

ADMIRALTY SUIT NO.67 OF 2014

forming part of Admiralty Suit (L) No.1231 of 2014 filed by the Trustees against Defendant Nos. 1A, 2 and 3 herein. Whilst under such arrest, an application for release of Defendant No.1A vessel was made by Defendant No.4 on her behalf upon furnishing of security. The Plaintiff proceeded to file a caveat against the release of Defendant No.1A vessel. When this Court heard the application for release of Defendant No.4, this Court directed the Plaintiff caveator to file its own admiralty suit against Defendant No.1A or amend its present suit by a particular date and withheld the release of the vessel by then. The Plaintiff has, accordingly, sought now to amend its suit to join Defendant No.1A and include the claim in respect of necessities supplied to her aggregating to over Rs.33.83 lacs against the then owners - proposed Defendant No.3 (when the supplies were made) and the present owners - proposed Defendant No.4. The Plaintiff applies for arrest of Defendant No.1A vessel after such joinder. During the pendency of this application, the vessel was ordered to be released upon the proposed Defendant No.4 depositing with its solicitors a demand draft representing the entire claim of the Plaintiff against the proposed Defendant No.1A vessel. The solicitors were directed to hold the demand draft until further orders.

2. The draft amendment moved by the Plaintiff bearing the date of 19 March 2015 is allowed (marked 'X' for identification) and the Plaintiff is permitted to amend the plaint within a period of two weeks from today.

3. The Plaintiff's application for arrest of Defendant No.1A vessel, which is strenuously opposed by Defendant No.4, may now be taken up for consideration. Learned Counsel for the Plaintiff submits that Defendant No.1A, being the particular ship to which the supplies of necessities were made whilst she was on a bareboat charter with Defendant No.2, is liable

for the maritime claim and can be arrested even in the hands of its present owners, though the charterparty of Defendant No.2 has admittedly come to an end by the time this application for arrest is made. Learned Counsel relies on the Arrest Convention of 1952 and the provisions of the Merchant Shipping Act, 1958 in this behalf. On the other hand, it is submitted by learned Counsel for Defendant No.4 that the arrest is impermissible; the Plaintiff's claim does not give rise to any maritime lien; and there is no liability owed in *personam* by Defendant No.4 to the Plaintiff in respect of the latter's claim.

4. The Arrest Convention of 1999, which is applicable in India as held by the Supreme Court in the case of **Liverpool & London S.P. & I. Association Ltd. Vs. M.V. Sea Success I & Anr.**¹, makes the following provisions about the exercise of the right of arrest.

Article 3

Exercise of right of arrest

1. Arrest is permissible of any ship in respect of which a maritime claim is asserted if:

(a) the person who owned the ship at the time when the maritime claim arose is liable for the claim and is owner of the ship when the arrest is effected; or

(b) the demise charterer of the ship at the time when the maritime claim arose is liable for the claim and is demise charterer or owner of the ship when the arrest is effected; or

(c) the claim is based upon a mortgage or a "hypothèque" or a charge of the same nature on the ship; or

(d) the claim relates to the ownership or possession of the ship;
or

¹ (2004) 9 SCC 512

(e) the claim is against the owner, demise charterer, manager or operator of the ship and is secured by a maritime lien which is granted or arises under the law of the State where the arrest is applied for.

2. Arrest is also permissible of any other ship or ships which, when the arrest is effected, is or are owned by the person who is liable for the maritime claim and who was, when the claim arose:

(a) owner of the ship in respect of which the maritime claim arose; or

(b) demise charterer, time charterer or voyage charterer of that ship.

This provision does not apply to claims in respect of ownership or possession of a ship.

3. Notwithstanding the provisions of paragraphs 1 and 2 of this article, the arrest of a ship which is not owned by the person liable for the claim shall be permissible only if, that claim can be enforced against that ship by judicial or forced sale of that ship.

According to this provision, arrests are permissible in the case of (i) any ship in respect of which a maritime claim is asserted (“particular ship”) and also (ii) any other ship or ships, subject to satisfaction of certain conditions. In the present case, the vessel is sought to be arrested as a ship in respect of which the claim arose, i.e. particular ship. In the case of the particular ship, the conditions are either (a) the person who owned the ship at the time when the maritime claim arose is liable for the claim **and** is owner of the ship when the arrest is effected, or (b) the demise charterer of the ship at the time when the maritime claim arose is liable for the claim **and** is demise charterer or owner of the ship when the arrest is effected. In all other cases, the claim must be (i) based upon a mortgage or charge of such nature or (ii) relate to ownership or possession of the ship, or (iii) secured by a maritime lien under the law of the State where arrest is applied. None of these conditions is satisfied in the present case. The suit

claim does not fall under either of the last three categories mentioned, and though the person liable was the demise charterer when the claim arose, he is neither the demise charterer nor owner when the arrest is sought to be effected. But it is submitted by learned Counsel for the Plaintiff that the Arrest Convention of 1952 permits such arrest. The argument is based on the relevant article (Article 3) of that Convention. The article is quoted below :

Article 3

(1) Subject to the provisions of para. (4) of this article and of article 10, a claimant may arrest either the particular ship in respect of which the maritime claim arose, or any other ship which is owned by the person who was, at the time when the maritime claim arose, the owner of the particular ship, even though the ship arrested be ready to sail; but no ship, other than the particular ship in respect of which the claim arose, may be arrested in respect of any of the maritime claims enumerated in article 1, (o), (p) or (q).

(2) Ships shall be deemed to be in the same ownership when all the shares therein are owned by the same person or persons.

(3) A ship shall not be arrested, nor shall bail or other security be given more than once in any one or more of the jurisdictions of any of the Contracting States in respect of the same maritime claim by the same claimant: and, if a ship has been arrested in any of such jurisdictions, or bail or other security has been given in such jurisdiction either to release the ship or to avoid a threatened arrest, any subsequent arrest of the ship or of any ship in the same ownership by the same claimant for the maritime claim shall be set aside, and the ship released by the Court or other appropriate judicial authority of that State, unless the claimant can satisfy the Court or other appropriate judicial authority that the bail or other security had been finally released before the subsequent arrest or that there is other good cause for maintaining that arrest.

(4) When in the case of a charter by demise of a ship the charterer and not the registered owner is liable in respect of a maritime claim relating to that ship, the claimant may arrest such ship or any other ship in the ownership of the charterer by demise, subject to the provisions of this Convention, but no other ship in the

ownership of the registered owner shall be liable to arrest in respect of such maritime claim. The provisions of this paragraph shall apply to any case in which a person other than the registered owner of a ship is liable in respect of a maritime claim relating to that ship.

The submission is that under para (1), the particular ship in respect of which the maritime claim arose can always be arrested. The condition of ownership applies only to 'any other ship'; even para (4) provides for arrest of "such ship", where in the case of a charter by demise of a ship the charterer is liable in respect of a maritime claim relating to that ship. The argument, at the first blush, seems plausible, but once we consider the basic principles of the law of arrest and its connection with the admiralty jurisdiction of the Court, its hollowness becomes apparent, as discussed below.

5. It is a peculiarity of an admiralty action that it always starts as an action in rem, that is to say, an action directed against the res. The "*res*" here denotes a thing that forms an *object* of rights, in opposition to "*persona*", which is regarded as a *subject* of rights. In admiralty law, it means any 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. An action is commenced against this res to enforce a maritime claim.

6. The law distinguishes between two types of maritime claims, claims which are secured by a maritime lien and other claims arising out of "the business of carrying goods and passengers by water". These latter claims impose a personal liability upon the owner or the charterer, as the case may be, of the vessel. Both types of claims are usually commenced in admiralty by proceedings against the res, usually the vessel. Yet they are

different. Maritime liens are attached to the property of a ship when the cause of action arises and travel with the ship and subsist whenever the action may be commenced, whereas other maritime claims are essentially claims against the owner or charterer which can be enforced against the ship only so long as the ship is in the same ownership or the same charter.

7. A maritime lien is attached to the vessel. The Supreme Court in **M.V. Elisabeth Vs. Harwan Investment & Trading Pvt. Ltd., Goa**² explained a 'maritime lien', thus:

“A maritime lien is a privileged claim against the ship or a right to a part of the property in the ship, and it “travels” with the ship. Because the ship has to “pay for the wrong it has done”, it can be compelled to do so by a forced sale. (see *The Bold Buccleugh*, (1852) 7 Moo PCC267).”

Since 1851 English law has recognized the concept of 'maritime lien' and attached that lien to specified claims. It was defined probably for the first time by Sir John Jervis in **Bold Buccleugh, The**.³ This is how that definition was noted by the Supreme Court in **Epoch Enterrepots Vs. M.V. Won Fu**⁴.

13. Incidentally, be it noted that this concept of maritime lien did come for judicial scrutiny before the courts often and it is Sir John Jervis who probably for the first time in *Bold Buccleugh, The* defined the maritime lien as below: (All ER p. 128 B-D)

“[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

2 AIR 1993 Supreme Court 1014

3 (1852) 7 Moo PCC 267

4 (2003) 1 Supreme Court Cases 305

claim or privilege attaches, and, when carried into effect by legal process by a proceeding in rem, relates back to the period when it first attached.”

In **M.V. Al Quamar Vs. Tsavliris Salvage (International) Ltd.**⁵, the Supreme Court upon reference to **Elisabeth Case** (supra) and whilst dealing with the attributes of maritime lien, observed as follows:

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. It is a right which springs from general maritime law and is based on the concept as if the ship itself has caused the harm, loss or damage to others or to their property and this must itself make good that loss. (See in this context 'Maritime Law' Christopher Hill, 2nd Edn).

This maritime lien is attached to a ship and travels with it; it is enforced even if the ship be in the hands of an innocent purchaser when the action is commenced. In **Ripon City, The**⁶, Gorell Barnes, J observed as follows:

“[A] maritime lien travels with the vessel into whosoever 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.”

8. It is only a small number of claims which give rise to a maritime lien. The Supreme Court in **M.V. Won Fu** (supra) explained the subject thus:

5 (2000) 8 SCC 278

6 1897 p 226; (1895-99) All ER Rep 487

“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.”

9. In addition to maritime liens, a ship is liable to be arrested in enforcement of a host of other maritime claims which confer upon the Claimant a right to proceed against the ship or cargo as distinguished from a right to proceed against the owner. The basis of this jurisdiction is explained by the Supreme Court in **Elisabeth Case** thus:

“47. The foundation of an action in rem, which is a peculiarity of the Anglo-American law, arises from a maritime lien or claim imposing a personal liability upon the owner of the vessel. A defendant in an admiralty action in personam is liable for the full amount of the plaintiff's established claim. Likewise, a defendant acknowledging service in 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)].

48. Merchant ships of different nationalities travel from port to port carrying goods or passengers. They incur

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

49. A ship may be arrested (i) to acquire jurisdiction; or (ii) to obtain security for satisfaction of the claim when decreed; or (iii) in execution of a decree. In the first two cases, the court has the discretion to insist upon security being furnished by the plaintiff to compensate the defendant in the event of it being found that the arrest was wrongful and was sought and obtained maliciously or in bad faith. The claimant is liable in damages for wrongful arrest. This practice of insisting upon security being furnished by the party seeking arrest of the ship is followed in the United States, Japan and other countries. The reason for the rule is that a wrongful arrest can cause irreparable loss and damages to the shipowner; and he should in that event be compensated by the arresting party. (See *Arrest of Ships* by Hill, Soehring, Hosoi and Helmer, 1985).

50. The attachment by arrest is only provisional and its purpose is merely to detain the ship until the matter has been finally settled by a competent court. The attachment of the vessel brings it under the custody of the marshal or any other authorized officer. Any interference with his custody is treated as a contempt of the court which has ordered the arrest. But

the Marshal's right under the attachment order is not one of possession, but only of custody. Although the custody of the vessel has passed from the defendant to the marshal, all the possessory rights which previously existed continue to exist, including all the remedies which are based on possession. The warrant usually contains admonition to all persons interested to appear before the court on a particular day and show cause why the property should not be condemned and sold to satisfy the claim of the plaintiff.

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. I p. 375 etc.).

55. A personal action may be brought against the defendant if he is either present in the country or submits to jurisdiction. If the foreign owner of an arrested ship appears before the court and deposits security as bail for the release of his ship against which proceedings *in rem* have been instituted, he submits himself to jurisdiction.”

10. Thus it is that an action *in rem* in relation to a ship, in any case other than for enforcement of a maritime lien, is in substance an action against the shipowner, though, by reason of the peculiar nature of the maritime trade, the action is actually initiated by arresting of a ship. The shipowner *per se* may not be amenable to the jurisdiction of the Admiralty Court. That is why the action is initiated against the ship which is within the jurisdiction of the Court. There are two objectives behind such arrest. Firstly, the Admiralty Court thereby acquires jurisdiction and secondly, the plaintiff obtains a security for satisfaction of his claim when decreed. The owner of the ship may then choose to enter appearance and deposit a security as bail for the release of his ship, thereby submitting to the jurisdiction of the Admiralty Court. Once he so submits to the jurisdiction and secures release of the ship, the proceedings against him continue as a

personal action. Just as a defendant in an original admiralty action in personam is liable for the full amount of the plaintiff's established claim, likewise a defendant in an action in rem acknowledging thus the service of such action is saddled with full liability even when the judgment exceeds the value of the res or of the bail provided. In other words, as soon as the owner of the arrested vessel submits to the jurisdiction of the Admiralty Court, as noted above, the proceedings *in rem* assume the character of proceedings *in personam*.

11. Once this is acknowledged, it is easier to see why there must be a link between the person liable *in personam* (i.e. one who would be liable if the action succeeded) and the ship concerned in the claim at two critical times. Once when the cause of action arose (at which juncture he must be the owner or charterer, as the case may be) and again when the action is brought (at which time he must be in possession or control of the ship either as the beneficial owner or the charterer under a charter of demise). The links (owner, charterer or in possession or control) not only apply to the ship in regard to which the claim is brought (the particular ship) but even to "any other ship".

12. Now let us interpret Articles 3(1) and (4) of the 1952 convention. It is submitted by the Plaintiff that the particular ship, in respect of which the maritime claim has arisen, can be arrested anytime without reference to its ownership, possession or control at the time of arrest. If that were so, all maritime claims would be placed on par with claims involving maritime lien. For it is only for enforcement of a maritime lien that the condition that the claim has arisen in respect of the ship to be arrested is by itself, without anything more, sufficient. As we have seen

above, all other claims require the critical link between the person liable and the vessel on both the occasions, i.e. at the time of accrual of cause of action and at the time of arrest. The question is whether the requirement, therefore, that the owner must be the person liable (save when the claim is secured by a maritime lien) is implied by Article 3(1). That it is so implied is clear from the reading of Article 3 as a whole, firstly, because otherwise there is no reason why a ship other than that in respect of which the maritime claim has arisen can be arrested on the basis that it is owned by the owner of the particular ship (i.e. that ship in respect of which the maritime claim has arisen). Secondly, the opening words of Article 3(1), “subject to the provisions of paragraph 4”, also make it clear that paragraph 4 constitutes an exception to the general rule laid down in paragraph 1. Since the exception consists in the right of arrest of a ship when the charterer by demise and not the owner is liable in respect of the maritime claim, in all other cases the general rule must apply, namely, that the arrest is only permissible when the owner of the ship is liable. This implication is also clear when we read Article 9 of the 1952 Convention in conjunction with Article 3(1). Article 9 is in the following words:

ARTICLE 9

Nothing in this Convention shall be construed as creating a right of action, which, apart from the provisions of this Convention, would not arise under the law applied by the Court which was seized of the case, nor as creating any maritime liens which do not exist under such law or under the Convention on maritime mortgages and liens, if the latter is applicable.

This Article makes it clear that by Article 3(1) no new right of action or maritime lien was created which did not exist under the law or under the convention of maritime mortgages and liens (if applicable). An

interesting discussion is to be found in *Berlingieri on Arrest of Ships, A Commentary on 1952 and 1999 Arrest Conventions*⁷, in connection with this subject, and particularly referring to the way the particular provisions of Article 3 and Article 9 (Article 11 of the original draft) evolved. Berlingieri has put it thus:

“I.396 If in fact the claimant had the right to arrest the ship in the hands of a *bona fide* purchaser, the maritime claims would acquire one of the special features of the maritime liens, viz. The so-called *droit de suite*, which is set out in Article 7(2) of the 1967 Convention on Maritime Liens and Mortgages and now in Article 8 of 1993 International Convention on Maritime Liens and Mortgages. This problem was raised during the Naples Conference by the British delegation, which drew the attention of the Conference to the fact that only four out of the maritime claims listed in Article 1(1) were maritime liens followed the ship into the hands of a *bona fide* purchaser, while that was not the case for the other maritime claims. The view was then expressed that Article 3(1) as then drafted might be construed to extend to all maritime claims the peculiar characteristics of maritime liens and it was suggested that the matter might be taken care by the Drafting Committee.

I. 397 The Drafting Committee thought that this question could be clarified by amending Article 11(now Article 9), which at the time was drafted as follows :

Nothing in this Convention shall be construed as a creating a right of action, which, apart from the provisions of this Convention, would not arise under the law applied by the Court which had seisin of the case

by adding the words :

nor as creating any maritime liens which do not exist under such law or under the Convention on Maritime Mortgages and Liens.

I.398 Probably because the British delegation had raised the question whether maritime claims not secured by maritime liens would follow the ship, in the French text reference was expressly

⁷ Berlingieri on Arrest of Ships, Third Edition, by Francesco Berlingieri.

made to the *droit de suite*. The addition was contained in a separate paragraph, while in the English text it was a continuation of the same paragraph, and was drafted as follows :

La presente Convention ne confere aux demandeurs aucun droit de suite autre que celui accorde par la loi du lieu de la saisie ou par la Convention internationale sur les privileges et hypotheques maritimes. (This Convention does not grant to claimants any *droit de suite* other than that granted by the law of the place of arrest or by the International Convention on Maritime Liens and Mortgages).

I.399 As is known, at the Diplomatic Conference the words “if the latter is applicable” (“*si celle-ci est applicable*”) were added at the end of the sentence.

I.400 A further clarification of this question was suggested by the Finnish delegate at the Diplomatic Conference. He suggested that in order to avoid Article 3(1) being construed so as to give the claimant the right to follow the ship into the hands of a *bona fide* purchaser, there should be added in that paragraph a reference to Article 11.

I.401 Although no comments were made on the amendment proposed by the Finnish Delegation, it appears that it was inserted in the text prepared by the Drafting Committee. Article 3(1), as submitted to the Plenary Conference and approved by it, read as follows :

1. Subject to the provisions of paragraph 4 of this Article and of Article 10, a claimant may arrest either the particular ship in respect of which the maritime claim arose, or any other ship which is owned by the person who was, at the time when the maritime claim arose, the owner of the particular ship, even though the ship arrested be ready to sail but no ship, other than the particular ship in respect of which the maritime claim arose, may be arrested in respect of any of the maritime claims enumerated in Article (1)(1)(o), (p) or (q).

I.402 Article 10, reference to which was made in Article 3(1), was at that time Article 11, the numbering of the Articles having changed after the incorporation of Article 9 of the draft approved at Naples into Article 2. Article 9 provided :

This Convention shall not apply to claims made by Governments or other Public Authority in respect of taxes, dues or penalties under any Statute or Regulation, and the Convention shall not affect any rights of Dock or Harbour Authorities under their existing domestic law against vessels or their owners.

I.403 Article 10 was approved by the plenary session of the Conference. But after the second paragraph of Article 6 had been deleted, President Lilar, when submitting Article 7(which provided that the rules of procedure shall be governed by the law of the State in which the arrest is made or applied for) to the vote, stated that the text of Article 7 could be inserted into Article 6.

I.404 Even if no express decision appears to have been taken on this suggestion of the President, Articles 6 and 7 were actually merged, and consequently Article 8 dealing with jurisdiction became Article 7, Article 9 dealing with the scope of application of the Convention became Article 8 and Article 10, which is that presently considered, became Article 9. Unfortunately, it was not realised that as a consequence of this change in the numbering of the Articles from 7 onwards, the reference in Article 3(1) to Article 10 should be changed to a reference to Article 9.

I.405 The conclusion is that the first part of Article 3(1) should be read: "Subject to the provisions of paragraph 4 of this article and of article 9, a claimant may arrest either the particular ship", etc.

I.406 There can be no doubt, therefore, that, unless the claim is secured by a maritime lien, the right of arrest of a ship in respect of a maritime claim exists only if that ship, at the time of the arrest, is still owned by the person who owned her when the maritime claim arose.

I.407 This view is accepted in a number of Contracting States, including Belgium, Croatia, Denmark, Finland, France, Germany, Greece, Haiti, Ireland, Italy, the Netherlands, Nigeria, Norway, Portugal, Slovenia, Spain, Sweden and the United Kingdom."

13. Thus, if it is clear on the interpretation of paragraph 1 of Article 3 that unless the claim is secured by a maritime lien, the right of arrest of a ship in respect of a maritime claim exists only if that ship, at the time of the arrest, is still owned by the person who owned her when the

maritime claim arose, there is absolutely no reason to interpret paragraph 4 differently. Paragraph 4 cannot possibly mean that the particular ship, in relation to which a maritime claims arose and which was with a charterer by demise against whom the claim arose, can be arrested without the same charterer being in its possession or control.

14. That which was latent in Article 3 of the 1952 Convention is made patent in the corresponding Article 3 of the 1999 Convention. There is thus no material difference in this respect in the arrest provisions of Article 3 of 1952 Convention and Article 3 of 1999 Convention. But even if it were, the latter Article being contained in a later convention and which applies in India, as held by the Supreme Court in the case of **M. V. Sea Success** (supra), we would rather go by the later Convention and apply Article 3 of 1999 Convention. Just as in the case of overlapping provisions of municipal laws or of international treaties between two nations, it is to be presumed that concerning the same subject matter a later convention, if it fully and exhaustively deals with the subject matter, must prevail over the earlier convention.

15. Let us now consider whether any difference is made to this position by the provisions of the Merchant Shipping Act, 1958 referred to by learned Counsel for the Plaintiff, namely, Sections 443 and 444 read with Section 3(15) of that Act, and the interpretation of these provisions by the Supreme Court in the case of **M.V. Elisabeth**. The submission is that under Section 3(15), a foreign ship falls within the jurisdiction of the High Court where the vessel happens to be at the relevant time or where the cause of action wholly or in part arises, and the detention is authorised in terms of Sections 443 and 444 since this vessel has caused 'damage', such damage

not being necessarily confined to physical damage, but even extending to breach of contract, as held in **Elisabeth case** (supra). Section 443 is in the following terms :-

Section [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 damage, 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 or 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 proceedings be deemed to be the owner of the ship that has occasioned the damage.

The Supreme Court in **Elisabeth case** considered, what is meant by 'damage caused by a ship' within the meaning of Section 443. The Supreme Court held as follows :-

79. The detention of a foreign ship is authorised in terms of

sections 443 and 444. In view of their vital significance in the enforcement of maritime jurisdiction, we shall read these two sections in full. Section 443 defines the character and scope of the power of detention:

Section 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 damage, 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 or 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 proceedings be deemed to be the owner of the ship that has occasioned the damage.

(emphasis supplied)

The power of enforcement of an order of detention of a foreign ship is dealt with by Section 444.

Section 444. Power to enforce detention of ship. - (1) Where under this Act a ship is authorised or ordered to be detained, any commissioned officer of the Indian Navy or any port officer, pilot, harbour master, conservator of port or customs collector may detain the ship.

(2) If any ship after detention, or after service on the master of any notice of, or order for, such detention proceeds to sea before she is released by competent authority, the master of the ship shall be guilty of an offence under this sub-section.

(3) When a ship so proceeding to sea takes to sea, when on board thereof in the execution of his duty any person authorised under this Act to detain or survey the ship, the owner, master or agent of such ship shall each be liable to pay all expenses of, and incidental to, such person being so taken to sea and shall also be guilty of an offence under this sub-section.

(4) When any owner, or master or agent is convicted of an offence under Sub-section (3), the convicting magistrate may inquire into and determine the amount payable on account of expenses by such owner, master or agent under that sub-section and may direct that the same shall be recovered from him in the manner provided for the recovery of fines.

These provisions relate to detention by reason of damage caused in any part of the world by a foreign ship to property belonging to the Government of India or to an Indian citizen or company. 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. In the *Victoria* 1887 12 PD 105, the Court so construed Section of the Admiralty Court Act, 1861 (24 Victorine c.10).¹⁴ It has been held to apply only to physical damage done by a ship by reason of its coming into contact with something. See *The Vera Cruz*, ; *Currie v. M. Knight and The Jade*. In view of the specific provisions of the English statutes of 1920, 1925, 1956 and 1981, it was unnecessary for the English Courts to construe the expression broadly so as to include cargo claims and the like. The

last two enactments contain an exhaustive list of maritime claims and questions in regard to which the High Court can exercise jurisdiction over any merchant ship by arresting it as it enters the waters of Britain. This power, as already noticed, is available, whatever be the nationality of the ship or its owner or the domicile or place of residence or business of the owner, or wherever the cause of action has arisen. About the words 'damage done by a ship' in Section of the Admiralty Court Act, 1861 and the decision in *The Victoria* to the effect that the section had no application to claims against the carrying ship for damage to cargo, the following observation significantly appears in Halsbury's Laws of England, 4th ed, Vol. 1(1), para 319 N. 12.

... but this question is academic in the light of the fact that jurisdiction in respect of claims for damage to cargo carried in a ship is now expressly given by the Supreme Court Act, 1981 Section 20(2)(g).

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 contact or otherwise, by reason of unauthorised acts or negligent conduct on the part of the shipowner 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.

Undoubtedly, as held by the Supreme Court, Section 443 is wide in terms and 'damage' is not necessarily confined to physical damage, but includes damage caused to the property by breach of contract or acts of

commission or omission on the part of the carrier or his agents. Any damage arising by reason of the operation of the vessel in connection with the carriage of goods would be covered within the meaning of such “damage”. But it must be remembered that (i) this damage is 'damage to property' and (ii) it must have been caused as a result of an unauthorised act or negligent conduct on the part of the shipowner or his agents or someone who is in charge of the ship. If goods or other property are lost or damaged, whether by physical contact or otherwise, by reason of unauthorised acts or negligent conduct of the carrier or his agents, the ship is liable to be arrested whenever found within Indian jurisdiction under Section 443. That is what the Supreme Court held in **Elisabeth case**. The requirement of unauthorised or negligent conduct of carrier or agents brings the provision of Section 443 in line with the law of arrest discussed above. Except in a case where there is a maritime lien, where the 'damage' is seen as a damage by the ship itself, in every other case the damage must be something which is caused by the shipowner or his agents or someone in charge of the vessel (charterer by demise), which, in turn, brings in the element of link between the ownership or possession and control and the cause of action. If the shipowner or demise charterer at the time of arrest is not the owner or demise charterer when the damage occurred, it is not possible to arrest the vessel having regard to this requirement of Section 443. The Supreme Court in **Elisabeth case** was dealing with the claim of a consignor – cargo owner. Notwithstanding the consignor cargo owner's direction not to deliver the goods by reason of the buyer's failure to pay the agreed price, the cargo consignment was delivered by the vessel. This unauthorized delivery was termed as giving rise to the damage to the Plaintiff cargo owner's property, namely, the cargo itself and this claim arose against the defendant – owner of the vessel who breached his duty

owed to the Plaintiff. In this context, the Supreme Court discussed the term “damage” occurring in Section 443. Based on this discussion, it cannot possibly be suggested that for any and every maritime claim, the particular ship, namely, the ship in connection with whom such claim arises, can at any time be arrested under Section 443 without reference to her ownership or control at the time of arrest. It cannot be said that every such claim is a claim for damage done to the property by the ship within the meaning of Section 443 or arising as a result of an unauthorised or negligent conduct of the carrier or agents. Section 443 does not either introduce any new maritime lien, which travels with the ship irrespective of ownership or control of the ship or alter the law of arrest applied by Indian Courts for enforcement of maritime claims. Particularly in our case non-payment of a claim of a supplier for necessities supplied to the charterer by demise cannot be termed as damage done by the ship to the property of such supplier. So also, it is not possible to say that the alleged damage was caused by the shipowner (Defendant No.4) or his agents who are in possession and control of the ship.

16. For all these reasons, the Plaintiff is not entitled to proceed against the newly added defendant vessel. There is no connection any longer between the person liable *in personam*, namely, M/s Jaisu Shipping, who was the charterer by demise of the particular vessel when the claim arose and the vessel when the arrest application is made. The vessel is now owned by and is in possession and control of newly added Defendant No. 4, who in turn owes no liability to the Plaintiff in connection with the maritime claim which is the subject matter of the present suit.

17. The application for arrest of the newly added Defendant No. 1A is thus rejected. The Solicitors of Defendant No.4 may, accordingly, return

the demand draft held by them in pursuance of the order passed by this Court earlier to Defendant No.4.

(S.C. GUPTE, J.)