M.V.A.L. Quamar

Vs

Tsavliris Salvage (International) Ltd. & Ors.

Civil Appeal No. 4578 of 2000 ETC.

(Mr. S.B. Majmudar and Mr. Umesh C. Banerjee, JJ.)

17.08.2000

JUDGMENTS

S.B. Majmudar, J.:— I have gone through the erudite and exhaustive judgment prepared by learned Brother, U.C. Banerjee, J., in these appeals. I respectfully agree with the conclusion reached by him. However, as the matter at issue has wide repercussions regarding the scope and ambit of admiratly jurisdiction vested in the Chartered High Courts or their successor High Courts, like the High Court of Andhra Pradesh, I deem it fit to record my reasons for concurring with the decision arrived at by learned brother.

At the outset, admitted and well-established facts deserve to be noted in order to appreciate the contours of controversy posed for ourconsideration. They can be enumerated as under:

1. Respondent No.2 before this Court has suffered a foreign decree passed by the High Court of Justice, Queen's Bench Division, Admiralty Court, England in monetary terms by way of damages for breach of contract for salvaging and towing the vessel "M.V.Al Tabish" alleged to be renamed as "M.V. Al Quamar". Respondent No.1- company before us is the decree-holder. It has filed the suit in the Admiralty Court in England alleging that pursuant to a contract of salvage entered into by Respondent No.1 with Respondent No.2, it had mobilized its tug for salvaging and towing the aforesaid vessel which had met rough weather in the high seas. Its further case against Respondent No.2 is that though the plaintiff was prepared to render services as per the contarct it was prevented from rendering the same by Respondent No.2 which committed breach of contract and hence this suit in the Admiralty Court for damages for breach of contract pertaining to salvaging the said ship. As the alleged breach of contract for salvage had admittedly taken place in London, the suit was filed in the Admiralty Court, England.

2. After getting notice of the filing of the suit, Respondent No.2 subsequently remained ex-parte and a decree for damages for breach of salvage contract was passed by the English Court on 02.11.1998. It was held by that Court that Respondent No.2 was liable in the sum of US $ 265,000 together with interest @ 9.51% p.a. from 01.06.1994. It was also ordered that copies of the order and judgment were to be served on Respondent No.2 at their address in Cyprus and the order was to become final and binding after seven days of service.

3. Admittedly the vessel in question for salvaging the same, the contract was entered into by Respondent No.1 with Respondent No.2, was not available for being proceeded againt in the English Court and only Respondent No.2 was joined as a party to litigation. Consequently, the aforesaid money decree passed by the English Admiralty Court remained a decree in personam against Respondent No.2.

4. The vessel in question having crossed the high seas for discharging the cargo carried by it ultimately was found to have anchored in Visakhapatnam Port in Andhra Pradesh. Thus, admittedly, the res in question was found located in the territorial waters of Andhra Pradesh within the territorial jurisdiction of Admiralty Court of Andhra Pradesh, being the High Court of Andhra Pradesh, as a successor to the Chartered High Court of Madras.

5. Respondent No.1 decree-holder having come to know about the anchoring of the said ship at Visakhapatnam filed an execution petition invoking Section 44-A of the Civil Procedure Code (for short "C.P.C.") for arrest and detention of the ship and for recovering the decretal amount from Respondent No.2 judgment-debtor on the ground that it had obtained a foreign money decree from competent Admiralty Court against Respondent No.2, who was the owner of the said res M.V. Al. Tabish.

6. In the said execution petition the res in question, namely, M.V. Al Tabish was joined as a party opponent as it was required by the decree-holder to be attached and sold in execution of its decree against Respondent No.2.

7. The master of the ship M.V. Al Quamar contested the execution proceedings and raised a preliminary objection about their maintainability in the Andhra Pradesh High Court. The Andhra Pradesh High Court, by its impugned judgment, took the view that the execution petition is maintainable and directed that evidence be led as per Order XXI, Rule 58 of the C.P.C., for deciding the question whether the vessel M.V.Al Quamar really belongs to the judgment-debtor- Respondent No.2 or to a stranger, third party purchaser, who is said to have renamed vessel M.V.Al Tabish as M.V.Al Quamar and, therefore, according to the appellant-master of the said vessel it has no longer remained the property of the judgment-debtor - Respondent No.2. The resolution of this question on evidence is pending before the High Court.

8. It is not in dispute between the parties that in the aforesaid execution proceedings pending in the Andhra Pradesh High Court on its Admiralty side, original judgment-debtor of English Court who has suffered decree from the Admiralty Court of England though served has not thought it fit to appear before the Andhra Pradesh High Court and to contest these proceedings.

9. By an ad interim order of the Andhra Pradesh High Court, the ship in question has been attached and is lying detained in Visakhapatnam Port awaiting further orders of the Court.

10. The High Court of Andhra Pradesh, in exercise of its Admiralty jurisdiction, falls within the definition of "District Court", on a conjoint reading of Section 44-A and Section 2(4) as it is the principal Court of original Admiralty jurisdiction as contra-distinguished from its appellate or revisional jurisdiction.

In the light of the aforesaid well-established facts on record, the short question arises for our consideration whether the aforesaid execution proceedings are maintainable before the High Court of Andhra Pradesh as an executing court for enforcing the foreign decree passed by the English Admiralty Court by attachment and sale of the vessel in question.

Mr. P. Chidambaram, learned senior counsel for the appellant, placed two submissions for our consideration in support of these appeals. The same are as under:

1. Invocation of Section 44-A of the C.P.C. by Respondent No.1 decree-holder of a decree passed by the Admiralty Court is misconceived as the said provision gets excluded by Section 112(2) of the

C.P.C.

2. In the alternative, it is ocntended that even assuming that the said provision applies on the facts of the present case, the Andhra Pradesh High Court is not a competent Court which can entertain such excution proceedings under Section 44-A of the C.P.C.

We have to resolve these controversies in the light of the aforesaid admitted and well-established facts on record. It is made clear that if such proceedings are maintainable, then the moot question which arises is whether the attached ship M.V.Al Quamar realty belongs to Respondent No.2 judgment-debtor or it belongs to a third party, who is alleged to be the purchaser of the said original ship-M.V.Al Tabish. It admittedly belonged to Respondent No.2 at the time when the suit was filed in the English Admiralty Court by Respondent No.1 on 11.10.1994 and, pending those proceedings, Respondent No.2 is alleged to have sold the said vessel by a Memorandum of Agreement dated 04.02.1997 for a sum of US$ 2,515,000 to third party and the master of which ship - M.V.Al Quamar is contesting the execution proceedings, will have to be resolved and the evidence which is being recorded by the executing Court at present has also to be looked into. We are not concerned with this factual controversy. All that was argued before us and which is to be decided is about the maintainability of the execution petition on demurer, meaning thereby, assuming that the averments in the execution petition are true. That is how Mr. P. Chidambaram, learned senior counsel for the master of the vessel and Mr. F.S. Nariman and Mr. Ashok H. Desai, learned senior counsels for Respondent No.1 decree-holder have addressed us and sought appropriate decision in the present proceedings.

I may now proceed to deal with the aforesaid two contentions pressed in service by Mr. P. Chidambaram, learned senior counsel for the appellant in support of these appeals.

CONTENTION NO.1:

So far as applicability of Section 44-A of the C.P.C. is concerned, we may usefully refer to the said provision for appreciating its correct scope. The same is already reproduced in the judgment of brother Banerjee, J.

A mere glance at that provision, read with relevant explanations, shows that before it is invoked by any decree-holder, the must satisfy the following conditions.

1. A Decree-holder who seeks execution must be armed with a money decree passed by any of the superior Court of any reciprocating territory, being any foreign country or territory which the Central Government may, by notification in official gazette, has declared to be a reciprocating territory for the purpose of the Section.

2. Such an execution petition can be entertained by the executing Court in India being the District Court that will be clothed with the legal fiction as if the said foreign decree was passed by itself and whose aid and assistance are required for executing such a decree.

3. Such a decree can be put up for execution before a District Court in India being the principal Civil Court of original jurisdiction and which will include the local limits of the original civil jurisdiction of a High Court.

4. Once such execution petition is filed before the appropriate District Court the entire machinery of Section 47 for execution of Indian decree would automatically get attracted.

5. In such execution proceedings, the judgment-debtor of a foreign Court decree will be entitled to satisfy the executing Court in India that the foreign decree cannot be executed against him as it is hit by any of the exceptions specified in Clauses (a) to (f) of Section 13 of the C.P.C.

The first grievance voiced by Mr. P. Chidambaram, learned senior counsel for the appellant, is to the effect that Section 44-A itself gets excluded by Section 112(2) of the C.P.C. The said provision reads as under:

"112(2) Nothing herein contained applies to any matter of criminal or admiralty or vice-admiralty jurisdiction, or to appeals from orders and decrees of Prize Courts."

Now if this provision is read in isolation it may project a situation wherein the entire Code may get excluded for governing any matter of criminal or admiralty or vice-admiralty jurisdiction. However, a closer look at the said provision exposes the hollowness of the aforesaid contention. We have to keep in view the fact that the C.P.C. is divided into various parts. Section 112 occurs in Part VII dealing with appeals. Sections 96-99A deal with one sub-topic-appeals from original decrees. There is a second sub-topic- appeals from appellate decrees. They are dealt with by Sections 110-103. The third sub-topic in the said Part VII deals with appeals from orders. They are dealt with by Sections 104-106. Then falls another sub-topic-general provisions relating to appeals. They are dealt with by Sections 107-108 and lastly falls the sub-topic - appeals to the Supreme Court. This sub-topic-appeals to the Supreme Court is dealt with by Sections 109-112. It is pertinent to note that erstwhile Section 110 dealing with ‘value of subject matter in the Supreme Court appeals’ is deleted. Section 111 dealing with ‘bar of certain appeals’ is also deleted. Section 111-A dealing with ‘appeals to Federal Court’ is also deleted and then remains Section 112. Sub-sections (1) and (2) thereof earlier extracted in the judgment of brother Banerjee, J bears repetition.

"**112. Savings. —** (1) Nothing contained in this Code shall be deemed -

(a) to affect the powers of the Supreme Court under Article 136 or any other provision of the Constitution, or

(b) to interfere with any rules made by the Supreme Court, and for the time being in force, for the presentation of appeals to that Court, or their conduct before the Court.

(2) Nothing herein contained applies to any matter of criminal or admiralty or vice-admiralty jurisdiction, or to appeals from orders and decrees of Prize Courts".

Mr. P. Chidambaram, learned senior counsel for the appellant, is prima facie right when he contends that the word "herein" is of wide import and may exclude the gamut of the entire Civil Procedure Code including Section 44-A so far as admiralty or vice-admiralty jurisdiction is concerned. However, it is pertinent to note that while sub-section (1) of Section 112 provides for excluding the entire Code in connection with the topics covered by sub-clauses (a) & (b) of sub-section (1) thereof pertaining to powers of the Supreme Court in appeals. Sub-section (2) of Section 112 conspicuously does not contain the same phraseology i.e. "nothing contained in this Code" instead it uses the phraseology "nothing herein contained", meaning thereby, nothing contained in the sub-topic "appeals to the Supreme Court" would apply to admiralty or vice-admiralty jurisdiction amongst others and nothing more. The said provision cannot get telescoped into any other part of the C.P.C. nor can it travel beyond the limited scope and periphery of its operation as indicated in the said provision. It has to be kept in view that Part VII deals with `appeals’, which is the genus of all the

aforesaid sub-topics in Part VII, that dealt with the species i.e. different types of appeals before different Courts in the hierarchy of civil proceedings. It is in this connection that Section 112(2) has to be read. It must, therefore, be held that what is excluded by Section 112(2) by the phrase "nothing contained herein" is the sub-topic dealing with "appeals to the Supreme Court". It is not made applicable by sub-section (2) of Section 112 to admiralty or vice-admiralty jurisdiction, amongst others. In short, the bar of Section 112(2) operates within and is confined to the question of "appeals to the Supreme Court" neither can it go backward to any other Parts from I-VI nor can it go forward and touch upon any other subsequent provisions found in Parts VIII to XI of the C.P.C. It is to be noted that Section 47 dealing with execution proceedings is found in Part-II. It is miles away from Part-VII dealing with "appeals" wherein is found Section 112(2). This aspect can be further highlighted from having a look at Section 4 which is a general provision excluding the operation of the entire C.P.C. to special jurisdictions or situations as contemplated by sub-sections (1) and (2) thereof, which read as under:

"**4. Savings.** — (1) In the absence of any specific provision to the contrary, nothing in this Code shall be deemed to limit or otherwise affect any special or local law now in force or any special jurisdiction or power conferred, or any special forum of procedure prescribed, by or under any other law for the time being in force.

(2) In particular and without prejudice to the generality of the proposition contained in sub-section (1), nothing in this Code shall be deemed to limit or otherwise affect any remedy which a landholder or landlord may have under any law for the time being in force for the recovery of rent of agricultural land from the produce of such land".

We do not find any such general exception or exclusion of the entire body of Code to admiralty jurisdiction. We may also turn to Section 140 which is found in Part-XI dealing with "miscellaneous provision". The said Section 140 also bears repetition. It provides as under:

"140. Assessors in causes of salvage, etc. - (1) In any admiralty or vice-admiralty cause of salvage, towage or collision, the Court, whether it be exercising its original or its appellate jurisdiction, may, if it thinks fit, and shall upon request of either party to such cause, summon to its assistance, in such manner as it may direct or as may be prescribed, two competent assessors; and such assessors shall attend and assist accordingly.

(2) Every such assessor shall receive such fees for his attendance, to be paid by such of the parties as the Court may direct or as may be prescribed".

This Section clearly indicates that it is not the legislative intent to exclude the applicability of the C.P.C. to admiralty jurisdiction whether original or appellate. Consequently, the first submission of Mr. P. Chidambaram, learned senior counsel for the appellant, has to be rejected.

CONTENTION NO.2

So far as this contention is concerned, it has to be kept in view that basic conditions of Section 44-A have clearly been satisfied by the decree-holder, Respondent No.1, who seeks to execute foreign decree of Admiralty Court against Respondent No.2 who has suffered the decree in personam from the English Admiralty Court. Certified copy of the decree is already filed in the execution proceedings. It is, admittedly, a decree passed by the superior Court of Admiralty in England. That Court is situated in reciprocating territory as United Kingdom has been duly notified by the Central

Government as a reciprocating territory. However, Mr. P. Chidambaram, learned senior counsel for the appellant, submitted that even if that is so, on a combined reading of Section 44-A and Section 39 sub-sections (1) and (3) of the C.P.C., it must be held that before such execution proceedings can be entertained by the Andhra Pradesh High Court in exercise of its admiralty jurisdiction as successor to the Chartered High Court of Madras, it must be shown that it was a competent Court which could have entertained such a suit of Respondent No.1 against Respondent No. 2 seeking decree in personam against it. He submitted that neither the foreign decree-holder Respondent No.1 nor foreign judgment-debtor Respondent No.2 are Indian Nationals. None of them has any connection which India as residents or having any immovable property in India and no part of cause of action has also arisen in India in favour of Respondent No.1 against Respondent No.2 That the foreign decree of appellate Court is a personal decree against Respondent No.2 who is alleged to have committed breach of contract in London and hence the Admiralty Court's jurisdiction was invoked in England because the suit filed by Respondent No.1 against Respondent No.2 was pertaining to the breach of salvage contract regarding Respondent No.2's ship M.V.Al Tabish which, on the date of the filing of the suit in English Admiralty Court, allegedly belonged to Respondent No.2. According to Mr. P. Chidambaram, learned senior counsel for the appellant, as no part of cause of action in this case had arisen in India and, especially within the local territorial limits of the Andhra Pradesh High Court, even though it may be acting as an Admiralty Court such a suit could not have been filed by Respondent No.1 personally against Respondent No.2 in the Andhra Pradesh High Court. If that is so, the Andhra Pradesh High Court is not competent to execute such a decree even by resorting to the legal fiction created by Section 44-A by treating such a foreign decree of English Admiralty Court as if it was a decree passed by the Andhra Pradesh Admiralty Court. In order to buttress this contention Mr. P. Chidambaram, learned senior counsel for the appellant, gave an extreme example. He placed a hypothetical illustration for our consideration. An English national files a suit against another English national for breach of contract regarding purchase of movable or immovable property in England. A competent English Court passes a decree at common law by way of damages for breach of contract by the foreign defendant and in favour of foreign plaintiff. It both the decree-holder as well as the judgment-debtor happen to take a trip to India as tourists and if the English decree-holder tourist finds his English judgment-debtor to be possessed of costly writwatch or other costly movable property in Agra when both of them are on a sight seeing tour of Taj Mahal at Agra can execution of such a foerign decree be enforced in the District Court at Agra? Mr. P. Chidambaram, learned senior counsel for the appellant, posed this question to himself. He submitted that a superficial reading of Section 44-A may entitle such a foreign national English decree-holder armed with certified copy of the decree to file execution proceedings for recovering his money claim against the foreign judgment-debotor in the District Court at Agra. He submitted that such execution petition would be travesty of justice and would reflect an absurd situation which cannot be countenanced on a conjoint reading of Section 44-A and Sections 38, 39 & 44 of the C.P.C.

Such as extreme contention canvassed by Mr. P. Chidambaram, learned senior counsel for the appellant, does not really call for any serious discussion in the present proceedings as we are not concerned with such a hypothetical situation. But the situation is not so alarming as wrongly assumed, with respect, by Mr. P. Chidambaram. When we turn to Section 38, we find that a decree may be executed either by the Court which passed it, or by the Court to which it is sent for execution. This Section by itself refers to decrees passed by Indian Courts against defendants who may be within the territorial jurisdiction of the competent Civil Court in the light of the correct place for suing in such Courts as laid down by Sections 15 to 20 of the C.P.C. If the nature of the suit against the defendant falls within any of these provisions then, admittedly, such a decree can be

executed by the same Court which passed the decree being a competent Court but it can be sent by that competent Court to any other Court for execution if the defendant has properties within the territorial jurisdiction of any other competent Court in India and that is what Section 39(1) provides. The said section reads as under:

"**39. Transfer of decree.—(1)** The Court which passed a decree may, on the application of the decree-holder, send it for execution to another Court of competent jurisdiction, -

(a) if the person against whom the decree is passed actually and voluntarily resides or carries on business, or personally works for gain, within the local limits of the jurisdiction of such other Court, or

(b) if such person has not property within the local limits of the jurisdiction of the Court which passed the decree sufficient to satisfy such decree and has property within the local limits of the jurisdiction of such other Court, or

(c) if the decree directs the sale or delivery of immovable property situate outside the local limits of the jurisdiction of the Court which passed it, or

(d) if the Court which passed the decree considers for any other reason, which it shall record in writing, that the decree should be executed by such other Court.

(2) The Court which passed a decree may of its own motion send it for execution to any subordinate Court of competent jurisdiction.

(3) For the purposes of this section, a Court shall be deemed to be a Court of competent jurisdiction if, at the time of making the application for the tranfer of decree to it, such court would have jurisdiction to try the suit in which such decree was passed". Sub-section (3) of Section 39 provides that such a transferee court, admittedly situated in India, shall be deemed to be a court competent to execute such a transferred decree if, at the time of making the application for transfer of decrees, it is shown to have jurisdiction to try the suit in which such decree was passed. It must at once be noted that Section 38 refers to executing Courts in India which have themselves passed the decrees in suits which were within their jurisdiction and were admittedly, therefore, competent Courts. Such decrees passed by competent Courts in India can also be executed by getting the decrees transferred to other competent Courts in India provided the requirements of Section 39(1) read with sub-section (3) are satisfied. Therefore, the transferee Court in India must be a competent Court, which at the time of making an application for transfer of decree by the decree-holder, should be shown to have jurisdiction to pass such a decree even originally. It is easy to visualise that, this requirement of a transferee Court in India which gets jurisdiction qua such execution proceedings only on transfer from competent executing Court which has passed by the decree in India is conspicuously absent, when we turn to Section 44-A. It nowhere lays down that the District Court in which decree of any superior Court of a foreign territory is submitted for execution by a foreign decree-holder must be a Court which could have been competent to pass such a decree if in the first instance such a suit was filed by a foreign national against another foreign national in India. The second distinguishing feature is that Section 44-A permits the foreign judgment debtor to challenge the foreign decree even before the executing Court being the District Court in India on any of the grounds mentioned in Clauses (a) to (f) of Section 13. A transferee Court under Section 39 which is called upon to execute an Indian decree passed by a competent Indian Court against the judgment-debtor cannot permit the judgment-debtor to go beyond the decree sought to be executed by such transferee Court.

But apart from these two distinguishing features and even proceeding on the lines as suggested by Mr. P. Chidambaram, learned senior counsel for the appellant, that in any case the District Court in India which is called upon to execute a foreign decree by treating it as if it was passed by itself should, in the first instance, be shown to be competent to pass such a decree, the result would be the same on the facts of the present case.

It is no doubt true that the foreign decree, which is sought to be executed, is a money decree passed by the English Admiralty Court in favour of Respondent No.1 against Respondent No.2. That decree is in personam for the simple reason that, at the time when the suit was filed in England, the res, namely, M.V.Al Tabish was not within the territorial waters of English Admiralty Court. Therefore, the plaintiff Respondent No.1 had to sue only Respondent No.2 in personam for recovering damages for breach of salvage contract entered into between them. The said decree has become final between the parties. It is also axiomatic that if the res, namely, the vessel M.V. Al Tabish was available within the territorial waters of English Admiralty Court it would have also become co-defendant along with its owner Respondent No.2 and then the decree would have a decree in rem against the vessel but if Respondent No.2 had submitted to the jurisdiction of English Admiralty Court, the proceeding would hav been converted into proceedings in personam and then a decree would have been passed also in personam against Defendant No.2 along with decree in rem against the vessel. If that had happened there would have been no difficulty for the English decree-holder in pursuing the vessel M.V. Al Tabish and to get his decree executed against the vessel wherever it went during the course of its voyage over the high seas and its ultimate anchorage in any port for the discharge or reloading of cargo in the course of maritime business. The contract of salvage of such vessel and any proceedings in connection with the execution of such contract or its breach raising claim for damages would remain in the realm of maritime claim legitimately within the jurisdiction of Admiralty Courts. In the absence of a decree in rem against the vessel whose salvage contract have given rise to the present maritime claim, the decree passed by competent Admiralty Court in England though remains a decree in personam could validly be executed by English Admiralty Court itself.

Once decree of foreign Superior Court is sought to be executed under Section 44-A of the C.P.C. as if it is the decree of the Indian Court executing the same, no further question would survive regarding competence of such executing court. Still let us consider in the alternative the question of competence of the Andhra Pradesh Admiralty Court for entertaining such a suit in its inception. Then the question arises whether the Andhra Pradesh High Court which is, admittedly, having admiralty jurisdiction as a successor to the Chartered High Court of Madras could have entertained such a suit in the first instance. We have, therefore, to visualise a situation by way of flashback as if a suit had to be filed in the first instance by Respondent No.1 against Respondent No.2 in the admiralty jurisdiction of the Andhra Pradesh High Court in 1994 instead of in an English Court provided the res i.e. the ship was found at that time in the territorial waters of Andhra Pradesh. Then Respondent No.1 could have filed a suit in personam against Defendant No.2 because, admittedly, it was alleged to have committed breach of salvage contract in connection with the sea-going vessel M.V. Al Tabish which is a res and which by chance was found within the territorial waters of the port of Visakhapatnam in 1994. Such a ‘res’ would have admittedly remained within the original admiralty jurisdiction of the Andhra Pradesh High Court. Respondent No.1 thus could have validly filed a suit praying for decree in rem against the vessel M.V. Al Tabish making it as Defendant No.1 along with its owner Defendant No.2. What the English Court could do in connection with the suit validly filed on 11.10.1994 by Respondent No.1 againsst Respondent No.2 would have validly done by the Andhra Pradesh High Court if the vessel, Respondent No.1 and Respondent No.2 were all within the territorial admiralty jurisdiction of the Andhra Pradesh High Court at the time. It is the

case of Respondent No.1 decree-holder that pending the said proceedings, illegally and by way of a fictitious transaction, the said vessel is alleged to have been tranferred by Respondent No.2 in favour of M.V. Al Quamar and the ship's name is changed to M.V. Al Quamar from M.V.Al Tabish though in fact it still remains the property of Respondent No.2. That is a question which is still to be considered by the Andhra Pradesh High Court in the execution proceedings and for which we are not called upon at this stage to make any observations. But the fact remains that in such settings of the dispute between the parties such a suit could have been validly filed in the Andhra Pradesh High Court's admiralty jurisdiction if the vessel was in its territorial waters on 11.10.1994. In such a contingency suit could then have been validly filed by plaintiff-Respondent No.1 against defendant-Respondent No.2 and it could have validly joined the vessel also as Defendant No.2. The Admiralty Court, being the Andhra Pradesh High Court, could have under these circumstances validly entertained the suit and would have been perfectly competent to pass a decree in rem against the ship as well as the decree in personam against its owner Defendant No.2 if it had submitted to its jurisdiction for getting the ship bailed out. Such suit is perfectly maintainable in the Andhra Pradesh High Court in exercise of its admiralty jurisdiction as already decided by a Bench of this Court in the case of M.V. Elisabeth and Others vs. Harwan Investment and Trading Pvt. Ltd., Hanoekar House, Swatontapeth, Vasco-De-Gama, Goa etc. [1993 Supp (2) SCC 433]. That was a case in which the res in question was found within the territorial waters of Visakhapatnam Port. Neither the plaintiff nor the defendant had any nexus with the territorial limits of the Andhra Pradesh. The cause of action has also had not arisen within Andhra Pradesh. The cause of action has also had not arisen within Andhra Pradesh still because of the presence of res in territorial waters of the Andhra Pradesh, it was held by this Court that the Andhra Pradesh High Court as Admiralty Court had perfect jurisdiction to arrest the ship being sued as Defendant No.1 before judgment. In the light of the aforesaid settled legal position, therefore, it must be held that once the vessel - M.V. Al Tabish came within the territorial waters of the Andhra Pradesh, the Andhra Pradesh High Court, as Admiralty Court, had complete jurisdiction to even initially entertain the suit against not only the ship but against its owner, that is alleged to have committed breach of salvage contract qua that ship. If such a suit was maintainable in the inception before the Andhra Pradesh High Court in its admiralty jurisdiction, then at the executing stage when Section 44-A was invoked for executing a similar decree passed by competent superior Court in England in exercise of admiralty jurisdiction, such a decree could validly be executed by invoking the aid of corresponding Admiralty Court being the Andhra Pradesh High Court when the res was already within its jurisdiction. Consequent, even reading Section 39(3) with Section 44-A, there is no escape from the conclusion that the time when execution petition was moved before the Andhra Pradesh High Court by even treating it as a transferee Court it can be said to be perfectly competent to entertain such a suit even in its inception against the ship as well as its alleged owner and to resolve the dispute between Respondent No.1 and Respondent No.2. It has to be kept in view that if the ship in question which is arrested at Visakhapatnam had sailed out of the territorial waters of Andhra Pradesh then the Andhra Pradesh High Court would have lost its jurisdiction to entertain such a suit or the execution proceedings for executing the decree of foreign Court. But once it was within its territorial waters, the ship could have been validly subjected to such a suit not only against itself but against its owner. Whether the subsequent purchaser is a genuine purchaser of the ship and whether the sale transaction is hit by any other provision of law and whether the ship still remains the property of Respondent No.2 could have been validly examined in such a suit if it was originally filed before the Andhra Pradesh High Court in its admiralty jurisdiction. Under these circumstances, it cannot be said in the background of this fact situation that the Andhra Pradesh High Court, in exercise of its admiralty jurisdiction, was not competent to even originally entertain such a suit in which a foreign Court had passed the decree which is sought to be executed before it. Both the English Admiralty Court, which is, admittedly a

Court of competent jurisdiction, as well as the Andhra Pradesh High Court, being a corresponding Court of competent admiralty jurisdiction, could not only entertain such a suit in the first instance but could equailty be competent to execute such a decree of Admiralty Court.

The aforesaid analysis of Sections 44-A, 38 and 39 in the light of the fact situation which is well-established on record furnishes a perfect answer to the imaginary apprehension voiced by Mr. P. Chidambaram, learned senior counsel for the appellant, and to the alleged absurd situation, which, according to him, may result if such execution petitions are entertained under Section 44-A for execution of foreign decrees passed between two absolute foreigners who have neither any immovable property nor place of residence in India. It is easy to visualise that a foreign English tourist who might have suffered a money decree against another foreign tourist in England may not be able to execute his decree in the District Court at Agra in India only because his judgment debtor who is a mere tourist is found to be possessed of some valuable property like jewellery or wrist-watch etc., as neither wrist-watch nor the jewellery nor even any valuable carpet possessed by a foreign judgment-debtor can give jurisdiction to the District Court, Agra to even in the first instance entertain such a suit by a foreign national against another foreign national but has no moorings in India and suit againt whom does not fall within the fore-corners of Sections 15-20 of the C.P.C. subject, of course, to one rider i.e. such foreign national had not submitted to the jurisdiction of the District Court, Agra. If he had, then the District Court, Agra could have entertained such a suit in the first instance. Neither the wrist-watch nor any other movable valuable properties of the foreign judgment debtor can be equated with a res covered by a maritime claim which can be validly subjected to adjudication for a decree in rem by a competent Admiralty Court within whose territorial jurisdiction the res is found to be available for being subjected to arrest and detention either pending such Admiralty suit or in execution of the decree passed by a competent Admiralty Court, whether local or foreign, as the casee may be, subject to such foreign court being a Court in reciprocal territory as laid down by Section 44-A of the C.P.C. The District Court, Agra could not have passed a decree in rem against wrist-watch or carpet treating it to be a res. Consequently, the apprehension voiced by Mr. P. Chidambaram, learned senior counsel for the appellant, about such extraordinary, unimaginable or horrendous situation would remain nearly imaginary. It is only in the light of the present facts we hold that Section 44-A was rightly invoked by Respondent No.1 against Respondent No.1 and also againt the vessel M.V. Al Tabish, which, according to Respondent No.1., is renamed as M.V. Al Quamar and, which according to him, still belongs to its judgment-debtor Respondent No.2. Whether the said contention is right or wrong will have to be examined by the High Court under Order XXI Rule 58 of the C.P.C., as noted earlier. We say nothing on this factual aspect. All that we hold in the present proceedings is to the effect that the execution petition on demurer was rightly held by the High Court as maintainable before it. The second contention of Mr. P. Chidambaram, learned senior counsel for the appellant, therefore, is also devoid of any merits and stands rejected.

The appeals, therefore, fail subject to the liberty already gievn in the judgment of brother Banerjee, J. to the appellant to take away the ship subject to furnishing of suitable bank guarantee of a nationalised bank as indicated therein.

SUPREME COURT OF INDIA

Hon'ble Mr. S.B. Majmudar and Mr. Umesh C. Banerjee, JJ.

M.V.A.L. Quamar Appellant

versus

Tsavliris Salvage (International) Ltd. & Ors. Respondents

Civil Appeal No. 4578 of 2000 with 4579 of 2000

Decided on 17th August, 2000

JUDGMENT

Umesh C. Banerjee, J.:— Leave granted in both the SLPs.

By consent of learned Senior Advocates of the parties, the appeals were heard finally and being disposed of by this common judgment.

Assumption of Admiralty jurisdiction by Andhra Pradesh High Court and passing of an order of arrest in execution of a judgment and decree of the High Court of Justice Queen's Bench Division, Admiralty Court in London in case No. 194 Folio No. 1693 dated 9.11.1988, is the key issue for discussion in these appeals by the grant of special leave.

Adverting to a brief reference to the factual aspect of the matter at this juncture it appears that an Execution Petition was filed before the learned Single Judge of the Andhra Pradesh High Court in terms of Section 15 of the Admiralty Courts Act and Section 44A read with Order XXI Rule 10 of the Code of Civil Procedure for executing the decree issued by the High Court of Justice Queen's Bench Division Admiralty Court in an action by the first respondent against the second respondent herein claiming damages for repudiation of an L.O.F. salvage contract. Needless to record that the second respondent was said to be the owners of the vessel M.V.AL QUAMAR ex AL ALTABITH.

The factual score depicts that pending the Execution Petition, the decree holder prayed for an Interlocutory Order to issue a warrant of arrest against the vessel together with Hull: tackle: Engines: Machinery equipments stores etc. The learned Single Judge of the Andhra Pradesh High Court on 15th September, 1999 granted an interim order as prayed for on a prima facie view of the matter that the Execution Petition can be filed in the High Court which is otherwise having original admiralty jurisdiction. The records depict that the appellant herein filed a petition to vacate the interim order principally on the ground that the ownership of the ship having been transferred bona fide and for valuable consideration to Quamar Shipping Ltd., the ship as attached in terms of the order of 15th September, 1999, cannot possibly be kept under attachment in execution of the decree against the original owner being the respondent No.2 herein. The appellant contended that in any event, the latter being, not a party to the judgment, question of execution on the basis thereof would otherwise be a total miscarriage of justice.

Incidentally, the learned Single Judge in his judgment has been pleased to record that the matter in issue involves eminently an arguable case as regards the maintainability of the Execution Petition and the proper course should therefore be, as the learned Judge pointed out to hear the Execution Petition itself at a date early and to continue interim order during the interegnum.

The records depict that the appellant herein subsequent to the order as above moved the Appellate Forum and the Appellate Court while dismissing the appeal observed as below:—

"In our view, the opinion expressed by the learned single Judge that the execution petitioner (first respondent herein) has an arguable case as regards the maintainability of the E.P. and that the contentious issues ought to be dealt with more appropriately at the hearing of the E.P. instead of entering into a discussion at the interlocutory stage, cannot be faulted. The E.P. itself has been posted for hearing and the hearing would have been concluded by now, but for this intervening appeal. Equally, the other reason given by the learned Judge that vacation of the interim order would have the potential effect of making the execution petition infructous and, therefore, the interim order ought not be vacated before the disposal of the E.P. also appeals to us. Considerations of prima facie case and balance of convenience were rightly taken into account by the learned single Judge. We see no valid ground to suspend the interim order.

The contention of the learned counsel for the appellant that continuance of interim order should be made conditional upon furnishing of security or at least insisting on an undertaking to indemnify the loss, does not merit acceptance. Incidentally, it may be mentioned that the counsel for the appellant did not express any doubts about the solvency and financial capacity of the first respondent company.

However, the grievance of the appellant that on account of the interim order, the appellant is incurring substantial expenditure day to day, has to be suitably redressed. To this limited extent, we are inclined to safeguard the interest of the appellant by directing the first respondent to furnish an undertaking to the satisfaction of the Registrar (Judicial) of this Court to pay a maximum amount of Rs. 600 U.S. Dollars per day from 19.11.1999 (date of hearing this appeal) onwards till the date of disposal of E.P. and also to pay crew's wages subject to the proof of actual expenditure being furnished by the appellant to the first respondent in respect of all the items.

The O.S.A. is dismissed subject to the above direction. No. costs.

We consider it a fit to be heard by Division Bench".

In terms of the orders as above, the Execution Petition itself was placed before the Bench of the learned Chief Justice wherein upon recording concurrence as regards the maintainability of the petition it was observed that the execution petition be heard on merits and hence the Special Leave Petition before this Court under Article 136 of the Constitution being SLP@ No. 4410 of 2000. Incidentally, be it noted that there is in the record of this Court another SLP being SLP@ No. 18616 of 1999 against the judgment of the Division Bench of the High Court as passed earlier and as noticed above, but since both the matters pertain to self same subject matter, this Bench deemed it fit to hear both the appeals together and deal with the same in one judgment.

Before adverting to the most illuminating and lucid submissions of the learned Senior Advocates Shri P. Chidambaram, for the appellant and Shri Ashok H. Desai, for the respondent No.1, a brief backdrop of the admiralty jurisdiction of the country may be a useful introduction; The three erstwhile Presidency High Courts (in common and popular parlance Chartered High Courts) namely, Calcutta, Bombay and Madras were having the Letters Patent for the conferment of the ordinary original civil jurisdiction and by reason of the provisions contained therein read with the Admiralty Court Act, 1861 and subsequent enactment of Colonial Courts of Admiralty Act, 1890 and Colonial Courts of Admiralty (India) Act, 1891, the admiralty jurisdiction on the three High

Courts noticed above can be fairly traced. This special Admiralty jurisdiction was saved by the Government of India Act, 1915 as also that of 1935 and subsequently protected in terms of Article 225 of the Constitution.

By and under the provisions of Colonial Courts of Admiralty Act 1890, the High Courts of these three Presidency towns were conferred with the same jurisdiction as was vested in the High Court of England and the High Courts were declared to be otherwise competent to regulate their procedure and practice as would be deemed necessary corresponding to the Indian perspective in exercise of the admiralty jurisdiction by way of rules framed in that regard. There is thus no manner of doubt that there existed or is existing any fetter in regard to the exercise of admiralty jurisdiction in so far as the three High Courts at Calcutta, Bombay and Madras are concerned.

The other introductory aspect pertains to the conferment of admiralty jurisdiction on to the Andhra Pradesh High Court. In terms of provisions of Andhra Pradesh Act of 1953 (Act 30 of 1953) certain territories from erstwhile State of Madras were included in the State of Andhra Pradesh and the Court at Andhra Pradesh was re-designated as the High Court of Andhra Pradesh when the State was so named under the States Re-organisation Act, 1956. The Andhra Pradesh High Court 'being the successor' of the High Court of Madras [presently Tamilnadu] has thus the similar jurisdiction as was so vested in the Madras High Court prior to the transfer. Needless to say that since Visakhapatnam is also included in the State of Andhra Pradesh, the port of Visakhapatnam falls within the admiralty jurisdiction of the High Court of Andhra Pradesh. It is in this context observations of this Court in **M.V. Elisabeth & Others vs. Harwan Investment and Trading Pvt. Ltd., Goa** AIR 1993 SC 1014 seem to be of some assistance. This Court in paragraph 26 of the report observed:

"Assuming that the admiralty powers of the High Courts in India are limited to what had been derived from the Colonial Courts of Admiralty Act, 1890 that Act, having equated certain Indian High Courts to the High Court of England in regard to admiralty jurisdiction, must be considered to have conferred on the former all such powers which the latter enjoyed in 1890 and thereafter during the period preceding the Indian Independence Act, 1947. What the Act of 1890 did was, as stated earlier, not to incorporate any English statute into Indian law, but to equate the admiralty jurisdiction of the Indian High Courts over places, persons, matters and things to that of the English High Court. As the Admiralty jurisdiction of the English High Courts expanded with the progress of legislation, and with the repeal of the earlier statutes, including in substance the Admiralty Court Acts of 1840 and 1861, it would have been reasonable and rational to attribute to the Indian High Courts corresponding growth and expansion of admiralty jurisdiction during the pre-independence era. But a restrictive view was taken on the question in the decision of the High Courts cited above".

There is thus no scope to conclude that the Admiralty jurisdiction of the Andhra Pradesh High Court stands 'frozen' or 'atrophied' in any way whatsoever.

The discussion above pertaining to the admiralty jurisdiction of the Andhra Pradesh High Court in our view is rather pertinent more so by reason of the submissions that the matter in issue pertains to maritime claim. English legislations after the Admiralty Courts Act, 1890 are galore in the matter of widening the scope and ambit of the jurisdiction of the Admiralty Courts: We however need not go into that aspect of the matter any further, suffice however, to record our concurrence that jurisdiction of the Indian Courts also has not been 'atrophied' in any way whatsoever. [vide MV Elisabeth (supra)].

The cardinal issue pertains to the invocation of Section 44A of the Code in the matter under consideration, for enforcement of a foreign judgment in the Andhra Pradesh High Court stands contradicted by Mr. Chidambaram on two specific counts. The same being on the first count: the Civil Procedure Code cannot possibly be made applicable to any matter of criminal or admiralty or vice admiralty jurisdiction. The basis of the submission however, was laid on Section 112 of the Code. The ouster provision (Section 112) may thus be noted herein below for its true scope and purport:

"112. (1) Nothing contained in this Code shall be deemed -

(a) to affect the powers of the Supreme Court under article 136 or any other provision of the Constitution, or

(b) to interfere with any rules made by the Supreme Court, and for the time being in force, for the presentation of appeals to that Court, or their conduct before that Court.

(1) Nothing herein contained applies to any matter of criminal or admiralty or vice-admiralty jurisdiction, or to appeals from orders and decrees of Prize Courts".

Incidentally, Section 112(1)(a) and (b) stand substituted by the Adaptation of Laws Order 1950 and as a matter of fact, the state of affairs prevailing in the pre-Independence period has been set right by the legislation of 1950 (Adaptation of Laws Orders). A look at the provisions of two Parallel Codes of Civil Procedure 1882 and 1908 together with the moderation after Independence will obviously clarify the situation. The Parallel Codes and the present Section 112 thus runs:

Code of 1882 Code of 1908 Present Section 112

616. Nothing herein contained **112.(1)** Nothing contained **112.(1)** Nothing contained

shall be understood- in this Code shall be deemed - in this Code shall be deemed-

(a) to bar the full and unqualified (a) to bar the full and unquali- (a) to affect the powers of the

exercise of Her Majesty’s pleasure fied exercise of His Majesty’s Supreme Court under article

in receiving or rejecting appeals to pleasure in receiving or 136 or any other provision

Her Majesty in Council, or rejecting appeals to His of the Constitution, or

Otherwise howsoever, or Majesty in Council, or

otherwise howsoever, or

(b) tointerfere with any rules made (b) to interfere with any rules (b) to interfere with any rules

by the Judicial Committee of the made by the Judicial Committee made bby the Supreme Court,

Privy Council, and for the time of the Privy Council, and for and for the time being in force,

Being in force, for the presentation the time being in force, for the for the presentation of appeals

of appeals to Her Majesty in Council presentation of appeals of His to that Court, or their conduct or their conduct before the said Majesty in Council, or their before that Court.

Judicial Committee. Conduct, before the said Judicial Committee.

[And] nothing in this Chapter (2) Nothing herein contained (2) Nothing herein contained applies to any matter of criminal applies to any matter of criminal applies to any matter of or admiralty or vice-admiralty or admiralty or vice-admiralty criminal or admiralty or vice-jurisdiction, or to appeals from jurisdiction, or to appeals from admiralty jurisdiction, or to orders and decrees of Prize Courts. orders and decrees of Prize appeals from orders and Courts. decrees of Prize Courts.

This comparative analysis of the provisions of the Code as amended from time to time unmistakably goes to show that as regards Section 112(a) and (b) in the post-Independence period, the powers of this Court under Article 136 stand substituted in place and stead of His Majesty in Council and the Judicial Committee of the Privy Council. The Adaptation of Laws Orders however, did not in fact, add to or alter sub-section (2) of Section 112 which also finds place in Section 616 of the 1882 Code in identical language. The non exclusion of sub-section (2) howesoever surprising it may be in independent India, but the fact remains that the 1950 legislation has chosen not to omit it from the Statute Book and as such a meaning shall have to be attributed thereto. It is significant to note that subb-section (2) of Section 112 even after the Adaptation of Laws Order1950 speaks of decrees of Prize Courts.

In Halsury's Laws of England (4th Edn. Vol.-I) paragraph 309, the following has been stated to be the jurisdiction of the prize Courts;

309. Assignment to Admiralty Court. The whole jurisdiction of the High Court belongs to all the divisions alike, and all the judges of that court have equal power, authority and jurisdiction. However, every action to enforce a claim for damage, loss of life or personal injury arising out of a collision between ships or the carrying out or omission to carry out a manoeuvre y one or more of two or more ships or non-compliance with the collision regulations is assigned to the Queen's Bench Division and taken by the Admiralty Court. The same applies to every limitation action, and generally to causes and matters involving the exercise of the High Court's admiralty jurisdiction, or its jurisdiction as a prize court.

The word 'Prize' has also been dealt with in Halsury's Laws of England (4th Edn. Vol.I) in paragraph 352 which reads as below:

352. Prize. The High Court is a prize court within the meaning of the Naval prize Acts 1864 of 1916, as amended by any subsequent enactment, and has all such jurisdiction on the high seas and

throughout Her Majesty's dominions and in every place where Her Majesty has jurisdiction as, under any Act relating to naval prize or otherwise, the High Court of Admiralty possessed when acting as a prize court. The Admiralty Court takes causes and matters involving the exercise of the High Court's jurisdiction as a prize court.

The issue arises as to whether we have after Independence, available in this country, the decrees of the Prize Courts or there is even any existence thereof. Admiralty jurisdiction of the courts as noticed hereinbefore has been reason of the Letters Patent and certain other legislations, saved by the provisions of the Constitution apart therefrom, question of ascribing any independent admiralty court as prize court in the country presently, would not arise: Be that as it may, we do not wish to express any definite opinion in regard thereto by reason of the fact that the same is not called for in the contextual facts of the matter under consideration, suffice it to note that a doubt persists as to the applicability to sub-section 2 of the Section 112. In any event, if the intent of the legislation was to do away with the applicability of provisions of the CP Code, in terms of Section 112(2) of the Code then and in that event, question of continuance of Section 140 of the Code would not have arisen. Incidentally, Section 140 (1) and (2) is a repetition of Section 645(a) of the 1882 Code. For convenience sake, Two Parallel Codes of 1882 and 1908 and the present Section 140 which is in identical language as that of the 1908, Code, is set out herein below:

Code of 1882 Code of 1908/Code of 1976

645-A. In any Admiralty or Vice-Admiralty **140. (1)** In any Admiralty or vice-Admiralty

cause of salvage, towage or collision, the Court, cause of salvage, towage or collision, the Court

whether it exercising its original or its appellate whether it be exercising its original or its appellate

jurisdiction, may, if it thinks fit, and upon request llate jurisdiction, may, if it thinks fit, and shall,

of either party to such cause shall, summon to its upon request of either party to such cause

assistance, in such manner as the Court may summon to its assistance, in such manner as it

[by rule, from time to time], direct, two competent may direct or as may be prescribed, two competent

assessors; and such assessors shall attend and assessors; and such assessors shall attend

assist accordingly. and assist accordingly.

Every such assessor shall receive such fees for (2) Every such assessor shall receive such fes

his attendance as [the Court by rule prescribes. for his attendance, to be paid by such of the

Such fees] shall be paid by such of the parties parties as the Court may direct or as may be

as the Court [in each case] may direct. Prescribed.

It is in this context a rather old decision of the Bombay High Court seems to be apposite. The

learned Single Judge of the High Court in the case of The Bombay and Persia Steam Navigation Company Ltd. vs. Shephered and Haji Ismail Hossein (ILR (1888) XIi Bombay 237) was pleased to state as below:

"The rules regulating Admiralty practice provide that a suit shall be commenced by a plaint according to the provisions of the Code of Civil Procedure. They were framed when the Code of 1859 was in force, and when the power of the Court to regulate its procedure was more extended than it is at present. The Rules subsequent to the one above referred to, provide for the taking out of a warrant of arrest when the suit is in rem, and make no special provision when the suit is in personam; but Rule 54 directs that proceedings not provided for by the rules shall be regulated by the rules and practice of the High Court in suits brought in it in the exercise of its ordinary original civil jurisdiction. Though these rules do not apparently contemplate a suit in rem and in personam being combined, they do not expressly or by necessary implication forbid it. The Code of Civil Procedure of 1882 applies to proceedings on the Admiralty side of the High Court; section 645-A shows that this is so."

Needless to record here that in accordance with the salutary principle of interpretation and one of the golden canon of statutory interpretation being that the latter provision shall prevail over the earlier and in the event, the Adaptation of Laws Order deemed it expedient to exclude applicability of the Civil Procedure Code in terms of Section 112(2) as is being contended by Mr. Chidambaram, question of incorporating Section 140 or continuing therewith and in any event in the 1976 Code would not have arisen. The learned Single Judge in our view has rightly decided the applicability of the Code of Civil Procedure even in Admiralty jurisdiction. Reliance was placed in support of the exclusion of the Code pertaining to Admiralty jurisdiction in the decision of the Calcutta High Court in the case of **State of Ukraine vs. Elitarious Ltd.** (whereinI was a party). A mere perusal of the judgment of the High Court, however, negates the contention in support of the Appellant. As a matter of fact, Mr. Ashok H. Desai, appearing for the Respondents relies on the judgment as a judgment in sub-silencio and we feel it rightly so, since the judgment dealt with the various provision of C.P. Code vis-a-vis. The Admiralty actions and the ratio decendi of the decision being Admiralty jurisdiction is not a ordinary original civil jurisdiction and thus not a suit within the meaning of Section 86 of the Code. In paragraph 37 of the decision of **State of Ukraine vs. Elitarious Ltd.** (supra), the High Court upon reference to the **Jolly Varghese case (Jolly George Varghese and another vs. The Bank of Cochin:** AIR 1980 SC 470) observed as below:

"37. In this connection reference may be made to decision of the Supreme Court in (17) Jolly George Varghese and another vs. The Bank of Cochin reported in AIR 1980 SC page 470. While considering Article 11 of the International Covenant on Civil and Political right to which India is a signatory, the Apex Court in paragraph 6 of the Judgment inter alia made the following observations:—

".... India is now a signatory to this convenant and Article 51(c) of the Constitution obligates the state to "foster respect for International Law and treaty obligations in the dealings of organised peoples with one another". Even so until the Municipal Law is changed to accommodate the convenant what binds The Court is the former, not the latter. A.H. Robertson in "Human Rights - in National and International Law" rightly points out that International Conventional Law must go through the process of transformation into the Municipal Law before the international treaty can become an internal Law...."

In view of the aforesaid decision of the Supreme Court, in our opinion, even if a suit appears from

the statement in the plaint to be barred by any. International Law the plaint cannot be rejected unless such International Law has gone through "the process of transformation into Municipal Law". Thus, we conclude that in order to bring a case within the mischief of Order 7 Rule 11(d) of the Code of Civil Procedure, the suit must appear from the statement made in the plaint to be barred by any state-made in the plaint to be barred by any state made law including any ordinance, order, bye-law, rule, regulation, notification, custom or usages having in the territory of India the force of law. As the word has not been defined in the Code of Civil Procedure, in arriving at the aforesaid conclusion, we have thought it profitable to take aid of Article 13(3) (a) of the Constitution of India. Thus, we find no force in the second contention of Mr. Mukherji".

On the wake of aforesaid, we are unable to record our concurrence pertaining to the exclusion of the Code in Admiralty jurisdiction. Significantly, the Admiralty Rules of the High Court at Madras, which stand adopted by the Andhra Pradesh High Court in no uncertain terms also negate the submision in support of the appeal. The relevant Admiralty Rules are however set out herein below:

2. A suit shall e instituted by a plaint drawn up, subscribed and verified according to the provisions of the Code save that if the suit

is in rem, the defendants, may subject to such variation as the circumstances may require, be described as "the owners and parties interestd in" the vessel or other property proceeded against instead of by name.

29. An attorney instituting a suit against any property in respect of which a Caveat has been entered in the register of Admiralty suits shall forthwith serve a copy of the plaint upon the party on whose behalf the Caveat has been entered or upon his attorney.

32. If when the suit comes before the Court it is satisfied that the claim is well founded, it may pronounced for the amount which appears to be due and may enforce the payment thereof bby order and attachment against the party on whose behalf the Caveat has been entered and by the arrest of the property if it then be or thereafter come within the jurisdiction of the Court.

34. Every sale under decree of the Court, shall, unless the Judge shall otherwise order, be made by the Sheriff in like manner as a sale of movable property in execution of a decree in an ordinary civil suit.

50. Where no other provision is made by these rules, proceedings in suits brought in the Court in the exercise of its Admiralty jurisdiction shall be regulated by the Rules and Practice of the Court in suits brought in it in the exercise of its Ordinary Original Civil Jurisdiction .

These rules having co-relation with the ordinary civil jurisdiction thus cannot but be said to be subscribing to a view contra to that canvassed before us by the Appellant.

In any event Section 112 is in Part VII of the Code dealing with the provisions pertaining to appeals: whereas Sections 96 — 108 in Part VII of the Code deal with appeals from original decrees, Section 109-112 deal with appeals to the Supreme Court. The specific words used in sub-section (2) of Section 112 to wit: "Nothing herein contained" (emphasis supplied) cannot possibly negate the Code in its entirety. The word `herein' as emphasised above has a specific connotation and will have to be given a definite meaning which goes alongwith the entire legislation. In the event the legislature intended a complete ban, then and in that even the words used in sub-section (1) in the normal course of events would have been used since sub-section (1) used the expression

`nothing contained in this Code' - Sub-section (1) pertains to the powers of the Supreme Court and the legislature is specific enough to record the same. In the event of there being similar intent, legislature would have used the similar language and not "herein" as noticed above. The word "herein" thus cannot possibly be meant to include the entirety of the Code but to the group of provisions in which it appear. Section 112 thus evidently have two different areas of operation whereas sub-section (1) is wider in its amplitude, sub-section (2) is limited in scope and restrictive in its applicability. This is more so by reason of the discussion hereinbefore in this judgment pertaining to Section 140 of the Code and the insertion thereof in the Code is clear and unambiguous to the effect that Section 112(2) does not render the Code completely inapplicable to admiralty cases. The Bombay High Court in 1888 ILR 12 Bombay (supra) has thus came to the conclusion that the Code of Civil Procedure of 1882 applies to proceedings on the admiralty side of the High Court and Section 645-A (presently Section 140) shows the same. We record our concurrence with the observation of the Bombay High Court in 12 Bombay (supra) and approve the same in that regard. A recent decision of this Court in the case of Videsh Sanchar Nigam Limited (Videsh Sanchar Nigam Ltd. vs. M.P. Kapitan Kud and Others (1996 (7) SCC 127) also lends concurrence to the applicability of the Code of Civil Procedure in admiralty action as well since Section 140 has been taken recourse to in the matter of appointment of assessors to give their estimate of the anchoring position and the probable involvement of the first Respondent (in the case under reference) in breakage of the cable. The applicability of the Code in the admiralty action, as a matter of the fact, was not doubted, on the contrary Section 140 was taken recourse to for the purposes of the assessment of the situation.

Needless to record that exclusion of jurisdiction cannot be inferred readily unless of course there are cogent materials in regard thereto. In the matters under consideration the submissions of Mr. Chidambaram, however, completely overlooks the provisions as contained in Section 4 of the Code. We need not dilate on this issue suffice it to record that Section 4 bbeing a general provision which excludes the operation of the CP Code in specific instances as mentioned therein and since exclusion of admiralty jurisdiction is not specifically mentioned, we are unable to sustain the submissions of Mr. Chidambram, in any event, since there is no such general exclusion.

In that view of the matter, question of having any concurrence with the submissions of Mr. Chidambram as regards the bar of applicability of the Code of Civil Procedure in Admiralty action does not cannot arise, though I must frankly confess that the submissions of Mr. Chidambaram at the first blush was very attractive but a closer scrutiny of the provisions as noticed above, with respect, rendered the same totally insignificant.

Adverting now to the second count of submissions of Mr. Chidambaram to the effect that the judgment of the English Court cannot but be termed to be the judgment in personam and the Execution Petition for the arrest of the vessel and subsequent order thereon thus is not maintainable: Mr. Chidambaram found fault with the Bench decision of the High Court affirming the maintainability of the Execution Petition since arrest of a ship according to his contentions, operates in rem and not in personam and it is on this score, strong reliance was placed on the decision of the Court of Appeal in the case of The City of Mecca (1881 (6) P.D. 106) Jessel M.R. in the decision under reference stated as below:

There is no suggestion from beginning to end that the ship is liable; there is no declaration that the ship is liable, and it does not appear on the proceedings that the ship was even within the jurisdiction at the time the action was commenced against the owners. An action for enforcing a maritime lien may no doubt be commenced without an actual arrest of the ship, but there is no

suggestion that they intended anything of the kind, and, in fact, the law dow not allow it. An action against a ship, as it is called, is not allowed by the law of Portugal. You may in England and in most countries proceed against the ship. The writ may bbbe issued against the owner of such a ship, and the owner may never appear, and you get your judgment against the ship without a single person being named from beginning to end. That is an action in rem, and it is perfectly well understood that the judgment is against the ship. In the present case the judgment does not affect the ship at all, unless the ship should afterwards come within the jurisdiction of the Portuguese Court, and then it can be made a proceeding by which you can afterwards arrest the ship and get it condemned. Therefore, it seems to me to be plain that this is a personal action as distinguished from an action in rem, and it is nothing more or less; and any attempt to make it out something else (because the law of Portugal does not allow actions in rem) is really to change the real nature of the action to meet the exigencies of those who want to make the judgment of the Court of Portugal go further than it really does".

In the similar vein, Lush, J. in The City of Mecca (supra) also observed:

"Now upon the face of this judgment, there is not a word about a claim against the ship from beginning to end. It is well known that the owner of a vessel that has suffered by collision with another has two remedies. He may bring an action against the captain or owner of the other vessel and recover damages, or he may sue in the Court of Admiralty and madke the ship pay. It has been stated before us that the Court of Admiralty and make the ship pay. It has been stated before us that the Court of Admiralty has been abolished in Portugal and the jurisdiction is transferred to a Court of Commerce, and that there is no power now in that country to institute what are called actions in rem. That is what I collect from these proceedings. Whether there is or is not, seems to me immaterial. There certainly is a proceeding by which a vessel can be laid under embargo, that is arrested, if an action is brought against the captain, in order to secure payment, by lien perhaps, of ultimate damages; but whether that can be carried out to proceedings in rem I do not know, nor does it strike me to be material. But what is material in considering an action of the nature claiming damages alone is tha there is nothing about the ship from the beginning to the end, as I have said.

I do not see how it was possible for them to carry and execute a maritime lien when they had not possession of the thing. The vessel was out of their jurisdiction, it was an English vessel, and it naturally left the Portuguese coast; and under the decree of that Court, if a purchaser had to prove his title he could not quote a single word of this judgment or any judgment at all that would justify a sale of that ship. It is a judgment purporting to be a judgment against the persons of the captain and owners, and if they ever find them within their jurisdiction they may execute according to the process they have at their command the judgment againt them individually. But as to any judgment against the ship, I doubt if the ship were found there now that they could seize it. But even if they found the ship there, and they could without further process seize the ship and sell it in satisfaction, that would not make this a judgment in rem which any Court in this country could be calle do to execute".

The decision in the The City of Mecca (supra) was, lately followed in the ‘Alletta’ (1974 1 Llyod’s Law Reports 40) and ‘Sylt’ (1991 1 Llyod’s Law Reports 240). The decision of the Queen’s Bench Division (Admiralty Court) in the ‘Despina G.K.’, [1983 1 All ER 1] has also been very strongly relied in support of the contention that Admiralty jurisdiction is available by a proceeding in rem and not in personam.

Mr. Chidambaram, has also placed strong reliance on the Brussels Convention, being the

international convention relating to the arrest of seagoing ships of 1952: while it is true that India has not adapted the same, but its relevance however cannot be doubted in any way in the perspective of maritime lien. On this score, however we can usefully note the observations of this Court in MV Elisaeth (supra) which reads as below:

"Indian legislation has not, however, progressed, notwithstanding the Brussels Protocol of 1968 adopting the Visby Rules or the United Nations Convention on the Carriage of Goods by Sea, 1978 adopting the Hamburg Rules. The Hamburg Rules prescribe the minimum liabilities of the carrier far more justly and equitably than the Hague Rules so as to correct the tilt in the latter in favour of the carriers. The Hamburg Rules and acclaimed to be a great improvement on the Hague Rules and far more beneficial from the point of view of the cargo owners. India has also not adopted the International Convention relating to the Arrest of Sea-going Ships, Brussels, 1952. Nor has India adopted the Brussels Conventions of 1952 on civil and penal jurisdiction in matters of collision; nor the Brussels Conventions of 1926 and 1967 relating to maritime liens and mortgage. India seems to be lagging behind many other countries in ratifying and adopting the beneficial provisions of various conventions intended to facilitate international trade. Although these legislation, the principles incorporated in the conventions are themselves derived from the common law of nations as embodying the felt necessities of international trade and are as such part of the common law of India and applicable for the enforcement of maritime claims against foreign ships".

Mr. Chidambaram in continuation of his submissions rather emphatically contended that the High Court has significantly overlooked the fact that it is only when a decree in rem is passed that a vessel may be arrested for obtaining satisfaction of the claim or the execution of a decree in rem especially in a maritime action having maritime lien. Mr. Chidambaram contended that in the event however, the proceedings are in personam as in the present case then and in that event, exercise of such a power by a foreign litigant would not arise. The appellant contended that the decree holder has to proceed only against the judgment debtor and not against the vessel and it is on this count a strong criticism has been levelled against the judgment of the High Court to the effect that there has been a total confusion as regards exercise of admiralty power in execution of a judgment in rem and judgment in personam. Admittedly the decree of the English Court is in personam, and against respondent No.2 and not the appellant-petitioner herein. It is on this score further reliance was place on the decision of this Court in the case **World Tanker Carrier Corporation vs. SNP Shipping Services Pvt. Ltd. & Anr.** [1998 (5) SCC 310] wherein this Court had the following to observe:

"20. Under principles of Private International Law, a court cannot entertain an action against a foreigner resident outside the country or a foreigner not carrying on business within the country, unless he submits to the jurisdiction of the court here. This principle applies to actions in personam.

Mr. Chidambaram very strongly commented against the judgment of the High Court for lack of appreciation so far as the English decree is concerned and contended that the entire claim was in regard to the damages on the ground of a breach of contract in the matter of performance of salvage operations, which in fact was never performed and as such question of any maritime claim acquired therefrom would not arise. It is on this score that the learned Chief Justice speaking for the Bench of the Andhra Pradesh High Court in the judgment impugned has the following to state:—

"In India there is not much distinction in civil law system between maritime law and other branches of law. The Courts administer them alike. A perspective of the law further emerges from the reading of the said judgment that where the statutes are silent the remedy has to be sought by reference to the basic principle. It is the duty of the Court to devise procedural rule by analogy and expedience.

It was observed "the action in rem as seen above were resorted by the Court as a device to overcome the difficulty of personal service on the defendant by compelling him to enter appearance and accept service of summons and for furnishing security for the release of the res or any action proceeded against the res itself by entering a decree and executing the same by sale of the res. This practical procedural device developed by the Courts with a view to render justice in accordance with the substantive law not only in the cases of collision and salvage but also in case of other maritime liens and claims arising by reason of breach of contract for hire of vessel etc. etc."

By reading of the judgment reported in 1993 SC 1014 we are of the considered view that the vessel is a juridical person; a maritime claim can be enforced against the vessel; there is no substantive distinction between the Admiralty Court's jurisdiction and the jurisdiction under the common law for execution of a decree of a foreign origin in view of the provisions of Section 44-A of the Code. Apart from this, the High Court has jurisdiction being a repository of the power of reach its arm to do justice. By reading of the judgment we are unable to agree with the contention of the learned counsel for the respondent that the Supreme Court has laid down any law that a ship can be arrested only for securing a maritime claim and not in execution of satisfaction of a judgment especially in view of the statutory provisions of Section 44-A of the Code.

Mr. Ashok H. Desai for the respondent No.1 and being the decree holder, however in no uncertain terms contended that as a matter of fact it is of no significance at all if the judgment be termed to be the judgment in rem or judgment in personam especially in the facts of the matter under consideration having due regard to the domestic law and in particular Section 44A of the Code of Civil Procedure. Before however, dealing with the same, a passage from encyclopedia Britannica (Transportation Law) may be of some significance. Learned authors thereof while referring the components of maritime law had the following to state pertaining the maritime liens; a word of caution at this juncture ought to be introduced by reason of the confusion in populas between a maritime claim and maritime lien whereas claim cannot but be termed to e a genus-lien is a particular species arising out of the genus and the two terms namely, claim and lien cannot be identified with each other so as to accord same meaning. Let us, however, address ourselves on maritime lien as is available in the encyclopedia and the same reads as below:

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

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

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

Be it noted that there are two attributes to maritime lien: (a) a right to a part of the property in the res; and (b) a privileged claim upon a ship, aircraft or other maritime property in respect of services

rendered to, or injury caused by that property. Maritime lien thus attaches to the property in the event the cause of action arises and remains attached. It is, however, inchoate and very little positive in value unless it is enforced by an action. It is a right which springs from general maritime law and is based on the concept as if the ship itself has caused the harm, loss or damage to others or to their property and this must itself make good that loss. (See in this context 'Maritime Law' Christopher Hill, 2nd Edn.).

As regards the concept of proceeding in rem and proceeding in personam, it should be understood as actions being related to the same subject matter and are alternative methods pertaining the same claim and can stand side by side.

In this context, reference may also be made to the observations of this Court in **M.V. Elizaeth's c**ase (supra) as stated below:

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

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

In Halsbbbury's Laws of England, the nature of action in rem and the nature of action in personam is stated to be as below:

310. Nature of actions in rem and actions in personam. An action in rem is an action against the ship itself, but the view that if the owners of the vessel do not enter an appearance to the suit in order to defend their property no personal liability can be established against them has recently been questioned. It has been stated that, if the defendant enters an appearance, an action in rem becomes, or continues also as, an action in personam; but the Admiralty jurisdiction of the High Court may now in all cases be invoked by an action in personam, although this is subject to certain restrictions

in the case of collision and similar cases, except where the defendant submits or agrees to submit to the jurisdiction of the Court.

The foundation of an action in rem is the lien resulting from the personal liability of the owner of the res. Thus an action in rem cannot be brought to recover damages for injury caused to a ship by the malicious act of the master of the defendant's ship, or for damage done at a time when the ship was in the control of third parties by reason of compulsory requisition. On the other hand, in several cases, ships allowed bby their owners to be in the possession and control of charterers have been successfully proceeded against to enforce liens which arose whilst the ships were in control of such third parties.

The defendant in an Admiralty action in person is liable, as in other actions in the High Court, for the full amount of the plaintiff's proved claim. Equally in an action in rem a defendant who appears is now liable for the full amount of the judgment even though it exceeds the value of the res or of the bail provided. The right to recovery of damages may however be affected by the right of the defendant to the benefit of statutory provisions relating to limitation of liability ".

The decisions above has shown us the Anglo-American jurisprudence pertaining to the admiralty matters and the distinction between the action in rem and action in personam being within a very narrow margin but before embarking on to a fuller analysis of the same, let us for the time being transfer our attention to the domestic law in the matter in issue. As regards the domestic law Section 44A of the Civil Procedure Code may be considered as one of the basic elements of domestic law viz., a viz. foreign judgments. Section 44A of the Code as noted above reads as below:

"Section 44-A. (1), Where a certified copy of a decree of any of the superior Courts of any reciprocating territory has been filed in a District Court, the decree may be executed in India as if it had been passed by the District Court.

(2) together with the certified copy of the decree shall be filed a certificate from such superior court stating the extent, if any, to which the decree has been satisfied or adjusted and such certificate shall, for the purposes of proceedings under this section, be conclusive proof of the extent of such satisfaction or adjustment.

(3) The provisions of Section 47 shall as from the filing of the certified copy of the decree apply to the proceedings of a District Court executing of any such decree, if it is shown to the satisfaction of the Court that the decree falls within any of the exeptions specified in clauses (a) to (f) of Section 13".

It is on the basis of the above provision that the Respondent No.1 moved the High Court upon having the decree registered in this country for execution of the English Court decree and it is on this score that Mr. Chidambaram contended that Section 44A cannot possibly be said to be of any assistance to the English decree holder.

Incidentally, a plain reading of Section 44A would depict the following components:

(i) The decree must be of a superior court of a reciprocating territory;

(ii) the decree is to be filed in District Court;

(iii) the decree may be executed in India as if it had been passed by the District Court;

(iv) Provisions of Section 47 of the CPC shall apply; subject to the exceptions specified in clauses (a) to (f) of Section 13;

(v) "Decree" means any decree under which a sum of money is payable. (See Explanation II).

Section 44A thus indicates an independent right, conferred on to a foreign decree holder for enforcement of its decree in India. It is a fresh cause of action and has no co-relation with jurisdiction issues. The factum of the passing of the decree and the assumption of jurisdiction pertaining thereto, do not really obstruct the full play of the provisions of Section 44A. It gives a new cause of action irrespective of its original character and as such it cannot be termed to be emanating from the admiralty jurisdiction as such. The enforcement claimed is of an English decree and the question is whether it comes within the ambit of Section 44A or not. The decree itself need not and does not say that the same pertains to an admiralty matter neither it is required under Section 44A of the Code. Though however in the facts of the matter under consideration, the decree has been passed by the High Court of England (a Superior Court) in its Admiralty jurisdiction. Registration in this country, as a decree of a superior foreign Court having reciprocity with this country would be itself be sufficient to bring it within the ambit of Section 44A. The conferment of jurisdiction in terms of Section 44A, cannot be attributed to any specific jurisdiction but an independent and an enabling provision being made available to a foreigner in the matter of enforcement of a foreign decree.

It is in this context that Mr. Desai placed strong reliance on a decision of the Commonwealth of Australia 1980 (144) CLR 565: Hunt vs. B.P. Exploration Co. (Libya) Ltd., and since the summary of the judgment as is available in the report would sub-serve our purpose we need not go in for longish narration in regard thereto.

The summary provides:

"A judgment creditor registered a judgment of the High Court of Justice in England under Section 5 of the Reciprocal Enforcement of Judgments Act, 1959(Q). The judgment debtor had assets in Queensland but he was not present within the jurisdiction and there was no other fact or circumstance to connect him with the State. He did not submit to the jurisdiction of the Supreme Court. Section 6(1)(c) of the Act enabled Rules of Court to be made providing for the service or a judgment debtor of notice of the registration of a judgment. No such rules had been made when the judgment was registered.

Held that the judgment had been validly registered. The Act was within the legislative competence of the Queensland Parliament because it provided for the registration of foreign judgments in a Court of the State and their enforcement within the State. The facts that the parties to the judgment had no connexion with the State was not relevant to the validity of the registration. Further the Act should not be construed as limited in its application to persons within the State".

The second decision again under the same cause title of the New Zealand Supreme Court at Aukland (Hunt vs. B.P. Exploration Co. (Libra) Ltd. : 1980 1 NZLR 104) is also to the same effect. The principal issue in the New Zealand's case was to the following effect:

"(1). Does the Court have jurisdiction under the Act to register the English Judgment?" If that issue is decided in favour of Mr. Hunt, then the injunction and the charging order fell to the ground".

The issue however, was answered by the New Zealand Supreme Court upon consideration of the

Black-Clawson's case (Black Clawson International Ltd. vs. Papierwerke Waldhof-Aschaffenburg; 1975 AC 591) as also the Australian judgment noticed hereinbefore in the manner following:

"The Act provided a new system for bringing a judgment debtor in foreign proceedings before the registering Court, whilst preserving his common law defences once he got there.

I am left with a statute, clear and unambiguous in its references to "judgment debtor" and "judgment of a superior Court of a country to which this Part of this Act applies". Mr. Hunt clearly comes within those references. The fact that the debtor is not within the jurisdiction of this Court was obviously not considered important. In practice, the Act would normally be applied to debtors with assets within the jurisdiction although there do not need to be assets within the jurisdiction. See Hospital for Sick Children vs. Walt Disnev Productions Inc (1968) Ch 52, 69, 77; [1967] All ER 1005, 1011, 1016, which held that an injunction could issue against a corporation not within the Court's jurisdiction and which did not have assets there at the time of the order.

I think that, fundamentally, my decision must come down to this: On the one hand, is the Mareva jurisdiction (for want of a better term) merely an instance of the exercise of the Court's general jurisdiction conferred in broad terms of S. 16: or is [118] the Mareva jurisdiction to be regarded as legsilating in an area which should be left to Parliament? The two opposing points of view are well set out in the various Mareva judgments I have cited on the one hand, and in the South Australian judgments on the other.

I consider that this Court does have a Mareva jurisdiction. I do not accept the view that this jurisdiction is in the nature of legislating in an area forbidden to the Courts. I am not impressed by the "assumption of fearful authority" line of cases. There appears to have been an old English procedure of "foreign attachment" which provides a perfectly respectable ancestry for the procedure. The fact that this procedure accords with that in European countries is, for a New Zealand Court, a matter of coincidence.

The Court has to approach modern problems with the flexibility of modern business. In former times, as Lawton L.J. pointed out, it would have been more difficult for a foreign debtor to take his assets out of the country. Today, vast sums of money can be transferred from one country to another in a matter of seconds as a result of a phone call or a telex message. Reputable foreign debtors of course having nothing to fear; the facts of the reported Mareva cases indicate that the jurisdiction is wholesome; the sheer number of Mareva injunctions granted in London indicates that the jurisdiction is fulfilling a need.

Lord Denning M.R. cited with approval in the Rasu Maritima case [1978] QB 644, 660-661 [1977] 3 All ER 324, 333-334, the following statement of practical reasons by Kerr J., a highly experienced commercial Judge.

"A plaintiff has what appears to be an indisputable claim against a defendant resident outside the jurisdiction, but with assets within the jurisdiction which he could easily remove, and which the court is satisfied are liable to be removed unless an injunction is granted. The plaintiff is then in the following difficulty. First, he needs leave to serve the defendant outside the jurisdiction, and the defendant is then given time to enter an appearance from the date whenhe is served, all of which usually takes several weeks or even months. Secondly, it is only then that the plaintiff can apply for summary judgment under Order 14 with a view to levying execution on the defendant's assets here. Thirdly, however, on being apprised of the proceedings, the defendant is laible to remove his assets,

thereby precluding the plaintiff in advance from enjoying the fruits of a judgment which appears irresistible on the evidence before the Court. The defendant can then largely ignore the plaintiff's claim in the courts of this country and snap his fingers at any judgment which may be given against him. It has always been my understanding that the purpose and scope of the exercise of this jurisdiction is to deal with cases of this nature. To exercise it on an ex parte basis in such cases presents little danger or inconvenience to the defendant. He is at liberty to apply to have the injunction discharged at any time on short notice".

I, for one, do not always agree with the alleged judicial "law-making" of Lord Denning; on this occasion, I think that he has legitimately spelt out the jurisdiction of the Court and has up-dated old but useful procedures, aimed at enabling the law to deal with the commercial realities of modern business. Accordingly, I am of the view that the Mareva jurisdiction exists in New Zeeland. I find no cause to dissent from the view of Quilliam J. in Mosen v. Donselaar that the Mareva jurisdiction exists in New Zealand, which view was accepted without argument in the other New Zeeland decision.

The principal consideration is whether BP has given has some grounds for believing that there is a risk of Mr. Hunt's New Zeeland assets being removed before the judgment or award is satisfied. Mr. Gatenby, in one of his affirmations, asserted that although the judgment debtor is reputedly an extremely wealthy and substantial businessman, searches and inquiries conducted by or on behalf of the judgment creditor reveal relatively few assets in countries where enforcement can be conducted expeditiously and economically through the use of reciprocal enforcement legislation from which the judgment debtor benefits other than only indirectly through the medium of American based companies or trusts. He opined that it was apparent that Mr. Hunt has the means and the capability to organise his business affairs in a sophisticated manner. This statement is riddled with hearsay and does not state, as required by R 185 of the Code, the grounds for the deponents's belief. I therefore feel that I can take limited account of this statement. My concern at such a hearsay statement is similar to that expressed by Lawton L.J. in the passage cited, although, in its terms, the statement appears to have followed some of Lawton L.J.t's guidelines.

All in all, I infer that there is a danger that the assets will be taken out of New Zealand. The situation is different from the usual Mareva type of case where there is not even a judgment but merely the issue of proceedings. Here, there is a judgment, albeit one subject to an appeal; a judgment obtained after a lengthy defended hearing and one subject to being set aside under the provisions of the Act.

All things considered, I am of the view on the authorities, that there was sufficient justification for the issue of the Mareva injunction which will therefore stand as varied, with liberty to apply reserved to both parties to vary its terms further. I prefer Lawton L.J.'s formulations of the criteria, although read in context, Bridge L.J. in the Montechhi case was not purporting to lay down a narrower test. I am of the view also that B.P. is in a stronger position than the average Mareva applicant in that it has a judgment capable of being registered as a Judgment of this Court whereas normally, all the applicant has is a prima facie case. I bear in mind Lawton L.J's statement that if nothing is known about a defendant, that may be enough; whilst in one sense, much is known about Mr. Hunt, nothing concrete is known about his willingness to pay the English Judgment if his appeal fails. Had there been some credible statement to this effect, in even one of the various Courts involved thus far, I might not have found enough to justify the Mareva injunction. However, his silence on the point, added to all the other factors, persuades me to sustain the injunction".

The two decisions noted above in our view deal with the situation amply after having considered more or less the entire gamut of judicial precedents. Barker, J's judgment in the New Zealand case very lucidly sets out that the court has to approach the modern problem with some amount of flexibility as is now being faced in the modern business trend. Flexibility is the virtue of the law courts as Rosco Pound puts it. The pedantic approach of the law courts are no longer existing by reason of the global change of outlook in trade and commerce. The observations of Barker, J. and the findings thereon in the New Zealand's case with the longish narrations as above, depicts our inclination to concur with the same, but since issue is slightly different in the matter under consideration, we, however, leave the issue upon, though the two decisions as above cannot be doubted in any way whatsoever and we feel it expedient to record that there exists sufficient reasons and justification in the submission of Mr. Desai as regards the invocation of jurisdiction under Section 44A of the Code upon reliance on the two decisions of the New Zealand and Australian Courts.

The observations of us, as above, do find some concurrence in Dicey and Moris on 'The Conflict of Laws' Vol. I, 13th Ed. Page 538 which is to the following effect:

"There is no requirement that the judgment debtor be subject to the personal jurisdiction of the English Court. Enforcement is by registration, and not by action, and the judgment debtor need have no connection with England..."

In the view as above, the appellants' contention pertaining to Section 44A thus cannot be sustained. The apprehension of there being a 'horrendous consequences' on the wake of the observations as above thus cannot but be stated to be totally unrealistic and with respect, a figment of imagination.

Mr. Chidambaram by way of an alternative submission contended that assuming Section 44-A of the Code is applicable for the execution of a decree in personam obtained from an Admiralty Court in Britain but since Section 44-A is not a self-contained Code for execution of a decree, the same is not exhaustive and the same, as a matter of fact does not displace the common law and it has to be read alongwith the well settled principles of common law in matters relating to execution of decree for a sum of money. Strong reliance was placed on the foreign judgment (Reciprocal Enforcement) Act 1933 and it is on this context, reliance was placed on the decision in Black Clawson's case (supra). It has been contended that since Section 44-A was introduced by an amendment after the foreign judgment (Reciprocal Enforcement) Act, 1933 it is apparent that the legislature did not think it fit to include in Section 44A into the 1933 Act. Without dilating much on this score, in our view, the decisions of the New Zealand and the Australian Courts as noticed above, answer the same in no uncertain and unambiguous language. The views expressed by the English Courts in Black Clawson's case (supra) has been expressly dissented from in both the decisions noticed above and we do feel it expedient to reiterate the views expressed as above more so by reason of the fact that the 1933 Act on which Black Clawson was decided expressly saved the applicability of the common law though to a limited extent by and under Section 8(3) of the Act.

As noticed above Section 44A is an independent provision enabling a set of litigants whose litigation has come to an end by way of a foreign decree and who is desirous of enforcement of the same: It is an authorisation given to the foreign judgments and a noticed above, the Section is replete with various conditions and as such independently of any other common law rights, an enabling provision for a foreign decree holder to execute a foreign decree in this Country, has been engrafted on to statute book to wit: Section 44A of the Code.

Mr. Chidambaram next contended that there are certain fundamental principles of execution in India and referred to a judgment of Sir Ashutosh Mukherji in the case of Begg Dunlop & Co. v. Jagannath Marvari (ILR 39 Calcutta 104). The fundamental principles as recorded therein and as strongly contended by Mr. Chidambaram runs as follows:

i. A decree may be executed either by the Court which passed it or by the Court to which it has been sent for execution. (See. 38 CPC).

ii. A Decree may be sent to another Court of competent jurisdiction; the Court shall be deemed to be a Court of competent jurisdiction, if such Court would have jurisdiction to try the suit where the decree was passed. (Section 39(1) & (3) CPC).

iii. Even after sending the decree to another Court for execution, the original Court does not lose jurisdiction over the matter.

Mr. Chidambaram in support of his contention of 'Fundamental Principles' has also taken us through the provisions of Sections 16,17, 19 and 20 of the CP Code. Admittedly and without much dialation Section 20 overlaps Section 19 (see in this context Mulla's Civil Procedure Code 15th Ed. Vol. I page 240). The submissions pertaining to the fundamental principles of execution does not, however warrant, in our view, a fuller and detailed discussion save to note that Section 44A is a departure from the scheme of execution of domestic decree. By virtue of Section 44A (3), all defences under Section 13(a) to (f) which reads as under the are available to a defendant:

"13. (S.14) A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except -

(a) where is has not been pronounced by a Court of competent jurisdiction;

(b) where it has not been given on the merits of the case;

(c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of India in cases in which such law is applicable;

(d) where the proceedings in which the judgment was obtained are opposed to natural justice;

(e) where it has been obtained by fraud;

(f) where it sustains a claim founded on a breach of any law in force in India".

As a matter of fact this is a scheme alien to the scheme of domestic execution as is provided under Section 39(3) of the Code. The scheme under the latter section is completely a different scheme wherein the transferee Court must be otherwise competent to assume jurisdiction and the general rule or the principle that one cannot go behind the decree is a permissible proposition of law having reference to Section 39(3) of the Code. Section 44A however is having a in-built scheme of execution which is not in any comparable situation with the scheme in terms of Section 39(3). One can thus from the above conclude that whereas the domestic law, execution scheme is available under Sections 37, 38, 39, 41 and 42, Section 44A depicts an altogether different scheme for enforcement of foreign judgments through Indian courts. Reference in this context may also be made to the provisions as contained in Order 21 Rule 22 of the Code which expressly provide that in

the event of their being an application for execution and the same been taken out beyond a period of two years after the date of the decree, there is existing a mandatory obligation to serve a notice to show cause against the execution. Such a requirement of the decree being more than 2 years old is not mentioned as regards the provisions of execution of decree filed under Section 44A. This is a new introduction in the 1976 Code and in our view substantiates the reasonings as above and supports the contention of Mr. Desai as regards two separate and independent Schemes for execution.

On the wake of the aforesaid, it can thus be safely concluded that while it is true that action in rem and in personam have lost much of significance in the present day world but in the facts of the matter under consideration, we are not really concerned threwith and as such we are not expressing any definite opinion in regard thereto suffice however, to record that we aree inclined to lend out concurrence with the views expressed by the Australian and the New Zealand courts' apropos judgment in personam and in rem as noticed above.

In fine, the legal fiction created by Section 44A makes the Andhra Pradesh High Court, the Court which passed the decree and as such competency of the High Court to entertain the execution proceeding cannot be doubted in any way.

In the premises above-said, we do not find any merit in the Appeals before us and thus the same are liable to be dismissed subject to the liberty reserved to the appellants as indicated herein below.

This order of dismissal however, would not preclude the appellant herein, to obtain release of the attached ship on furnishing a Bank Guarantee of a nationalised Bank for suitable amount to the satisfaction of the Registrar (Judl.) of the Andhra Pradesh High Court, pending the execution proceedings. The amount of Bank Guarantee may be fixed by the Registrar (Judl.) after hearing the parties or their advocates. Furnishing of such Bank Guarantee will be in addition to the undertakings required to be furnished by the appellant pursuant to the order of the High Court which is subject matter of civil appeal arising out of SLP (C) No. 18616 of 1999. Furnishing of such Bank Guarantee will also be without prejudice to the appellants rights and contentions regarding the merits of the decree-holders' claim qua the arrested ship. Once such Bank Guarantee is furnished by the appellant and requisite undertaking as earlier ordered by the High Court are filed, the ship will be released from attachment and will be permitted to sail out of the port of Vishakhapatnam. In case the execution petition ultimately succeeds on merits against the appellant it will be open to Respodnent No.1 decree-holder to encash the Bank Guarantee amount towards its claim in the execution proceedings. Subject to the aforesaid modification both the appeals stand dismissed with no order as to costs in each of them.
