conformity with the prevailing decisions of English Courts. With respect, that does not matter. The Apex Court was not bound to take the same narrow view as English Courts have taken in respect of range of claims to which maritime lien extends. This Court is also not so bound. It is just and reasonable that the view expressed by our Supreme Court in the above referred decision be followed by Indian High Courts without any endeavour to narrow it down. According to well known work of Thomas on Maritime Liens (page 13), the claim currently recognised by English Courts on giving rise to maritime liens are:--

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

The last sub-para, of para 3 at p. 13 of the said work reads as under:--

"The categories of maritime liens identified above represent the "Principal" or proper maritime liens. There exist other maritime liens which arise by implications from various statutory enactments and these are discussed later."

Our Supreme Court has expressed a view to the effect that the range of claims giving rise to maritime liens is much wider and includes claim for supply of necessaries as to the ship. With respect, I take the same view.

27. In this situation, I would prefer to be guided by the observations of the Supreme Court in preference to the observations made by the House of Lords in the above referred case.

28. Clause 9 of the agreement of sale dated 3-10-1994 (Exhibit 1 to the affidavit dated 19-12-1994) clearly provides that the seller i.e. defendant No. 2 undertakes to indemnify the buyers against all encumbrances, maritime liens and other claims. In my opinion, it would be travesty of justice to refuse interim relief prayed for. In all such cases, the purchaser is protected by indemnity clause. In my opinion, the plaintiffs have maritime lien in respect of the suit claim and the said claim is enforceable against the vessel even where there is a change of ownership of the vessel.

Operative part of the order

29. In the result, I pass an order for arrest of the 1st defendant vessel as prayed for by the learned counsel for the plaintiff. If the defendants or either of them furnish bank guarantee or other security to the satisfaction of the Prothonotary and Senior Master in sum of Netherland Guilders 58,745.10 and Rs. 3,88,762.03, the 1st defendant vessel need not be arrested. All contentions on merits of the suit claim shall be examined by me Court at final hearing of the suit.

30. The learned counsel for the defendant No. 1 applies for stay of the operation of this Order.

31. Operation of the order passed by the Court today is stayed for a period of four weeks from today on the condition that the 1st defendant vessel shall not sail from the " Port of Bombay and the ad interim injunction granted by this Court shall continue until further orders.

32. The Customs and the Port Authorities are directed to act on the basis that the ad interim order of injunction continues until further orders. The said authorities shall act on the basis of ordinary copy of the operative part of the order duly authenticated by the Associate of this Court. The learned advocate for the plaintiff is also authorised to communicate this order to the Customs and Port Authorities.

33. If, however, the Bank Guarantee or other security is furnished to the satisfaction of Prothonotary and Senior Master, Order of injunction shall come to an end.

34. No Order as to costs of the hearing of the application, for interim relief. Hearing of the suit is expedited.

Order accordingly.