(2009) 06 MAD CK 0266

Madras High Court

Case No: Application No''s. 3448, 3449, 4274 and 4275 of 2003 in C.S. No. 441 of 2001

Interaccess Marine Bunkering Ltd., Gulf Marine and Industrial Supplies Inc. and The Royal Bank of Scotland Plc.		APPELLANT
	Vs	
K.M. Allauddin and Owners and Parties interested in the Vessel M.V. Neamonitisa, now lying at the Port of Visakhapatnam, India and is represented by its Master		RESPONDENT

Date of Decision: June 15, 2009

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 2 Rule 2, Order 34 Rule 13, Order 48 Rule 1
- Constitution of India, 1950 - Article 141, 225
- Customs Act, 1962 - Section 115, 126
- Government of India Act, 1915 - Section 106
- Government of India Act, 1935 - Section 223
- Merchant Shipping Act, 1958 - Section 138, 139, 145, 146, 148
- Transfer of Property Act, 1882 - Section 57, 69(1)

Citation: (2009) 3 CTC 611

Hon'ble Judges: V. Ramasubramanian, J

Bench: Single Bench

Advocate: S. Vasudevan in A. Nos. 3448 and 3449/2003; Mr. S. Raghunathan in A. Nos. 4274 and 4275/2003, for the Appellant;

Final Decision: Dismissed

Judgement

V. Ramasubramanian, J.

A vessel by name MV NEAMONITISA, registered in Panama and flying a Panamanian

Flag, said to be owned by M/s. Trinity Shipping Corporation, Piraeus, Greece, berthed at the port of Visakhapatnam on 12.4.2001. On the very next day viz., 13.4.2001, 2 Suits in C.S. Nos. 34 and 36 of 2001 came to be filed, on the file of the High Court of Andhra Pradesh, respectively by (i) Interaccess Marine Bunkering SA, Liberia, and (ii) Gulf Marine and Industrial Supplies Inc., USA. While the prayer in C.S. No. 34 of 2001 was for recovery of a sum of USD 90,501.502 from the owners of the aforesaid vessel and for a decree of arrest and detention of the vessel, till the amount is paid, the prayer in C.S. No. 36 of 2001 was for recovery of a sum of USD 903,273.56 and for the arrest and detention of the vessel. The claim of the plaintiff in C.S. No. 34 of 2001 was that they had supplied bunkers to the vessel, when she was at the ports of Piraeus, Bandirama and Istanbul, during the period from November 2000 to January 2001 and that the value of the supplies so made, was not paid. The claim of the plaintiff in C.S. No. 36 of 2001 was that they supplied necessaries to the vessel in question as well as to its sister vessels, during the period from October 1997 to January 2001 at various ports in USA and that the value of the supplies was not paid. It appears that in both the Suits, interim orders of arrest of the vessel were passed by the High Court of Andhra Pradesh.

2. In June 2001, one K.M. Allauddin, sole proprietor of M/s. Sea Traffic, claiming to be a shipchandler and exporter, filed a Suit C.S. No. 441 of 2001 on the file of this Court (out of which the applications on hand arise), for recovery of a sum of USD 14,123.10 and for the arrest and sale of the vessel, on the ground that at the request of the Master of the vessel, he supplied necessaries such as provisions, cabin stores, deck stores, engine stores, electrical stores, etc., on 20.4.2001, under six invoices, for an aggregate amount of USD 13,579.92 on 10 days credit. Since the value of the supplies was not paid, the Suit was filed for recovery of the amount together with interest at 24% per annum. Though, by the time C.S. No. 441 of 2001 was filed, the vessel was already under orders of arrest, the plaintiff in C.S. No. 441 of 2001 also obtained an order of arrest in A. No. 2633 of 2001 on 25.6.2001 and the same was also executed on 26.6.2001.

3. The owners of the vessel abandoned it and did not even come forward to defend the Suit. The wages of the seamen and Master also remained unpaid, forcing them to intervene in the Suit C.S. No. 441 of 2001.

4. Since there were at least three claims, two on the file of the Andhra Pradesh High Court and one on the file of this Court, which the owners of the vessel could not meet, the vessel was ordered to be sold, by an order dated 25.7.2001 passed by this Court in A. No. 3079 of 2001 in C.S. No. 441 of 2001, by appointing an Advocate Commissioner and directing the Advocate Commissioner to put the plaintiffs before the Andhra Pradesh High Court on notice of the proposed sale.

5. Several steps such as the valuation of the vessel, publication of the advertisement in ''Lloyds List'' and in ''The Hindu'', etc., were taken subsequently by the Advocate Commissioner, during the month of August 2001.

6. At this stage, the Royal Bank of Scotland Plc, UK, filed a Suit on 3.9.2001 in C.S. No. 37 of 2001, on the file of the High Court of Andhra Pradesh, seeking (i) a declaration that the vessel was hypothecated, charged and mortgaged to them by way of first preferred mortgage (ii) recovery of an amount of USD 601,000.52 and (iii) the arrest of the vessel. Since, by then, there were two orders of arrest by the Andhra Pradesh High Court and one order of arrest by this Court, the Royal Bank of Scotland did not obtain an interim order of arrest of the vessel.

7. In pursuance of the orders passed by this Court, the vessel was sold in favour of one M/s. M.J.R. Steels Pvt. Ltd. The purchaser deposited the sale proceeds and the sale was confirmed and the vessel directed to be delivered to the purchaser by an order dated 24.9.2001. Subsequently, the Advocate Commissioner also took steps and got the orders of arrest passed by the High Court of Andhra Pradesh, lifted.

8. The entire sale proceeds of Rs. 3,05,00,000/- were deposited with the Standard Chartered Bank, by the order of this Court and out of the sale proceeds, the Advocate Commissioner made several payments, as per various orders passed by this Court. Thereafter, the Advocate Commissioner was discharged and the balance amount was directed to be kept in Fixed Deposit, so that it earns interest, till various claims on the same get settled.

9. In view of the sale of the vessel and the deposit of the sale proceeds into Court, the various claimants viz., (1) Interaccess Marine Bunkering, (2) Gulf Marine and Industrial Supplies Inc., (3) The Royal Bank of Scotland Plc, and (4) Capt. Papaspamatiou (the Master of the vessel) have all got impleaded as parties to the Suit C.S. No. 441 of 2001, by filing necessary applications in A. Nos. 4069, 4435, 4475 and 4492 of 2001 respectively.

10. In the meantime, C.S. No. 34 of 2001 filed by Interaccess Marine Bunkering SA, was decreed on 19.11.2002 by the High Court of Andhra Pradesh, for a sum of USD 71,251.79, together with interest at the rate of 9% per annum and costs of Rs. 82,100/-. Similarly, C.S. No. 36 of 2001 filed by Gulf Marine and Industrial Supplies Inc., was decreed on 15.7.2003 by the High Court of Andhra Pradesh, for a sum of USD 528,781.52, together with interest at 18% per annum and costs of Rs. 7,70,225/-.

11. Likewise, the Suit C.S. No. 37 of 2001 filed by The Royal Bank of Scotland Plc, was decreed by the Andhra Pradesh High Court, on 20.11.2002 for a sum of USD 601,000.52, together with interest at 9% per annum and costs of Rs. 2,42,065/-.

12. Since all the three Suits filed before the Andhra Pradesh High Court, have already reached their logical end and the vessel was also sold and the net sale proceeds are now lying in deposit, under orders of this Court, passed in various applications in C.S. No. 441 of 2001, the parties have now come up with Applications for payment out, as per the details furnished below:

(i) A. No. 3448 of 2003 has been filed by Interaccess Marine Bunkering Ltd., (plaintiff in C.S. No. 34 of 2001 on the file of the Andhra Pradesh High Court), seeking payment out of a sum of USD 85,251.79, representing the decretal amount, interest and costs.

(ii) A. No. 3449 of 2003 has been filed by Gulf Marine and Industrial Supplies Inc. (plaintiff in C.S. No. 36 of 2001 on the file of the Andhra Pradesh High Court), seeking payment out of a sum of USD 7,08,925.52, representing the decretal amount, interest and costs.

(iii) A. No. 4274 of 2003 has been filed by The Royal Bank of Scotland Plc, (plaintiff in C.S. No. 37 of 2001 on the file of the Andhra Pradesh High Court), seeking a declaration that the decree passed in their favour has priority over all other claims in the Suit C.S. No. 441 of 2001.

(iv) A. No. 4275 of 2003 has been filed by The Royal Bank of Scotland Plc, (plaintiff in C.S. No. 37 of 2001 on the file of the Andhra Pradesh High Court), seeking payment out of the amount due to (hem.

13. Apart from the claims made by Interaccess Marine Bunkering (applicant in A. No. 3448/2003), Gulf Marine and Industrial Supplies Inc. (applicant in A. No. 3449/2003), and The Royal Bank of Scotland Plc. (applicant in A. Nos. 4274 and 4275 of 2003), we also have the claims made by the plaintiff-K.M. Allauddin in C.S. No. 441 of 2001 and the claim made by Capt. Papaspamatiou, the Master of the vessel for the wages payable to him. Though, the Court auction purchaser has also made a claim for damages due to the alleged delay in the delivery of possession of the vessel, the same does not merit any consideration, since he would stand only as an unsecured creditor, even if his claim for damages is presumed for the sake of argument, to be acceptable. Therefore, the claim of the Court auction purchaser is rejected even at the outset.

14. Coming to the other claims, it is seen from the facts narrated above that the aggregate sale proceeds as well as the balance amount now available in Fixed Deposit with the Standard Chartered Bank, is far below the total amount of claim now made in the present Applications. As per the memo filed by the Advocate Commissioner in March 2004, the balance amount lying in Standard Chartered Bank, after making various payments, was Rs. 1,20,89,908.76. Since it was later directed to be deposited in fixed deposit, the said amount would have earned some interest. But the total amount claimed in all these Applications put together, works out to many times more than the amount lying in deposit. Therefore, it is not possible to allow all the Applications as prayed for. The applicants herein are also not in agreement with one another that the claims of all of them are on equal footing. If they are at least in agreement that all their claims are on equal pedestal, it would have been possible to order pro rata distribution of the amount now lying in deposit. But each of the applicants herein contends that his claim has priority

over the others. Therefore, the Applications were taken up for hearing in full.

15. I have heard Mr. S. Vasudevan, learned counsel appearing for the applicants in A. Nos. 3448 and 3449 of 2003 and the plaintiff in C.S. No. 441 of 2001 and Mr. S. Raghunathan, learned counsel appearing for the applicants in A. Nos. 4274 and 4275 of 2003.

16. From the conspectus of facts narrated in the previous paragraphs, it could be seen that the claims to be adjudicated herein, fall under three categories viz.:

(i) claims for supply of necessaries, made by the applicants in A. Nos. 3448 and 3449 of 2003 (Interaccess Marine and Gulf Marine) and by the plaintiff in C.S. No. 441 of 2001;

(ii) claim for payment of wages due, made by the Master of the ship; and

(iii) claim made by The Royal Bank of Scotland, on the ground that the vessel was hypothecated, charged and mortgaged to them.

17. In brief, it is the claim of The Royal Bank of Scotland, that since the vessel was mortgaged to them, their claim would take precedence over all other claims. But it is the contention of the other claimants that the suppliers of necessaries and the persons to whom wages are payable, have a maritime lien over the vessel and that therefore their claims have precedence even over the mortgagee. The other claimants also attempt to substantiate their contention by pointing out that the mortgagee did not obtain a mortgage decree and that the mortgagee could not also obtain an order of arrest of the vessel and hence according to them, the claim of The Royal Bank of Scotland, could be treated only as that of an ordinary creditor, who does not even have a maritime lien. But in response, it is contended by The Royal Bank of Scotland that the suppliers of necessaries do not acquire a maritime lien and that therefore any claim made by them, could be considered only after the discharge of the mortgage debt.

18. In the light of the rival contentions, the following issues, in my considered view, arise for consideration:

(a) Whether the suppliers of necessaries and persons to whom wages are payable have a maritime lien or just a maritime claim ?

(b) Does a maritime lien, if it exists, override the claim of a registered mortgagee ?

(c) Whether the failure of The Royal Bank of Scotland, to obtain a decree on mortgage (instead of a simple decree for money as they have obtained now) and to obtain an order of arrest of the vessel, has a bearing upon their claim as a registered mortgagee?

ISSUE NO. 1:

19. Before we delve deep into the question as to whether a maritime lien is created in favour of the suppliers of necessaries and those to whom wages are payable, it is necessary to understand that there is a marked distinction between "a maritime claim" and "a maritime lien". Any claim on the owners of a vessel may be a maritime claim, but every one of them may not give rise to a maritime lien. This is so because of the peculiar nature of the Admiralty law, to understand which, we may have to turn to history before we take a plunge into law.

20. If we trace the history of the Admiralty jurisdiction of this Court, it could be seen that though at several points of time, the procedural law got codified by various enactments, the substantive law did not get codified, resulting in custom, usage and practice still holding the field. While the first Court of Admiralty appears to have been established in the Madras Presidency on 10.7.1686, with a new Charter issued by King Charles-II to the Fort St. George (refer the Article on "Judicial Institutions of the State of Madras" by Sri N. Arunachalam in "A Century Completed"), it appears that after the issue of the Letters Patent, in exercise of the power conferred by The Indian High Courts Act, 1861, constituting the High Court of Madras, in the year 1862, the High Court was vested with Admiralty and Vice-Admiralty jurisdiction, apart from others. But the Letters Patent of 1862, was revoked by an Amended Letters Patent issued on 28.12.1865, Clauses 32 and 33 of which, conferred such jurisdiction upon this Court, on the following terms:

32. Civil -- And We do further ordain that the said High Court of Judicature at Madras shall have and exercise all such Civil and Maritime jurisdiction as may now be exercised by the said High Court as a Court of Admiralty or of Vice-Admiralty, and also such jurisdiction for the trial and adjudication of prize causes and other maritime questions arising in India, as may now be exercised by the said High Court.

33. Criminal -- And We do further ordain that the said High Court of Judicature at Madras shall have and exercise all such Criminal jurisdiction as may now be exercised by the said High Court as a Court of Admiralty, or of Vice-Admiralty or otherwise in connexion with maritime matters or matters of prize.

21. By the time the High Court of Madras was established, the provisions of the Admiralty Offences (Colonial) Act, 1849 (12 & 13 Vict. C. 96) was extended to British India and British Burma, under the Admiralty Jurisdiction (India) Act, 1860. But these enactments dealt only with the Criminal jurisdiction. However, the Admiralty Courts Act, 1840, which appears to be the first legislative step in the extension of the Admiralty jurisdiction of the High Court, erased the geographical restriction on the Admiralty jurisdiction. It was followed by the Admiralty Courts Act, 1861 (24 & 25 Vict. C. 104) which also effected a substantial extension of the jurisdiction and both these Acts (1840 and 1861 Acts) became applicable by virtue of the Letters Patent.

22. However, in the year 1890, the Colonial Courts of Admiralty Act, 1890 (53 & 54 Vict.C. 27) was issued redefining the jurisdiction and the powers of a Colonial Court

of Admiralty and conferring all the powers both upon Courts which could be declared to be Courts of Admiralty and upon Courts having original unlimited Civil jurisdiction. By this Act, the Vice-Admiralty Courts Act, 1863, was repealed and the Vice-Admiralty Courts were abolished. In pursuance of the said enactment, the Colonial Courts of Admiralty (India) Act, 1891 was passed, by Section 2 of which, the High Court of Judicature at Madras was declared to be a Colonial Court of Admiralty. Section 106 of the Government of India Act, 1915, Section 223 of the Government of India Act, 1935 and Article 225 of the Constitution preserved that status and this Court continues to be a Court of record, having original and appellate jurisdiction including Admiralty jurisdiction vested in it by the Letters Patent.

23. The practice and procedure to be followed in the Admiralty jurisdiction of this Court, are now governed by a set of rules of practice and procedure known as "Rules of the High Court, Madras Original Side, 1956", which were issued in exercise of the powers conferred by various enactments listed in Appendix-I to the said Rules. The preamble to the said Rules contained a mandate that those rules of practice and procedure and the forms set out in Appendix-II thereto, should be used and observed in all cases coming up in the ordinary and extraordinary original Civil jurisdiction, Extraordinary Original Criminal jurisdiction, testamentary, intestate and matrimonial jurisdiction and as a Court of Admiralty. Order 42 of those Rules prescribes the procedure for the institution of a Suit, the various procedures to be followed with regard to service of summons, trial, etc., and the reliefs that could be granted.

24. Though Order 42 of the High Court Original Side Rules, 1956, is also concerned primarily with the procedural law, relating to the Admiralty jurisdiction of this Court, it nevertheless contains some provisions touching upon the substantive rights of parties. Rule 2 of Order 42 makes a distinction between a Suit in rem and a Suit in personam. If a Suit is instituted in rem, Rule 2 permits the plaintiff to describe the defendants as "the owners and parties interested in " the vessel, instead of by name. Rule 3 empowers this Court to issue a warrant for the arrest of the property, at the instance of the plaintiff or the defendant, if the Suit is in rem. Rule 3 also prescribes the conditions to be satisfied, for seeking an order of arrest of the property, in respect of three categories of Suits viz., (i) Suit of wages or of possession (ii) Suit of bottomry, and (iii) Suit of distribution of salvage.

25. The emphasis in Order 42 of the High Court Original Side Rules, 1956, on an action in rem, stems out of the peculiar nature of the Admiralty law. In admiralty, the vessel has 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, quoted in

MV Elisabeth case by Supreme Court).

26. The peculiarity of this branch of law, as distinct from common law, was noted by Barnes, J., in The Ripon City, 1897 (77) LT 98, as follows:

In his interesting and excellent work on the Common Law, O.W. Holmes, J. of Boston, finds this source in the ancient law of deodand, and considers that it is only by supposing the ship to have been treated as if endowed with personality that the seeming arbitrary peculiarities of the maritime law can be made intelligible.

27. Thus in Admiralty Law, the ship is not only treated as the res (object), but also treated as a personality, answerable to certain claims. It is this treatment that has actually led to the well known Admiralty practice of arrest of ships. An elaborate procedure is prescribed in various rules under Order 42 of the High Court Original Side Rules, for service of summons, service of warrant and the manner of execution of the warrant. Rule 11 enables any person not named in the proceedings, to intervene and appear by filing an affidavit showing that he is interested in the property under arrest. But this is also possible only in a Suit in rem.

28. Thus, the High Court Original Side Rules, 1956, throw little light upon the substantive rights of parties. Being rules of procedure, they do not go beyond a point in indicating the rights of parties, when a cause of action arises.

29. Therefore, the rights of parties were mostly governed by custom, usage and practice. But it is a fundamental principle that a legislation may create a new right or recognise one founded upon custom or practice. Admiralty statutes fall under the second category. This is why, the Supreme Court has pointed out in M.V. Elisabeth case that Admiralty law is rooted in judicial decisions and influenced by the impact of civil law, common law and equity and that the ancient maritime codes like the Rhodian Sea Law, the Basilika, the Assizes of Jerusalem, the Rolls of Oleron, the Laws of Visby, the Hanseatic Code, the Black Book of the British Admiralty, Consolato del Mare, and others are, apart from statutes, some of the sources from which the law developed in England.

30. But in so far as merchant shipping was concerned, the United Kingdom had Merchant Shipping Act, 1894, based upon which the Indian Merchant Shipping Act, 1923 was passed. But after independence, it was repealed and the Merchant Shipping Act, 1958, was enacted, with the professed object of fostering the development and ensuring the efficient maintenance of the Indian mercantile marine and to consolidate the law relating to merchant shipping.

31. The Merchant Shipping Act, 1958, contains some provisions, which may be of relevance, to the issue on hand. Section 47 enables a registered ship to be made a security for a loan or other valuable consideration. But it also obliges such mortgages to be registered in a register kept for the purpose. Section 49 indicates the priority of mortgages on the basis of date of entry in the register and not on the

basis of the date of creation of the mortgages. Section 51(1) empowers the registered mortgagee of a ship, to realise the amount due under the mortgage, by selling the mortgaged ship without even approaching the High Court, if there is only one registered mortgagee. But if there are two or more registered mortgagees, they are entitled to recover the money only through Court. Section 52 makes it clear that the registered mortgage of a ship shall not be affected by any act of insolvency committed by the mortgagor, after the date of record of such mortgage. Section 138 states that a seaman''s right to wages and provisions shall be taken to begin either at the time when he commences work or at the time specified in the agreement, whichever is earlier. Section 139 makes it clear that a seaman shall not, by any agreement, "forfeit his lien on the ship". Thus, Section 139 positively recognises the fact that a seaman has a lien on the ship in respect of his wages and that the owners of the vessel cannot contract out. Section 145 provides for summary proceedings before a Judicial Magistrate of First Class or Metropolitan Magistrate, at the instance of a seaman or apprentice, for any wages due to him. Section 146 bars the institution of a Suit for recovery of wages due to a seaman or apprentice, in a Civil Court, except where (i) the owner of the ship is declared insolvent (ii) the ship is under arrest or sold by the authority of any Court (iii) a Judicial Magistrate refers a claim to the Court.

32. Section 148 enlists the remedies available to the Master of the ship for wages, disbursements etc., and it reads as follows:

148. Remedies of Master for wages, disbursements, etc. -- (1) The Master of a ship shall, so far as the case permits, have the same rights, liens and remedies for the recovery of his wages as a seaman has under this Act or by any law or custom.

(2) The Master of a ship and every person lawfully acting as a Master of a ship by reason of the decease or incapacity from illness of the Master of the ship shall, so far as the case permits, have the same rights, liens and remedies for the recovery of disbursements or liabilities properly made or incurred by him on account of the ship as a Master has for recovery of his wages.

(3) If in any proceeding in any Court touching the claim of a Master in respect of such wages, disbursements or liabilities any set-off is claimed or any counter-claim is made, the Court may enter into, and adjudicate upon, all questions and settle all accounts then arising or outstanding and unsettled between the parties to the proceeding and may direct payment of any balance found to be due.

33. Though, Section 2(1) of the Act, makes the provisions of the Act applicable only to (i) any vessel registered in India (ii) any vessel required to be registered in India, and (iii) any other vessel which is owned wholly by a citizen of India or a company or body established by or under any Central or State Act, which has its principal place of business in India or a Cooperative Society, Section 443 empowers the High Court even to detain a foreign ship. But the power u/s 443 can be enforced, only if the

vessel is within India, including the territorial waters thereof. Section 2(2) of the Act, recognises the fact that there are certain provisions of the Act which apply to vessels other than those referred to in sub-section (1). Section 443 is one such provision and it reads as follows:

443, Power to detain foreign ship that has occasioned damage. -- (1) Whenever any damage has in any part of the world been caused to property belonging to the Government or to any citizen of India or a company by a ship other than an Indian ship and at any time thereafter that ship is found within Indian jurisdiction, the High Court may, upon the application of any person who alleges that the damage was caused by the misconduct or want of skill of the Master or any member of the crew of the ship, issue an order directed to any proper officer or other officer named in the order requiring him to detain the ship until such time as the owner, Master or consignee thereof has satisfied any claim in respect of the damage or has given security to the satisfaction of the High Court to pay all costs and damages that may be awarded in any legal proceedings that may be instituted in respect of the damages, and any officer to whom the order is directed shall detain the ship accordingly.

(2) Whenever it appears that before an Application can be made under this Section, the ship in respect of which the Application is to be made will have departed from India of the territorial waters of India, any proper officer may detain the ship for such time as to allow the Application to be made and the result thereof to be communicated to the officer detaining the ship, and that officer shall not be liable for any costs or damages in respect of the detention unless the same is proved to have been made without reasonable grounds.

(3) In any legal proceedings in relation to any such damage aforesaid, the person giving security shall be made a defendant and shall for the purpose of such proceeding be deemed to be the owner of the ship that has occasioned the damage.

34. Thus, we find two provisions in the Merchant Shipping Act, 1958, one in Section 148, for recovery of wages, disbursements, etc., by the Master of the ship and another in Section 443, for recovery of the value of the damage caused by a ship to the property of a citizen of India. Section 148 reinforces that the Master of the ship shall have the same rights, liens and remedies, as a seaman would have under this Act or by any law or custom, both in respect of his wages and also in respect of the disbursements or liabilities properly made or incurred by him. Therefore, coupled with the fact that u/s 139, the lien of the seaman cannot be forfeited by agreement, the Master as well as the seamen of the ship can trace their rights, liens and remedies, to custom or usage, in respect of the recovery of wages or the disbursements made or liabilities incurred. But in so far as the damage caused by a foreign vessel is concerned, Section 443 empowers this Court to detain the vessel, till the value of the damage caused and costs incurred, are secured.

35. Therefore, it is clear from the above discussion that the codified law relating to Admiralty jurisdiction, does not contain express provisions as to when a maritime lien is created. On the contrary, Sections 139 and 148 provide an indication that one may have to advert to the customary law, to see when a maritime claim gets elevated as a maritime lien.

36. "Maritime claim" is defined in Article-1 of the International Convention for the Unification of Certain Rules relating to the Arrest of Seagoing ships, Brussels, 1952, to mean one or more of the following:

(a) damage caused by any ship either in collision or otherwise;

(b) loss of life or personal injury caused by any ship or occurring in connection with the operation of any ship;

(c) salvage;

(d) agreement relating to the use or hire of any ship whether by charterparty or otherwise;

(e) agreement relating to the carriage of goods in any ship whether by charterparty or otherwise;

(f) loss of or damage to goods including baggage carried in any ship;

(g) general average;

(h) bottomry;

(i) towage;

(j) pilotage;

(k) goods or materials wherever supplied to a ship for her operation or maintenance;

(l) construction, repair or equipment of any ship or dock charges and dues;

(m) wages of Masters, Officers, or Crew;

(n) Master''s disbursements, including disbursements made by shippers, charterers or agents on behalf of a ship or her owner;

(o) disputes as to the title to or ownership of any ship;

(p) disputes between co-owners of any ship as to the ownership, possession employment or earnings of that ship;

(q) the mortgage or hypothecation of any ship.

It is doubtful if this Convention of 1952 was adopted by India. Yet the definition is useful for our purpose and hence it is extracted above.

37. Section 20(1)(a) of the Supreme Court Act of 1981 for England and Wales, recognises the Admiralty jurisdiction of the High Court (of England) to hear and determine any of the questions and claims mentioned in sub-section (2). While some of the claims mentioned in sub-section (2) relate to possession, ownership, employment, earnings of the ship, claims in respect of mortgage of or charge in a ship, there are several other claims listed under sub-section (2). These include claims for (i) the damage received by or done by a ship (ii) loss of life or personal injury in consequence of any defect in a ship or her apparel or equipment (iii) loss of or damage to goods carried in the ship (iv) salvage (v) pilotage (vi) towage. Clauses (m) and (o) of sub section (2) of Section 20 relate to the following claims:

(m) Any claim in respect of goods or materials supplied to a ship for her operation or maintenance;

(o) Any claim by a Master or member of the crew of a ship for wages.

38. The International Convention on Arrest of Ships, 1999, also defines a "maritime claim" under Article 1.1, almost on similar lines as in Brussels Convention. But the expression "maritime lien" is not defined either in the Supreme Court Act of 1981 for England and Wales or in any of these Conventions.

39. The difficulty with the expression ''maritime lien'' is that it does not denote a lien in the normal sense in which the word ''lien'' is understood in common parlance. Liens, so far as the source of their creation is concerned, are divisible into (i) common law liens (ii) equitable liens (iii) maritime liens, and (iv) statutory liens. While in common law, a lien is a right by which a person in possession of the property holds and retains it till the debt due on or secured by such property shall be paid or satisfied, a maritime lien does not include or require possession. The expression "maritime lien" was for the first time, perhaps, defined by Sir John Jervis (or Jeruis) in Bold Buccleugh, 1852 (7) Moo PCC 267, as follows:

A maritime lien is well defined.....to mean a claim or privilege upon a thing to be carried into effect by legal process.... that process to be a proceeding in rem.....This claim or privilege travels with the thing into whosoever possession it may come. It is inchoate from the moment the claim or privilege attaches, and when carried into effect by legal process by a proceeding in rem, relates back to the period when it is first attached.

The Bold Buccleugh was approved by the House of Lords in Currie v. McKnight, 1891 AC 97.

40. In Black''s Law Dictionary, the expression, which is also termed as "tacit hypothecation", is defined as follows:

A lien on a vessel, given to secure the claim of a creditor who provided maritime services to the vessel or who suffered an injury from the vessel''s use.

Black also quotes from Griffith Price''s The Law of Maritime Liens, as to what constitutes a maritime lien in the following words:

The maritime lien has been described as one of the most striking peculiarities of Admiralty law, constituting a charge upon ships of a nature unknown alike to common law and equity. It arises by operation of law and exists as a claim upon the property, secret and invisible. A maritime lien may be defined as: (1) a privileged claim, (2) upon maritime property, (3) for service done to it or injury caused by it, (4) accruing from the moment when the claim attaches, (5) travelling with the property unconditionally, (6) enforced by means of an action in rem.

41. In their book "ARREST OF SHIPS" (published by Lloyd''s of London Press Ltd, 1985 Edn.), the learned Authors M/s. Christopher Hill and others define a maritime lien on the following lines:

The maritime lien is a right which springs from general maritime law and is based on the concept that the ship (personified) has itself caused harm, loss or damage to others or to their property and must itself make good that loss. The ship is, in other words, the wrongdoer, not its owners.

42. Lord Tenterden defined a maritime lien to mean "a privileged claim upon a thing in respect of service done to it or injury caused by it, to be carried into effect by a legal process."

43. In P. Ramanatha Aiyar''s Advanced Law Lexicon (Book 3), a maritime lien is defined as "a lien or claim for salvage, damages or wages, made in respect of any maritime adventure charged upon the vessel." The Law Lexicon elaborates further as follows:

A maritime lien is a claim or privilege upon a maritime res. i.e., ship, freight, or cargo, which may arise ex contractu, i.e., for services rendered to the res, such as salvage, or ex delicto, i.e., for compensation for damage by collision, and is enforced by proceeding in rem, or against the res by arrest in Admiralty. It differs from a common law or possessory lien in that "it does not include or require possession. The word is used in maritime law not in the strict legal sense in which there can be no lien without possession actual or constructive, but to express as if by analogy the nature of claims which neither pre-suppose nor originate in possession.

44. That a maritime claim and a maritime lien cannot be identified with each other, was made clear by the Supreme Court in M.V. Al Quamar Vs. Tsavliris Salvage (International) Ltd. and Others, , after referring to the Encyclopaedia Brittanica. The relevant portion reads as follows:

A word of caution at this juncture ought to be introduced by reason of the confusion in populas (sic populus) between a maritime claim and maritime lien whereas claim cannot but be termed to be a genus lien is a particular species arising out of the genus and the two terms namely, claim and lien cannot be identified with each

other so as to accord same meaning. Let us, however, address ourselves on maritime lien as is available in the encyclopaedia and the same reads as below:

Maritime liens: although admiralty actions are frequently brought in personam, against individual or corporate defendants only, the most distinctive feature of admiralty practice is the proceeding in rem, against maritime property, that is, a vessel, a cargo, or ''freight'', which in shipping means the compensation to which a carrier is entitled for the carriage of cargo.

Under the American maritime law, the ship is personified to the extent that it may sometimes be held responsible under no liability. The classic example of personification is the ''compulsory pilotage'' case. Some State statutes impose a penalty on a shipowner whose vessel fails to take a pilot when entering or leaving the waters of the State. Since the pilotage is thus compulsory, the pilot''s negligence is not imputed to the shipowner. Nevertheless, the vessel itself is charged with the pilot''s fault and is immediately impressed with an inchoate maritime lien that is enforceable in Court.

Maritime liens can arise not only when the personified ship is charged with a maritime tort, such as a negligent collision or personal injury, but also for salvage services, for general average contributions, and for breach of certain maritime contracts.

33. Be it noted that there are two attributes to maritime lien: (a) a right to a part of the property in the res; and (b) a privileged claim upon a ship, aircraft or other maritime property in respect of services rendered to, or injury caused by that property. Maritime lien thus attaches to the property in the event the cause of action arises and remains attached. It is, however, inchoate and very little positive in value unless it is enforced by an action.

45. In Epoch Enterrepots Vs. M.V. WON FU, , the Supreme Court quoted with approval, the definition of the expression from Brussels Convention of 1967 and from Thomas on Maritime Liens. The relevant portion of the decision is extracted below:

16.....The International Convention for Unification of Certain Rules Relating to Maritime Liens and Mortgages at Brussels in 1967 defined the maritime lien to be as below:

(a) wages and other sums due to the master, officers and other members of the vessel''s complement in respect of their employment on the vessel;

(b) port, canal and other waterways and pilotage dues;

(c) claims against the owner in respect of loss of life or personal injury occurring, whether on land or on water, in direct connection with the operation of the vessel;

(d) claims against the owner based on tort and not capable of being based on contract, in respect of loss of or damage to property occurring, whether on land or on water in direct connection with the operation of the vessel;

(e) claims for salvage, wreck removal and contribution in general average.

17. Incidentally, the Admiralty Courts Act, 1861, read with the International Convention for Unification of Certain Rules Relating to Maritime Liens and Mortgages, Brussels, 1926 read with the Brussels Arrest (of Seagoing Ships) Convention, 1952 and the Brussels Maritime Liens Convention, 1967 clearly indicate that a claim arising out of an agreement relating to the use and/or hire of the ship although a maritime claim would not be liable to be classified as maritime lien (See in this context Thomas on Maritime Liens.).

19. We have in this judgment hereinbefore dealt with the attributes of maritime lien. But simply stated, maritime lien can be said to exist or restricted to in the event of (a) damage done by a ship; (b) salvage; (c) seamen''s and master''s wages; (d) master''s disbursement; and (e) bottomry; and in the event a maritime lien exists in the aforesaid five circumstances, a right in rem is said to exist. Otherwise, a right in personam exists for any claim that may arise out of a contract.

21. Further on the issue, we find Thomas on Maritime Liens stated it to represent a small cluster of claims which arise either out of services rendered to a maritime res or from damage done to a res and listed five several heads of maritime liens as under:

(a) Damage done by a ship

(b) Salvage

(c) Seamen''s wages

(d) Master''s wages and disbursements

(e) Bottomry and respondentia.

22. The limited applicability of such a lien thus well illustrates that not every kind of service or every kind of damage which arises in connection with a ship gives rise to a maritime lien. We, however, hasten to add that this is apart from the statutory enactments which may further list out various other forms of maritime claims. In The Ripon City (1897 P 226: (1895-99) All ER Rep 487) (P at p. 246), Gorell Barnes, J. upon appreciation of this facet of maritime lien and also, in part, to the surrounding policy considerations observed: (All ER p. 499 G-H)

(A) maritime lien travels with the vessel into whosesoever possession it comes, so that an innocent purchaser of a ship may find his property subject to claims which exist prior to the date of his purchase, unless the lien is lost by laches or the claim is one which is barred by the Statutes of Limitation. This rule is stated in The Bold

Buccleugh to be deduced from the Civil law, and, although it may be hard on an innocent purchaser, if it did not exist a person who was owner at the time a lien attached could defeat the lien by transfer if he pleased.

46. In British Shipping Laws, Vol. 14, while contrasting maritime liens and statutory rights of action, it is stated:

Although maritime liens and statutory rights of action in rem are similar in that they involve the admiralty process in rem, there nonetheless exist fundamental differences between the two categories. These differences may be categorised as follows:

(1) Nature of the claim.-- Although the point is not free of uncertainty it is probably the case that a maritime lien is a substantive right whereas a statutory right of action in rem is in essence a procedural remedy. The object behind the availability of a statutory right of action in rem is to enable a claimant to found a jurisdiction and to provide the res as security for the claim.

47. Therefore, it is clear from the above discussion that all types of claims on the vessel or on its owners, cannot be treated as coming under the category of "maritime liens". Only certain types of claims are recognised by custom and usage, as giving rise to a maritime lien. In Para 1903, Vol. 43 (2) of the Halsbury''s Laws of England (Fourth Edition-Reissue), it is stated as follows:

The maritime liens recognised by English law are those in respect of bottomry and respondentia bonds, salvage of property, seamen''s wages, damage and a salvor''s rights under any international convention or national law. A maritime lien has been held not to exist in respect of towage, the supply of goods, materials, etc. or insurance contributions. It is doubtful whether a maritime lien exists in respect of pilotage dues.

48. Therefore, in the above backdrop, we now have to see if the Master of the vessel had a maritime lien for unpaid wages and also if the suppliers of necessaries (Interaccess Marine Bunkering SA and Gulf Marine and Industrial Products Inc.) had a maritime lien on the vessel.

Claim for wages by the Master.

49. It appears from paragraphs 1907, 1918 and 1919, Vol. 43(2) of Halsbury''s Laws of England--(i) that the lien for the wages of the Master and the seamen attaches to the ship as well as to the freight and every part thereof; (ii) that the lien for wages travels with the res into whosesoever possession it may come; (iii) that the Master''s lien for wages has priority over a mortgage, unless the Master has guaranteed payment of it; (iv) that the seamen''s lien for wages also takes priority over the claim of a mortgagee.

50. The International Convention for Unification of Certain Rules relating to Maritime Liens and Mortgages at Brussels, 1967 and Thomas on Maritime Liens, both quoted by the Supreme Court in Epoch Enterrepots, also reiterate that the wages of seamen and Master constitute maritime lien.

51. The General Assembly of the United Nations, by a Resolution 46/213 dated 20.12.1991, decided that a United Nations/International Maritime Organization Conference of Plenipotentiaries on a Convention on Maritime Liens and Mortgages should be convened in order to consider a draft convention and to embody the results of its work in a convention on maritime liens and mortgages. The Conference was accordingly convened in May 1993. On the basis of its deliberations, the Conference established the text of the International Convention on Maritime Liens and Mortgages, 1993 and the same was adopted by many countries including India. As seen from its preamble, the purpose of the Convention was to ensure international uniformity in the field of maritime liens and mortgages and to have an international legal instrument governing maritime liens and mortgages.

52. Article 4 of the above Convention lists out the claims that shall be secured by a maritime lien on the vessel. Article 5 declares that the maritime liens set out in Article 4 shall take priority over registered mortgages. Article 6 entitles each State party to the Convention, to make law granting maritime liens in respect of claims other than those enlisted in Article 4, subject to certain conditions. Article 8 declares that the maritime liens would follow the vessel notwithstanding the change of ownership or of registration or of flag. Article 9 provides for the extinction of maritime liens by efflux of time. Articles 4, 5 and 6 are of relevance for our purpose and hence they are reproduced below:

Article 4 - Maritime liens;

1. Each of the following claims against the owner, demise charterer, manager or operator of the vessel shall be secured by a maritime lien on the vessel:

(a) claims for wages and other sums due to the master, officers and other members of the vessel''s complement in respect of their employment on the vessel, including costs of repatriation and social insurance contributions payable on their behalf;

(b) claims in respect of loss of life or personal injury occurring, whether on land or on water, in direct connection with the operation of the vessel;

(c) claims for reward for the salvage of the vessel;

(d) claims for port, canal, and other waterway dues and pilotage dues;

(e) claims based on tort arising out of physical loss or damage caused by the operation of the vessel other than loss of or damage to cargo, containers and passengers'' effects carried on the vessel.

2. No maritime lien shall attach to a vessel to secure claims as set out in subparagraphs (b) and (e) of paragraph 1 which arise out of or result from:

(a) damage in connection with the carriage of oil or other hazardous or noxious substances by sea for which compensation is payable to the claimants pursuant to international conventions or national law providing for strict liability and compulsory insurance or other means of securing the claims; or

(b) the radioactive properties or a combination of radioactive properties with toxic, explosive or other hazardous properties of nuclear fuel or of radioactive products or waste.

Article 5 - Priority of maritime liens:

1. The maritime liens set out in Article 4 shall take priority over registered mortgages, "hypotheques" and charges, and no other claim shall take priority over such maritime liens or over such mortgages, "hypotheques" or charges which comply with the requirements of Article 1, except as provided in paragraphs 3 and 4 of Article 12.

2. The maritime liens set out in Article 4 shall rank in the order listed, provided however that maritime liens securing claims for reward for the salvage of the vessel shall take priority over all other maritime liens which have attached to the vessel prior to the time when the operations giving rise to the said liens were performed.

3. The maritime liens set out in each of subparagraphs (a), (b), (d) and (e) of paragraph 1 of Article 4 shall rank pari passu as between themselves.

4. The maritime liens securing claims for reward for the salvage of the vessel shall rank in the inverse order of the time when the claims secured thereby accrued. Such claims shall be deemed to have accrued on the date on which each salvage operation was terminated.

Article 6 - Other maritime liens:

Each State Party may, under its law, grant other maritime liens on a vessel to secure claims other than those referred to in Article 4, against the owner, demise charterer, manager or operator of the vessel, provided that such liens:

(a) shall be subject to the provisions of Articles 8, 10 and 12;

(b) shall be extinguished

(i) after a period of 6 months, from the time when the claims secured thereby arose unless, prior to the expiry of such period, the vessel has been arrested or seized, such arrest or seizure leading to a forced sale; or

(ii) at the end of a period of 60 days following a sale to a bona fide purchaser of the vessel, such period to commence on the date on which the sale is registered in

accordance with the law of the State in which the vessel is registered following the sale;

whichever period expires first; and

(c) shall rank after the maritime liens set out in Article 4 and also after registered mortgages, "hypotheques" or charges which comply with the provisions of Article 1.

53. Article 12.2 of the 1993 Convention prescribes the method of distribution of the sale proceeds of a vessel, whenever a forced sale of the vessel takes place. It reads as follows:

2 The costs and expenses arising out of the arrest or seizure and subsequent sale of the vessel shall be paid first out of the proceeds of sale. Such costs and expenses include, inter alia, the costs for the upkeep of the vessel and the crew as well as wages, other sums and costs referred to in Article 4, paragraph 1(a), incurred from the time of arrest or seizure. The balance of the proceeds shall be distributed in accordance with the provisions of this Convention, to the extent necessary to satisfy the respective claims. Upon satisfaction of all claimants the residue of the proceeds, if any, shall be paid to the owner and it shall be freely transferable.

54. As stated earlier, India is a signatory to the above Convention. There is no Municipal Law in conflict with the above International Convention. On the contrary, Section 148(1) of the Merchant Shipping Act, 1958, which has already been extracted earlier, makes it clear that the Master of a ship has the same rights, liens and remedies for the recovery of his wages as a seaman has under this Act or by any law or custom. It is clear from the detailed discussion that by custom, the seamen and the Master have a maritime lien over the vessel, in respect of wages due to them. Such a customary right has been preserved by Section 148(1) of the Merchant Shipping Act, 1958 and reiterated by India signing the International Convention on Maritime Liens and Mortgages, 1993.

55. It appears that even statutorily, many countries have recognised the existence of a maritime lien in favour of the Master and seamen. Under Article 2 of Chapter 3 of the Maritime Act of Finland, the claim for unpaid salary or other emoluments to the Master or other persons employed on Board, creates a maritime lien. The Israeli Supreme Court has opined that the existence of maritime lien is subject to the lex causae, while the question of priorities between maritime liens is subject to the lex fori.

56. In The Board of Trustees of the Port of Calcutta v. Khatua and Others, 2000 (3) Cal.LT (HC), a Division Bench of the Calcutta High Court held that the wages of crew members have priority over all other claims, not just as a statutory right, but also under the International Maritime Law. Similarly, the Kerala High Court held in Al Ahli Bank of Kuwait (KSC) Vs. M.T. Arabian Victory, that the unpaid wages of seamen took priority even over a mortgage in favour of the appellant-Bank.

57. In O. Konavalov Vs. Commander, Coast Guard Region and Others, , a vessel registered in Panama, with crew members belonging to Ukraine was spotted by the Customs Department and investigation initiated into the alleged involvement of the crew in dealing with narcotics/drugs. The vessel was arrested and sold and the Chief Officer of the ship moved an application for payment of unpaid wages from out of the sale proceeds. In the meantime, an order was passed under the Customs Act, confiscating the vessel and the cargo. Consequently the Coast Guard and the Customs Authorities opposed the payment of wages to the seamen, on the ground that once a vessel is confiscated, there was no question of any charge on the vessel. Though, the Single Judge rejected the contentions of the Customs Authorities and allowed the Application for payment of wages, the Division Bench reversed the same. When the matter was taken to the Supreme Court on behalf of the seamen, the Supreme Court held that in terms of the provisions of the Merchant Shipping Act, 1958, the right of the seamen to wages, is unfettered and that no limitations on the entitlement to and exercise of such entitlement are found in the Act. The Supreme Court also held that Sections 115 and 126 of the Customs Act, 1962, cannot be read to confer a power upon the Government to destroy the charges and claims, under the Admiralty Law. In paragraphs 25 and 26 of its decision, the Supreme Court stated as follows:

25. Judicial opinion and textbook writers hold that a maritime lien such as seamen''s wages is a right to a part of property in the res and a privileged claim upon a ship, aircraft or other maritime property and remains attached to the property travelling with it through changes of ownership. It is also acknowledged that it detracts from the absolute title of the "res" owners [see (1) Maritime Liens by D.R. Thomas; British Shipping Laws, Vol. 14 at pp. 51-67; (2) Maritime Law by Cristopher Hill, 2nd Edn. 1985 at pp. 107-11; and (3) Principles of Maritime Law by Susan Hodges and Cristopher Hill, 2001].

26. The seamen''s right to their wages have been put on a high pedestal. It is said that a seaman had a right to cling to the last plank of the ship in satisfaction of the wages or part of them as could be found in Neptune and also Ruta.

58. Therefore, the claim made by Capt. Papaspamatiou, the Master of the vessel, for the wages remaining unpaid, is not a mere maritime claim but a claim giving a right of maritime lien. The lien cannot even get extinguished, by virtue of a confiscation by the Government under the provisions of the Customs Act, 1962. Therefore, I hold that Capt. Papaspamatiou''s claim for unpaid wages, constitute a maritime lien, which has priority over the mortgage claim made by The Royal Bank of Scotland, in terms of Article 5.1 of the International Convention on Maritime Liens and Mortgages, 1993.

Claim for supplies:

59. In so far as the claim made by Interaccess Marine Bunkering and Gulf Marine and Industrial Supplies Inc., are concerned, there appears to be divergence of opinion, on the question whether the supply of necessaries constitutes a maritime lien or not.

60. In Sigma Coatings BV Vs. "Agios Nikolaos" and another, , on which strong reliance is placed by Mr. S. Vasudevan, learned counsel for the plaintiff, a learned Judge of the Bombay High Court held that a person who supplied paints to a vessel, acquired a maritime lien. For coming to the said conclusion, the learned Judge relied upon the observations in para-99 from the separate but concurring judgment of Justice R.M. Sahai, as he then was, in M. V. Elisabeth case.

61. But in Elinoil-Hellenic Petroleum Company S.A. Vs. M.V. "ANNY L" (Ex- "ALEXIA S") and another, , a learned Judge of the Bombay High Court rejected the claim that the supply of necessaries constituted a maritime lien. However another learned Judge of the Bombay High Court held in Fujairah National Shipping Agency Vs. M.V. Sagar Shakti (Ex. Al Karim), A motor vessel registered in a port other than India, flying flag of St. Vincent and Grenadines and presently in port and harbour Mumbai, , as follows:

This issue stands concluded by a recent judgment of the Supreme Court in Epoch Enterrepots vs. M.V. WON FU. In fairness, it must be stated that both the Counsel, have fairly accepted before the Court that the judgment of the Supreme Court would conclude this issue... A bench of two Learned Judges of the Supreme Court held that a maritime lien can be said to exist and is restricted in the event of (a) damage done by a ship; (b) salvage; (c) seamen''s and master''s wages; (d) master''s disbursement; and (e) bottomry... In view of the judgment of the Supreme Court, this issue will have to be answered in the negative... The claim of the Petitioner is not based on any of the five categories set out in the judgment of the Supreme Court wherein only a maritime lien has been held to exist.

But another learned Judge of the same High Court took the view in Jupiter Denizcilik Mumessillik v. M.V. Lima, 2007 (3) Bom. C.R. 717, that the supply of bunkers was nothing but a supply of necessaries and that it constituted a maritime lien.

62. In M.V. Sea Renown Vs. Energy Net Ltd. , Puj, J., a learned Judge of the Gujarat High Court held that the bunkers supplied to a vessel, are necessaries for the operation of the vessel and that therefore the supplier had a maritime lien. But the learned Judge did not go into the subtleties between a maritime claim and a maritime lien. Moreover, the terms and conditions of supply of bunkers contained a Clause (Clause 10.3) to the effect that the deliveries of marine fuel was not only on the credit of the buyer, but also on the faith and credit of the vessel and that the buyer warranted that the seller would have a lien against the vessel for the purchase price of the fuel.

63. Though the above decision was also confirmed by the Division Bench M.V. Sea Renown and Another Vs. Energy Net Ltd. , the ratio laid down in Epoch Enterrepots by the Supreme Court was not considered even by the Division Bench. Therefore I am unable to agree with the view taken by the Gujarat High Court.

64. While one learned Judge of the Calcutta High Court left the very same question open, in Chrisomar Corporation v. M.V. Nikolaos, 2005 (3) Cal. LT 237, another learned Judge viz., A.K. Ganguly J., held in Saba International Shipping & Project Investment Pvt Ltd v. M.V. Brave Eagle 2002 (2) CHN 280, that the supply of provisions to a vessel did not constitute a maritime lien. For holding so, A.K. Ganguly J., followed an earlier judgment of the same High Court and held in paragraphs 30 and 31 as follows:

30. There is a direct judgment on this point by a learned Judge of this Court in Bailey Petroleum, referred to above.

31. Relying on the judgment of the Privy Council in Rio Tinto, 1884 (9) Appeal Cases 356 and the judgment in Shell Oil Co. v. The Ship Lastrigoni, 1974 (3) All England Reports 399, the learned Single Judge held in Bailey Petroleum that a claim arising out of the supply of necessaries may give rise to a statutory right of action ''in rem'' u/s 5 of Admiralty Court Act 1861 but it does not give rise to maritime lien.

65. Similarly, in S. Samiyullah Vs. Owners and Parties interested in the Vessel M.V. Makar, , M. Chockalingam, J., held that the supply of necessaries did not constitute a lien.

66. There are certain observations in paragraphs 98 and 99 of the decision in M.V. Elisabeth and Others Vs. Harwan Investment and Trading Pvt. Ltd., Hanoekar House, Swatontapeth, Vasco-De-Gama, Goa, , which tend to give an impression as though the supply of necessaries constituted a maritime lien. The relevant portion, on which strong reliance is placed by Mr. S. Vasudevan, learned counsel for the plaintiff and which was also relied upon by the Bombay High Court in Sigma Coatings BV Vs. "Agios Nikolaos" and another, , reads as follows:

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 bill of lading.

67. In Sigma Coatings, the learned Judge of the Bombay High Court understood the above observations in para 99 of M.V. Elizabeth to mean that the supplier of necessaries had a maritime lien. But that contention was repelled by another learned Judge of the Bombay High Court as well as a learned Judge of the Calcutta High Court. In Elinoil-Hellenic Petroleum Company S.A. v. M.V. nny L (Ex-Alexia S) and another, AIR 2000 Bombay 6, it was held in paragraph-14, as follows:

14. These observations of the Supreme Court have been pressed into service by the counsel for the plaintiffs in order to show that supply of necessaries constitutes maritime lien. Counsel for the plaintiffs also placed reliance upon these parts of the judgment in the case of M.V. Elisabeth and Others Vs. Harwan Investment and Trading Pvt. Ltd., Hanoekar House, Swatontapeth, Vasco-De-Gama, Goa, and some part which was reproduced by Justice Dhanuka in the case of Sigma Coatings BV v. M.V. Agios Nikolaos, IR 1995 Bom 281, in support of the plaintiffs'' contentions that supply of necessaries constitutes maritime lien. In my humble opinion and with respect, I am unable to agree with this submission. While deciding the issue involved in the case of M.V. Elizabeth, the question as to what is maritime lien and whether supply of necessaries constitutes maritime lien was not the question directly or indirectly involved before the Supreme Court. The aforesaid observations were made in the course of tracing history of Admiralty jurisdiction without the question being directly involved, without the parties before Supreme Court being called upon to advance arguments and without considering the pros and cons of this question i.e., whether the supply of necessaries constitutes maritime lien, and therefore, the judgment in the case of M.V. Elizabeth v. Harwan Investment & Trading, cannot be taken as binding precedents. In my humble opinion this part of the judgment that is paragraph No. 98 quoted above is neither the ratio decidendi nor obiter dicta, and therefore, the contention of the counsel for the plaintiffs in that regard cannot be accepted.

68. Similarly in Saba International Shipping & Project Investment Pvt Ltd. v. M.V. Brave Eagle, 2002 (2) CHN 280, A.K. Ganguly J., also expressed similar views about the observations in para 99 of M.V. Elizabeth. They read as follows:

41. In M.V. Elisabeth the issue before the Supreme Court was one of jurisdiction namely whether Andhra Pradesh High Court lacked admiralty jurisdiction to entertain a cause of action arising out of carriage of goods from a port in India to a foreign Port. In para 7 of M.V. Elisabeth, there is express indication on that effect.

42. The learned Judges while considering the said question discussed in detail, the origin of Admiralty Jurisdiction of this Court under British India and how the said jurisdiction is being continued and in doing so, the leading judgment has been delivered in M.V. Elisabeth by Justice T.K. Thommen. Justice R.M. Sahai has expressly agreed with the judgment of Justice T.K. Thommen. But in the concurring judgment His Lordship, Hon''ble Mr. Justice R.M. Sahai has made certain observations. Those observations have been made by Justice Sahai in order to (a) impress upon the appropriate authority the urgency of enacting up to date law on Admiralty, and (b) to express agreement only on scope of 1890 Act as well as the extensive jurisdiction enjoyed by High Courts after 1950 (This will appear from para 102 of the judgment).

43. It is therefore, clear that Justice Sahai did not want to lay down any opinion which is different from the opinion of Justice Thommen.

44. So the observations occurring in para 99 of the judgment in M.V. Elisabeth about supply of necessaries giving rise to maritime lien cannot be taken to be a declaration of law on the subject as to bind all Courts in India within the meaning of Article 141 of the Constitution, it may be noted that in a case where necessaries are supplied on Masters'' disbursements with the express authority of the ship owner, a case of maritime lien may crop up. But supply of necessaries, as in the instant case, does not give rise to a maritime lien. These aspects have not been discussed in detail in the observation of Justice Sahai. So with great respect this Court is of the view that the observations relating to necessaries made in para 99 of the judgment ought to be considered in the background of the case as a whole and not in isolation.

69. Thus, there is a divergence of opinion on the question whether supply of necessaries constituted a maritime lien, despite the fact that it does not fall under any one of the five categories recognised by English Courts and listed out by D.R. Thomas on Maritime Liens. This is perhaps due to a small mix up first between a maritime claim and a maritime lien and next between a maritime lien and a statutory lien.

70. Though it is stated in Para 1903, Vol. 43(2) of the Halbury''s Laws of England, that a maritime lien has been held not to exist in respect of the supply of goods, materials, etc., it is also stated in para 1910, that "a statutory lien attaches when property is arrested in an action in rem in the Admiralty Jurisdiction of the High Court or any county Court having Admiralty jurisdiction." Therefore a supplier of necessaries can always bring an action in rem and secure an order for the arrest of the vessel, which in turn, may confer a lien upon him. Alternatively, as declared by Article 6 of the International Convention on Maritime Liens and Mortgages, 1993, a State may, under its law, grant maritime liens on a vessel to secure claims other than those referred to in Article 4. The lien so conferred by statute would be a statutory lien.

71. If the supplier of goods and materials has a statutory lien, then Para 1920, Vol. 43(2) of The Halsbury''s Laws of England provides as follows:

1920. Supply of goods, materials, etc.-- The statutory lien for the supply of goods and materials to, and the repair of, a ship and disbursements made by a Master, shipper, charterer or agent on account of a ship as a general rule ranks after maritime liens but takes priority over a Master''s lien for wages and disbursements when supplied by the order of a Master who is part owner of the ship. It is postponed to a mortgage to execution creditors at whose instance the sheriff has seized the res before the person supplying the goods, materials, etc. has arrested it, and to the solicitor''s costs in defending an action brought against the ship before the goods etc were supplied.

72. The International Convention on Arrest of Ships, 1999, to which I have already made a reference, enlists 22 claims under Article 1 as amounting to a maritime claim. Article 2.2 of the Convention provides that a ship may only be arrested in respect of a maritime claim and not in respect of any other claim. However, Article 9 of the Convention makes it clear that nothing in that Convention shall be construed as creating a maritime lien. A claim arising out of goods, materials, provisions, bunkers or equipment supplied or services rendered to the ship for its operation, management, preservation or maintenance, is included as a maritime claim in clause (1) of Article 1 of the Convention. Therefore, the fact that Interaccess Marine and Gulf Marine and Industrial Supplies Inc., were able to file suits on the file of the Andhra Pradesh High Court and secure orders of arrest of the vessel, on the strength of such a maritime claim arising out of supply of necessaries, is actually in tune with the 1999 Convention. But that by itself would not create a maritime lien, as spelt out by Article 9 of the Convention.

73. As held consistently by all Courts, the arrest of the ship is only for the purpose of securing the claim of the plaintiff against an unknown owner of a vessel or against a known owner of a vessel not amenable to the jurisdiction of the Admiralty Court except when the vessel has arrived within the territorial waters of the country. Even in M.V. Elisabeth case, the Supreme Court observed in para 49 that the arrest of the ship may be (i) to acquire jurisdiction, or (ii) to obtain security for the satisfaction of the claim when decreed, or (iii) in execution of a decree. In para 50, the Supreme Court indicated that the attachment by arrest is only provisional and that "its purpose is merely to detain the ship until the matter has been settled by a competent Court". In para 51, the Supreme Court stated as follows:

51. The attachment being only a method of safeguarding the interest of the plaintiff by providing him with a security, it is not likely to be ordered if the defendant or his lawyer agrees to "accept service and to put in bail or to pay money into Court in lieu of bail." (See Halsbury''s Laws of England, 4th Edn. Vol. 1 p. 375, etc.).

74. Rule 19 of Order 42 of the High Court Original Side Rules, 1956, entitles an Attorney to obtain the release of any property by paying into the Registry, the sum in which the Suit has been instituted. Similarly, Rule 22 also entitles an Attorney to secure the release of the property, if security is given in the sum in which the suit has been instituted. A party desiring to prevent the arrest of a ship, is entitled to lodge a caveat under Rule 26 and he may give security within 3 days from the date of service of a copy of the Plaint.

75. The scheme of Order 42, confirms the traditional view, as expressed by the Supreme Court in para 51 of its judgment in M.V. Elisabeth case, that the arrest of a ship is only a method of safeguarding the interest of the plaintiff by providing him with a security. Therefore, the crystallisation of the right of a person making a maritime claim, with the arrest of the ship in an action in rem, is similar to the arrest or attachment before judgment, provided for, under Rules 1 and 5 respectively of

76. Once the issue on hand is understood as above, it would be clear that if a maritime claim constituting a maritime lien exists, such a lien would continue to exist independent of, irrespective of and even in the absence of an order of arrest. A maritime lien is not created by the order of arrest. This is because a maritime lien always travels with the ship, in whosesoever custody it may be. On the contrary, an order of arrest passed in an action in rem, in respect of a mere maritime claim (in contrast to a maritime lien), can always be lifted at the instance of the owner submitting to the jurisdiction of the Admiralty Court and converting the action as one in personam, by depositing security. This is made clear by the Supreme Court in paragraphs 57 and 59 of its decision in M, V. Elisabeth case.

77. That, an order of arrest made in an action in rem, in respect of a maritime claim, is similar to an order passed under Order 48, Rule 1, C.P.C., can be well appreciated, by taking an example. If for instance, in a given case, a ship has travelled beyond the territorial waters of the country before an order of arrest was passed and executed in a manner provided by the statutory rules (such as Order 42, Rule 8 of the High Court O.S. Rules), the plaintiff may not be able to claim that a lien was created by the order of arrest and that it travelled with the ship, wherever it went. But in the same case, if the claim of person fell within one of those categories of claims which constitute a maritime lien, it would travel along with the ship, enabling the plaintiff to enforce the claim in any jurisdiction.

78. Though, in its origin, an action in rem was believed to be the result of a maritime lien, the law took a different turn later, as could be seen from Paragraph 305 in Vol. 1 (1) of the Halsbury''s Laws of England, extracted below:

305. Origin of claims in rem.-- Originally a suit in Admiralty was commenced by the arrest either of the person of the defendant or of his goods, whether or not the ship or goods in question constituted the subject matter of the offence, the purpose being to make the defendant put up bail or provide a fund for securing compliance with the judgment, if any, when it was obtained against him. The result of the conflict between the Court of Admiralty and the common law Courts was that this method of procedure became obsolete, but the Admiralty Court succeeded in establishing a right to arrest property which was the subject matter of a dispute, and to enforce its judgments against the property so arrested, on the theory that a maritime lien to the extent of the claim attached to the property from the moment of the creation of such claim. Such a claim became known as an action in rem. The right to enforce a maritime lien by an action in rem was confined to the property by which the damage was caused or in relation to which the claim arose, and was enforceable against the property in the hands of an innocent purchaser.

The present law preserves the jurisdiction based upon the maritime lien and extends the right to proceed in rem to many claims which do not give rise to a

maritime lien.

79. The last portion of the passage extracted above, makes it clear that an action in rem and the order of arrest need not necessarily indicate the presence of a maritime lien, since the right to proceed in rem now stands extended to many claims which do not constitute a maritime lien. In other words, every maritime lien gives a right to initiate an action in rem and to seek an order of arrest of the vessel. But every action in rem and every order of arrest does not presuppose the existence of a maritime lien.

80. Paragraph 337 of Vol. 1(1) of the Halsbury''s Laws of England reads as follows:

337. Extent of Jurisdiction.-- The Admiralty jurisdiction of the High Court includes jurisdiction to hear and determine any claim in respect of goods and materials supplied to a ship for its operation and maintenance, and any claim in respect of the construction, repair or equipment of a ship or in respect of dock charges or dues. The supply of goods and materials to and the repair of a ship does not confer a maritime lien. The repairer has, however, a common law possessory lien.

81. Mr. S. Vasudevan, learned counsel appearing for the suppliers of necessaries, contended that the Admiralty jurisdiction of this Court, cannot be construed within a narrow compass and that the power of this Court to render justice need not be confined to the provisions of the imperial statutes. In support of the said contention, the learned counsel relied upon the following observations in paragraphs-87 and 101 of the decision of the Supreme Court in M.V. Elisabeth case:

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

A citizen of a colonial State may or may not but a citizen of an independent republic cannot be left high and dry. The construction of law has to be in consonance with sovereignty of a State.

82. The learned counsel also contended that since damage done by a ship is considered even traditionally to constitute a maritime lien, the non payment for the supply of necessaries could be construed as a damage done by the ship, by breach of contract. In support of the said contention, the learned counsel relied upon the following portions of paragraphs-79 and 80 of the decision in M.V. Elisabeth case:

The Sections are wide in terms and the expression ''damage'' is not necessarily confined to physical damage. Ordinarily damage is caused by physical contact of the

ship, such as in collision. But damage can also be caused to property by breach of contract or acts of commission or omission on the part of the carrier or his agents or servants by reason of the negligent operation and management of the vessel, as, for example, when cargo is damaged by exposure to weather or by negligent stowage; or, by the misconduct of those in charge of the ship, like when cargo is disposed of contrary to the instructions of the owner or by reason of theft and other misdeeds. In all these cases, damage arises by reason of loss caused by what is done by the ship or by the breach, negligence or misdeeds of those in charge of the ship. It must however be noticed that the expression ''damage done by any ship'' has been construed by the English Courts as not to apply to claims against the carrying ship for damage done to cargo.

80. In the absence of any statute in India comparable to the English statutes on admiralty jurisdiction, there is no reason why the words ''damage caused by a ship'' appearing in Section 443 of the Merchant Shipping Act, 1958 should be so narrowly construed as to limit them to physical damage and exclude any other damage arising by reason of the operation of the vessel in connection with the carriage of goods. The expression is wide enough to include all maritime questions or claims. If goods or other property are lost or damaged, whether by physical contract or otherwise, by reason of unauthorised acts or negligent conduct on the part of the ship owner or his agents or servants, wherever the cause of action has arisen, or wherever the ship is registered, or wherever the owner has his residence or domicile or place of business, such a ship, at the request of the person aggrieved, is liable to be detained when found within Indian jurisdiction by recourse to Sections 443 and 444 of the Merchant Shipping Act, 1958 read with the appropriate rules of practice and procedure of the High Court. These procedural provisions are but tools for enforcement of substantive rights which are rooted in general principles of law, apart from statutes, and for the enforcement of which a party aggrieved has a right to invoke the inherent jurisdiction of a superior Court.

83. But unfortunately for the applicants, whose claims are based upon the supply of necessaries, the Supreme Court did not recognise anywhere in its decision in M.V. Elisabeth, the existence of a maritime lien, in favour of supplier of necessaries. All that the Supreme Court said was that the expression "damage done by a ship" appearing in Section 443 is so elastic as to include even the breach of obligations created by contracts and that the powers of the Court are not limited by colonial practices. A reading of the judgment of the Supreme Court in M.V. Elisabeth, in totality, would show that there are a wide range of claims, in respect of which an action in rem could be initiated and the arrest of the vessel sought. Neither any of the provisions of the Merchant Shipping Act, 1958 nor any portion of the decision in M. V, Elisabeth, recognise the existence of a maritime lien in favour of the supplier of necessaries. As pointed out by the Bombay and Calcutta High Courts (in Elinoil Hellenic Petroleum and Saba International), the passing reference in paragraph-99 of the decision in M.V. Elisabeth, to "the supply of necessaries", cannot be taken to

lay down a proposition of law that the supply of necessaries constituted a maritime lien. As a matter of fact, the observation made in para-99 is actually with reference to the law in England as it grew and developed. But we have found from the Halsbury''s Laws of England, that even today, a maritime lien is not created in favour of a supplier of necessaries. This is why, even in Epoch Enterrepots Vs. M.V. WON FU, , the Supreme Court quoted with approval those 5 categories of maritime liens listed in Thomas on Maritime Liens and The Brussels Convention of 1967. In Enterrepots, the Supreme Court took note of M.V. Elizabeth and yet did not expressly go beyond those 5 categories of maritime liens.

84. Interestingly, the Merchant Shipping Act, 1958, uses the word "lien" with reference to the wages of seaman in Sections 139 and 148. But the Act does not use the expression "lien" in Section 443 or 444, while dealing with the power to detain a foreign ship which has caused damage to any property belonging to the Government or a citizen of India. Therefore even if the expression "damage done by a ship" appearing in Section 443, is given a wider meaning so as to include any claim arising out of breach of contracts, it cannot be said that a maritime lien is created. Such a claim would only be a maritime claim, giving a right of action in rem and a right to seek the arrest of the vessel. It will still fall short of a maritime lien.

85. One of the earliest English cases, in which a claim on a mortgage clashed with a claim for supply of necessaries, is The Two Ellens, 1872 (26) L.T. 1. It was a case in which a vessel had been mortgaged. Subsequently, necessaries were supplied to her. She was arrested and sold, but the proceeds of sale were insufficient to pay both the claims of the mortgagee and that of the necessaries men. The Judicial Committee of the Privy Council held that "the claim of the necessaries men gave them a right to arrest the vessel but not a maritime lien ".

86. It was opined by Mellish L.J., in "Two Ellens" that prior to the passing of the 3 & 4 Vict.c. 65, the Court of Admiralty had no jurisdiction in the case of necessaries supplied to a ship and that the supply of such necessaries did not give any maritime lien upon a ship. But Section 6 of the Admiralty Courts Act, 1840 (3 & 4 Vict.C. 65) changed the position and conferred jurisdiction upon the High Court of Admiralty to decide all claims and demands including the claim for necessaries supplied to a foreign vessel. Section 6 of the Admiralty Courts Act, 1840 reads as follows:

6. The Court in certain cases may adjudicate, etc. -- The High Court of Admiralty shall have jurisdiction to decide all claims and demands whatsoever in the nature of salvage for services rendered to or damage received by any ship or seagoing vessel or in the nature of towage, or for necessaries supplied to any foreign ship or seagoing vessel, and to enforce the payment thereof, whether such ship or vessel may have been within the body of a country, or upon the high seas, at the time when the services were rendered or damage received, or necessaries furnished, in respect of which such claim is made.

87. Thus what was conferred by Section 6 of the Admiralty Courts Act, 1840, was only a jurisdiction upon the High Court of Admiralty to decide "the claim for necessaries supplied to a foreign ship". Till the enactment of the 1840 Act, there was not even such a jurisdiction vested with the Court in the case of necessaries supplied to the ship (according to Mellish L.J., in Two Ellens). But nevertheless, the Admiralty Courts Act, 1840, did not elevate such a claim to the level of a maritime lien.

88. Even Section 5 of the subsequent enactment viz., the Admiralty Courts Act, 1861 (24 & 25 Vict.c. 104), did not change the position from what it was under the 1840 Act, in so far as supply of necessaries are concerned. Section 5 of the 1861 Act, reads as follows:

5. As to claims for necessaries. -- The High Court of Admiralty shall have jurisdiction over any claim for necessaries supplied to any ship elsewhere than in the port to which the ship belongs, unless it is shown to the satisfaction of the Court that at the time of the institution of the cause any owner or part-owner of the ship is domiciled in England or Wales:

Provided always, that if in any such cause the plaintiff do not recover twenty pounds, he shall not be entitled to.

(The above Section 5 was repealed by 15 & 16 Geo. 5. c. 49).

89. Despite the expansion of the jurisdiction, in England, with several subsequent enactments over a century, no maritime lien was recognised in favour of materials man and the law laid down in Two Ellens, appears to have remained the same. While Two Ellens was in 1872, Bankers Trust International v. Todd Shipyard Corporation, The Halcyon Isle, 1980 Ch. D. 197, decided over a century later, denied repairmen, a maritime lien. It was held therein as follows:

As a matter of policy such a claim might not unreasonably be given priority over claims by holders of prior mortgages the value of whose security had thereby been enhanced. If this is to be done, however, it will, in their Lordship''s view have to be done by the legislature. It is far too late to add, by judicial decision, an additional class of claim to those which have hitherto been recognised as giving rise to maritime liens under the law of Singapore.

90. When a question arose as to whether an unpaid insurance premium for the protection and indemnity cover (P&I Cover) extended to a vessel would fall within the definition of the word "necessaries", the Supreme Court, in Liverpool and London S.P. and I Asson. Ltd. Vs. M.V. Sea Success I and Another, , referred to the provisions of Section 6 and 5 respectively of the 1840 and 1861 Acts. Thereafter, the Supreme Court held in para-61 that since insurance is needed to keep the ship going, it has to be construed as "necessaries". In para-63, the Supreme Court held as follows:

63. Supply of necessaries is a maritime lien in USA in terms of the relevant statute and has been classified in the category of subordinate to the preferred ship mortgage.

91. In paragraph-64, the Supreme Court quoted the following passage from Benedict on Admiralty, 6th Edn., Vol. 1, p. 22:

Whenever a debt of a maritime nature is by law, no matter what law, or by contract, a lien upon the vessel, the vessel may be proceeded against in rem. The maritime lien, whether created by actual hypothecation or by implication or operation of law, may be enforced in admiralty.

92. After an elaborate consideration of various issues, the Supreme Court held in para-107 in Liverpool case, that an unpaid insurance premium is a maritime claim that would be enforceable in India. But the Supreme Court never came to the conclusion that necessaries constituted a maritime lien. As a matter of fact, the entire discussion in Liverpool, is divided into several titles and subtitles. Paragraphs-21 to 33 are under the sub-title "Necessaries-as a maritime claim". Despite noting the fact that under the American Law, the supply of necessaries is a maritime lien, but under the English Law, it is not, the Supreme Court just came to two conclusions viz., (i) that an unpaid insurance premium for protection and indemnity cover (P&I) would come within the purview of the expression "necessaries supplied to a ship", and (ii) that such a claim would be a maritime claim that would be enforceable in India.

93. Even if English precedents are discarded and the American principles are followed, it is difficult to take the view that the supply of necessaries is a maritime lien, since the Supreme Court indicated in para-63 in Liverpool that in USA, it is a maritime lien in terms of the relevant statute. But there is no statute here in India recognising the claim as a maritime lien. At any rate, even in USA, it is classified in the category subordinate to the preferred ship mortgage.

94. A close scrutiny of Order 42 of the High Court Original Side Rules, 1956, shows that these Rules actually took note of only three categories of claims, for the purpose of enabling the Court to issue a warrant of arrest in a Suit in rem. Rule 3 of Order 42, is as follows:

3. In Suits in rem a warrant for the arrest of property may be issued at the instance either of the plaintiff or of the defendant at any time after the Suit has been instituted, but no warrant of arrest shall be issued until an affidavit by the party or his agent has been filed, and the following provisions complied with:

(A) The affidavit shall state the name and description of the party at whose instance the warrant is to be issued, the nature of the claim or counter-claim, the name and nature of the property to be arrested, and that the claim or counter-claim has not been satisfied.

(B) In a Suit of wages or of possession, the affidavit shall state the national character of the vessel proceeded against; and if against a foreign vessel, that notice of the institution of the suit has been given to the consul of the State to which the vessel belongs, if there be one resident in Madras and a copy of the notice shall be annexed to the affidavit.

(C) In a Suit of bottomry, the bottomry bond and if in a foreign language also a notarial translation thereof, shall be produced for the inspection and perusal of the Registrar, and a copy of the bond, or of the translation thereof, certified to be correct shall be annexed to the affidavit.

(D) In a Suit of distribution of salvage, the affidavit shall state the amount of salvage money awarded or agreed to be accepted, and the name and address and description of the party holding the same.

95. Thus, even the procedural rules take care of only three out of five categories of maritime liens, enlisted by Thomas on Maritime Liens. Out of the five heads of maritime liens, listed by Thomas, viz., (i) damage done by a ship (ii) salvage (iii) seamen''s wages (iv) Master''s wages and disbursements and (v) bottomry, Order 42, Rule 3 deals only with three heads viz., (i) wages (ii) bottomry and (iii) salvage. I am not for a moment drawing an inference from Order 42, that the other two claims (left out in Order 42) cannot be recognised as constituting a maritime lien. I am only drawing attention to the fact that Order 42 explicitly recognises that a claim for wages can be by way of an action in rem. Coupled with the recognition in Sections 139 and 148(1) of the Merchant Shipping Act, 1958, to the lien of the seamen and the Master of a ship for their wages and the absence of any such reference or recognition to the claim of the supplier of necessaries, it is clear that a claim for supply of necessaries, is neither recognised by custom or usage nor recognised statutorily as constituting a maritime lien.

96. Therefore, I hold that the claim for supply of necessaries do not constitute a maritime lien, though it certainly constituted a maritime claim, giving a right of action in rem with a right to seek an order of arrest of the vessel.

97. Moreover, the claim of Interaccess Marine Bunkering SA (the applicant in A. No. 3448 of 2003) in their Suit C.S. No. 34 of 2001 was for the value of the supply of bunkers made by them at the ports of Piraeus, Bandirama and Istanbul (all out of India). Similarly, the claim of Gulf Marine and Industrial Supplies Inc. (the applicant in A. No. 3449 of 2003) in their Suit C.S. No. 36 of 2001 was for the supplies made to the sister vessels in USA. Thus the claims by both these parties are in respect of supply of necessaries made in ports other than the Indian ports and the claim of one of them is in respect of the supplies made to the defendant vessel and its sister vessels. The claim of the plaintiff in C.S. No. 441 of 2001 is in respect of the supply of provisions, cabin stores, deck stores, engine stores, electrical stores, etc., made on 20.4.2001. But by then, the ship was under orders of arrest issued by the High Court

of Andhra Pradesh on 13.4.2001 in C.S. Nos. 34 and 36 of 2001. The suit C.S. No. 441 of 2001 itself was filed only in June 2001. Therefore, in the light of the law relating to maritime liens and in the background of these facts, the claim of the plaintiff in C.S. No. 441 of 2001 and the claim of the intervenors/applicants in A. Nos. 3448 and 3449 of 2003 do not certainly constitute a maritime lien and hence their claims cannot take precedence over a mortgage, in terms of 1993 Convention.

98. In view of what is stated above, I hold on issue No. 1 (i) that the claim for wages made by Capt. Papaspamatiou, is a maritime lien, and (ii) that the claims for supply of necessaries, made by the applicants in A. Nos. 3448 and 3449 of 2003, and the claim made by the plaintiff in C.S. No. 441 of 2001, did not constitute a maritime lien.

ISSUE NO. 2 (Priority of Maritime Lien over mortgage):

99. The normal rule as enunciated in Order 34, Rule 13, C.P.C. is that the claim of a person interested in the property sold under a decree on mortgagee would rank last in the order of priorities. It reads as follows:

13. Application of proceeds. -- (1) Such proceeds shall be brought into Court and applied as follows:

first, in payment of all expenses incident to the sale or properly incurred in any attempted sale;

secondly, in payment of whatever is due to the prior mortgagee on account of the prior mortgage, and of costs, properly incurred in connection therewith;

thirdly, in payment of all interest due on account of the mortgage in consequence whereof the sale was directed, and of the costs of the suit in which the decree directing the sale was made;

fourthly, in payment of the principal money due on account of that mortgage; and lastly, the residue (if any) shall be paid to the person proving himself to be interested in the property sold, or if there are more such persons than one, then to such persons according to their respective interests therein or upon their joint receipt.

(2) Nothing in this rule or in Rule 12 shall be deemed to affect the powers conferred by Section 57 of the Transfer of Property Act, 1882 (4 of 1882).

Thus a mortgage shall normally prevail over all other claims except those of prior encumbrances. But maritime lien is an universally recognised exception to this normal rule. Article 5.1 of the International Convention on Maritime Liens and Mortgages, 1993, to which India is a signatory, declares that maritime liens set out in Article 4 shall take priority over registered mortgages, hypotheques and charges and that no other claim shall take priority either over such maritime liens or over such mortgages. I have already extracted Articles 4, 5 and 6 of the said Convention and also referred to Articles 8 and 12.2, elsewhere in this judgment.

100. The provisions of the Merchant Shipping Act, 1958 or any other municipal law, is not in conflict with the above Convention. Therefore, the obligations arising out of the above Convention are enforceable. Hence there is no difficulty in holding on issue No. 2 that a maritime lien takes precedence over a registered mortgage, despite the fact that in USA, a maritime lien is made subordinate to the preferred ship mortgage. This view is also fortified by the decision in O. Konavalov, where the Supreme Court held that unpaid wages would take precedence even over a claim by the State and the confiscation made by the Customs Department.

101. Therefore, I hold on issue No. 2 that the claim for wages made by Capt. Papaspamatiou, shall take priority over the mortgage claim made by the Royal Bank of Scotland.

ISSUE NO. 3 (Mortgage Claim of Royal Bank of Scotland);

102. Opposing the claim made by the Royal Bank of Scotland, it was contended by Mr. S. Vasudevan, learned counsel that a mortgagee, in maritime law does not acquire a maritime lien. According to him, The Royal Bank of Scotland made matters worse for themselves, by not filing a Suit on mortgage, but filing a simple Suit for recovery of money. Though, the Suit was instituted against the owners and parties interested in the vessel and though a prayer for arrest was also made, neither an interim order of arrest pending Suit nor a decree for arrest was passed in C.S. No. 37 of 2001 instituted by them. Therefore it was contended by Mr. S. Vasudevan, learned counsel that the claim of Royal Bank of Scotland is to be treated as that of a mere unsecured creditor.

103. But, I do not think that a mortgage gets extinguished by the mere absence of an order of arrest. Admittedly, the Royal Bank of Scotland filed the Suit in September 2001, by which time, two Suits C.S. Nos. 34 and 36 of 2001 were already pending and two orders of arrest of the vessel were already in force. Therefore there is no necessity to seek one more order of arrest, as multiple orders of arrest, are neither contemplated nor made essential under maritime law. As a matter of fact, Order 42, Rule 11 of the High Court Original Side Rules, enables any person not named in the writ, to intervene. Rule 36 enables any person interested in the proceeds to be heard. These Rules read as follows:

11. In a Suit in rem, any person not named in the writ may intervene and appear on filing an affidavit showing that he is interested in the property under arrest or in the fund in the Registry.

36. Any person interested in the proceeds may be heard before the taxing officer on the taxation of the account of expenses and an objection to the taxation shall be heard in the same manner as an objection to the taxation of a bill of costs.

104. Section 3 of the Admiralty Courts Act, 1840 also provides a direct answer to the contention of the learned counsel for the supplier of necessaries. It reads as follows:

3. Whenever a vessel shall be arrested, etc. Court to have jurisdiction over claims of mortgagees. -- Whenever any ship or vessel shall be under arrest by process issuing from the said High Court of Admiralty, or the proceeds of any ship or vessel having been so arrested, shall have been brought into and be in the Registry of the said Court, in either such case the said Court shall have full jurisdiction to take cognizance of all claims and causes of action of any person in respect of any mortgage of such ship or vessel, and to decide any suit instituted by any such person in respect of any such claims or causes of action respectively.

105. Section 51 of the Merchant Shipping Act, 1958, confer certain rights upon the registered mortgagee of a ship or share. It reads as follows:

51. Rights of mortgagee. -- (1) Where there is only one registered mortgagee of a ship or share, he shall be entitled to receive the amount due under the mortgage by selling the mortgaged ship or share without approaching the High Court:

Provided that nothing contained in this sub-section shall prevent the mortgagee from recovering the amount so due in the High Court as provided in sub-section (2).

(2) Where there are two or more registered mortgagees of a ship or share they shall be entitled to recover the amount due under the mortgage in the High Court, and when passing a decree or thereafter the High Court may direct that the mortgaged ship or share be sold in execution of the decree.

(3) Every registered mortgagee of a ship or share who intends to recover the amount due under the mortgage by selling the mortgaged ship or share under sub-section (1) shall give an advance notice of fifteen days relating to such sale to the registrar of the ship''s port of registry.

(4) The notice under sub-section (3) shall be accompanied with the proof of payment of the wages and other amounts referred to in clause (a) of sub-section (2-A) of section 42.

106. Thus, a right is conferred statutorily upon a registered mortgagee of a ship, to realise the amount due under the mortgage, by selling the ship even without approaching the High Court. The right conferred upon the registered mortgagee u/s 51(1) of the Merchant Shipping Act, 1958, is akin to the right conferred u/s 69(1) of the Transfer of Property Act. Therefore the fact that the Royal Bank of Scotland came to Court after an order for the sale of the ship was passed in C.S. No. 441 of 2001 and the fact that they did not secure an order of arrest of the ship, did not really matter and did not actually extinguish their rights as mortgagees.

107. Even under the Transfer of Property Act, the mortgage does not get extinguished, by a mortgagee choosing to file a simple Suit for recovery of money. If a mortgagee chooses to file a simple Suit for recovery of money, he may be barred under Order 2, Rule 2, C.P.C. from filing another Suit on mortgage. But at the stage of execution of the money decree, the mortgagee can always enforce his security by

proceeding against the same.

108. In The Firm of Ayili Mallappa Sanna Jembappa by Partner Bharmappa v. Parasetti Sidramappa and another, 1937 (1) MLJ 469 a Suit arose out of a claim against the principal debtor and his surety under a mortgage bond executed by the principal debtor. The second defendant who was the surety claimed to have been exonerated from all liability by reason of the plaintiff having given up his rights under the mortgage. He relied on the words appearing in the plaint to the following effect, "the plaintiffs have given up only the mortgage right and filed the Suit on a simple bond." Justice Varadachariar held that since it was nowhere suggested that there had been any other act of relinquishment, oral or documentary, except such as might arise from the statement contained in the plaint, the statement in the plaint could be reasonably construed only as a statement of the intention not to claim relief by way of sale. Therefore he held that the mortgage right could not be held to have been extinguished.

109. Though, the procedure under Order 34, Rule 14 primarily applies to the mortgages of immovable properties, I have drawn inference from the same, in view of the fact that the Merchant Shipping Act, 1958 also uses the expression "mortgage of a ship". Therefore the last contention of the counsel for the plaintiff is also rejected. In the result, Application Nos. 3448 and 3449 of 2003 are dismissed. Application Nos. 4274 and 4275 of 2003 are allowed, subject however to the payment of the amount claimed by Capt. Papaspasmatiou, the Master of the vessel for the wages payable to him. In other words, out of the balance of amount now lying in deposit, an amount necessary to satisfy the claim of the Master of the vessel shall be retained and paid to him and the rest of the amount may be paid to the Royal Bank of Scotland. The plaintiff in C.S. No. 441 of 2001 and the applicants in A. Nos. 3448 and 3449 of 2003 may work out their remedies against the owners of the vessel, on the basis of the decrees obtained by them. No costs.