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## REVIEW ARTICLE

### ADMIRALTY JURISDICTION AND SHIP ARREST IN INDIA

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#### ABSTRACT

The Admiralty Law in India is still governed by the obsolete Admiralty Court Act 1861 applied by (English) Colonial Courts of Admiralty Act 1890 and adopted by Colonial Courts of Admiralty (India) Act 1891. The 1861 Act continued to be in force even after the commencement of the Indian Constitution in 1950 because of Act 372 of the Constitution which provided for continuance of existing laws. The Indian Parliament also failed to enact a domestic law relating to Admiralty law. As per the 1861 Act the High Courts of Bombay, Calcutta and Madras were vested with Admiralty jurisdiction. They were equated with the High Court of England with respect to unlimited jurisdiction. Admiralty jurisdiction had been exercised by the Court in England under the Admiralty Act 1840 through action in rem or in personam. The defendants' vessel can be arrested by an action in rem in respect of a maritime claim. The action in rem has its foundation in maritime lien under which the claimant though an order of the court arrest the vessel. The purpose of action in rem is to compel the appearance of the ship owner. The three High Courts in India continued this practice. In *M.V. Elizabeth V. Harwan Investments Co. Pvt. Ltd* (AIR 1993 1014) the Supreme Court declared that the Courts need not be bound by the obsolete 1861 which was in fact repealed in India and all the High Courts in India are vested with admiralty jurisdictions. The Court gave relief to the claimant by applying the provisions of International Convention on Law of the sea, 1982, International convention on arrest of sea going ships 1952, sections 443 & 444 of Merchant shipping Act 1958.

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## INTRODUCTION

India is now considered as a better forum in the world to arrest and release ships and to process claims despite the absence of an Admiralty law. The Hon'ble Supreme Court in *M.V. Elizabeth*<sup>1</sup> evolved an admiralty jurisdiction investing admiralty jurisdiction to all the High Courts in India since the country is still governed by the obsolete Admiralty Act 1861. The apex Court rightly observed that Court's Admiralty jurisdiction was not limited to what was permitted by the Admiralty Court Act 1861. It has also been laid down that a suit against a foreign ship owned by a foreign company not having a place of business or place of residence in India is liable to be proceeded by an action in rem. Lack of an Admiralty Act vesting admiralty jurisdiction to all the High Courts in India did not prevent the Court to administer justice to the litigant.

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Relying on English heritage, Maritime practices and International Conventions<sup>2</sup>, the Court concluded that a Merchant ship though generally governed by the laws of the flag State, subjects itself to the jurisdiction of a foreign State as it enters its territorial waters. There the ships are liable to be arrested and detained for the enforcement of maritime claims. Making use of the Two Conventions the Court expanded its admiralty jurisdiction to the arrest of sister ships also. Yet the Court evolved its own principle by laying down that lifting the corporate veil is permitted only if fraud is proved.

#### Admiralty Jurisdiction in England

In the Middle Ages Admirals administered maritime justice in England and France under royal authority. In course of time by the 14<sup>th</sup> century Admiralty Court emerged in England. Admiralty Courts were permitted to exercise jurisdiction in one or both of two modes: in personam or in rem. The primary mode of exercise of admiralty jurisdiction in England was by

<sup>2</sup> International Convention for the unification of certain rules relating to the arrest of sea going ships 1952  
International Convention on Arrest of Ships, 1999  
UNCLOS-111

<sup>1</sup> *M.V. Elizabeth v. Harwan Investments and Trading Pvt. Ltd.* 1993 AIR 1014

arresting the person of the defendant, arrest of his property was a subsidiary mode. It was also possible to arrest both the person and the property.

Often the property arrested would be the defendant's ship to which a claim is related or any other goods belonging to him which were found within the jurisdiction. Sister ships also could be seized. This type of arrest eventually came to be called as admiralty attachment by which the claimant could obtain pre-judgment security for his claim.

### Development of in personam and in rem jurisdiction

In the seventeenth and eighteenth centuries a clear cut distinction between in rem and in personam jurisdiction emerged. In rem jurisdiction was exercised exclusively over a few types of claims arising at sea or on tidal waters. In an action in rem arrested ship is personified as a defendant distinct from its owner. The foundation of an action in rem arises from a maritime lien or claim imposing a personal liability on the owner of the vessel<sup>3</sup>. In the 19<sup>th</sup> century the first Admiralty Court Acts of 1840 did not provide for the arrest of the person/the owner. He would be served with a writ of summons. Statutes permit the admiralty courts only to exercise action in rem/in personam in respect of maritime claims listed in the enactment. This led to the extinction of maritime attachment. Mareva Injunction (freezing injunction) emerged instead. It is an interlocutory injunction prohibiting the defendant from removing the assets before or pending the suit from the court's jurisdiction<sup>4</sup>. Simultaneously Anton Piller orders were also created by the English Courts providing for the search of the defendant's premises by the applicant. It is an ex parte injunction.

### Admiralty Jurisdiction- Legislative Development in England

The Admiralty Court Act 1840 extended the jurisdiction of the admiralty courts to claims in respect of damage received by a ship. In 1861 the Indian Admiralty Court Act further extended the jurisdiction and provided for exclusive jurisdiction to damages done by a ship through an action in rem or in personam. Section 6 of the Act conferred jurisdiction over foreign ships in respect of inward cargo. It did not apply to outward cargo. Later this distinction between inward and outward cargo was discarded by the 1875 Act. All these Acts were consolidated by the Supreme Court of Judicature of 1925 (Consolidation Act 1925). The Admiralty jurisdiction of English High Court was redefined by this Act by adding more claims to the list. Again the Administration of Justice Act 1956 superseded the 1925 Act and widened and redefined the admiralty jurisdiction. Finally the 1981 Supreme Court Act was enacted to amend or to repeal all obsolete and unnecessary enactments. It also incorporated the provisions of the 1952 Arrest Convention. Further the requirements of an action in in personam the habitual residence, or a place of business of the

defendant or cause of action having a nexus with England and Wales were dispensed in an action in rem.

### Admiralty jurisdiction in India

The Colonial Court of Admiralty Act of 1890 equated the High Courts of Bombay, Calcutta and Madras to the High Courts of England with regard to admiralty jurisdiction. It is to be noted that admiralty jurisdiction in India is still governed by the obsolete English Admiralty Courts Act 1861 applied by (English) Colonial Courts of Admiralty Act 1890 and adopted by Colonial Courts of Admiralty (India) Act 1891. This state of affairs continued due to legislative inaction. Further Section 3 of the 1890 Act empowered the Colonial Legislature to enact law to declare any Court of unlimited jurisdiction to be a Colonial Court of Admiralty. As per this provision the Indian Legislature enacted the Colonial Courts of Admiralty established under the 1890 Act at Calcutta, Bombay and Madras. Their powers and jurisdiction were continued in the 1915 and 1935 GOVT of India Acts. The Admiralty jurisdiction of the High Courts continued even after the promulgation of the Constitution by virtue of Art.372 which provided for the continuance of existing laws. Though the Admiralty jurisdiction was extended to a considerable extent in England, it continued to be the same in India as per the 1861 Act.

### Admiralty Jurisdiction in India and M.V.Elizabeth

In M.V.Elizabeth<sup>5</sup> the question before the Hon'ble Supreme Court was the dispute regarding jurisdiction. It was contended that the plaintiff's suit against a foreign ship owned by a foreign company not having place of business or residence in India was not liable to be proceeded against on the admiralty side of the High Court by an action in rem in respect of a cause of action alleged to have arisen by reason of tort or a breach of obligation arising from the carriage of goods from a port in India to a foreign port. The vessel M.V.Elizabeth was a vessel of foreign nationality and owned by a foreign company carrying on business in Greece. Their sole contention was that the AP High Court or any Court in India lacked jurisdiction. The case of the plaintiff is that the defendant acted in breach of duty for delivering the goods to the consignee contrary to his direction. The suit was instituted in AP High Court invoking its Admiralty jurisdiction by means of an action in rem by the plaintiff who was having the registered office at Goa. The vessel was arrested when it reached the port of Vishakapattanam on 13.4.1984 after returning from foreign ports. However the vessel was released upon furnishing bank guarantee.

On appeal the Supreme Court observed that in England all unwanted enactments were repealed and the Supreme Court Act 1981 was enacted to incorporate the provisions of the 1952 Brussels Convention. The Act provides for a list of claims where in rem proceedings can be initiated even though these do not give rise to maritime lien. Unfortunately there is no such corresponding legislation in India. The Court further added that the Court shall interfere where the Statute is silent and apply

<sup>3</sup> The jurisdiction of the High Court of England exercised in rem action with respect to a maritime lien eg. damage done to a ship, salvage, bottomry, seamen's wages and master's disbursements

<sup>4</sup> William Tetley, "International Maritime and Admiralty law", International shipping Publications at 405-406

<sup>5</sup> See supra Note 1

the principles of international Conventions on Maritime law applicable to India.

### International Convention on Law of the Sea

All foreign Merchant Ships and persons fall under the jurisdiction of the Coastal State as they enter its waters subject to the rights of innocent passage. The Coastal State is free to exercise jurisdiction over these ships.<sup>6</sup> Such ships are subject to the local jurisdiction in criminal and administrative matters. The Coastal States are also entitled to exercise jurisdiction in respect of maritime claims against foreign merchant ships lying in their waters. These ships are liable to be arrested and detained for the enforcement of maritime claims. The Courts of the Country in which a foreign ship had been arrested may determine the case according to merits provided they are empowered to do so as per the domestic law or according to the Arrest Conventions.

### Sections 443 and 444 of the Merchant shipping Act 1958

There are various legislations in India for regulating carriage of goods by sea. The substantive law is the Carriage of Goods by Sea 1925 followed by Bill of Lading Act 1856 and the Merchant shipping Act 1958. The procedural laws are contained in Civil Procedure Code and Criminal Procedure Code<sup>7</sup>. The detention of a foreign ship is provided under Ss.443&444 of MSA 1958<sup>8</sup> which authorise the detention of a foreign ships that have caused damage. It is worth to note here the judicial activism of the Court in expanding the scope of "damage" under Sec.443 in the absence of a Statute in India. The Court further observed that the words damage done by a ship should not be so narrowly construed as to limit them to physical damage and exclude any other damage caused due to the operation of the vessel in connection with the carriage of goods. The expression is wide enough to include all maritime questions or claims.

The Court continued and referred to the **Carriage of Goods by Sea Act 1925** which provides the substantive rights and responsibilities. The cargo owner has a right to bring a suit against a ship owner in respect of an outward cargo. The same rights are equally applicable to foreign merchant ships. However COGSA 1925 does not contain a provision for arresting the foreign vessel found in Indian waters. The remedy is now available under the MSA 1958. It confers a right to arrest a vessel in respect of any damage caused by a vessel. With this enabling provision jurisdiction can be assumed over a foreign ship for the enforcement of a substantive right recognised by law. Hence law has provided a remedy for the right of the cargo owner.

<sup>6</sup> See UNCLOS-111

<sup>7</sup> See M.V.Elizabeth at 1035, supra note 1

<sup>8</sup> The detention of a foreign ship is authorised in terms of Ss. 443 and 444. In view of their vital significance in the enforcement of maritime jurisdiction, we shall read these two sections in full. Section 443 defines the character and scope of the power of detention:

"S.443. Power to detain foreign ship that has occasioned damage

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

"S.444. Power to enforce detention of ship

The Merchant Shipping Act 1958 empowers the Court to arrest a ship in respect of a substantive right. The right is conferred by the Carriage of Goods by Sea Act 1925 in respect of outward cargo to the cargo owner. This right can be enforced by the arrest of the vessel. With respect to inward cargo the substantive right is contained in the Admiralty Court Act 1861 read with Colonial Courts of Admiralty Act 1890 which provide for the arrest of the vessel. The same principle is applicable to carriage of goods under a charter party can be done in the case of inward cargo as well by reason of the substantive rights conferred by the Admiralty Act 1861 read with Colonial Admiralty Court Act 1890 and other rules of law. There are also other laws like Contract Act, Tort, Marine Insurance, Customs and Port Trust Acts governing claims relating to inward and outward cargo and such claims are enforceable against foreign ships by recourse to arrest and detention when it is found within the jurisdiction. Hence Court concluded that the AP High Court did not lack jurisdiction in respect of claims relating to outward cargo.

### Videsh Sanchar Nigam Limited -vs- m.v. Kapitan Kud

The Supreme Court in this case<sup>9</sup> again held that the jurisdiction can be assumed by the High Court concerned, whether or not the defendant resides or carries on business, or the cause of action arose wholly or in part, within the local limits of its jurisdiction. Once a foreign ship is arrested within the local limits of the jurisdiction of the High Court, and the owner of the ship has entered appearance and furnished security to the satisfaction of the High Court for the release of the ship, the proceedings continue as a personal action."In the instant case the vessel caused damage to the cable belonging to the appellant sine it was anchored in the prohibited area. The vessel was arrested and later released by the trial judge having admiralty jurisdiction.

The Court further observed that the distinguishing feature of an admiralty action in rem is that this jurisdiction can be assumed by the Court in respect of a maritime claim by arrest of the ship irrespective of the place of business or domicile or residence of its owners or the place where the cause of action arose wholly or in part. One of the main reasons that made the action *in rem* favourable in many places worldwide by the claimants specially is that the action can bring effective results and merits, which cannot be obtained by the action *in personam*.

### Arrest Convention 1952

The 1952 Arrest Convention<sup>10</sup> was created to unify the rules relating to arrest of ships around the world. Before the Convention, the rules relating to arrest of ships were governed by the different countries' domestic law. This created problems for the shipping industry since a ship could be arrested in relation to any claim whatsoever if it was permitted by the domestic law of the country where the ship was. Shipping involves movable property and is of great value and suddenly can enter jurisdictional territory of another country and a claimant can get the arrest of ships for security. This makes

<sup>9</sup> 1996 AIR 516

<sup>10</sup> International Convention for the unification of certain Rules Relating to the arrest of sea going ships 1952

shipping business insecure. Therefore the Arrest Convention was created to protect the interest of the shipping industry. This convention tried to keep the suitable balance between both the ship owners and the claimants' commercial interests. The arrest procedure in itself is an act that arises as a last solution to force the ship owner to fulfil his financial obligations. The Convention regulates for what claims a ship can be arrested. Also the claimant and the defendant can foresee an arrest.

The Convention permits ship arrest by judicial process for any of the seventeen types of maritime claims listed under Art.1 (1). The claims include the traditional maritime liens and claims which include ship mortgages, claims to ownership or possession of the vessel. Sister ship arrest is also permitted and special legislative rights. The Convention also regulates the release of the ship on the giving of sufficient security. The arresting court has the jurisdiction to decide the dispute on its merits.

### **The Arrest Convention 1999**

The Arrest Convention 1999<sup>11</sup> ensures a wide spread application. It extends the right of sister ship arrest to vessels belonging to persons who were time or voyage charterers (not merely owners or demise charterers). The Convention also permits forum selection, forum non-conveniens and arbitration clauses.

### **Towards Legislation**

The Admiralty Bill 2005 was introduced in the Lok Sabha on 11th May 2005. The bill is aimed to develop India's Admiralty laws to meet the commercial demands and bridge the gap between commercial realities and legislative requirements. However the Bill was allowed to lapse and was not re-introduced.

### **The admiralty (jurisdiction and settlement of maritime claims) Bill, 2012**

The Admiralty (Jurisdiction and Settlement of Maritime Claims) Bill, 2012 awaits legislative process and is expected to be the Admiralty law in India. The law when it comes to force would fill the legislative gap which was now being dealt by judicial pronouncements and International Conventions. The proposed Bill consolidates and amends the laws relating to the Admiralty Jurisdiction of Courts, legal proceedings in connection with vessels, their arrest, detention, sale, and matters connected there with or incidental to shipping.

### **Conclusion**

The Admiralty jurisdiction exercised by the High Courts in Indian Republic is still governed by the obsolete English Admiralty Courts Act, 1861 applied by (English) Colonial Courts of Admiralty Act, 1890 and adopted by Colonial Courts of Admiralty (India) Act, 1891 (Act XVI of 1891). Yet there appears no escape from it, notwithstanding its unpleasant echo in ears. The shock is still greater since this state of affairs is due to lack of legislative exercise. The status continued even after the commencement of the Constitution because of Art.373 which provided for the continuance of the existing laws. Over and above the legislative inaction India failed to be signatory to international conventions like arrest conventions and also lagged behind in adopting Conventions like HAGUE/Visby Rules and incorporating it into the COGSA 1925. India continued to apply the outdated colonial legislation where as England repealed all the obsolete enactments and enacted the Supreme Court Act 1981 to incorporate the provisions of the 1952 Arrest Convention. It is pertinent to note the judicial activism of the Apex Court reflected in the land mark verdict in *M.V.Elizabeth* by evolving an admiralty jurisprudence comprising of international conventions and maritime practices. It is also heartening to note that India has made a belated attempt to draft an Admiralty Bill 2012.

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<sup>11</sup> International convention on the Arrest of Ships 1999