

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ADMIRALTY AND VICE ADMIRALTY JURISDICTION

INTERIM APPLICATION NO. 169 OF 2019

IN

COMMERCIAL ADMIRALTY SUIT NO. 51 OF 2018

CMOG FUEL DMCC ... Applicant/Plaintiff

vs.

OSS ALTUS UBER (IMO No. 9385300) ... Respondent/Defendant

WITH

INTERIM APPLICATION NO. 330 OF 2019

IN

COMMERCIAL ADMIRALTY SUIT NO. 62 OF 2018

Siem Offshore Redri AS ... Applicant/Plaintiff

vs.

MV ALTUS UBER ... Respondent/Defendant

WITH

INTERIM APPLICATION NO. 454 OF 2020

IN

COMMERCIAL ADMIRALTY SUIT NO. 62 OF 2018

MV ALTUS UBER ... Applicant/Defendant no.1

In the matter between

Siem Offshore Redri AS ... Plaintiff

vs.

MV ALTUS UBER ... Defendant

Mr. Shyam Kapadia a/w. Mr. Prashant Asher and Ms. Bulbul Singh Rajpurohit i/b.. Crawford Bayley & Co. for the Applicant/Plaintiff in IA/169/2019 in COMAS/51/2018.

Ms. Naira Jejeebhoy a/w. Mr. Amitava Majumdar, Mr. Ruchir Goenka and Mr. Catakam Vishwesh Kumar i/b. M/s. Bose & Mitra & Co, for Defendant no. 1 in IA/169/2019 in COMAS/51/2018..

Mr. Prashant S. Pratap, Senior Advocate a/w. Mr. Vishal Muglikar and Mr. Nishaan Shetty i/b. Mr. Kaushik S. Krishnaswamy for the Applicant/Plaintiff in IA/330/2019 in COMAS/62/2018 and for the Defendant in IA/454/2020 in COMAS/62/2018

Mr. Venkatesh Dhond, Senior Advocate a/w. Mr. Akshay Kolse Patil, Mr. Ruchir Goenka, Mr. Catakam Vishwesh Kumar i/b. M/s. Bose & Mitra & Co. for Defendant nos. 1 and 2 in IA/330/2019 in COMAS/62/2018 and for the Applicant in IA/454/2020 in COMAS/62/2018.

CORAM : A. K. MENON, J.

RESERVED ON : 5th MAY, 2022

PRONOUNCED ON : 16th JUNE, 2022

P.C. :

1. This common order disposes three Interim Applications in two Commercial Admiralty Suits against a common vessel and its owner. In Commercial Admiralty Suit No. 51 of 2018 Interim Application No. 169 of 2019 seeks the following reliefs :

(a) That the Written Statement dated 13 September 2019 filed by Swordfish Shipco Limited be struck off and/or be taken off the record;

- (b) That Swordfish Shipco Limited be directed to file an affidavit disclosing names of the persons / directors who instructed Bose & Mitra & Co. to file the praecipe dated 16th September 2019 through which the Written Statement was filed with the registry of this Hon'ble Court;*
- (c) costs for this Application;*
- (d) any other or further reliefs in the facts and circumstances of the case, and in interest of justice.*

2. In Commercial Admiralty Suit no. 62 of 2018 there are two Interim Applications being Interim Application no. 330 of 2019 and Interim Application No. 454 of 2020. The reliefs sought in those Interim Applications are set out in brief below.

Interim Application No. 330 of 2019

- (a) Pass a no WS Order against Defendant No. 2;*
- (b) The Written Statement dated 16th July, 2019 submitted by the Defendant No. 2 be discarded and struck off the record and returned to the Defendant No. 2;*
- (c) Pending hearing and final disposal of the present Interim Application, the proceedings in the above Commercial Admiralty Suit be stayed;*
- (d) Interim and ad-interim reliefs in terms of prayer clause (c);*
- (e) Such other and further reliefs as this Hon'ble Court deems fit in the facts and circumstances of the present case.*

Interim Application No. 454 of 2020

- (a) Allow and to take on record the written statement on behalf of 1st Defendant vessel;*
- (b) In the alternative and only in the event of this Hon'ble Court not being inclined to consider the primary request of the Applicant, the Applicant / 1st Defendant vessel be permitted to treat the pleadings and documents filed in Notice of Motion (L) no. 1392 of 2018 on its behalf and/or the pleadings and documents filed in Notice of Motion No. 2408 of 2018 by the Defendant no. 2 herein as Registered Owners of the 1st Defendant vessel, as written statement on behalf of the 1st Defendant vessel and the Applicant be allowed to rely on the same as its written statement.*
- (c) Pending the final hearing and disposal of the present Interim Application this Hon'ble Court be pleased to stay the proceedings in the Suit; and*
- (d) Ad-interim orders in terms of prayer clause (c) and*
- (e) Pass such further and other orders as it may deem fit.*

3. Quite apart from the different nature of the reliefs sought in these three Interim Applications, the core issue is common viz. whether it is obligatory for the plaintiff to serve a Writ of Summons upon the defendant in a Commercial Admiralty Suit in *rem* such that the period of 120 days of filing a Written Statement would commence only from the date of service of the

Writ of Summons. As a corollary, the further issue that arises is whether defendant is entitled to condonation of delay or whether defendant is now entitled to file its written statement. Before dealing with the core issues it would be appropriate that I refer to the facts in each of these suits leading upto the present Interim Applications.

4. I propose to deal with Commercial Admiralty Suit No. 51 of 2018 in the first instance. The suit seeks to recover a sum of USD 788,720 said to be due for supply of bunker to M/s. Marine Engineering Diving Services FZC ("MEDS"). The vessel named *Altus Uber* was initially known as *Swordfish*. MEDS was the bareboat charterer. On account of non payment of the amount claimed by the plaintiff for supply of bunker, the vessel was arrested on 23rd July, 2018. On 25th July, 2018 the Sheriff of Mumbai acknowledged a letter evidencing receipt of the warrant of arrest. The Warrant of arrest was apparently served on the Master of the defendant vessel on 28th July, 2018 when he went on board the vessel at about 3.45 pm and served a duplicate warrant of arrest of the vessel upon one K R Babu, Master who accepted the same and signed an acknowledgment of the original warrant of arrest by affixing his rubber stamp thereon. The plaintiff has proceeded on the basis that in law and in particular under the Maritime and Admiralty jurisdiction, the plaintiff is not required to serve a writ of summons in context of the commencement of time to file a written statement in a Commercial Suit.

5. According to the plaintiff and as canvassed by Mr. Kapadia the provisions of the Bombay High Court (Original Side) Rules applicable at the material time provide that service is to be effected upon the defendant by serving a Warrant of Arrest or a Writ of Summons. In COMAS/51 it is contended that under Rule 946 of the Bombay High Court (Original Side) Rules in a suit in *rem* only one process viz. a Writ of Summons or Warrant of Arrest is requested to be served. The rule is reproduced below for ease of reference

946. Service of Writ of Summons or warrants of arrest in a suit in rem

(1) In a suit in rem the Writ of Summons or the Warrant of arrest shall be served on property against which the suit is brought.

Service how effected

(2) Where the property is ship or cargo on board, service shall be effected by affixing the original Writ of Summons or the warrant of arrest for a short time on any mast of the ship or on the outside of any suitable part of the ship's superstructure, and leaving a duplicate thereof affixed in its place, when removing the original Writ of Summons or the warrant of arrest

(3) (a) Where the property is cargo which has been landed or transhipped, service shall be effected by placing the original Writ of Summons or the warrant of arrest for a short time on the cargo and leaving a duplicate thereof upon the cargo, when removing the original Writ of Summons or the warrant of arrest.

(b) Where a cargo is in the custody of a person who will not permit access to it, service shall be made upon the custodian.

(4) Where the property is freight, service shall be effected by serving on the cargo in respect of which the freight is payable or on the ship in which the cargo was carried, in the manner herein above prescribed in this rule for service on cargo or on a ship.

6. It is contended that in the present case the Warrant of Arrest was not served in accordance with Rule 946 but was served on the Master of the vessel and hence is no valid service of the Warrant of Arrest. It is also contended that service of the Warrant of Arrest being invalid, was not a substitute for service of a Writ of Summons which must be served in accordance with law. The period of 120 days for filing a written statement would commence only from the date of service of the Writ of Summons in the case of any Commercial Suit including a Commercial Admiralty Suit.

7. It is contended by Ms. Jejeebhoy the learned counsel for the defendant that the plaintiffs' reliance on the alleged service of the Warrant of Arrest is misplaced since in a Commercial Suit the provisions of the Code of Civil Procedure, 1908 as amended would override the provisions of the Bombay High Court (Original side) Rules and to this effect reliance is placed by learned counsel on the decision of this Court in *Mira Gehani vs. Axis Bank*¹ as also *Atlanta Limited vs. Metso India*². In addition to the aforesaid two

¹ 2019 SCC Online Bom 358

² (2021) SCC Online Bom 1594

decisions counsel for the plaintiff has also placed reliance on the decision in *Freeman vs. SS Calanda and Capt. Yanovsky*³ and *Suresh Exports vs. Orient Shreyas and Ors.*⁴ to the effect that these are not relevant for the purposes of Commercial Suits since they proceed on the basis that the CPC is not binding and that the Bombay High Court (Original Side) Rules would prevail. It is contended that the practice now being followed of service of warrant of arrest and the requirement of filing a written statement upon service of warrant of arrest is incorrect in any Commercial Admiralty Suit. That a Commercial Admiralty Suit being classified as a Suit under the Commercial Courts Act [“CC Act”] must follow the Code of Civil Procedure which provides for a period of 120 days of filing the Written Statement from date of service of Writ of Summons. That period is not negotiable and in the present case apart from the fact that service of the Warrant of Arrest was improper since it was handed over to the Master of the vessel the time to file a written statement would not begin to run till it was served in accordance with Rule 946. It is contended that there is no valid service of the Warrant of Arrest or the Writ of Summons. Even assuming that a Warrant of Arrest is a substitute and an alternative to service of Writ of Summons, there is no effective service.

8. It is further pointed out that on or about 7th September, 2018 the plaintiff’s Advocates received emails from one Pol Legal Juris stating that they would enter appearance on behalf of the defendant and requesting that

3 1923 Bombay 51

4 1998 (3) Mh.L.J 703

papers and proceedings in the suit be served upon them. On that date vakalatnama of Pol Legal Juris was not on record. This request was repeated by email dated 10th September, 2018, however even thereafter Pol Legal Juris had not entered appearance.

9. On 6th October, 2018 M/s. Bose & Mitra & Co. representing the owners of the vessel then known as "*Swordfish*" entered appearance on behalf of the defendant vessel. It is contended that even assuming Pol Legal Juris claims that it represented the defendant vessel, there was no vakalatnama on record and it is only the present Advocates M/s. Bose & Mitra & Co. which had entered appearance. On 8th October, 2018 M/s. Bose & Mitra & Co. called upon the plaintiff's Advocates to serve a copy of the entire record clarifying that they have entered appearance on behalf of the defendant vessel and had filed their vakalatnama. This letter was duly acknowledged by the plaintiff's Advocate on 8th October, 2018. It is alleged in the course of submissions that this letter has been suppressed by the plaintiff in the present interim application. Thereafter on 11th October, 2018 the plaintiff's Advocates are seen to have requested the office of the Sheriff of Mumbai to serve the Writ of Summons on Pol Legal Juris, although in the meanwhile the vakalatnama of M/s. Bose & Mitra and Co. had been filed and apparently to the knowledge of the plaintiff's Advocate who had been informed of the fact that M/s. Bose & Mitra & Co. had entered appearance as of 8th October, 2018. The defendants' Advocate appears to have received copy of letter dated 11th October 2018

pursuant to their Advocates letter dated 15th October, 2019 addressed to the Sheriff of Mumbai enquiring about the matter. It was then revealed that the Writ of Summons in the suit was issued in the Form prescribed by the Bombay High Court (Original Side) Rules and not in the form required by the CPC as amended by the CC Act. On the same day 11th October, 2018, there being no response from the plaintiffs Advocate, the defendant's Advocates once again informed the plaintiffs Advocates that they are yet to receive / be served with copy of the papers and proceedings despite vakalatnama being on record.

10. It appears from the submissions at the bar that the plaintiffs Advocate have duly acknowledged this letter on 11th October, 2018 itself but appears to have omitted reference to this letter in the present interim application. In response to the letter of 11th October, 2018, the plaintiff's Advocates by their letter of 12th October, 2018 informed the defendants Advocate that their clients [the plaintiff] was then negotiating a settlement in the matter. Settlement talks being at an advanced stage they believed that service of papers and proceedings could jeopardise the settlement process. The plaintiff's Advocate assured the defendant's that if the settlement did not conclude by 15th October, 2018 the required papers and documents would be shared. As of that date the fact that the defendant's Advocates M/s. Bose & Mitra & Co. had entered appearance has not been disputed and thus it is clear from the response dated 12th October, 2018 that M/s Bose & Mitra & Co. would have to be served with the pleadings.

11. On 16th October, 2018 M/s. Bose & Mitra & Co. reminded the plaintiff's Advocates that they have been requesting copies of the pleadings since 8th October, 2018. Their vakalatnama had been filed and yet pleadings had not been served. Notwithstanding any settlement talks there is an obligation cast upon the plaintiffs' to serve a copy of the pleadings upon Advocates who had entered appearance for defendant(s). A reminder followed on 17th October, 2018, once again seeking copies of the pleadings. Finding no response further reminders are said to have been sent on 19th, 22nd, 23rd, 24th, 25th, 26th, 29th, 30th and 31st October, 2018 as well. Yet again there was no response. The defendant's Advocate sent further reminders on 1st, 2nd, 3rd, 5th, 6th, 12th, 13th and 14th November, 2018.

12. On 14th November, 2018 the plaintiff's Advocate are believed to have responded to all the earlier emails and letters stating that since there were two sets of Advocates who had approached them for service of papers Pol Legal Juris had accepted service of Writ of Summons. However this was clearly after the plaintiff's Advocate had been informed of the fact that M/s. Bose & Mitra & Co. had entered appearance for the vessel Swordfish and the registered owner of the defendant vessel. The contention on behalf of the defendant is that the plaintiff's Advocates had admitted that service of Writ of Summons has been effected on the wrong Advocates because the plaintiff's Advocates had notice of the fact that M/s. Bose & Mitra & Co. had entered appearance as early as 8th October, 2018. Ms. Jejeebhoy submits that it is by

now clear that under the CC Act time to file Written Statement would run from the date of service of Writ of Summons and in the present case the Writ of Summons had not been served on the defendant as required by law and hence there is no service at all. In this respect reliance is placed on the decision of *Atlanta Limited (supra)* which clarifies that in Commercial suits the Summons in the prescribed form would have to be accompanied by copies of the plaint and pleadings.

13. On 14th November, 2018 M/s. Bose & Mitra & Co. clarified that they alone are authorised to act for the defendant vessel in the suit and their vakalatnama is already on record. They once again sought that pleadings be served upon them. The letter clarified that they had not been served with the Writ of Summons and they were the Advocates on record and were not concerned with any other Advocates who may have claimed to have the authority to represent the defendant vessel.

14. On 15th November, 2018 the plaintiff's Advocates served the defendant's Advocates with pleadings along with the exhibits which included Notice of Motion no (L) 2191 and 2306 of 2018. Although the plaint and proceedings were served Writ of Summons had not been served on the vessel or M/s. Bose & Mitra & Co. On 8th March, 2019 the defendant was duly represented by M/s Bose & Mitra & Co. when an order came to be passed whereby the court recorded an undertaking of the Advocates to furnish a

Bank Guarantee without prejudice to their rights and contentions in order to release the defendant vessel. Such a Bank Guarantee came to be furnished on 25th March, 2019 and thereafter was taken on record.

15. On 16th September, 2019 the defendant filed its Written Statement in the belief that the Written Statement was being filed within time. The Written Statement which came to be filed with a praecipe was taken on record. It was also served on the plaintiff's Advocate on 19th September, 2019. The interim application now seeks rejection of that Written Statement as being barred by time. All along the fact that Writ of Summons had not been served upon the defendant's or upon M/s. Bose & Mitra & Co. in accordance with the Bombay High Court (Original side) Rules has not been disputed. On 9th October, 2019 the plaintiff is seen to have filed an affidavit of service dated 5th October, 2019 and the present interim application is filed on 11th October, 2019. After the interim application was filed the Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017 ["Admiralty Act, 2017"] was brought into force and consequently Admiralty Rules 927 to 968 of the Bombay High Court (Original Side) Rules were replaced by Rules Nos. 1063 to 1109 under Chapter LX – titled "*Special Jurisdiction : Admiralty Jurisdiction, Rules for Regulating the Procedure and Practice in cases brought before the High Court under the Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017*". These are hereafter referred to as "New Rules"

16. On behalf of the defendant it is submitted that in the light of the provisions of the CC Act, Rules of the Bombay High Court (Original Side) Rules requiring service of the Warrant of Arrest or in the alternative the Writ of Summons not being relevant rule to be applied, in a Commercial Suit the Code of Civil Procedure as amended by the CC Act would have to be followed and that requires a Writ of Summons to be served upon the defendant. The reference to service of Warrant of Arrest as an alternative in the Bombay High Court (Original Side) Rules is of no avail in a Commercial Suit. In an 'Admiralty Suit' i.e. an Admiralty suit which is not filed as a Commercial Admiralty Suit that the New Rule nos. 1070 and 1071 could prevail but once the suit is classified as a Commercial Admiralty Suit the provisions of the CPC as amended must be followed.

17. Mr. Kapadia on the other hand relies on the decision of single judge of this court in *M. V. Tongli Yantai vs. Great Pacific Navigation (Holdings) Corporation Ltd.*⁵ in which the court observed that seizure under a court process such as arrest of a ship in admiralty would operate in *rem* since it transfers the custody of the property to the court or its officers and holds good against the world at large. Any interference with the Custody of the court or its officer would invite action in contempt. The Court referred to the procedure in England for arrest of the ship as indicated in the decision of *The Johnny Two*⁶ which required the Admiralty Marshal upon a warrant of arrest

5 2018 SCC Online Bom 2694

6 (1992)2 Lloyd's Rep 257

being issued to telephone the relevant officer of HM Customs and Excise and instruct him to arrest the ship followed by sending a *“Note of Action”* by fax confirming his instructions. There upon an officer of Her Majesty’s Customs then arrests the ships by attaching Note of Action to the ship. The Marshal’s instructions are carried out for keeping the ship under arrest.

18. In the case then at hand, the court observed that the procedure followed by this court is similar, that upon issuance of a warrant of arrest the bailiff appointed by the Sheriff serves copies upon the Conservator or Deputy Conservator of the Port as also the Customs office within whose territorial waters the ship lies. The bailiff carries the original warrant to the ship and executes the same personally upon the Master or other officer appointed to man the ship and in case of an unmanned ship, pastes the original to the wheel of the vessel. The Custody of the Court is thus complete in that manner. This is sought to be asserted as sufficient service upon the defendant and it is not necessary to ‘affix’ the Warrant on the mast etc. per old Rule 946. It is the plaintiff’s case in this Commercial Admiralty Suit No. 51 of 2018 upon such service on the Master, a practice which has been approved by the court, the defendant was obliged to file a written statement within 120 days of such service.

19. Reliance is also placed by Mr. Kapadia on a decision of a single judge of the High Court of Gujarat in *MT Nautical Global VII (EX Name GP III)*

*(IMO 9110432) vs. Nautical Global Ship Management DMCC*⁷ dated 8th January, 2018 in which the court ordered arrest of the defendant vessel to secure the plaintiffs claim. Reliance is also placed on the decision of this court in *Suresh Exports (supra)* in which the Court while interpreting the Rules 945 and 946 of the Bombay High Court (Original Side) Rules held that on an analysis of the aforesaid rules, once a Warrant of Arrest is served there is no necessity of serving the Writ of Summons, the main object being that a party should know about the case filed against it and so as to enable the party to file a Written Statement. It was found that while Warrant of Arrest was executed by affixing on the ship copies of the plaint and other papers are also served along with the Warrant of Arrest and the Warrant of Arrest discloses the exact amount of money that is claimed as also the full title of the plaint and hence there is no need to serve a Writ of Summons. Reliance was placed upon *SS Calanda (supra)* in support of the plaintiff's case.

20. Opposing the application on behalf of the defendants Ms. Jejeebhoy has reiterated the repeated attempts of the defendants Advocate to obtain copies of the plaint and proceedings since appearance was entered on 8th October, 2018 and the fact that the Advocates of the defendants who had entered appearance had still not been served with the Writ of Summons, let alone the defendant. Moreover, the contention on the part of the plaintiff is that their Advocates had already served the papers and proceedings and the Writ of Summons upon Pol Legal Juris. It ignores the fact that Pol Legal Juris did not

⁷ Civil Application (OJ) No. 179 of 2017

file appearance for the defendants and even assuming that service of writ of summons was effected on Pol Legal Juris, this would not constitute valid service of the writ of summons since even under Rule 946 the Writ of Summons had not been served in accordance with the procedure laid down by the rules. Pol Legal Juris had not given security nor paid any money into court. In a suit in *rem* Writ of Summons or Warrant of Arrest is not required to be served if the Advocate agrees to accept service and to give security or pay money into court. Since Pol Legal Juris had neither given security nor deposited the money in court and it was M/s. Bose & Mitra & Co. who had then provided the security. Service upon M/s. Bose & Mitra & Co. was required but that had not been effected.

21. The plaint and proceedings were ultimately served only on 15th November, 2018. It was thereafter that the present Advocates M/s. Bose & Mitra & Co. had furnished security. The written statement dated 13th September, 2019 was filed on 16th September, 2019 with a praecipe and the contents of the praecipe were believed to be true. A Writ of summons had not been served on the defendant vessel or the Advocates on record M/s Bose & Mitra & Co. although the plaintiff's Advocate had sufficient notice of the said M/s. Bose & Mitra & Co. having entered appearance. The warrant of arrest had not been affixed on the defendant vessel at all as required by the Bombay High Court (Original Side) Rules and the Advocate for the defendant had not come across copy of the Warrant of Arrest served on the vessel when

carrying out search of the papers and proceedings in this court. Apparently the copy of the Warrant of Arrest was not available in the record at the relevant time. An affidavit of service was filed by the plaintiff only on or about 9th October, 2019 after the Written Statement has been filed and hence learned counsel submitted that by no stretch of reasoning can it be held that service in accordance with law had been effected such that the period of 120 days would commence running.

22. Ms Jejeebhoy relied upon a decision of the House of Lords in the case of the *The Baumwoll Manufactur Von Carl Scheibler vs. Christopher Furness*⁸ and the decision of *UCO Bank vs. Hem Chandra Sarkar*⁹ inter alia dealing with bailment and agency. These decisions are sought to be canvassed in support of the defendants plea that service upon the bareboat charterer is not sufficient service upon the owners. The learned counsel for the defendant thus contended that absent service of Writ of Summons there is no question of a Warrant of Arrest being a substitute .

23. Having dealt with the factual aspects and the submissions on behalf of the plaintiff's and defendant's in COMAS/51 it is appropriate now to deal with the contentions in COMAS/62. As and by way of an introduction I may observe that the claim in COMAS/62 involves the same defendant viz. *M. V. Altus Uber* and on behalf of the learned Advocates appearing in that suit

8 [1892] 1 Q.B. 253

9 (1990) 3 SCC 389

who were aware of the pendency of the Interim application in COMAS/51 since the issue was common, it would be appropriate that these be decided together and that submissions on behalf of the parties in COMAS/62 be also be taken into account. Mr. Pratap learned Senior Counsel has thus offered to assist the court in this respect by canvassing the case of the plaintiff in COMAS/62 before an order is passed in COMAS/51.

Submissions of the Plaintiff's in COMAS/62

24. Mr. Pratap submitted that action in *rem* is directed against the vessel itself seeks to obtain satisfaction of the claim of a plaintiff out of *res* and for that purpose the vessel is treated as a person. A decree passed by a court against the vessel will not only bind the parties but the entire world at large who might wish to dispute the plaintiffs claim. In this behalf reliance is placed by Mr. Pratap on the decision of *M.V. Elisabeth vs. Harwan Investment & Trading Pvt. Ltd.*¹⁰. Mr. Pratap further submitted that by virtue of a Commercial Admiralty Suit filed as an action in *rem* against the vessel the claim of the plaintiff is secured by way of arrest of the ship and the plaintiff need not sue the owner of the vessel or anyone else interested in the proceedings. The Writ to be issued in a suit would be against owners and any other party who may be interested in the vessel and if such owner does not appear in court and seek release of the vessel such a vessel is liable to be sold and the plaintiff's claim satisfied from the sale proceeds. The owner however may submit to the court's jurisdiction and seek release of the ship by offering

¹⁰ 1993 Supp (2) SCC 433

security and then he would be liable to be proceeded against in *personam* if the court was to pass judgment and the said judgment is for an amount exceeding the amount of security offered and created. Relying upon the extracts of the decision in *M.V. Elisabeth (supra)* Mr. Pratap submits that an action in *rem* being directed against the vessel alone, recoveries are limited only to the extent of the value of the ship. The owner is not bound personally unless he appears as aforesaid and under the English Law the term “Writ” is used in the context of the procedure followed in England whereby an action is commenced by issuance of a writ. Whereas in India the lodgment of a plaint would signify the commencement of an action, issuance of the Writ is thus stated to be not relevant.

25. My attention was invited by Mr. Pratap to Rule 928 of the Old Admiralty Jurisdiction Rules as also Rule 1064 of the New Rules pursuant to the Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017. Mr. Pratap also submitted that action in *rem* seeks to enforce a maritime claim against the vessel on the basis that the vessel is liable to pay the claim. In an action in *rem* the owner need not be present before the court for deciding the plaintiffs claim and hence no writ of summons is required to be served on the owner of the vessel. He submits on the basis of the decision of this Court in *Raj Shipping Agencies vs. Barge Madhwa*¹¹ (*supra*) and as reiterated in the case of *Angre Port Pvt. Ltd. vs. TAG 15 (IMO 9705550)*¹²

11 (2020) SCC Online Bom 651

12 (2022) SCC Online Bom 56

26. Mr. Pratap also relies upon the decision in *Suresh Exports (supra)* and submits that there is no requirement of serving a Writ of Summons on a vessel and the service of the Warrant of Arrest is sufficient. Even under the new Admiralty Rules, Rule 1082 an action in *rem* can proceed even if no appearance is entered by the owner to provide security for the vessel and the presence of the owner is not necessary and so also a Written Statement is not necessary. He supports his contention by relying upon the decisions in *Raj Shipping Agencies (supra)*, *Angre Port (supra)* and *Suresh Exports (supra)* which specifically dealt with Rule 945 and 946 and held that once a warrant of arrest is issued and executed against the vessel there is no need to serve a Writ of Summons. This position Mr. Pratap submits is time tested and need not be altered in the facts of the present case merely because the suit has been filed as a Commercial Admiralty Suit. It is contended by Mr. Pratap that the amendment to Order V of the CPC by virtue of the CC Act will not alter the requirements of law in suits in *rem* and that the Code of Civil procedure is not concerned with actions in *rem*. It deals exclusively in actions in *personam* and hence there cannot be any conflict between Admiralty Rules as incorporated in the Bombay High Court (Original Side) Rules ["Admiralty Rules"] and the provisions of the CPC. As far as actions in *rem* are concerned it is only the Admiralty Rules which will prevail. The CPC has no application in that respect to the extent it concerns actions in *rem*.

27. Mr. Pratap further submitted that a fair reading of decision in *Mira Gehani (supra)* as reiterated in *Atlanta Limited (supra)* would reveal that only Rules which are in conflict with the provisions of the CC Act would stand superseded, all other rules will continue to apply since the CPC does not deal with actions in *rem*. there can be no conflict that could arise. Furthermore the rules in question as applicable to Admiralty Suits are framed under Section 7 of the Colonial Courts of Admiralty Act 1890 and Section 16 of the Admiralty Act, 2017. These are not rules framed under Section 122, 125 or 129 of the CPC and such rules are framed by virtue of Section 4 of the CPC. Mr. Pratap invites my attention to Section 4(1) of the CPC which provides the absence of any specific provision to the contrary, nothing in the CPC shall be deemed to limit or otherwise affect any special law or local law now in force under any special jurisdiction. The expression “specific provision” is sought to be interpreted in terms of the Supreme Court’s decision in *Pankajakshi (Dead) through Lrs & Ors. vs. Chandrika & Ors.*¹³ to suggest that it carves out a special exception for special and local laws.

28. According Mr. Pratap Section 12 of the Admiralty Courts Act, 2017 makes it clear that provisions of the CPC would apply in all proceedings before the High Court only insofar as they are not inconsistent with or contrary to provisions of this Act or the Rules thereunder. The CPC being applicable only if its provisions are not inconsistent with or contrary to the

13 2016 6 SCC 1517

Admiralty Act or the Rules thereunder and assuming there is a conflict, the Rules with the Admiralty Act will prevail. He further submits that there is no conflict since the Admiralty Rules and the CPC and the two operate in different spheres. The CPC would deal with action in *personam* alone and does not contemplate actions in *rem*. This distinction is sought to be emphasised. It is therefore contended that the procedural rules under the CPC are not applicable to service of a Warrant of Arrest. The provisions of amended Order V Rule 1 (1) will not be applicable.

29. Mr. Pratap submits that one cannot proceed on the assumption that in *Raj Shipping (supra)* and *Angre Port (supra)* the court was unaware of the provisions of the CC Act and the amendments brought about to the CPC. Actions in *rem* under the Admiralty Jurisdiction of this Court will attract application of the Admiralty Rules and not the CC Act. However it is contended by Mr. Pratap that in the event this court is of the view that the decision in *Raj Shipping (supra)* and *Angre Port (supra)* is not correct, a different view need not be taken but it would be appropriate to refer it to larger bench as contemplated by the Supreme Court's decision in *Dr. Vijay Laxmi Sadho (supra)* an order to maintain judicial discipline. He submits that it is necessary to maintain the quality of certainty and if co-ordinate benches take different views it would only result in confusion.

30. Mr. Pratap further submitted that it is also appropriate to consider that provision of Rule 946 of the Old Rules is not mandatory but only

directory. According to him if the warrant of arrest is served upon the Master in command and the Master accepts service on behalf of the vessel, service would be complete. The warrant of arrest need not be affixed as contemplated in the old rules. He submits that modern ships do not have masts and it is impossible to affix the warrant of arrest on any masts or a suitable part of the ship's superstructure. If such superstructure is, as normally in current day vessels, made of steel it is not possible to "affix" the Warrant. Relying on the decision in *S. P. Gupta vs. Union of India*¹⁴. Mr. Pratap submits that procedure is a handmaid of justice and the cause of justice cannot be thwarted by any procedural technicality. Referring to the decision in *M.V.Tongli Yantai (supra)* Mr. Pratap submits that the court had observed that actual seizure is not required and a symbolic act is sufficient. Physical contact was not necessary to constitute actual seizure and that symbolic act would satisfy the requirement of Order XXI Rule 43. The service upon the Master of warrant of arrest is sufficient and the warrant need not be affixed on the vessel or its mast or its superstructure. If Master accepts services there is sufficient compliance with the rules.

31. In the facts of COMAS/62 the Warrant of Arrest and the plaint and accompanying annexures were served on the Master of the defendant vessel on 3rd June, 2018 in accordance with Rule 946. The warrant was served on the vessel on 14th June, 2018 as recorded in the affidavit of service of the

14 (1981) suppl 1 SCC 87

bailiff. According to Mr. Pratap time to file a Written Statement commenced on 14th June, 2018 and the period of 120 days expired on 12th October, 2018.

32. It is further submitted that the defendant vessel was under demise charter to MEDS, the owners were Swordfish Shipco Limited and required MEDS to appear on behalf of the vessel. They are obliged to do so under the Charter Party Agreement and clause 17 thereof. MEDS appeared on behalf of the vessel and sought setting aside of the order of arrest on 12th June, 2018. This application however came to be dismissed on 25th September, 2019. Meanwhile Swordfish had terminated the demise charter with MEDS on 12th July, 2018. Termination notwithstanding, no written statement was filed. On the other hand Swordfish filed an application seeking leave to intervene on 27th July, 2018. Leave was sought since MEDS was already appearing in the matter. Leave to intervene was granted on 22nd November, 2018 and thereafter the plaint was amended and served on Swordfish on 12th December, 2018. Although Swordfish was not required to obtain leave and intervene, 120 days from service of the amended plaint expired on 11th April, 2019 and the right of Swordfish to file a Written Statement as owner of the vessel expired before the Written Statement was filed on 16th July, 2019. He submits that an intervener under Rule 949 of the Bombay High Court (Original Side) Rules was not required to be served with Writ of Summons unless the defendant is added as a party to a suit under Order I Rule 10.

33. That under Rule 949 a party being aware of the suit and being interested in an arrested vessel applies to intervene to protect his own interest and not the suit claim since the suit was not directed against the owner in *personam* but against the vessel in *rem*. Thus under Order I Rule 10 a person who is joined as a defendant at the instance of the plaintiff or by court is required to be served with the Writ of Summons since the party is not intervener but a necessary or proper party, Swordfish's right to file a written statement therefore expired on 12th October, 2018. Interim Application No. 454 of 2019 was filed by the said defendant on 16th January, 2019.

34. Mr. Pratap submits that in Interim Application No. 330 of 2019 the plaintiff seeks return of the Written Statement filed by Swordfish since Swordfish cannot file an independent Written statement as owner of the vessel because the period for filing written statement on behalf of the vessel has expired. Even assuming Swordfish was entitled to file a separate written statement for itself, time to file one commenced on being joined as a party defendant on 12th December, 2018 and 120 days expired on 11th April, 2019. The Written statement was sought to be filed only on 16th July, 2019 and thus it is clearly beyond time. Mr. Pratap therefore submits that some questions that arise in the present context are as follows :

1. *Whether service of warrant of arrest on a vessel is sufficient to commence time for filing of Written Statement on behalf of the vessel without the requirement of service of Writ of Summons – following the judgment in Suresh Exports vs. Orient Shreyas 1998(4) Bom Mh.L.J. 703.*

OR

Whether in view of Section 16(3) of the Commercial Courts Act, 2015 and the amendment to Order V Rule 1 (in 2016) service of Writ of Summons in addition to Warrant of arrest is mandatory in an action in rem under the Admiralty Act, 2017 to commence time for filing of Written Statement on behalf of the vessel.

2. Whether the procedure for service of warrant of arrest set out in Rule 946 is mandatory or directory and whether acceptance of warrant of arrest by the Master on board the vessel is sufficient service on the vessel.

35. Mr. Pratap has also drawn my attention to the provisions of the Colonial Courts of Admiralty (India Act) 1891 in particular Section 2 (1) and 2(2) and the Rules of Code under Section 7 submits that the rules of CPC are meant to regulate the procedure and practice of the court exercising Admiralty jurisdiction and thus the rules of the Bombay High Court framed in exercise of admiralty jurisdiction will prevail in all matters where the Colonial Courts of Admiralty Act, 1890 was in effect.

36. Relying upon a copy of the bareboat charter party in the case at hand, in particular making reference to clause 17 thereof, it provides for an indemnity in favour of the owners by the Charterers against any loss or damage or expense incurred by the operation of the vessel by the charterer if the vessel were to be arrested or otherwise detained. It was the charterer who would be responsible for meeting expenses and taking reasonable steps to

secure the vessel's release. He therefore submitted that it is the charterers who were responsible for securing release of the vessel and not the original owners Swordfish.

37. Mr. Pratap has also invited my attention to the New Admiralty Rules which include Admiralty Forms of the Warrant of Arrest. Admiralty Form nos. 139 to 144 are relevant. Form 142 is the form of a Warrant of arrest. It is this form in which a warrant of arrest is to be issued and once the warrant is served as aforesaid including upon the vessel's Master there is no requirement of issuing a Writ of Summons and serving the Writ of Summons upon the defendants,

38. One preliminary aspect that I must deal with is Mr. Pratap's contention is that in the event the court is of the view that in a Commercial Admiralty Suit service of Writ of Summons is necessary for time to commence. Considering the fact that two other decisions of this court i.e. *Raj Shipping (supra)* and *Angre Port (supra)* have already observed that it is not necessary to serve a writ of summons, it would be appropriate that the issue be referred to a larger bench so as to maintain a uniformity of approach and to avoid confusion. In this behalf having given anxious thought to Mr. Pratap's suggestion canvassed with the support of the decision in *Dr. Vijaylaxmi Sadho supra*) which in turn quotes *Mahdeolal Kanodia vs. The Administrator-General of West Bengal* ¹⁵, I am of the view that the decisions

15 1960 SCR (3) 578

in *Raj Shipping (supra)* and *Angre Port (supra)* do not consider the core issue. The core issue of forfeiture of the right to file a written statement did not arise in those cases. The fact situations in those cases are entirely different and the observations of the learned judges of this court in those matters are essentially based on the Rules as framed and on a fair reading of the rules. Since the issue was not specifically been raised for consideration in those cases, I am not inclined to accept Mr. Pratap's submission the issue is required to be referred to a larger bench. It is in that view of the matter that I have proceeded to hear the applications.

Submissions of the Defendant in COMAS /62

39. Mr. Dhond has contended that a defendant's right to file a Written Statement cannot stand forfeited if the Writ of Summons is not served and the period of 120 days for filing the Written Statement in Commercial Suit will start from the date of service of the Writ of Summons. He relies upon Order V Rule 1 and Order VIII Rule 1 of the CPC and submits that service of Writ of Summons is a pre-condition for commencement of the period of 120 days available for filing Written Statement. He invited my attention to Section 2(1)(b) of the CC Act, 2015 and submits that since a Commercial Court is constituted under Section 3(1) and Section 2(1)(c)(iii) of the CC Act which contemplates a Commercial Dispute, issues relating to Admiralty and Maritime Law are contemplated. Thus the dispute in the present suit comes within the definition of Commercial Suit, since the dispute pertains to Specified Value as defined under Section 2(1)(i).

40. Mr. Dhond submits that Section 3 of the CC Act establishes a Commercial Court in the State and Section 4 constitutes a Commercial Division in the High Courts. He also submits that Section 12(3) bars a civil revision application under section 115 of the CPC which shall lie from an order of a Commercial Division or Commercial Court finding that it has jurisdiction to hear a Commercial dispute under this Act.

41. Mr. Dhond also relies upon Section 16 of the CC Act and submits that this Court sitting in its Commercial Division is bound to follow the CPC as amended by the CC Act. These amended provisions will override the provisions of any rules made by this Court. According to Mr. Dhond the plaintiff does not dispute the fact that the CPC stands amended by virtue of the CC Act. That Act also provides that vide Section 16(2) that many Commercial disputes of specified values should be tried under the provisions of CPC as amended.

42. He invited my attention to clause 4(a) and (d) of the Schedule of the CC Act which provides for forfeiture of the right to file a Written Statement upon expiry of 120 days of service of Writ of Summons. According to Mr. Dhond the plaintiff seeks to ignore the requirement of Section 16(3) viz. that if any Rule of the jurisdictional High Court or any amendment by the State Government is found to be in conflict with the provisions of the CPC, the CPC shall prevail. The rule making power of the High Court it is contended

provided under Section 122, 125 and 129 is also subject to amendments to the CPC.

43. Mr. Dhond contends that Section 16(3) of the CC Act must be read in contrast with Section 97(1) of the CPC Amendment Act, 1976 and Section 16(1) of the CPC Amendment Act, 2002 requiring that any amendment or any principal act by State legislatures or the High Court before commencement of amendment act shall stand repealed except to the extent that such amendment to provisions is consistent with the principal Act. He relies upon *Iridium India Telecom Ltd. (supra)* in this respect. Mr. Dhond relies on the following other judgments in support of his case.

- (i) *Iridium India Telecom Ltd. vs. Motorola Inc.*¹⁶
- (ii) *M. V. Quamar vs. Tsavliris Salvage (I) Ltd. & Ors.*¹⁷
- (iii) *CNA Peejay Exports Pvt. Ltd. vs. M. V. Nikolay Maksimov & Ors.*¹⁸
- (iv) *Mira Gehani vs. Axis Bank.*¹⁹
- (v) *Atlanta Limited vs. Metso India.*²⁰
- (vi) *Mahadev Govind Gharge & Ors. vs. Special Land Acquisition Officer.*²¹
- (vii) *Ocean Connect Marine UK Ltd. vs. MV Don Jose.*²²

44. Mr. Dhond further submitted that the Bombay High Court (Original

16 (2005) 2 SCC 145

17 (2000) 8 SCC 278

18 1993 Mh. L. J.

19 (2019) SCC Online Bom 358

20 (2021) SCC Online Bom 1594

21 (2011) 6 SCC 321

22 COMAS/58/2018

Side) Rules of this Court are framed by the Chief Justice and Judges of this Court. Admiralty rules are also framed under *Chapter LX – Special Jurisdiction : Admiralty Jurisdiction, Rules for Regulating the Procedure and Practice in cases brought before the High Court under the Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017*. He submits that even assuming that the Admiralty Rules were framed under the provisions of the Admiralty Act, 1890, Section 16(3) covers any rule that is framed and which would stand subjected to amended provisions of the CPC. He has contended that Rule 946 can be read harmoniously to mean that services of Writ of Summons is mandatory because the warrant of arrest is addressed to the Master and not to the defendant. Warrant of arrest does not require a Written Statement to be filed.

45. He further submits that Rule 1071 of new Admiralty rules distinguishes between Writ of Summons and Warrant of arrest. He reiterates that this Court has in COMAS/58/2018 has permitted a Written Statement to be filed on 13th November, 2019 even though warrant of arrest was served and because no Writ of Summons had been served in a suit in *rem* and submits that the Master is a person who receives the documents on behalf of the vessel from the office, he may be foreigner when he receives the warrant of arrest. He may be unaware of the fact that statement is required to be filed within 120 days. A Writ of Summons would convey that requirement. He relies upon decision of this court in *Atlanta Limited (supra)* and *Mira Gehani*

(*supra*). He also relies upon *Mahadev Govind Gharge & Ors (supra)* in support of his contention that strict construction of a procedural law is called for where there is complete extinguishment of rights, as opposed to the cases where discretion is vested in the courts to balance the equities between the parties to meet the ends of justice which would invite liberal construction.

46. In view of the above it is contended that the plaintiffs contention cannot be accepted that once a Commercial Suit is filed, which the plaintiff has in the present case he is bound to serve the writ of summons. Mr. Dhond sought to distinguish the decision in *Raj Shipping (supra)* and *Angre Port (supra)*. Mr. Dhond has also invited my attention to Form no. 10 being a format of Writ of Summons in support of his contentions.

Conclusions :

47. I have heard the learned counsel for the parties in all the above matters at length and the core issue is whether in a Commercial Suit dealing with a maritime claim and therefore described as a Commercial Admiralty Suit, service of warrant of arrest would obviate the need for serving Writ of Summons I have attempted to list below a few areas which require consideration and which will assist in deciding the core issue viz.

- (i) What is a Commercial Admiralty Suit? How is it different from an Admiralty Suit ?
- (ii) What is a Writ of Summons and whether it is distinguishable from a

Warrant of Arrest of the vessel ?

(iii) The effect of Part I of the CPC 1908 dealing with suits in General.

Let me first deal with Part I of the CPC. Section 26 and 27 deal with institution of a suit and issuance of summons. They are reproduced below :

26. Institution of suits :

(1) Every suit shall be instituted by the presentation of a plaint or in such other manner as may be prescribed.

(2) In every plaint, facts shall be proved by affidavit.

Section 27 contemplates issuance of summons to defendants which reads as under :

27. Summons to defendants – *Where a suit has been duly instituted, a summons may be issued to the defendant to appear and answer the claim and may be served in manner prescribed [on such day not beyond thirty days from the date of the institution of the suit.]*

It would instantly appear that issuance of service of summons is optional but that is not so. This needs to be tested. Can a suit be dismissed if summons has not been issued at the instance of the plaintiff? If not, are there any consequences of non issuance of Writ of Summons.

48. The CPC does not define a “Summons”. The expression Writ of Summons is defined in Black’s Law Dictionary as follows :

“A writ by which, under the Judicature Acts of 1873–1875,

all actions were commenced.”

The definition also provides different meanings of the expression summon(s).

The verb to Summon means *“To command (a person) by service of a summons to appear in court.”*

Summons, the noun is defined as *“Formerly, a writ directing a sheriff to summon a defendant to appear in court”* or *“A writ or process commencing the plaintiff’s action and requiring the defendant to appear and answer”* or *“a notice requiring a person to appear in court as a juror or witness”*.

49. Section 31 does not define the expression summons but contemplates issuance of summons under Section 27. The Bombay High Court (Original) side Rules Chapter VI Rule 87 provides as follows :

87. Suits to be placed on board for dismissal if summons not served within six months

If the Writ of Summons is not served within six months from the date of the filing of the plaint, the Prothonotary and Senior Master shall, unless good cause is shown, place the suit on board for dismissal. The Prothonotary and Senior Master shall notify such suits on his notice board one week before they are placed on the board for dismissal.

Thus the CPC it would appear does not mandatorily require a plaintiff to have summons issued. The Bombay High Court (Original Side) Rules on the other hand do. Rule 87 appears to be in terrorem inasmuch as if the Writ of

Summons is not served within six months of the date of filing the plaint the Prothonotary is required to place the suit on board for dismissal unless good cause is shown. It is common place to find several suits dismissed for non service of Writ of Summons.

Chapter VII Rule 88 provides for time for filing appearance or vakalatnama by the defendant and reads thus.

88(a) In suits where the Written Statement is called for by the Writ of Summons, the defendant shall file an appearance in person or a vakalatnama, as the case may be, within twelve weeks from the service of the Writ of Summons. (emphasis supplied)

Rule 89 provides for consequences of default in filing appearance or vakalatnama and written statement which reads thus :

89. In default of filing appearance or vakalatnama and written statement, suit may be set down on board as undefended.

If the defendant commits default in filing his appearance in person or a vakalatnama and Written Statement as provided in Rule 74, the Judge in Chambers may, when the suit appears on board for directions, direct that the suit be set down on board for disposal as an undefended suit on the same day or on such other day as he may deem fit.

Rule 90 reads thus :

90. Judgment for want of written statement

Application for judgment for want of Written Statement shall be made by Notice of Motion, but no such Notice of Motion shall be issued before the date on which the Writ of Summons is returnable. On the filing of an affidavit of service of the Notice of Motion, the suit shall be set down on the daily board for the purpose of such application. (emphasis supplied)

It provides for judgment for want of Written Statement consequent upon service of Writ of Summons and premised on the date of which Writ of Summons is returnable.

50. On a fair reading of the above it becomes evident that as far as Bombay High Court (Original Side) Rules, 1980 are concerned in any suit the issuance and service of Writ of Summons appears mandatory. However I would subject this to one exception viz. if a defendant waives service of the Writ of Summons or if an Advocate enters appearance on behalf of his client thereby becoming bound to accept service under Rule 51, the consequence of dismissal of the suit may not be directed as contemplated under Rule 87 and yet again the period for filing Writ of Summons will be completed on date of filing Writ of Summons. This may be considered as waiver of Writ of

Summons in appropriate cases. These are the very rules which are now Rule Nos. 1063 to 1109 under Chapter LX – Special Jurisdiction: Admiralty Jurisdiction, Rules for Regulating the Procedure and Practice in cases brought before the High Court under the Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017. sought to be substituted by the amendments contemplated by the Commercial Courts Act.

51. Furthermore Chapter VI provides for Writ of Summons and Rule 69 reads as thus :

Section 69 : Summons to defendant

The Writ of Summons to appear and answer shall be in one of the Form Nos. 8, 9 and 10 as may be applicable to the case with such variations as the circumstances of the case may require.

Issuance of writ of summons including in Admiralty Suits is required to be in one of the forms specified.

52. In fact Rule 1064 of the Admiralty Rules provides for a suit to be commenced by filing a plaint signed and verified

1064 . Institution of suits

A suit shall be commenced by a plaint signed and verified according to the provisions of the Code of Civil Procedure, 1908 and by these rules.

Thus applicability of CPC was and is contemplated even in Special Jurisdiction i.e. Admiralty jurisdiction. The old Rule 928 also similarly

provided for institution of a suit i.e. plaint signed and verified in accordance with the CPC. Thus applicability of the CPC is inherent in admiralty jurisdiction. That brings us to Rule 1070 which reads as follows :

1070 . Service of writ of summons, or warrant of arrest, when dispensed with in a suit in rem

In a suit in rem no service of writ of summons or warrant of arrest shall be required, when the advocate for the defendant agrees –

- (a) to accept service having entered a caveat or otherwise; or*
- (b) to give security or to pay money into court; or*
- (c) where the warrant of arrest or the order of arrest is served on the ship.*

1071 is also relevant and reads as follows :

1071. Service of writ of summons or warrant of arrest or order of arrest in a suit in rem how effected.

- (a) In a suit in rem, writ of summons, warrant of arrest or order of arrest shall be served on the ship against which the suit is brought.*
- (b) Service shall be effected by serving the original writ of summons or warrant of arrest or order of arrest on the Master of the ship or as otherwise directed by the Judge.*
- (c) The plaintiff shall serve a copy of the plaint and all other*

proceedings and documents upon the advocate who claims to represent the ship or its owner upon the advocate giving an undertaking to enter appearance on behalf of the ship and/or its owner.

Rule 1105 (e) and (f) reads thus :

1105 . For the purposes of Limitation of Liability under Part XA of the Merchant Shipping Act, 1958, the following shall apply .

(a).....

(b).....

(c).....

(d).....

(e) Service of writ of summons

The writ of summons in a limitation action must be served on one or more of the defendants who are named by their names therein.

(f) Publication of institution of suit

(i) In addition to service of writ of summons, publication of the institution of the suit and the cause of action, reliefs claimed and the returnable date of writ of summons shall be made as prescribed in the court's general rules, the website of the court, one vernacular newspaper at Mumbai and also in Lloyds List, London or Trade Winds, London or as directed by the court.

(ii) Where the casualty has arisen in a foreign country, the court may in its discretion direct that the publications

must also be made in a local newspaper in that country.

53. Under Rule 1105 service of writ of summons appears to be mandatory. Furthermore under Sub-Rule (f) institution of a suit is required to be published in addition to service of Writ of Summons. These are all rules under the Admiralty Jurisdiction Act and which makes specific reference to the relevance and requirement of a Writ of Summons and its service.

54. Rules 1070 and 1071 are restricted to suits in *rem* alluding by implication to the fact that in a suit in *personam* there is no choice but to serve the Writ of Summons. However, let us see whether in a suit in *rem* service of writ of summons is optional. The Rules refer to service of Writ of Summons or Warrant of arrest but provides that there is no requirement of serving Writ of Summons or Warrant of arrest when Advocate for the defendant agrees to accept service, having entered a caveat or otherwise or agrees to give security or pays money in the court. Rule 1070 (a) and (b) do not refer to warrant of arrest. Furthermore this view gains credence from analysis of Rule 1071 which contemplates in a suit in *rem* service of (a) Writ of summons, warrant of arrest or order of arrest shall be served on the ship. Rule 1071 (b) talks of service of original writ of summons or warrant of arrest or order of arrest on the Master of the ship or as otherwise directed by the Judge. Rule 1071 (c) requires the plaintiff to serve a copy of the plaint and all other proceedings and documents upon the Advocate claiming to represent the ship or its owner upon the advocate giving an undertaking to

enter appearance on behalf of the ship and/or its owner.

55. A fair reading of Rule 1071 reveals that it deals with the mode of service of a writ of summons or mode of service of a warrant of arrest or an order of arrest in a suit in *rem*. It does not provide options or alternatives to service of writ of summons. Therefore service of a warrant of arrest is not in the alternative to service of writ of summons nor is service of an order of arrest in the alternative to service of writ of summons. As between a warrant of arrest and an order of arrest there seems to be little doubt that service of either one would be sufficient but as between writ of summons and warrant of arrest or an order of arrest it is fairly clear that the Rule does not provide alternatives to service of all three or any of these.

56. What Rule 1071 specifies is that in a suit in *rem* any one of the processes viz. writ of summons or a warrant of arrest or an order of arrest shall be served on the defendant ship and shall be served on the Master of the ship or as directed by the Judge who passes the order of arrest. Moreover the plaintiff is also obliged to serve a copy of the plaint and proceedings and documents if an Advocate claims to represent the ship or the owner and provided the Advocate gives an undertaking to enter appearance on behalf of the ship or its owner. Such undertaking would have to be provided to the court or communicated to the plaintiff and the subsequently filed in court. In view of the above, the plaintiff's contention that if a warrant of arrest is served on the ship it is not necessary to serve a Writ of Summons in order for

the period of filing the written statement to commence cannot be accepted. This also becomes clear from Rule 1106 and 1107 which are reproduced below :

1106. Affidavits of service

The Plaintiff(s) shall within two weeks of the service of writ of summons and publication of the notice in compliance with sub-rule(f) file an affidavit of service in which the plaintiff(s) shall state the following :

- (a) The names and addresses of the defendants who have been served with the writ of summons along with proof of service attached thereto;*
- (b) Proof of publication as provided in Rule 1107.*

1107. Publication of notice

All public notices issued under these rules including notice for determination of priorities under Rules 1087 and 1088 and notice for sale of ship under Rule 1094 and notice of publication of limitation action under sub-rule(f) of rule 1105 shall be published on the website of the court and also on the website of the Sheriff.

Rule 1106 refers to “defendants” indicating that the suit may not be a suit in *rem* against the *res* but the Rules must not be read in isolation but

harmonised with other Rules. The aforesaid Rules deals with the obligations of the plaintiffs to file an affidavit of service of the writ of summons and publication of notice in compliance with sub-rule (f). Reference to sub-rule (f) deals with sub-rule (f) of Rule 1105 which provides that the writ of summons in a Limitation action must be served on one or more of the defendants who had been named therein and publication of the fact of institution of the suit would therefore have to be made on the website of the court, one vernacular newspaper at Mumbai and also in Lloyds List, London or Trade Winds, London or as directed by the court.

57. All of these read together clearly indicates that in the Admiralty jurisdiction under the Admiralty Division of this Court service of a writ of summons for the purposes of a Commercial Suit in *rem* or in *personam* is not optional. It is thus mandatory in order for the 120 days to commence. Non filing of a written statement within 120 days has serious consequences and will result in forfeiture of the right to file a defence. Clearly that cannot be the intention of Rule 1070. One must bear in mind that the new Rules have been framed after the 2017 enactment and in the light of the Commercial Courts Act being in force. The manner in which the plaintiff's wish to read 1070 is clearly incorrect. It is not as if service of an order of arrest in a Commercial Admiralty Suit in *rem* would exempt the plaintiff from the obligation to have a writ of summons issued and served upon a defendant in an action in *rem*. Rules 1070 and 1071 clearly refer to an

action in *rem* and service of a Writ of Summons. In the event it was not necessary to serve a Writ of Summons in an action in *rem* there would have been no occasion to incorporate reference to the writ of summons in Rules 1070 and 1071. There may be suits in *rem* wherein no arrest is ordered.

58. Issuance of Writ of Summons is not dispensed with. Thus in the Admiralty Jurisdiction and Rules which provide for issuance of a warrant, the only exception to the requirement of service of a writ of summons for the period of 120 days to run would be an order of arrest which clearly directs that a written statement would have to be filed as per law viz Order V Rule 1(1) or otherwise specifying that time to file the written statement commences from the date of service of the order upon the defendant vessel. If that were to be the case clearly the service of a writ of summons need not be served for time to commence.

59. A warrant of arrest will not certainly suffice for time to commence since the warrant of arrest is as we have seen addressed to the Sheriff of Mumbai. It is not addressed to the defendant vessel. It is a direction to the Sheriff commanding him to effect the arrest. For ease of reference the form of a warrant of arrest in Admiralty Form 142 is reproduced below :

ADMIRALTY FORM NO. 142IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ADMIRALTY AND VICE ADMIRALTY JURISDICTION

ADMIRALTY SUIT NO. _____ OF 20____

FULL TITLE

Warrant of ArrestTo,
THE SHERIFF OF MUMBAI
MUMBAI.GREETINGS

WHEREAS the Plaintiff has instituted a suit against the Defendant in this Hon'ble Court to recover a sum of _____ (Rupees _____) payable by the Defendant to the Plaintiff with _____% (_____ percent) interest per annum thereon from the date of the suit till payment.

AND WHEREAS by an order made on the _____ day of _____ by the Hon'ble Shri Justice _____ His Lordship has, *inter alia*, ordered that a Warrant for the arrest of the Defendant vessel _____ be issued.

THIS IS TO COMMAND YOU to forthwith arrest the said vessel _____ along with her hull, engines, gears, tackle, machinery, bunkers, apparel, plant, furniture, fixtures, equipment and all appurtenances at present lying at the port of _____ at any time of the day and / or by night or on Sundays and holidays or any other place where she may be within the territorial waters of India and to keep the said vessel _____ under arrest until you have received further orders from this Hon'ble Court.

AND THIS IS TO FURTHER COMMAND you that either you or the Deputy Sheriff or your Bailiff do proceed to the port of _____, or such other place, wherever she may be, within the territorial waters of India to effect the arrest, seizure or detention of the Defendant vessel _____;

AND THIS IS TO FURTHER COMMAND YOU that in the event the Defendant above-named depositing in this Hon'ble Court a sum of _____ (_____) equivalent to Rs. _____ (Rupees _____ only) towards the satisfaction of the Plaintiffs claim in the suit or furnishing security in the said sum of _____ (_____) equivalent to Rs. _____ (Rupees _____ only) together with _____ % (_____ percent) interest per annum thereon from the date of the suit till payment to the satisfaction of the Admiralty Registrar of this Hon'ble Court as security towards the satisfaction of the Plaintiff's claim in the suit this Warrant of Arrest shall not be executed against the said Defendant vessel _____.

WITNESS SHRI _____, the Chief Justice at Bombay aforesaid this _____ day of _____ 20__.

ADMIRALTY REGISTRAR

Sealer
this _____ day of _____ 20__

Advocate

It is clearly addressed to the Sheriff of Mumbai, The Admiralty registrar issues the warrant of arrest pursuant to an order of the court and hence the Admiralty Registrar greets the Sheriff informing of the fact of the plaintiff has instituted a suit against the defendant vessel for recovery of these specified amount. Needless to mention this specified amount would be compliant with the specified value under a Commercial Court suit. It commands to the Sheriff to forthwith arrest the vessel along with the hull, engines, gears, tackle, machinery, bunkers apparel etc. There is a further command to the Sheriff and/or the Deputy Sheriff to proceed to the port or such other place where the vessel may be, within the territorial waters to

effect the arrest. The concluding portion of the warrant specifies a further command to the Sheriff that in the event of the defendant depositing the amount equivalent to the plaintiffs claim or furnishing security together with interest, warrant is not to be executed against the defendant vessel.

60. Having dealt with the Bombay High Court (Original Side) Rules in extenso including the Admiralty Rules old and new, one thing is clear and that is the applicability of the CPC throughout the conduct of the suit. The CPC will undoubtedly govern the processes in the suit. The Admiralty Rules provide for day to day operational procedural aspects which are unique to this court. They are, as rightly contended by Mr. Dhond on behalf of the defendant, Rules framed by the Judges of this court and given the power under Section 122, 125 and 129 of the CPC. To the extent the Colonial Courts of Admiralty Act, 1890 are relevant the act was intended to amend the law in relation to exercising Admiralty Jurisdiction under the then prevalent regime within and outside of the United Kingdom to some extent these are not material for us. Section 7 of the Admiralty Act, 1890 provides for Rules of the Court for regulating the procedure and practices in a court in a British possession in the exercise of the jurisdiction conferred by this Act and those rules are required to be made by the same authority and the same manner as the rules touching the practice, procedure, fees and costs in the said court in the exercise of its ordinary civil jurisdiction. Thus all that section 7 of the Admiralty Act, 1890 provides is that this Court acting in its ordinary original

civil jurisdiction may prescribe rules relating to the practice, procedure, fees and costs of the court. The very authority which frames those rules is entitled to frame rules in relation to the Admiralty Jurisdiction of the Court as well and that is how Rules 927 to 968 and New Rules 1063 to 1110 have been framed and from time to time modified.

61. The exercise of powers under Section 122, 125, and 129 of the CPC for framing these rules, essentially under Section 122 in *Mira Gehani (supra)* this court has already held in paragraph 54 as follows :

“54. Therefore, in summation, with the introduction of Section 16(3) of the Commercial Courts Act, if any amendment brought forth to the Code by the (Original Side) Rules, then and only then, will the provisions as introduced by the Commercial Courts Act prevail. In other words, only those rules of the Bombay High Court (Original Side) Rules which are in conflict with the provisions introduced by the Commercial Courts Act, will stand superseded by the introduction of the Commercial Courts Act. All other rules (which are not in conflict with the provisions introduced by the Commercial Courts Act) will continue to apply to Commercial as well as non-commercial suits.”

It is therefore clear as day light that any rule of the Bombay High Court (Original Side) Rules which are in conflict with the provisions of the CC Act stands superseded by the CC Act. The CC Act vide Section 16 has provided

for amendments to the CPC to the extent they apply to Commercial disputes for specified value. Section 16(3) provides that Rules of the jurisdictional High Courts or amendments to the CPC by the State Government if found to be in conflict to the provisions of the CPC as amended by the CC Act the CPC is to prevail.

62. The expression “Jurisdictional High Court” already finds consideration in *Iridium India Telecom Ltd. vs Motorola Inc*²³. There is no doubt that as far as Admiralty jurisdiction is concerned the jurisdictional High Court we are concerned with is the Bombay High Court. Thus the Bombay High Court (Original Side) Rules which are then subjected to their amendments to the CPC under section 122 of the CPC would only continue to prevail to the extent they are not in conflict to the CPC as amended by the CC Act *In this behalf order VIII Rule 1 of the CC Act now requires the defendant to file his written statement of defence within 30 days from the date of service of summons on him* (emphasis supplied).

In the event the defendant fails to file the written statement “he shall be allowed to file the same on such other day as may be specified by the court, for reasons to be recorded in writing, but which shall not be later than 90 days from the date of service of summons. Service of summons is thus a critical element of the period of time that the defendants has to file the written statement.”

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63. To conclude on this aspect and keeping issue at hand in focus I am of the view that service of Writ of Summons in any suit is mandatory unless service is waived as aforesaid. The Bombay High Court (Original Side) Rules under Part III provide for Admiralty Jurisdiction Rules for Regulating the Procedure and Practice in cases brought before the High Court under the Colonial Courts of Admiralty Act, 1890 framed under Rules 927 to 968 have now been replaced by Rule Nos. 1063 to 1109 under Chapter LX—titled “*Special Jurisdiction : Admiralty Jurisdiction, Rules for Regulating the Procedure and Practice in cases brought before the High Court under the Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017.*” These rules do not exclude the applicability of Rule 87, 89 and 90.

64. Thus, plain and simple, a warrant of arrest is a direction to the Sheriff to arrest the vessel. It does not address the vessel or its Master. It does not in any manner communicate the requirement of filing a written statement within the time specified under the Commercial Courts Act. The recipient of a warrant of arrest from the Sheriff being the Master of the vessel in view of the provisions of Rule 1071 is not expected to be aware that service of the warrant by the Sheriff would trigger the time for filing written statement by way of a defence to the suit. That would only be communicated by a writ of summons and the form of a writ of summons is not one of the forms under the Admiralty Division which provides for the forms under Rule 1109. If commencement of time to file a written statement is not brought to the attention of the vessel it would amount to a breach of rules of natural justice.

65. The form of a Writ of summons in a Commercial Suit would be, as held in *Atlanta Limited (supra)* the appropriate form. Only then would there be a complete extinguishment of rights to file a written statement upon the expiry of 120 days contemplated in Order V Rule 1 and Order VIII Rule 1. To that effect I am in agreement with Mr. Dhond that the decision of the Supreme court in *Mahadev Govind Gharge (supra)* is apposite on the aspect of the need for strict construction of procedural law. This is not a case where the court is vested with discretion to balance equities as contemplated in that judgment. Thus once a suit is filed as a Commercial Suit be it in the Ordinary Original Civil Jurisdiction or as a Commercial Admiralty Suit in the Admiralty and Vice Admiralty jurisdiction of this Court, they are both filed as suits to be heard by the Commercial Division of the High Court. In all such suits and in Commercial Admiralty Suits in particular service of the Writ of Summons cannot be dispensed with by serving a warrant of arrest or an order of arrest and the only exception that can be carved out is in case an order of arrest specifies the fact that a written statement, if any, may be filed within the time specified therein.

66. Having dealt with the provisions of the CPC and the Admiralty Rules it will be convenient to refer to the relevant provisions of the Commercial Courts Act 2015. There cannot be any doubt that the plaintiff has subjected itself to the provisions of the CC Act since the suit has been filed as a Commercial Admiralty Suit, relating to a Commercial dispute arising out of

issues relating to Admiralty and Maritime Law. Reference to definitions Section 2(1)(c) (iii) makes it clear that any dispute arising out of issues relating to Admiralty or Maritime Law would constitute a commercial dispute. Once filed as a Commercial suit, subject to the suit claim being of a specified value as contemplated in Section 2(1)(i), Section 6 comes into play whereby a Commercial Court has the jurisdiction to try all suits and applications in relation to such a dispute.

67. The court derives its jurisdiction by virtue of Section 7 which requires that all suits relating to Commercial disputes of a prescribed value filed in the High Court shall be heard and disposed by the Commercial Division of this court. There is no suit of a specified value in relation to Admiralty or Maritime Law that can be said to be excluded or set out for separate treatment. Indeed there is no bar against a Commercial Division of this court hearing a Commercial Admiralty Suit by virtue of section 11 of the Act and once a specified value has been determined by virtue of section 12 and if that falls within the pecuniary limits of the jurisdiction of this court clearly the suit would qualify as a Commercial Admiralty Suit. Thus a Commercial Admiralty suit is essentially a Commercial Suit. It is only after a suit acquires the character of the Commercial Suit can it be sub-classified as a Commercial Admiralty Suit or a Commercial Intellectual Property Suit. It is akin to a genus and species. Thus having been instituted as a Commercial Suit in the Admiralty and Vice Admiralty Jurisdiction of this Court it is

obvious that the provisions of the CC Act 2015 would apply in full force and that includes the provisions of Chapter VI and the amendments to the provisions of the CPC provided for in Section 16.

68. Section 16(2) clearly requires the Commercial Division of this court to follow the provisions of the CPC as amended by the CC Act in the trial of a suit in relation to a Commercial dispute of a specified value. Section 16(3) further provides if any rule of this High Court or any amendment of the CPC by the State government is in conflict to the provisions of the Code of Civil Procedure as amended by the CC Act the provisions of the CPC would prevail. Thus reading the amendment to the First Schedule in order V Rule 1 sub-rule (1) a new proviso has been incorporated which provides that if a defendant fails to file the written statement within 30 days he shall be allowed to file a written statement on such other days as may be specified by the court for reasons to be recorded in writing and on payment of costs, but such other days shall not be later than 120 days from date of service of summons and on expiry of 120 days from the date of service of summons the defendant shall forfeit the right to file a written statement. One of the submissions of Mr. Pratap in COMAS/62 is that time to file written statement commenced on 14th June, 2018 and the period of 120 days expired on 12th October, 2018. Inherent in this is the admission that CC Act and the amendment to the CPC by virtue of the Act would clearly apply as otherwise period of 120 days could not become applicable. The amendment does not specify any other process as a trigger for the period of 30 days or 120 days

to run. The defendant forfeits the right to file a written statement and the court is prohibited from allowing a written statement to be taken on record once the period expires.

69. To read into this provision the words “Warrant of Arrest” or “Order of Arrest” in place of the word “Summons” does not stand to reason and as I have already discussed above the Warrant of Arrest is a command to the Sheriff of Mumbai. It is not addressed to the defendant vessel. The order of arrest is not in any specific form save and except for the Judges Order which does not contain any reference to requirement of filing a written statement. An oral order passed by the court may or may not contain a direction to file a written statement. If it does then obviously it must be read as an exception to the Rule that in a Commercial Suit a Writ of Summons must be served for forfeiture of the right to file a defence and/or for the prohibition against a court taking on record a written statement coming into effect.

70. It is not the plaintiff’s case and indeed it cannot that the provisions of Order V Rule 1 Sub Rule (1) incorporating the second proviso does not apply to Commercial Admiralty Suits. Once a plaintiff files a suit as a Commercial Admiralty suit it invokes the jurisdiction of the Commercial Division of this Court and upon such institution the entire set of amendments to the CPC would become applicable. There is no exemption that can be provided in the case of a Commercial Admiralty Suit unless the CPC so provides. The requirement of service of the summons cannot be dispensed with as

aforesaid. This must also be read in the light of section 21 of the CC Act which states that the CC Act would have effect notwithstanding anything inconsistent therewith in any of the law for the time being in force or any instrument having effect by virtue of any law for the time being in force other than the CC Act. Thus notwithstanding the Admiralty Act of 1890 and the Admiralty Act of 1891 the applicability of the Commercial Courts Act and the amendments to the Code of Civil Procedure it brings with it by virtue of Section 16 cannot be ignored.

71. The contention of Mr. Pratap that for suits in *rem* the Admiralty Rules of this Court are premised on the Colonial Courts Admiralty Act of 1890 to the exclusion of the CPC which applies to suits in *personam* cannot be accepted and therefore I am unable to accept the contention of Mr. Pratap that the Admiralty Rules are saved by virtue of Section 4 of the CPC. Ordinarily speaking the special jurisdiction or power conferred under the Admiralty Rules may be applicable but only so far as the suit is not a Commercial Suit. Once the suit acquires its character as a Commercial Suit and in the instant case as a Commercial Admiralty Suit, these exclusions against applicability of amended provisions of CPC cannot operate. There can be no exemptions from Order V Rule (1) Sub-Rule (1). In view of the conclusions that I have reached I am of the view the decisions in *Raj Shipping (supra)*, *Angre Port (supra)* and *Suresh Exports (supra)* had no occasion to consider the aspect of forfeiture of the right to file a defence upon

expiry of 120 days and I am also not able to accept Mr. Pratap's submissions that in view of the decision in *S. P. Gupta (supra)* the requirement of service of writ of summons is a procedural technicality and can be ignored in view of Rule 1070 of the Admiralty Rules.

72. Coming to the judgments cited at the bar the decision in *Atlanta (supra)* was rendered after *Mira Gehani (supra)* and *Atlanta (supra)* in paragraph 35, 36 and 37 records as under :

“35. Where they are in conflict with the Code regarding commercial cases, our Rules simply do not apply. This is true for all aspects regarding services of the writ of summons. For instance, on 29th September, 2008, the Prothonotary & Senior Master issued a notice saying :

“IT IS HEREBY NOTIFIED for the information of the Advocates and those appearing-in-person that whenever the learned Counsel has filed Power of Attorney or Vakalatnama and appears for the Defendant/s Respondent/s etc., in the matter, there shall be no necessity of serving the Writ of Summons or filing Affidavit of Service.”

36. Kathawalla J considered this in *Mira Gehani*. He held :

“112. In view of the above, it is clarified that the period of 120 days will commence from the date of service of the Writ of

Summons and not the date a Defendant first enters appearance. In other words, a party or its Advocate/s can no longer rely on the above notification and avoid serving the writ of summons on the Defendant/s. However, in order to ensure expeditious disposal of Commercial Suits and in order to save time of this Court as also the office of Ld. Prothonotary & Senior Master of this court, in the event a Defendant/ its Advocate enters appearance and by consent, agrees to waive service, the period of 120 days will commence from the date of such waiver. In such instance, there would be no requirement to serve the Writ of Summons. This will prevent the loss of days involved in serving the Writ of Summons and will expedite commencement of trial and consequently, disposal of Commercial Suits."

37. Thus, service of the writ of summons as required by law is essential. It makes no difference at all if the error was on the part of the plaintiff or the court. The plaintiff can derive no advantage and the defendant can be put to no disadvantage on account of any such error."

73. Thus our court has already held that service of writ of summons as required by law is essential. Read in the context of the Admiralty Rules I have already concluded that Rule 1070 and 1071 are not to be read as providing alternatives in the type of process to be served. As far as a writ of summons is concerned it is mandatory to serve writ of summons. As between a warrant of

arrest and order of arrest there appears to be interchangeability. For instance the order of arrest can also direct the Sheriff to act and arrest the ship. The Sheriff would be bound to follow the same. Procedurally a warrant of arrest has been provided for and as practice has been followed for the sake of uniformity. However in my view nothing prevents this court from passing an order of arrest and incorporating in it the requisite elements of a warrant of arrest as we know that very often a formal warrant of arrest is dispensed with by the order of arrest. Both warrant of arrest and order of arrest are to be executed through the Sheriff of Mumbai. A writ of summons is also required to be served formally upon the defendants in all suits including an Admiralty Suit in *rem*.

74. In *Raj Shipping (supra)* the Court was not considering the aspect of forfeiture of the right to file a defence upon expiry of the period of 120 days. The issue before the court were dealing with two questions which arose in those set of matters in the context of the Admiralty Act and the Insolvency and Bankruptcy Code. Firstly the Court was examining whether there was a conflict in action in *rem* filed under the Admiralty Act and provisions of the Insolvency and Bankruptcy Code and if so how the conflicts were to be resolved. The second question that arose was whether leave under section 446(1) of the Companies Act, 1956 was required for commencement of or continuation of an Admiralty Act in *rem*, where a winding up order has been passed or an Official Liquidator has been appointed of the owners of the vessel.

75. The conclusions and answers to those questions have been dealt with in paragraph 128 to 132 and paragraphs 209 to 215. While answering those questions the court was really not concerned with the aspect of service of writ of summons in order to have the period of 120 days triggered. *Raj Shipping (supra)* observes that the Admiralty Act is a comprehensive code which parliament has enacted in relation to Admiralty jurisdiction of High Court, Arrest of Ships and maritime claims and determination of priorities. It should be regarded as an exception to the general provisions found in the Companies Act. We must also consider the fact that the Commercial Courts Act also provides for the overriding effect of the Commercial Courts Act over other laws and to that extent since service of Writ of Summons appears to be mandatory except where service is been waived as discussed above, I am of the view that the decision in *Raj Shipping (supra)* will not be of any assistance to the plaintiff in the present case.

76. *S S Calanda (supra)* considered the Admiralty Rules of the Bombay High Court then in operation. *S S Calanda(supra)* observes in paragraph 42 that it is natural to find that our Court should maintain the old Admiralty procedure. That in all Admiralty cases a writ should be issued in addition to a warrant of arrest, observing that suits in India do not begin with writ but by filing of a plaint. The warrant of arrest was notice to the world at large and certainly notice to the ship agents. Warrant of arrest in that case included a citation calling upon all parties interested to appear before the court and

process their claim. It also observes that apart from one being called a “Writ” and other being called “Warrant” what is actually effected is in every way as good as any writ. Paragraph 43 of *S S Calanda(supra)* observes that it is not essential under Admiralty Rules to issue a writ of summons. Reference is made to the various rules in question. *S. S. Calanda (supra)* could not obviously consider the effect of the Commercial Courts Act and the courts being deprived of discretion extending time to file a defence and in my view *S.S.Calanda (supra)* has no application in the present case since we are concerned with the requirement of service of Writ of Summons in a Commercial Admiralty Suit. Moreover the challenge in that case to the decree was that it was invalid because no writ was actually served. In the context of enactment of the CC Act I am of the view that *S S Calanda(supra)* can be of no assistance to the plaintiff.

77. *Suresh Exports (supra)* considered the effect of Rule 945 and 946 of the Bombay High Court (Original Side) Rules and *Suresh Exports (supra)* holds in paragraph 6 that it is very clear that once a warrant of arrest is issued and executed there is no need to serve writ of summons separately. What *Suresh Exports (supra)* does not consider is the requirement of service of writ of summons on the vessel itself. *Suresh Exports(supra)* proceeds on the basis that a writ of summons would have to be served on the other defendants, if any, in *personam* and the usual procedure for serving writ of summons as contemplated in the CPC and High Court Rules would have to be

followed. Thus in my view there is no conflict. *Suresh Exports(supra)* does not in any manner come in the way of following the requirements of the Commercial Courts Act which provisions and the amendment to Order V Rule 1 Sub -Rule 1 were not even in effect when the decision in *Suresh Exports (supra)* was rendered.

78. Although Mr. Pratap has placed reliance on the decision in *M.V.Tongli Yantai (supra)* I find that it is not of much assistance inasmuch as the service of the warrant of arrest upon the Master was the issue considered and the present case concerns service of Writ of Summons. I am of the view that the court had not considered the issue that now falls for consideration in the present context. Hence *M.V.Tongli Yantai (supra)* offers no assistance.

79. *Pankajakshi (supra)* considered the meaning of the expression “specific provisions” and held that it must mean the particular provision of the CPC must clearly indicate by itself and not by implication that the Special Law in question is to be effected. The words “specific provision” used in Section 4(1) of the CPC is because it carves out an exception to special local and other laws which deals with the same subject matter as the code itself but gets overridden by the CPC. This contention supported by the decision in *Pankajakshi (supra)* makes an impressive argument, but in view of Chapter VI of the Commercial Courts Act incorporating Section 16 and the amendments to the Code itself in its application to Commercial Disputes read

with Section 21 which provides that the CC Act will have an overriding effect, notwithstanding anything inconsistent contained in any other law. I am of the view that the provisions of Section 4(1) will not ensure the applicability of the Admiralty Act in a manner such as to supersede the provisions of the CC Act. This provisions of the CC Act do apply since the plaintiff has chosen to file the suit as Commercial Admiralty Suit and I am unable to find any assistance that can be derived by the plaintiff from the decision in *Pankajakshi(supra)*.

80. Coming to the decision in *Angre Port (supra)* and the observations in paragraph 22 to which my attention has been invited by Mr. Pratap, the Court found that in a suit in *rem* the plaintiff is not concerned with the owner and neither is the owner a necessary or proper party. The presence of the owner was not found necessary for adjudication of the plaintiff's claim and it was for that reason that there was writ of summons and service of warrant of arrest is considered adequate. There can be no quarrel with this proposition inasmuch as, to the extent it concerns the arrest and sale of the vessel there is no occasion to serve a writ of summons. However, the question to be considered whether a vessel is entitled to file a written statement and in my view the vessel can file a written statement by way of defence to the plaintiffs claim. Such a written statement would be made by the Master of the vessel and indeed it is the Master who would probably respond by filing a defence upon service of writ of summons. The service of warrant of arrest

does not in my view constitute a process which alerts the ship or its Master to the effect that the suit claim must be defended in a particular time by filing a written statement. Absent such a communication in the process contained in the warrant of arrest I am of the view that the vessel is also entitled to present a written statement and the time for filing such a written statement would be 30 days from the date of service of summons with the outer limit of further 90 days thereby making a total of 120 days from date of service of writ of summons. In particular Rule 1070 and 1071 make specific reference to Writ of Summons in suit in *rem*. The moment we recognise the fact that the vessel is also entitled to file a written statement service of writ of summons on the vessel in a Commercial Admiralty suit becomes absolutely essential. At the same time, where the only defendant to the suit is the vessel, to the exclusion of the owners, there is no question of serving the Writ of Summons upon such owners. Thus in my view *Angre port (supra)* does not deal with the specific question that is now before this court and the vessel representing the *res* in question is required to be served with a writ of summons. It can file its written statement through the Master of the vessel, The ultimate sale of the vessel upon non compliance upon service of the warrant of arrest would result in a decree being passed and it must be kept in mind that the vessel may at the appropriate stage file a written statement only if it is served with the writ of summons or if an Advocate enters appearance on behalf of the vessel with appropriate instructions to offer security.

81. Mr. Pratap also dealt with the decision of the Supreme Court in *M.V. Elisabeth (supra)* which reiterates the provisions of the Admiralty Colonial Court of Admiralty Act, and Section 7 thereof which confers the court to make rule thereof to regulate the procedure and practice. This is cited in support of Mr. Pratap's contention that the rules having been made under Section 7 of the said Act those rules alone are required to be followed and not the provisions of the CPC. I am unable to accept this contention on the basis of the provisions of Section 7 all of which now stand subjected to the non obstante provisions of the CC Act and the amendments by virtue of Section 16 and in conclusion I must observe that a vessel is entitled to file a written statement. Written statement may or may not be required to be filed by the vessel or on its behalf by the Master in all cases. In cases where the written statement is necessary to be filed, time to file the written statement cannot commence till a writ of summons is served on the vessel / its Master and in my view service of warrant of arrest or an order of arrest is not sufficient for commencement of the period of 120 days unless the order of arrest specifies that a written statement is required to be filed within time specified as required in law.

82. Provisions of Section 16(3) of the Commercial Courts Act read with the amendment of Order V Rule (1) Sub Rule (1) is of writ of summons is mandatory in an action in *rem* as well and such writ of summons must be served upon the vessel and not its owners. In this view of the matter I hold

that in a Commercial Admiralty Suit service of Warrant of Arrest upon the Master and acceptance of Warrant of Arrest by the Master will not obviate the need to file / serve the Writ of Summons. The issue is answered accordingly.

83. Now to deal with the reliefs sought in each of these interim applications. For all the above reasons, I pass the following order:

(i) Interim Application No. 169 of 2019 in Commercial Admiralty Suit No. 51 of 2018 and Interim Application No. 330 of 2019 in Commercial Admiralty Suit No. 62 of 2018 are dismissed.

(ii) Interim Application No. 454 of 2020 in Commercial Admiralty Suit No. 62 of 2018 is made absolute in terms of prayer clause (a). Written statement of defendant no. 1 shall be taken on file. If already lodged the same will be registered as filed.

(A.K.MENON, J.)