(2010) 03 BOM CK 0113

Bombay High Court

Case No: Appeal No. 92 of 2010 in Notice of Motion No. 271 of 2010 in Admiralty Suit (L) No. 87 of 2010

Best Food International Pvt. Ltd.		APPELLANT
	Vs	
Navbharat International Ltd., Cargo Onboard M.V. Amnitees and Mohsen Line General Trading LLC		RESPONDENT

Date of Decision: March 23, 2010

Acts Referred:

- Admiralty Courts Act, 1861 - Section 35, 6
- Civil Aviation Act, 1949 - Section 51
- Sales of Goods Act, 1930 - Section 30, 31

Citation: (2010) 3 ALLMR 693

Hon'ble Judges: Anil R. Dave, C.J; S.C. Dharmadhikari, J

Bench: Division Bench

Advocate: S. Venkiteshwaran and A.M. Vernekar, instructed by Chambers of Javed Gaya, for the Appellant; F.E. Devitre and Ashwin Shanker and D.C. Gomes, for the Respondent

Final Decision: Allowed

Judgement

S.C. Dharmadhikari, J.

Admit. Respondents waive service. By consent, Appeal is taken up for hearing forthwith. It is agreed between the parties that the final hearing of the Appeal shall be treated as disposal of Notice of Motion No. 271 of 2010 pending before the learned Single Judge.

2. This Appeal under Clause 15 of the Letters Patent is directed against the order dated 4th February 2010 passed in the aforementioned Notice of Motion which was moved by the Appellant original Applicant. The parties to this Notice of Motion are Respondent No. 1original Plaintiff and original Defendant Nos. 1 and 2 being

Respondent Nos. 2 and 3 herein. Any reference to them as per their original position be understood accordingly.

3. The learned Single Judge passed an adinterim order and posted the Notice of Motion for hearing and final disposal. However, the learned Judge directed the Applicant to furnish security to the extent of US $ 7.52 million as a precondition for vacating the order of arrest of a cargo which was on board vessel MV AMITEES.

4. The ApplicantAppellant filed the above Notice of Motion praying that this Court should forthwith vacate the order dated 12th January 2010 and warrant of arrest issued in furtherance thereof by which the Defendant No. 1 cargo on board the above vessel was arrested. The second relief that was claimed by the ApplicantAppellant was to allow it to reclaim its cargo on board the vessel MV AMITEES at the earliest. The application was moved on 20th January 2010 and supported by an affidavit of one Aslyn Fernandez, Constituted Attorney of the ApplicantAppellant.

5. He stated that the order passed by this Court is obtained by the Respondent No. 1Plaintiff by suppressing relevant and material facts from this Court. It was the case of the Appellant that the plaint proceeds on the basis that the Respondent No. 2original Defendant No. 1 cargo belongs to Respondent No. 3original Defendant No. 2. It was stated that out of the quantity of 15,000 metric tons of the cargo of Indian Pusa Basmati Rice 1121 presently laden upon the said vessel at Kandla, 13,000 metric tons belonged to the Appellant. This cargo is valued at US $ 14.3 million.

6. It was the case of the Appellant that they entered into a Contract as a seller on 9th November 2009 with Respondent No. 3original Defendant No. 2 buyer. Under the said contract, the Appellant agreed to sell cargo specified therein which the Respondent No. 3 agreed to purchase on the terms and conditions mentioned in the Contract. Reference is made to Items/Clauses of the Contract and in paragraph 6 of the affidavit in support of the Notice of Motion, the Appellant stated that by Clause 9 of the Contract, the date of shipment was to be between 12th 17th January 2010. That was mentioned in the Bill of Lading. The Appellant commenced loading on 5th January 2010 and completed the same on 9th January 2010. Thereafter reference is made to the Bills of Lading Numbers, Mates receipts and then it was urged that the Bills of Lading have not been endorsed in favour of any party.

7. The grievance of the Appellant was that the Suit of Respondent No. 1original Plaintiff has been filed on 12th January 2010. In the Plaint, the fact that 13,000 metric tons of the said cargo belongs to the Appellant has been suppressed and it has been stated that the Defendant No. 2 is the owner of the cargo. The Appellant stated that they came to know of the present proceedings when the Sheriff levied attachment on ''the cargo'' on 12th January 2010, at Kandla.

8. Thus, it is the case of the Appellant that 13,000 metric tons of the cargo belongs to them and not to Respondent No. 3, the Plaint suppresses this crucial fact and

misrepresents that Defendant No. 2Respondent No. 3 before us is the owner of the entire cargo of 15,000 metric tons. It is stated that the cargo is of a perishable nature and if the Appellant is not allowed to deal with the same by vacating the order of arrest, then, grave and serious loss and prejudice will be caused to the Appellant.

9. It was also urged that Respondent No. 1 has set out in the Plaint that their claim against Respondent No. 3original Defendant No. 2 is purely contractual. It is in personam. Their relation arises out of a contract which is distinct to that between Appellant and the Respondent No. 3. Therefore, Respondent No. 1Plaintiff have no maritime claim and they are not entitled to invoke the Admiralty jurisdiction of this Court. This was the plea raised in the alternative. For all these reasons, it was prayed that the Notice of Motion be made absolute.

10. It is common ground that this Notice of Motion was reply of their Constituted Attorney and urged that their Plaint does not proceed on the basis that Defendant No. 1 cargo as a whole belongs to Defendant No. 2. The attachment is sought to be levied to the extent of the cargo belonging to Defendant No. 2 which is sufficient to cover the claim of the Plaintiff. Respondent No. 1Plaintiff stated that they have no objection if the balance cargo is clarified to be not subject to the order of arrest.

11. Accusing the Appellant of suppressing material and relevant facts, the reply proceeds on the basis that the Contract between the Applicant and Defendant No. 2 is fabricated and forged. Several clauses of the Contract between the Applicant and Defendant No. 2 have been referred to in the affidavit in reply and it was stated that the Bills of Lading and the Mates Receipts have not been submitted with the affidavit in support. Respondent No. 1 called upon the Applicant''s Advocate to forthwith supply copies of these documents but they are not complying with the said request. Further, it is incorrect that the Plaint falsely states that the cargo does not belong to Defendant No. 2. If the cargo is of perishable nature, then the Appellant Applicant is free to provide security and have their cargo transported. It is the case of Respondent No. 1 that the vessel on which the cargo is presently laden also remains under arrest.

12. It is stated that the claim against Defendant No. 2 is subject matter of Arbitration at London. This is a maritime claim and/or a maritime question and/or maritime dispute between the Plaintiff and Defendant No. 2 arising out of Defendant No. 2''s failure to provide a vessel under the contract of sale and also breach out of or related to a contract for the use or hire of a ship. Therefore, this Court has jurisdiction to entertain and try the Suit.

13. Paragraph 10 of the affidavit in reply reads thus:

10. With reference to para 14, the claim against the defendant No. 2 has been properly expressed within the body of the plaint, and is subject matter of London arbitration that has been recently commenced. Both parties have made their

respective appointments/ nomination of the members in the Arbitral Tribunal. There is a maritime claims/ and or a maritime question/ and or maritime dispute between the plaintiffs and the defendants No. 2, arise out of the def. No. 2 failure to provide a vessel under the contract of sale and also a breach arising out of or related to a contract for the use or hire of a ship. Thus this Hon''ble Court has the necessary Admiralty jurisdiction to order security pending the dispute resolution between the plaintiffs and Def. No. 2.

14. Although it is stated that Defendant No. 2 has filed an affidavit which was on the record of the Notice of Motion, it was stated therein that Respondent No. 1Plaintiff''s understanding of paragraph 7 of the Plaint is misleading, mala fide and false and that Respondent No. 1 have no right and have not made out even a prima facie case to sustain this understanding, yet, the material contest was between the Appellant and Respondent No. 1.

15. Since, both sides have referred to the plaint allegations, it would be convenient to peruse them. The Plaint is filed in the Admiralty and Vice Admiralty jurisdiction of this Court on the basis that the original Plaintiff is a company incorporated under the Indian Companies Act, 1956. Defendant No. 1 is described as "Cargo onboard MV AMITEES at Kandla" and it is stated that the said cargo comprises of Indian Pusa Basmati Rice 1121 presently laden on board a vessel MV AMITEES at Kandla. It is stated that the cargo is a property of Defendant No. 2 valued approximately at US $ 17 million. Defendant No. 2 is impleaded as a person engaged in the business of trading in agricultural produce. It is stated that Respondent No. 1 have a claim of US $ 7.52 million against Defendant Nos. 1 and 2 who are impleaded as Respondent Nos. 2 and 3 to the Appeal. The claim arises out of the breach of three Contracts of Sale. It is stated that the Contracts are of 9th June 2009, 29th June 2009 and 6th July 2009 each of which states that it is PMT FOB ST Kandla.

16. It is stated that under all these Contracts, Respondent No. 3 which is Defendant No. 2 to the Suit, was obliged to place the vessel in Kandla Port. The Contracts contained details of the payment terms and the documents required for the same. It was stated that English Law was to apply as per the GAFTA Arbitration terms. After referring to the details of the Contracts and alleging that only a limited quantity was loaded and, therefore, the breach of the Contracts was committed. There were also certain defaults alleged in paragraphs 4 and 5 of the Plaint and for all these reasons it was stated that Respondent No. 1''s London Solicitor invoked arbitration against the original Defendant No. 2 for their claim arising out of the three Contracts. It was stated that the present maritime Suit seeks to obtain security from Defendant No. 2 for a sum of US $ 7.52 million pending the hearing and final disposal of the GAFTA Arbitration.

17. Paragraph 7 of the Plaint has been read and reread before us and, therefore, it would be convenient to reproduce it, so also paragraph 8. Paragraphs 7 and 8 of the Plaint read as under:

7. It is submitted that under the Admiralty Courts Act, 1861, Letters Patent and our Original Side High Court Rules and the various decisions of the Supreme Court on admiralty law, the Plaintiffs have a maritime claim which they are entitled to enforce in personam against the 2nd Defendants and in rem against any asset of theirs to be found within this Court''s Admiralty Jurisdiction. The Plaintiffs understand that the 2nd Defendants are owners of rice cargo valued at US $ 17 million laden on board MV AMITEES under the Sale of Goods Act, which has been impleaded as the 1st Defendant in the present suit. The plaintiffs have a copy of the checklist for the Shipping Bill. This cargo has been sold by few Indian exporters at Kandla to the 2nd Defendants (as buyers). The Plaintiffs thus have an in rem action against the 1st Defendants.

8. There is thus an amount of US $ 7.52 million due and payable to the Plaintiffs with further interest @ 12% pa from date of suit till the date of payment/realization and costs. Since this ranks as a maritime claim, it is submitted that the Plaintiff are entitled to seek a decree qua the 1st Defendant for an amount of US $ 7.52 million with further interest @ 12% pa from date of suit till the date of payment/realization and costs. This is as security pending the GAFTA Arbitration to be held in London. The Plaintiffs pray accordingly. Hereto annexed and marked as Exhibit "A" are the particulars of the Plaintiffs'' claim.

18. It is in these circumstances that a decree in favour of the Plaintiff and against the Defendants in the sum of aforementioned US Dollars together with interest has been claimed and a request was made that the cargo presently lying in the port and Harbour Kandla be ordered to be arrested by the Sheriff of Mumbai under a warrant of arrest issued by this Court and this cargo be therefore detained.

19. Prayer Clauses (d) and (e) of the Plaint read thus:

(d) That pending the hearing and final disposal of the suit, the 1st Defendant cargo be arrested and detained under the orders of this Hon''ble Court and/or be restrained by an order of injunction of this Hon''ble Court from sailing out of the port and harbour of Kandla and/or moving out of the territorial waters of India;

(e) That pending the hearing and final disposal of the suit, the Sheriff of Mumbai be directed to have the 1st Defendant cargo appraised by any suitable marine surveyors according to true value thereof and upon such value certified in writing by the said surveyors to sell the said defendant vessel by public auction free and clear from all exiting claims, liens, and/or any encumbrances for the highest price that can be obtained for the said 1st Defendant Cargo;

20. Upon this Suit being filed in this Court on 12th January 2010, an exparte application for arrest was made which came to be granted by this Court on 12th January 2010.

21. The usual undertakings were filed and hence the ApplicantAppellant was required to move the subject Notice of Motion for vacating the order of arrest of Defendant No. 1. That is how the controversy arose between parties which led to the impugned order being made. The learned Judge in the impugned order has observed that the averments which have been made require the Court to deal with connected documents. This would enable the Court to decide the ownership/title of the cargo in question and various aspects of and concept of FOB are also relevant. Therefore, till detailed hearing takes place and the issue of title of the cargo is settled, it would not be proper to grant the request of the Appellant. Therefore, by granting liberty to produce necessary documents to the Appellant, the Court observed that whether the cargo in question can fall within the ambit of maritime lien or maritime claim is another aspect which can be gone into only at the hearing of the Motion and cannot be decided on the basis of averments raised by parties. Yet, the learned Judge made it clear that Respondent No. 1Plaintiff is entitled for the security of the amount to the extent of 7.52 million US $ which the parties to the Suit/Defendants or the ApplicantAppellant can furnish jointly and/or individually and subject to that the arrest order can be vacated.

22. It is this order and conclusion against which the instant Appeal has been filed. While keeping the request of the Appellant Applicant pending, the learned Judge has impleaded it as a party Defendant to the Suit.

23. Shri Venkiteshwaran, learned Senior Counsel appearing on and detailed hearing before the learned Single Judge at which the Plaint Averments were referred to, documents as are necessary were perused and even the case law was brought to the Court''s notice. Therefore, it is not as if there was no material to resolve the issues raised in the Notice of Motion. Shri Venkiteshwaran submits that when the cargo is of perishable nature by postponing the adjudication, none would benefit by the course adopted by the learned Judge. Therefore, it is desirable and in the interest of justice that both sides be heard finally by the Division Bench and parties thereafter would abide by this Court''s order subject to their legal rights. In other words, despite the order being termed as an adinterim order, considering the controversy involved, the request of Shri Venkiteshwaran was not to leave the matter to be now resolved by the learned Single Judge. Instead, the Appeal Court should dispose of the Notice of Motion pending before the learned Single Judge.

24. This course of action was acceptable to Shri Devitre, learned senior Counsel appearing for Respondent No. 1original Plaintiff and that is how we have heard them at length.

25. The first contention of Shri Venkiteshwaran, learned Senior Counsel appearing on behalf of the Appellant, is that this Court could not have entertained the Suit in its Admiralty and Vice Admiralty jurisdiction. Shri Venkiteshwaran has submitted that the Admiralty jurisdiction of this Court could not have been invoked by Respondent No. 1original Plaintiff. The Plaintiffs are not sure about the nature of

their claim. According to them it is a maritime claim or a maritime question or a maritime dispute. During the course of arguments, they coin another word "maritime flavour" to describe the nature of their claim. All this shows that the Plaintiffs are taking a chance. Unless they have a maritime claim or a maritime lien they cannot maintain an action for arrest in the Admiralty Court. Shri Venkiteshwaran submits that claims which are essentially contractual are brought in within this Court''s Admiralty jurisdiction by referring to the Letters Patent of this Court being Letters Patent of 1823. This Letters Patent may have been referred to by the Supreme Court in the decision of M.V. Elisabeth and Others Vs. Harwan Investment and Trading Pvt. Ltd., Hanoekar House, Swatontapeth, Vasco-De-Gama, Goa, , however, this Court''s Admiralty jurisdiction cannot be widened to such an extent so as to bring within its ambit any contract with a maritime flavour. Shri Venkiteshwaran submits that the word "maritime flavour" is pressed into service by Respondent No. 1Plaintiff by borrowing it from a decision of the American Court. The argument is as long as there is a maritime flavour it can be considered as a maritime claim. However, the decision in MV Elisabeth (supra) does not lay down any such principle. Referring to paragraph 65 of this decision, Shri Venkiteshwaran submits that the Hon''ble Supreme Court has not held that any claim directly or indirectly associated with the maritime trade or which has a maritime flavour can be agitated in Admiralty jurisdiction. He submits that the Admiralty jurisdiction can be invoked only in the case of maritime claim or maritime lien.

26. Shri Venkiteshwaran then submitted that if the Plaint filed in the instant case is perused, it would be apparent that all that has been alleged is that the original Defendant No. 2 were obliged to place the vessel in Kandla Port. However, the claim of the Plaintiff is clearly for a breach of contract for sale of goods. Although, in paragraph 7 of the Plaint it is alleged that the Plaintiff has a maritime claim, yet, that is because the parties have entered into a contract which provides for FOB shipment of cargo. However, this by itself is not sufficient to hold that the claim falls within Admiralty jurisdiction.

27. Shri Venkiteshwaran submits that the plaint allegations and the documents produced by the Plaintiff themselves would go to show that their claim arises because they are unpaid sellers for 7400 metric tons of rice as the contract quantity was 8000 metric tons. The deficit shipment is to the extent of 600 metric tons. In this behalf, if the Advocate''s notice prior to the institution of the Suit, copy of which is annexed to the Plaint, is perused, it would be apparent that the claim is nothing but arising out of a breach of a contract for failing to make any payment and making arrangement for lifting of the cargo. If the breach is of such a nature, then it is apparent that it is not within the Admiralty and Vice Admiralty jurisdiction of this Court. The claim is maintainable in Ordinary Original Civil Jurisdiction of this Court. However, the jurisdiction, powers and authority thereunder are distinct and separate from Admiralty jurisdiction. Every claim arising under a contract where the goods are to be shipped would not mean that it is a maritime claim. If the plaint

allegations are perused as a whole and if they are assumed to be true for the purposes of jurisdiction, then, what follows therefrom is that the dispute between the parties has no relevance to any ship or carriage of goods by sea. On the contrary, there is no ship or vessel involved. The grievance is that the cargo was not shipped. Relying upon a decision in "THE "TESABA" reported in (1982) Vol. I LLR 397, Shri Venkiteshwaran submits that any claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship has to be against a particular vessel and it does not cover claims relating to carriage in unidentified vessel.

28. In the instant case, the claim is clearly not a maritime claim and, therefore, the Motion ought to have been allowed unconditionally by the learned Single Judge. Instead, he fell in patent error in postponing the adjudication and at the same time directing release of cargo against the Applicant furnishing security so as to satisfy Plaintiff''s claim. This means that the learned Judge has failed to exercise his jurisdiction in law. The learned Judge ought to have gone by the uncontroverted allegations in the Plaint for deciding as to whether the claim of the Plaintiff falls within this Court''s Admiralty or Vice Admiralty jurisdiction. That could have been done by referring to the Plaint and the documents referred therein. Shri Venkiteshwaran submits that assuming everything stated in the Plaint to be true, it is clear that the claim of the Plaintiff does not come within the purview of the Admiralty or Vice Admiralty jurisdiction of this Court and on this short ground alone the order of arrest of a cargo needs to be vacated.

29. Shri Venkiteshwaran relied upon the following in support of his above submission:

(i) Epoch Enterrepots Vs. M.V. WON FU, .

(ii) Extract from Maritime Liens (Volume 14) by D.R. Thomas.

(iii) Extract from Admiralty and Maritime Law Guide International Conventions.

(iv) Liverpool and London S.P. and I Asson. Ltd. Vs. M.V. Sea Success I and Another, .

(v) Queen''s Bench Division (Admiralty Court) decision in The "TESABA" reported in (1982) I. LLR 397.

(vi) Extract from "The Sale of Goods Act" Pollock & Mulla page 214.

(vii) Mitsui & Co. Ltd. and Anr. v. Flota Mercante Grancolombiana S.A. (The "Ciudad de Pasto") (1988) 2 LLR 208.

30. On the other hand, Shri Devitre, learned Senior Counsel appearing on behalf of the contesting Respondent No. 1original Plaintiff, submitted that the Appeal has been filed with a view to avoid the adjudication into the various issues raised by the Plaintiffs, before the Court reaches a final conclusion about the nature of the contract, the title of parties to the cargo and the jurisdiction of this Court. Shri

Devitre submits that the contract in the present case is a FOB contract. It has maritime elements in it. It is a maritime claim. Shri Devitre refers to the Bombay High Court Original Side Rules and particularly dealing with this Court''s Admiralty and Vice Admiralty jurisdiction and submits that cargo is a "property". It could be made subject matter of an Admiralty Suit. Further, if the form of GAFTA incorporated in the Respondent No. 1''s contract with Respondent No. 3 is perused, then, it would be apparent that Admiralty jurisdiction is available to Respondent No. 1Plaintiff. There are clearly marine elements in the claim. The name and description of the vessel is set out. If the Letters Patent of this Court is perused, it is clear that the Admiralty and Vice Admiralty jurisdiction is wide ranging. It is continued throughout. If the claim of the Plaintiff is founded on breach of the maritime obligation, then, it is not as if this Court has no jurisdiction to entertain and try the present Suit.

31. Alternatively, Shri Devitre submits that the subject contract (contract between original Plaintiff and original Defendant No. 2) must be construed as a whole. It cannot be divided into nonmaritime and maritime obligations. It should not seen in an isolated manner. He submits that even the Applicant''s claim will have to be considered in the backdrop of their contract with the original Defendant No. 2. It is clear that if the same is perused, then, a prima facie conclusion is inevitable that the contract dated 9th November 2009 between original Applicant and Defendant No. 2 is not genuine. It is a collusive act of parties so as to defeat the claim of Respondent No. 1. Shri Devitre invited our attention to several stipulations in that contract so also the copy of the Bill of Lading and submitted that this is a reason why the original Plaintiff sought all the documents and particulars with regard to the Applicant''s claim before making their detail submissions. There was nothing wrong in this approach and, therefore, the learned Judge was in no error in holding that after the Applicants are made parties to the Suit, if they desire release of the cargo they must secure the claim of the original Plaintiff by furnishing security. For all these reasons, Shri Devitre submits that this Court should not interfere with the impugned order and dismiss this Appeal.

32. Shri Devitre has relied upon the following:

(i) Extract from Admiralty Jurisdiction & Practice by Nigel Meeson.

(ii) M.V. Elisabeth and Others Vs. Harwan Investment and Trading Pvt. Ltd., Hanoekar House, Swatontapeth, Vasco-De-Gama, Goa, .

(iii) Letters Patent, 1823.

(iv) Supreme Court of the United States No. 021028 Norfolk Southern Railway Company v. James N. Kirby Pvt. Ltd. and Ors.

(v) Extract from the International Sale of Goods Law and Practice, Second Edition by Michael Bridge.

(vi) Extract from the Law of International Trade Third Edition by J.C.T. Chuah.

(vii) Gafta No. 82 Form.

(viii) Extract from Part I International Sales Governed by English Law, page 355.

33. With the assistance of Shri Venkiteshwaran and Shri Devitre, we have perused the Plaint, annexures thereto, the Notice of Motion moved before the learned Single Judge and all affidavits filed therein. With their able assistance we have perused the relevant statutory provisions and principles enshrined in eminent works in so far as the Admiralty and Vice Admiralty jurisdiction of the English and other Courts. We have been taken through a number of passages from the Works of renouned authors on Maritime Law. Wherever necessary we would be make a reference to them.

34. The basis of the submissions raised before us is the decision of the Hon''ble Supreme Court in the case of M.V. Elisabeth (supra) known as the Elisabeth''s case.

35. The controversy before the two Judge Bench of the Hon''ble Supreme Court arose out of an order of the Division Bench of the Andhra Pradesh High Court confirming a finding of the learned Single Judge of that Court holding that the Respondent''s Suit against the Appellants before the Supreme Court was maintainable and that the Andhra Pradesh High Court was competent to try the same in exercise of its Admiralty jurisdiction.

36. The cause of action therein was that the Appellant before the Supreme Court acted in breach of duty by leaving the Port of Marmagao on 8th February 1984 and delivering the goods to the consignee in breach of the RespondentPlaintiff''s direction to the contrary thereby committing conversion of goods entrusted with them. The Suit was instituted in Andhra Pradesh High Court invoking its Admiralty jurisdiction by means of an action in rem. It was stated that the cause of action arose on or after 1st February 1984 when the vessel M.V. Elisabeth was lying in the Port of Marmagao. The cause of action also arose on 8th February 1984 when the vessel left the Port without issuing Bills of Lading or other documents for the goods shipped as required by the Plaintiff supplier and subsequently when the goods were discharged and handed over to the consignee at the Port of destination at RasAlKhaimah, United Arab Emirates during the period 13th February to 19th February 1984 notwithstanding the directions of the Plaintiff not to deliver them by reason of the buyer''s failure to pay the agreed price. It is clear that the first Defendant to this Suit was M.V. Elisabeth the vessel which was of a foreign nationality and owned by the second Defendant which is a foreign company carrying on business in Greece and the third Defendant is stated to be a local agent of second Defendant at Goa.

37. It is apparent from the factual controversy that first Defendant to the Suit was the vessel and that the first Defendant vessel itself applied along with others for vacating the order of arrest on the preliminary objection of the jurisdiction of the Court. Their contention was that the Plaintiff''s Suit against a foreign ship owned by

a foreign company not having a place of residence or business in India was not liable to be proceeded against on Admiralty Side of the High Court by an action in rem in respect of a cause of action alleged to have arisen by a reason of tort or breach of obligation. This breach of obligation arises from the carriage of goods from a Port in India to a foreign Port. The argument was that the Andhra Pradesh High Court had no territorial jurisdiction because no part of cause of action has arose within its territorial limits. The second contention on the question of jurisdiction was as regards lack of Admiralty jurisdiction of any Court in Andhra Pradesh or any other city in India to proceed in rem against the ship on the alleged cause of action concerning carriage of goods from an Indian Port to a foreign Port. The preliminary objection was overruled by the learned Single Judge, his order was confirmed by the Division Bench. The Suit was finally decreed and Appeal therefrom was the subject matter before the Supreme Court together with an order by the Andhra Pradesh High Court made earlier directing security be provided in the form of a Bank Guarantee in the sum of Rs. 14,25,000/ for releasing the vessel from detention.

38. In paragraphs 5 and 6 of the decision in M.V. Elisabeth (supra), the Supreme Court summarized the nature of challenge, the dispute about jurisdiction and the sole question falling for its determination. In paragraphs 7 and 8 it referred to the documents of both sides and thereafter in paragraph 9 it referred to the jurisdiction of the Andhra Pradesh High Court over certain territories.

39. Thereafter in paragraph 11, the Supreme Court referred to the powers of the Madras High Court in so far as Admiralty jurisdiction. It referred to the Letters Patent of 1865 and the Colonial Courts of Admiralty Act, 1890 and the Colonial Courts of Admiralty (India) Act, 1891, the Government of India Act, 1915 and 1935 together with Article 225 of the Constitution of India. Thereafter, the Supreme Court made a reference to the decision of several High Courts and in paragraph 14 observed that the High Court as a Court of Admiralty is thus treated as a separate entity exercising a distinct and specific or prescribed or limited jurisdiction. This is on the assumption that the continuance in force of the Colonial Courts of Admiralty Act, 1890 as an existing law. However, the Admiralty jurisdiction is not restricted by the Admiralty Courts Act, 1861. The jurisdiction of the High Court can be subjected to its own rules as a superior Court. It is in that context that in paragraphs 17, 18 and 25 the Supreme Court held thus:

17. It is true that the Colonial statutes continue to remain in force by reason of Article 372 of the Constitution of India, but that does not stultify the growth of law or blinker its vision or fetter its arms. Legislation has always marched behind time, but it is the duty of the Court to expound and fashion the law for the present and the future to meet the ends of justice.

18. We do not accept the reasoning of the High Courts in the decisions cited above on the question of jurisdiction, whatever be the correctness of their decisions on the

peculiar facts of those cases in regard to which we express no view. But the narrow view adopted in those decisions on the source and ambit of the admiralty jurisdiction of the High Courts is, in our opinion, not warranted.

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25. It was because of the unlimited civil jurisdiction that was already vested in these High Courts that they were declared to be Colonial Courts of Admiralty having the same jurisdiction in extent and quality as was vested in the High Court of England by virtue of any statute or custom. The High Courts were declared to be competent to regulate their procedure and practice in exercise of admiralty jurisdiction in accordance with the Rules made in that behalf. There is, therefore, neither reason nor logic in imposing a fetter on the jurisdiction of these High Courts by limiting it to the provisions of an imperial statute of 1861 and freezing any further growth of jurisdiction. This is all the more true because the Admiralty Court Act, 1861 was in substance repealed in England a long time ago,. See Halsbury''s Law of England, 4th ed. Vol. 1(1), para 302, Halsbury''s Statutes of England, Vol. I, p.9.

40. The Supreme Court in the alternative also held that assuming that the admiralty powers of the High Courts are limited to what had been derived from the Colonial Courts of Admiralty Act, 1890, yet, the 1890 Act has not been incorporated in any Indian law. At the same time, admiralty jurisdiction of the England High Courts expanded with the progress of legislation and with the repeal of the earlier Statutes including in substance the Admiralty Courts Act of 1840 and 1861. Therefore, it would be reasonable and rational even to attribute to the Indian High Courts a corresponding growth and expansion of admiralty jurisdiction and that is why the jurisdiction of the Indian High Courts cannot be said to be frozen on the date of the Colonial Courts of Admiralty Act, 1890. In such circumstances, the Supreme Court traced the admiralty jurisdiction in England and in paragraphs 46 and 47 concluded thus:

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

47. The foundation of an action in rem, which is a peculiarity of the AngloAmerican law, arises from a maritime lien or claim imposing a personal liability upon the owner of the vessel. A defendant in an admiralty action in personam is liable for the

full amount of the plaintiff''s established claim. Likewise, a defendant acknowledging service in action in rem is liable to be saddled with full liability even when the amount of the judgment exceeds the value of the res or of the bail provided. An action in rem lies in the English High Court in respect of matters regulated by the Supreme Court Act, 1981, and in relation to a number of claims the jurisdiction can be invoked not only against the offending ship in question but also against a ''sistership'' i.e., a ship in the same beneficial ownership as the ship in regard to which the claim arose.

The vessel which commits the aggression is treated as the offender, as the guilty instrument or thing to which the forfeiture attaches, without any reference whatsoever to the character or conduct of the owner.

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

41. Thereafter, the Hon''ble Supreme Court in the subsequent paragraphs has elaborated the various aspects of Admiralty jurisdiction and the remedies available. In paragraphs 65 and 83 it held as under:

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

83. The admiralty jurisdiction of the High Court is dependent on the presence of the foreign ship in Indian waters and founded on the arrest of that ship. This jurisdiction can be assumed by the concerned High Court, whether or not the defendant resides or carries on business, or the cause of action arose wholly or in part, within the local

limits of its jurisdiction. Once a foreign ship is arrested within the local limits of the jurisdiction of the High Court, and the owner of the ship has entered appearance and furnished security to the satisfaction of the High Court for the release of the ship, the proceedings continue as a personal action.

42. These are the observations in the judgment of Hon''ble Dr. Justice T.K. Thommen with whom the other learned Judge Hon''ble Mr. Justice R.M. Sahai concurred. In the concurring judgment, Hon''ble Mr. Justice Sahai has made some pertinent observations and particularly in paragraphs 99 and 100. Paragraphs 99 and 100 read thus:

99. What then was the jurisdiction that the Court of England exercised in 1890? The law of Admiralty was developed by English courts both as a matter of commercial expediency and due to equity and justice. Originally it was a part of common law jurisdiction, but the difficulty of territorial limitations, constraints of common law and the necessity to protect the rights and interests of its own citizens resulted in growth of maritime lien a concept distinct from common law or equitable lien as it represents a charge on maritime property of a nature unknown alike to the common law or equity. The Privy Council explained it as ''a claim or privilege upon a thing to be carried into effect by legal process (The Bold Buccleugh, (1852)7 Moo PC 267).'' Law was shaped by exercise of discretion to what appeared just and proper in the circumstances of the case. Jurisdiction was assumed for injurious act done on high seas and the scope was extended, ''not only to British subjects but even to aliens'' (The Halley, (1868) LR 2 PC 193). Maritime law has been exercised all over the world by Maritime powers. In England it was part of Municipal law but with rise of Britain as empire the law grew and it is this law, that is, ''Maritime Law that is administered by the Admiralty Court'' (Halsbury''s Laws of England, IVth Edn., Vol. I). From the Maritime law sprang the right known as Maritime lien ascribing personality to a ship for purposes of making good loss or damage done by it or its master or owner in tort or contract. In England it grew and was developed in course of which its scope was widened from damage done by a ship to claims of salvor, wages, bottomry, supply of necessaries and even to bills of lading. Its effect was to give the claimant a charge on res from the moment the lien arose which follows the res even if it changed hands. In other words a maritime lien represented a charge on the maritime property. The advantage which accrued to the maritime lienee was that he was provided with a security for his claim up to the value of the res. The essence of right was to identify the ship as wrongdoer and compel it by the arrest to make good the loss. Although the historical review in England dates back to the 14th Century but its statutory recognition was much later and ''maritime law came to jurisprudential maturity in the first half of the 19th Century'' (Maritime Liens by D.R. Thomas). And the first statutory recognition of such right came in 1840 when the Admiralty Court Act of 1840 was enacted empowering the Admiralty Court to decide all questions as to the title or ownership of any ship or vessel or the procedure thereof remaining in the territory arising in any cause of possession, salvage,

damage, wages or bottomry. By Clause (6) of the Act jurisdiction was extended 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 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 necessary furnished in respect of such claims. But the most important Act was passed in 1861 which expanded power and jurisdiction of courts and held the field till it was replaced by Administration of Justice Act, 1920. The importance of the Act lay in introducing the statutory right to arrest the res on an action in rem. Section 35 of 1861 Act provided that the jurisdiction by the High Court of Admiralty could be exercised either by proceedings in rem or proceedings in personam. The essence of the rem in procedure is that ''res'' itself becomes, as one might say, the defendant, and ultimately the ''res'' the ship may be arrested by legal process and sold by the Court to meet the plaintiff''s claim. The primary object, therefore, of the action in rem is to satisfy the claimant out of the ''res'' (Maritime Law by Christopher Hill). If the 1840 Act was important for providing statutory basis for various types of claims then 1861 Act was a step forward in expanding the jurisdiction to claims of bill of lading. Section 6 of the Act was construed liberally so as to confer jurisdiction and the expression ''carried into any port was'' was expanded to mean not only when the goods were actually carried but even if they were to be carried ("The Ironsides", 167 English Reports 205 "The St. Cloud", 167 English Reports 269 "The Norway", 167 English Reports 347). Further the section was interpreted as providing additional remedy for breach of contract (The "Ironsides", 167 English Reports 205). By the Jurisdiction Act of 1873 the Court of Admiralty was merged in High Court of Justice. Result was that it obtained jurisdiction over all maritime cases. Therefore what was covered by enactments could be taken cognizance of in the manner provided in the Act but there was no bar in respect of any cause of action which was otherwise cognizable and arose in Admiralty. Section 6 of 1861 Act was confined to claim by the owner or consignee or assignee of any bill of lading of any goods carried into any port in England or Wales (to be read as India). But it did not debar any action or any claim by the owner or consignee or assignee of any bill of lading in respect of cargo carried out of the port. Even if there was no provision in 1861 Act, as such, the colonies could not be deprived under 1890 Act from exercising jurisdiction on those matters which were not provided by 1861 Act but could be exercised or were otherwise capable of being exercised by the High Court of England. ''The theory was that all matters arising outside the jurisdiction of common law i.e. outside the body of a country were inside the jurisdiction of Admiralty'' (Carter History of English Courts (Lord Stowell in ''The Hercules'' (1819) 2 Dods 353 (371). ''That this Court had originally cognisance of all transactions, civil and criminal, upon the high seas, in which its own subjects were concerned, is no subject of controversy'' (Carter History of English Courts (Lord Stowell in ''The Hercules'' 2 Dods, 353 (371). To urge, therefore, that the Admiralty

Court exercising jurisdiction under 1890 Act could not travel beyond 1861 Act would be going against explicit language of the Statute. Even now, the Admiralty jurisdiction of the High Court of Justice in England is derived ''partly from Statute and partly from the inherent jurisdiction of Admiralty'' (Halsbury''s Laws of England IVth Edn. Vol.I). Observations of Lord Diplock in Jade (1976 (1) All ER 920) that Admiralty jurisdiction was statutory only have to be understood in the context they were made. By 1976 the statutory law on Admiralty had become quite comprehensive. Brother Thommen, J., had dealt with it in detail. Therefore those observations are not helpful in deciding the jurisdiction that was exercised by the High Court in England in 1890.

100. From what has been narrated above it is apparent that law of Admiralty progressed gradually from ordinary courts, to Courts of Admiralty and ultimately to High Court commencing in commercial expediency, equity and justice and ending with statutory enactments covering entire field from collision on ships to cargo even. All this was existing when 1890 Act was enacted. But the Statutes of 1840 and 1861 were not exhaustive and English courts could take cognizance for various wrongs either in tort or contract. Therefore when colonial courts were conferred jurisdiction it was not restricted or confined to statutes, as the power was being conferred on High Courts which were, then and even now, not only courts of unlimited civil jurisdiction but higher courts possessed of every jurisdiction which was not expressly or impliedly conferred on other courts. The word ''otherwise'' literally means in a different way. Effect of its use in 1890 Act in law, was to confer not only statutory jurisdiction possessed of by English courts but all that which was being exercised or was capable of being exercised either under custom and practice or for sake of equity and justice. In the Iron Sides (supra) it was observed that Act of 1861 was passed not because the power or jurisdiction prior to it did not exist but no one ventured to exercise it. No such restriction was placed on exercise of power under 1890 Act. Rather the Act permitted exercise of it and that too to its fullest extent. This deliberate expansion of power and jurisdiction after existence of two statutes for nearly thirty years was founded on experience and necessity of arming the courts for every dispute that could arise relating to Admiralty jurisdiction, as the law on Admiralty was a growing law. Its development could not be stifled by its very nature. It was with this intention that the Parliament used the word, ''otherwise'' in 1890 Act. No word in a statute has to be construed as surplusage. Nor it can be rendered ineffective or purposeless. Courts are required to carry out the legislative intent fully and completely. The two legislations of 1840 and 1861 took care of those actions which appeared to be settled till then. But they did not close the door for the growth of law. They were enacted to ''improve the Admiralty practice'' as the jurisdiction which were conferred by the statutes were already being exercised. Action in personam or rem were not unknown. It was provided statutory base only. Statutes till 1920 in England were not creation of new rights but recognition of what was existing by practice or custom. It can thus be safely inferred that the jurisdiction

to entertain a claim for tort or breach of contract by owner or master of ship while carrying cargo outside the port could be exercised or was capable of being exercised in 1890 by the High Court of England if occasion arose. The rationale of extending jurisdiction in Admiralty over cargo carried into the port has been existence of a right in owner or consignee arising out of contract or agreement entered between him and the master or owner of the ship. It was the enforcement of the right which was safeguarded by providing a remedy to arrest a ship if the goods were carried into any port. Same rationale applies to redress the owner of bill of lading if the master of the ship in breach of agreement entered into any port committed tort by acting against it in course of outward journey. Such breach would have been actionable and a suit could be filed in the court where agreement was entered. Basis of Maritime Law has been necessity to provide remedy for wrong done on high seas. Inclusion or expansion of jurisdiction was in relation to any cause which could have been cognisable under ordinary law. Bottomry, salvage, seaman wages or towage are all causes for which action could be brought in court of law but their enforcement was rendered illusory with disappearance of the person beyond territorial waters. To overcome this difficulty this jurisdiction was created making it actionable against person and finally the res itself. What was basic was the existence of cause of action, arising out of tort or contract in relation to the master or owner of the ship. Applying this test the cause of action arose in Indian territory and if the owner of the ship would have remained in this country a suit for breach of contract could have been filed. Therefore the owner of bill of lading was not precluded from approaching the Admiralty Court for redress when the foreign ship which was guilty of violations appeared in Indian waters. On this construction the colonial courts could exercise the jurisdiction in respect of cargo going outside the port in exercise of jurisdiction under Act of 1890 not on statutes but as the High Court of England could exercise such power. Emphasis on absence of any instance in which English courts assumed jurisdiction in respect of goods carried out of English port was searching for existence of jurisdiction not in law but on precedent. Test is not whether the jurisdiction was ever exercised by English courts but whether it was capable of being exercised. If it could, then colonial courts were empowered to exercise it. Reliance was placed on Yuri Maru (1927 App Cas 906), a decision because of which the courts in Bombay and Calcutta got stuck, and could not see beyond 1861 Act. Distinction on facts, apart, the court was primarily concerned if the jurisdiction of colonial court expanded or dimunited by change of jurisdiction of High Court of England by different enactments passed from time to time. Incidentally it was also observed that there was conflict for long even in England on advantage of extending the process in rem and if a port of call could be benefited by existence of a power in all and sundry to arrest vessels found within its limits. This observation cannot be construed as determinative of limited jurisdiction possessed by the courts. No effort was made in the decision to adjudicate upon the impact of the expression or ''even otherwise''. Rather it turned on impossibility of automatic extension of jurisdiction of colonial court to exercise power under the English law

enacted subsequently because of the use of word ''existing'' in 1890 Act. Without entering into the controversy if 1890 Act was a legislation by reference or by incorporation and their consequences, on which arguments were addressed in extenso, suffice it to say that in absence of any consideration of the expression ''otherwise'' this Court does not find any difficulty in construing the expression as permissive of jurisdiction. Legislations may create a right or it may recognize one founded on custom or practice. .Admiralty statutes in England fell in latter category. In such legislations the background of enactment, the necessity to codify it, the purpose sought to be achieved by it all become relevant. Admiralty jurisdiction in England was rooted in remote past. It developed and expanded with rise and growth of Britain and its recognition as a superior maritime power. Law and practice revolved round it. Right to proceed against owner of ship for wrongs done on high seas was accepted and followed. Statutes of 1840 and 1861 provided legislative base only. Viewed in the background of enactment of 1890 it would be too artificial to confine the exercise of power by the High Courts in Admiralty to what was contained in 1861 Act. Even otherwise for deciding the jurisdiction exercised by the High Court in India founded on jurisdiction exercised by the High Court of England it is not necessary to be governed by the decision given by English courts. Law develops by pragmatic approach to problems arising under an Act and not by abdication or surrender. 1890 Act is an unusual piece of legislation expansive in scope, wider in outlook, opening out the wings of jurisdiction rather than closing in. Its authority and power to exercise jurisdiction was linked with power exercised by the High Court in England, the width of which was not confined to statute but went deep into custom, practice, necessity, and even exigency.

43. The necessity of referring to the judgment of the Hon''ble Supreme Court in M.V. Elisabeth (supra) and reproducing some of the paragraphs therein arises because Mr. Venkiteshwaran, learned Senior Counsel, strenuously contended that the judgment of the Hon''ble Supreme Court has resulted in filing of claims in Admiralty jurisdiction which are essentially in the nature of breach of contract of sale of goods on board some vessel or ship. Shri Venkiteshwaran submits that the judgment in M.V. Elisabeth (supra) has been followed by the Hon''ble Supreme Court and all Courts subsequently but the backdrop in which the said decision was rendered should not be lost sight of. He submits that the jurisdiction is available in limited cases.

44. In this behalf, he placed reliance on the later decisions of the Supreme Court.

45. In the subsequent decision Epoch Enterrepots Vs. M.V. WON FU, , the Supreme Court was concerned with a Suit which was instituted by the Appellant before it in the Madras High Court in its Admiralty jurisdiction. That was a Suit for recovery of damages for Rs. 11 lakhs for breach of contract with interest at the rate of 24% per annum. This was the loss and damage suffered and caused allegedly by breach of contract by the Defendant vessel. The Defendant vessel was the Respondent before

the Supreme Court. Therein, the factual aspects were noted in paragraph 4. The attention of the Hon''ble Supreme Court was invited to a fixture note. The contract according to the Appellant stands completed by signing of the fixture note. Further, it was contended that the AppellantPlaintiff acted in terms thereof by exporting the stock of goods to Taiwan through the Defendant''s vessel on 26th October 1995. However, the Defendant vessel failed to act in terms of the fixture note. By reason of which the Plaintiff has not been able to send the cargo to the purchaser as per the schedule. Therefore, the Plaintiff was exposed to damages. The damages resulted because of the alleged deliberate act and default to ship the cargo on the vessel. The observations of the learned Single Judge are reproduced in paragraph 6. The learned Single Judge dismissed the Suit. The finding was confirmed by the Division Bench of the Madras High Court in Appeal and then the Supreme Court considered the arguments based on M.V. Elisabeth (supra) and particularly as to what is a maritime claim. The Supreme Court held 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. In paragraphs 21 and 22, the Supreme Court held thus:

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 Ripon City, The (P at p.246), Gorell Barnes, J. upon appreciation of this facet of a maritime lien and also, in part, to the surrounding policy considerations observed: (All ER p. 499 GH)

[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 yet another decision Liverpool and London S.P. and I Asson. Ltd. Vs. M.V. Sea Success I and Another, also the Supreme Court had an occasion to refer to the decision in M.V. Elisabeth (supra) and in paragraphs 59, 60 and 61 held thus:

59. M.V. Elisabeth is an authority for the proposition that the changing global scenario should be kept in mind having regard to the fact that there does not exist any primary act touching the subject and in absence of any domestic legislation to the contrary; if the 1952 Arrest Convention had been applied, although India was not a signatory thereto, there is obviously no reason as to why the 1999 Arrest Convention should not be applied.

60. Application of the 1999 Convention in the process of interpretive changes, however, would be subject to: (1) domestic law which may be enacted by Parliament; and (2) it should be applied only for enforcement of a contract involving public law character.

61. It is not correct to contend as has been submitted by Mr. Bharucha that this Court, having regard to the decision in M.V. Elisabeth, must follow the law which is currently prevalent in UK and confine itself only to the 1952 Arrest Convention in Indian admiralty jurisprudence. The question is as to if the 1952 Arrest Convention had been applied keeping in view the changing scenario why not the 1999 Arrest Convention also? A distinction must be borne in mind between a jurisdiction exercised by the High Courts in India in terms of the existing laws and the manner in which such jurisdiction can be exercised. Once the court opines that insurance is needed to keep the ship going it has to be construed as "necessaries". The jurisdiction of the courts in India, in view of the decision of this Court in M.V. Elisabeth is akin to the jurisdiction of the English courts but the same would not mean that the Indian High Courts are not free to take a different view from those of the English courts. As regard application of a statute law the Indian High Courts would follow the pre independence statute but Indian courts need not follow the judgemade law.

47. Shri Venkiteshwaran also invited our attention to a decision of the Queen''s Bench Division (Admiralty Court) reported in (1982) Vol. Lloyd''s Law Reports 397 (THE "TESABA"). Shri Venkiteshwaran laid special emphasis on the following observations in that decision:

I consider first par. (j) and ask the question whether the plaintiffs are making "any claim in the nature of salvage". To my mind it is clear beyond doubt that the plaintiffs'' claim is not a claim in the nature of salvage for two main reasons. Firstly, the plaintiffs'' claim is for damages and is not for a salvage reward. Secondly, the claim endorsed on the writ is a claim for damages for breach of one of the obligations on the salvage agreement, which breach did not occur until after the termination of the salvage services. The assessment of the salvage reward has been

referred to an arbitrator. The words of par. (j):

... any claim in the nature of salvage (including any claim arising by virtue of the application by or u/s 51 of the Civil Aviation Act, 1949, of the law relating to salvage to aircraft and their apparel and cargo....

seem to me to refer to a claim for a salvage reward. The reference to Section 51 of the Civil Aviation Act, 1949, gives emphasis to this construction. If there is any doubt about the meaning of par. (j) it is permissible to turn to the Convention Relating to the Arrest of Seagoing Ships, signed at Brussels on May 10, 1952. The equivalent words of the Convention are "a claim arising out of ... salvage". The plaintiffs'' claim does not arise out of salvage, it arises out of the conduct of the defendants after the completion of the salvage services.

Turning next to par, (g) the question is whether this is "a claim for loss of or damage to goods carried in a ship". Giving those words their ordinary and natural meaning they do not describe this claim. Once again I look at the endorsement of the writ and find that there is no mention therein of any loss of or damage to goods. So far as I am aware the goods in question have not been damaged nor have they been lost. The plaintiffs have never had title to the goods or a right to possession of them. Mr. Howard submitted that his clients have a maritime lien upon the goods and that the holder of a maritime lien has in a sense lost the goods if he is unable to enforce that lien. The plaintiffs have had no more than a lien over the goods. They still have that lien even if they cannot enforce it. To my mind it would be a complete misuse of language to suggest that the claim advanced by the plaintiffs in this action can be described by the words of par. (g)....

xxxxx xxxxx xxxxx

In this case Tesaba has been arrested. The question, therefore, is whether the plaintiffs'' claim arises out of any agreement relating to the carriage of goods in Tesaba or to the use or hire of Resaba. The plaintiffs'' claim arises out of a breach by the defendants of the terms of the salvage agreement, which was in agreement to salve Tesaba and her cargo. It was a term of that agreement that the contractor may make reasonable use of the vessel''s machinery gear equipment anchors chains stores and other appurtenances during and for the purpose of the operations free of expense. A further relevant term was clause 5 quoted earlier in this judgment. Mr. Howard submitted that it was envisaged that the ship would be used to hold the cargo until security had been given.

If the ordinary businessman were to be asked "Is that an agreement relating to the carriage of goods in Tesaba?", the answer would undoubtedly be "No". The same emphatic answer would be given to the question "Is that an agreement for the use or hire of Tesaba ?".

48. Shri Devitre on the other hand apart from M.V. Elisabeth (supra) case, relied upon a well known work "Admiralty Jurisdiction and Practice" by Nigel Meeson to urge that an admiralty action in rem is most commonly brought against a ship but it is also possible to bring it against other property in respect of certain claims, although the category of such claims is very limited. Shri Devitre''s emphasis is that an action in rem could be brought against cargo only where the cargo is subject to a maritime lien as for example in respect of claim for salvage or a claim for forfeiture or condemnation of the goods in question or for their restoration for seizure. Shri Devitre does not dispute that the maritime liens are those which have been set out and referred in the Supreme Court decision (supra). Shri Devitre was also at pains to point out that the Supreme Court of the United States has taken a view that to ascertain whether a contract is a maritime one or not, one need not look about involvement of a ship or other vessel but the admiralty and maritime jurisdiction of United States extends to and includes all cases of damage or injury caused by vessel on navigable water and further without only looking to the place of contract formation or performance, we must also consider the nature and character of the contract. The true criterion is whether it has reference to maritime service or maritime transactions. Shri Devitre''s argument is that fundamental interest giving rise to maritime jurisdiction is the protection of maritime commerce. Therefore so long a Bill of Lading requires substantial carriage of goods by sea, its purpose is to effectuate maritime commerce and thus it is a maritime contract. Shri Devitre submits that the American Courts have gone much ahead than the narrow view taken in England and have held that as long as there is a maritime flavour to the contract, it should be held to be within the Admiralty jurisdiction. Shri Devitre submits that FOB contract is nothing but a free on board term used in International sails "with a maritime element" to signify that the sellers deliberate action is accomplished when the goods are loaded free on board ship. Shri Devitre submits that there are nonmarine variants of FOB and at the same time there are marine variants. Once the FOB contracts are understood as above, then, according to Shri Devitre, there is no difficulty in holding that the subject contract is within the maritime jurisdiction.

49. Shri Devitre has also invited our attention to the Chapters concerning the FOB Contracts in the International Sales of the Goods Law and Practice, 2nd Edition by Michael Bridge. Shri Devitre submits that the duties of the buyer as shipper are set out therein together with the duties of FOB seller. This coupled with the clauses of the Grain and Feed Trade Association (GAFTA) would go to show that the subject contract has a maritime element and maritime flavour and, therefore, it is within the Admiralty jurisdiction of this Court. It is not possible to agree with Shri Devitre for more than one reason.

50. Firstly, Shri Devitre''s arguments overlook the fact that the contours and limits of Admiralty jurisdiction of the three High Courts are now circumscribed and settled by the decisions of the Supreme Court of India. These contours and limits as specified

therein cannot be ignored and brushed aside by us because the Supreme Court decisions are binding on us. We cannot import into the limits of the Admiralty and Vice Admiralty jurisdiction something which the Hon''ble Supreme Court decisions do not permit us to do.

51. Secondly, the argument of Shri Devitre that the limits of the Admiralty and Vice Admiralty jurisdiction in India are set out on the basis of the English Admiralty Law and Practice is erroneous. The American Courts having gone much ahead and far from this narrow view, we should also take note of it, is his further submission. We do not think that we can accept this in the peculiar facts of this case so also generally because of the binding decisions of our Supreme Court. It is erroneous to assume that the English view is applied and followed in India straightaway. The Supreme Court has clarified this aspect in M.V. Elisabeth (supra) and the subsequent decisions. Assuming that the Supreme Court decisions hold that the English admiralty law and practice is somewhat limited and narrow, still the Supreme Court has held in clearest term that the Admiralty jurisdiction is available so long as the claim arises out of an agreement relating to use and/or hire of the ship or simply put is a maritime claim. The jurisdiction is confined to maritime claims and maritime liens. What constitutes a maritime claim has also been explained in the decisions brought to our notice.

52. Assuming we could, go as far as suggested by Shri Devitre, and are able to hold that any contract having a maritime element or a maritime flavour could be made a subject matter of a claim in Admiralty and Vice Admiralty jurisdiction of this Court, still we are afraid that in the facts and circumstances of the present case, we cannot agree with him that the Admiralty jurisdiction could have been invoked by the original Plaintiff. This is the third reason for not being able to uphold his submission.

53. In so far as this conclusion is concerned, it would be necessary to refer to the allegations in the Plaint which we have reproduced above. To the extent relevant, we have made a reference to them. It has been urged by the Plaintiff that under the Admiralty Courts Act, 1861, Letters Patent and Original Side High Court Rules so also various decisions on Admiralty law, the Plaintiff has a maritime claim which it is entitled to enforce in personam against Defendant No. 2 and in rem against any asset of theirs to be found within this Court''s Admiralty jurisdiction.

54. The Plaintiff in the same paragraph said that they understand that Defendant No. 2 are the owners of the rice cargo valued at US $ 17 million laden on board MV AMITEES under the Sale of Goods Act which has been impleaded as Defendant No. 1 in the present Suit.

55. It is not the case of the Plaintiff that they have a claim against the vessel. They concede that they have a claim in personam against Defendant No. 2. However, there case is that they have a claim in rem against any asset of Defendant No. 2. Shri Devitre laid special emphasis on the Original Side Rules and pertinently the word

"property" appearing in some of them to urge that cargo on board the vessel at Kandla is impleaded as Defendant No. 1 and such impleadment is permissible. Once such cargo is the asset and property of Defendant No. 2 and it is laden on board the vessel, then, the Admiralty and Vice Admiralty jurisdiction could have been invoked by the Plaintiff is his submission.

56. Shri Devitre is not on a sound footing while urging the above submission. Shri Devitre''s submission overlook the plaint allegations which must be seen as a whole. It is a clear case of the Plaintiff that Defendant No. 1 is a quantity of 15,000 metric tons of cargo comprising of Indian Pusa Basmati Rice 1121 presently laden on board MV AMITEES at Kandla. It is the property of Defendant No. 2. Defendant No. 2 is a company engaged in the business of trading in agricultural produce. The Plaintiff has a claim in so far as the three contracts of sale with Defendant No. 2. The details of the contracts are set out in the Plaint and particularly in paragraph 2. Thereafter, it was submitted that the Surveyor nominated by Defendant No. 2 issued their samplying and analysis report and on that basis a limited quantity out of the total quantity of 8000 metric tons was loaded. This limited loading was in breach of the Contracts. In paragraph 4 of the Plaint, it is stated that this loading took place after a delay. The delay is of a month in providing of a vessel for loading the cargo. Defendant No. 2 defaulted in making payment of agreed advance of 25% and breached their obligation to open a Letter of Credit for the 75% balance to the Plaintiff. The Plaintiff''s case is that they complied with all their obligations under the three Contracts and were at all time ready and willing to load the cargo. There is no fault or breach committed by them. The remaining quantity of 7400 metric tons was awaiting carting and loading instructions from Defendant No. 2 between August and November 2009. Defendant No. 2 delayed in making payment of 600 metric tons loaded as well as for the advance payment for the balance cargo. A reminder was sent. Defendant No. 2 confirmed their willingness to pay for the remaining cargo and promised to remit the amount. The Plaintiff allege that this is a clear indication of Defendant No. 2''s approval of the cargo security, their liability to purchase the cargo so also the obligation to pay the Defendants for the balance shipment.

57. It is alleged that except for the belated payment for the 600 metric tons actually purchased, Defendant No. 2 resiled from their undertaking to purchase the balance cargo that had been already contracted for and satisfactorily inspected. The Plaintiff''s representative actively pursued the Defendants for the purpose of accepting and loading the remaining cargo of 7400 metric tons and there were meetings and telephone calls after which the amount of the cargo of 600 metric tons loaded, was paid. It is alleged that Defendant No. 2 made constant misleading assurances to the Plaintiff''s representative that they were shortly arranging the vessel to load the remaining 7400 metric tons of cargo. In this hope, the Plaintiff kept their cargo ready in and around Kandla Port awaiting the Defendant No. 2''s nominated vessel, but there is no compliance by Defendant No. 2 in that behalf.

Therefore, the Plaintiff got frustrated and concluded that Defendant No. 2 were not going to load the cargo. The contract value for this breached part of the cargo was computed on the market price and in such circumstances the Plaintiff alleged that they have suffered a loss of US $ 7.52 million which is the claim to be adjudicated by reference to GAFTA Arbitration.

58. Thus, this is a contract where the Plaintiff agreed to sell to Defendant No. 2 Basmati rice at contracted price of quality and quantity specified therein. This was a FOB contract. Defendant No. 2 were obliged to place the vessel in Kandla Port. The claim upon Defendant No. 2 arises out of the value of the unsold cargo.

59. We do not see how such a contract involves any maritime element or maritime flavour. Even if we stretch the limits of the Admiralty and Vice Admiralty jurisdiction, we do not find anything in the said contract which would enable us to hold that there is a maritime lien. It is pertinent to note that the Plaintiff was in doubt and that is how the Plaintiff has stated before the Court that there is a maritime dispute or maritime question or maritime claim. The very use of this terminology is indicative of the fact that the Plaintiff was not clear about the claim falling within the purview of this Court''s Admiralty and Vice Admiralty jurisdiction. Therefore, in addition to he above, we find that this is not a claim which falls within the Admiralty jurisdiction of this Court.

60. In such circumstances, the attempt made by Shri Devitre to show that being a FOB contract and Defendant No. 2 obliged thereunder to arrange for a vessel is enough to bring the claim within the principles enunciated above, also is of no assistance to Respondent No. 1. While it is true that FOB contract has been referred to in the International Sale of Goods (Second Edition by Michael Bridge) to mean that it is a delivery term used in international sales with a maritime element, yet, the concept is in the context of the delivery obligation of the seller. That is accomplished when the goods are loaded free on board ship. However, at the same time the learned Author has stated that there are nonmarine variants or ingredients of a FOB contract. He has referred to a decision of an English Court in that behalf. Therefore, the expression "free on board" does not necessarily import that the goods should be put on board ship. Therefore, it is nothing but indicative of the mode of delivery under a term specified in the contract in that behalf. Therefore, by such stipulation without anything more, it cannot be said that the subject contract being a FOB contract, the claim of breach thereof would necessarily fall within this Court''s Admiralty and Vice Admiralty jurisdiction. Therefore, the reliance upon the passages from this book is of no assistance to Respondent No. 1original Plaintiff in this case.

61. We had to clarify all this and even refer to some decisions including M.V. Elisabeth (supra) in detail because we find some justification in the complaint of Shri Venkiteshwaran that all claims arising out of breach of such contract if brought within the purview of this Court''s Admiralty and Vice Admiralty jurisdiction, that would amount to assuming a jurisdiction which the Court is not conferred by law.

We had to even refer to the case in M.V. Elisabeth (supra) in detail because even that judgment is quoted so as to buttress the submission of the sweep of this Court''s Admiralty and Vice Admiralty jurisdiction. That decision must be seen in the backdrop of the issue and question framed by the Supreme Court for its consideration. Therein, the involvement of the vessel was never in dispute. Therein, the vessel itself was impleaded as a party to the Suit and was before the Court in that capacity. Therein, the question and issue essentially arose with regard to the powers of the Admiralty Court to arrest a ship (foreign vessel) flying an international flag and coming within Indian waters. Therefore and in that context the Supreme Court was called upon to decide as to whether the English Law and Practice in Admiralty is exhaustive of the powers and authority of an Indian Court exercising identical powers or whether the Indian Court can frame such rules so as to reach the vessel of the type before the Supreme Court. While emphasising that the claim has to be a maritime claim or a maritime lien that the Surpeme Court has made the observations reproduced by us hereinabove. If there was any doubt, then, the subsequent decisions of the Supreme Court in Epoch Enterrepots v. M.V. Wontu (supra) and Liverpool & London S.P. & I Association Ltd. v. M.V. Sea Success 1 and Anr. (supra) would clarify the issue. Therein, the Supreme Court followed M.V. Elisabeth (supra) on the basis that the claims before it were essentially in the nature of a maritime lien. That the claims falls within the purview of the Admiralty jurisdiction was never in doubt. Therefore, reliance by Respondent No. 1 on the decision of M.V. Elisabeth (supra) to support their claim in the instant case is somewhat misplaced.

62. Equally misplaced is their reliance upon the decision of the American Court on which Shri Devitre placed great emphasis. Therein, the American Court had before it a case where two Bills of Lading for transportation of goods from Australia to Alabama were placed before the Court. The claim was a maritime one but partially arising out of a train wreck. A shipment of machinery from Australia was destined for Huntsville, Alabama. The intercontinental journey was without any event. The machinery reached United States harmless. However, on its final journey to the destination by train, there was extensive damage. The owner of the machinery sued the railroad. It is in that context that the United States Supreme Court held that the suit claim was sustainable under the Admiralty jurisdiction. The twostep analysis was applied to draw a clear line between the maritime and nonmaritime contracts. In the case before it the Court found that the primary objection is to accomplish the transportation of goods by sea from Australia to the Eastern Coast of the United States. Therefore, the things which are principally connected with maritime transportation being involved relying upon some passages brought to the notice of the Court that the observations relied upon by Shri Devitre have been made. Therefore, the United States Supreme Court held that maritime contracts can be identified on the basis that so long as a Bill of Lading requires substantial carriage of goods by sea, its purpose is to effectuate maritime commerce and thus it is a

maritime contract. Its character as a maritime contract is not defeated simply because it also provides for some land carriage. Geography, is a useful conceptual inquiry only in a limited case. If a bill''s sea components are insubstantial, then the bill is not a maritime contract.

63. Therefore, even if we assume that Shri Devitre is right in his contention that the United States Court has to a certain extent widened the scope of the Admiralty jurisdiction by traveling ahead of English Law and Practice on Admiralty, even then, by such liberal extension also the subject claim does not come within the Admiralty and Vice Admiralty jurisdiction of this Court. Here, it must be clarified that we are not proceeding on the basis that the jurisdiction is so widened or that the liberal principles emphasised by Shri Devitre have been necessarily adopted in India. In the instant case, we proceed on the basis that the judgment of our Supreme Court in M.V. Elisabeth (supra) holds that the powers of Indian Courts exercising Admiralty and Vice Admiralty jurisdiction are not restricted and limited by the Colonial Acts. Yet, howsoever wide its sweep may be, in the present case we cannot hold that the claim of the Plaintiff falls within the purview of this Court''s Admiralty and Vice Admiralty jurisdiction.

64. Once this view is taken, then, we need not advert to the arguments of Shri Devitre based on the wording of the Letters Patent of High Court of Bombay, 1823. He also relied upon the Rules framed by this Court (Part III) entitled "ADMIRALTY JURISDICTION" in the Bombay High Court (Original Side) Rules. Shri Devitre relied upon the definition of the term "Suit" appearing in Rule 927(7), the wording of Rules 929 to 931 and Rules 939 to Rule 941 of the High Court Rules. These are Rules which would govern the exercise of Admiralty jurisdiction. They set out the procedure as to how this jurisdiction is to be exercised but these Rules do not define the limits of jurisdiction of this Court. If the title of the Rules itself is perused, it would be clear that they are Rules regulating the procedure and practice in cases brought in the High Court under the Colonial Courts of Admiralty Act, 1890. Therefore, the use of the word "property" therein must be understood in that context. That cannot be seen in isolation so as to enable the Court to arrest the cargo in all cases and particularly in the instant case.

65. Shri Devitre''s submission was that a Suit of the present nature to arrest the Defendant cargo on board a vessel would be maintainable because of the use of the term "property" in these Rules. We are afraid that this contention of Shri Devitre is not well founded. The present Suit impleads Defendant No. 1 the cargo and then without the impleadment of the vessel or its owner seeks to justify the presentation of the same under the Admiralty jurisdiction of this Court on the basis that the contract involving the cargo is a FOB contract which presumes involvement of a vessel or a ship. Hence, the claim of breach of such a contract comes within the purview of this Court''s Admiralty jurisdiction and Defendant No. 1 cargo can be sued in such capacity. Since we have found that there is no involvement of a vessel

or a ship and Shri Venkiteshwaran''s contentions in that behalf are well founded, we are of the opinion that the claim of breach of the suit contract does not fall within the purview of this Court''s Admiralty jurisdiction and impleadment of the cargo on board the vessel as Defendant No. 1 is not indicative of the claim being covered by such jurisdiction. It is well settled that ingenious drafting would not bring the claim within the Court''s jurisdiction if it is not possessed of the same in law. Such drafting would not confer jurisdiction on the Court if it does not possess it in law. In the present case, it is apparent that the contract of the Plaintiff does not contain any maritime elements and, therefore, the claim does not fall within the Admiralty jurisdiction of this Court. Thus, on the issue of jurisdiction alone the Appellant Applicant is entitled to succeed. The learned Judge fell in error in postponing the adjudication. The issue of jurisdiction would have been decided by him on a reading of the Plaint and the Annexures thereto including the Contract of the Plaintiff. The learned Judge fell in error in postponing the matter and directing furnishing of security by the ApplicantAppellant for release of their cargo. The impugned order is thus erroneous.

66. Shri Devitre took us through some of the documents including Proforma Invoice and referring to the terms therein, he submits that Clauses 8, 9, 10 and 12 of the proforma invoice dated 9th June 2009 would prove that there is an involvement of the vessel. This supports the case of the Plaintiff. His contention is that the breach arises on account of the failure to provide a vessel under the contract of sale and also a breach out of or related to a contract for the use or hire of a ship and, therefore, it is a maritime claim and/or a maritime question and/or a maritime dispute. We are afraid, this would not be a complete reading of the Plaint. At more places than one the claim of the Plaintiff is stated to have been arisen as unpaid sellers. The buyer was obliged to place a vessel but the breach as set out in the Plaint is clear. Therefore, it is apparent that what is put in issue is the principle of "unpaid seller" under the Sale of Goods Act, 1930. While reliance is placed on Sections 30 and 31 of the Sale of Goods Act, 1930, what is of importance is to note that the Sale of Goods Act, 1930 by Chapter V confers certain rights of unpaid seller against the goods. There can be exercised by recourse to appropriate proceedings, but in the instant case the Admiralty jurisdiction of this Court is not available for such enforcement. In these circumstances even the terms of the contract and the said Rules referred to above can be of any assistance to Respondent No. 1.

67. Shri Devitre also raised several issues with regard to the validity of the contract between the ApplicantAppellant and original Defendant No. 2Respondent No. 3 before us. We are of the opinion that the issue before us is of the jurisdiction of this Court on its Admiralty Side. In other words, whether the Plaintiff''s claim falls within the Admiralty jurisdiction of this Court or not. We are not deciding the rights and inter se disputes between parties to the Suit. We cannot take any note of the submission of Shri Devitre with regard to the validity of the contract between the ApplicantAppellant and Respondent No. 3 because the Plaintiff from their own case

must prove that this Court can take cognizance of their claim within its Admiralty jurisdiction. It is on this basis and on this touchstone alone that we have decided this Appeal. It will not be proper to go into the disputes and breaches of the respective contracts between parties to the Suit. Therefore, we refrain from expressing any opinion on the pleas raised by Shri Devitre in that behalf.

68. The same pleas are raised in the affidavit of Respondent No. 1 opposing this Appeal as well. Therefore, whether the Appellants have established their title to the goods or not is something with which we are not concerned. Suffice it to state that Defendant No. 2 has not taken up a plea that the ApplicantAppellant has no title to the goods. Further, the Plaintiff themselves in the Plaint as also in their affidavits stated that they do not claim the entire cargo. They have said in clearest terms that what they are concerned with is the cargo on board the vessel to the extent covered by their contracts. Therefore, it would not be proper to go into the issues of title to the cargo/goods in question.

69. We are of the view that once the claim of the Plaintiff was not within the purview of this Court''s Admiralty jurisdiction and, therefore, they could not have sought an arrest of the cargo in such jurisdiction, then, the Notice of Motion filed by the Appellant before the learned Single Judge deserves to be made absolute. The Appellant Applicant is entitled to the release of their cargo on board the vessel unconditionally and the order of arrest dated 12th January 2010 must be vacated on this ground alone. Once such a view is taken, then, it is not necessary to deal with other aspects and particularly about the title to the goods. The learned Judge had observed that the Appellant''s application involves an issue of ownership/title of the cargo. For the reasons indicated above, we are of the opinion that such issue was not involved in this case. Further, the concept of an FOB contract to which the learned Judge makes a reference is also not necessary to be decided in any wider angle. Assuming that a FOB contract may involve some maritime elements, yet, finding that there is no such element in the instant case that we are of the opinion that the Plaintiff could not have instituted the subject Suit in this Court''s Admiralty jurisdiction.

70. The other issue raised in the order of the learned Single Judge as to what is maritime lien or maritime claim is already dealt by us and finding that instant Suit does not involve a maritime claim and, therefore, it could not have been instituted in this Court''s Admiralty jurisdiction that the aforesaid conclusion has been reached by us.

71. In the result, the Appeal succeeds. The order of the learned Single Judge dated 12th January 2010 passed in Notice of Motion No. 271 of 2010 is set aside. The AppellantApplicant''s Notice of Motion No. 271 of 2010 is made absolute in terms of prayer Clauses (a) and (b).