

# ORISSA HIGH COURT

Reena Padhi

Vs

Owners of motor vessel

Admiralty Suit No.1 of 1980

(P.K. Mohanti and B.N. Misra JJ.)

21.10.1981

## JUDGEMENT

### **B.N. Misra, J.**

1. This is the first suit filed in the Admiralty jurisdiction of this Court. Reena Padhi, widow of the late Rabindranath Padhi, is plaintiff No.1; Rinku plaintiff No.2 and Rajat plaintiff No.3 are respectively the minor daughter and son of plaintiff No.1 and the late Rabindranath Padhi. Minor plaintiffs 2 and 3 are represented in the suit by their mother plaintiff No.1 who has filed an affidavit that her interest is not adverse to that of her minor daughter and son. The owners and parties interested in the ship "Jagdhir" are described as defendant No.1 and Messrs Great Eastern Shipping Company, Limited having their registered office at Mercantile Bank Building, 60 Mahatma Gandhi Road, Bombay are defendant No.2. In the plaint both "action in rem" and "action in personam" are combined and pleaded against the defendants. However, Mr. S. Mohanty, learned counsel for the plaintiffs, submitted to the Court that for the present he was not pressing for an action in rem. Therefore, the present claim is an action in personam. The defendants have entered appearance and filed objection to the maintainability of the suit. It was decided that the question of maintainability of the present suit in the Admiralty jurisdiction of this Court should be first considered as a preliminary issue. Plaintiffs and defendants have been heard on this preliminary issue and the present, order is confined to the question of maintainability of the present action in personam.

2. Facts necessary for a proper determination of the question of maintainability are noted hereunder. The late Rabindranath Padhi, husband of plaintiff No.1 and father of plaintiffs 2 and 3, graduated as a Marine Engineer and joined service under defendant No.2 on the 28th October, 1967 as the Fifth Engineer. In June, 1973, Rabindranath had risen to the position of a Chief Engineer and at the time of his death his total annual emoluments from service were Rs. 78,040.00 being his basic wages and allowances as per details given in Schedule "A" appended to the plaint. As per the terms and conditions of his service Rabindranath would have retired from service at the age of 60 years, but there were reasonable prospects of his continuing in service even beyond that age. Out of his aforesaid earnings Rs. 3,600/- per annum was being spent by him for himself. Had he lived, Rabindranath would have spared the balance amount as assets to his family, namely, the plaintiff. Rabindranath was the sole earning member of the

family. He was of good health and was expected to live up to the age of 85 years. On 12th, May, 1978, Rabindranath took over charge as the Chief Engineer of the ship "M.V. Jagdhir" at, Kandla port in the State of Gujarat, India. The ship started its voyage on or about the 2nd June, 1978 and thereafter called at Haladia and Paradip. After loading was over in these on ports, the ship sailed to the Japanese port of Sakai with a halt for a few hours at Singapore. The ship was dry-docked at the port of Osaka in Japan and after some repairs on shore it moved to the port of Mizushima in Japan for loading of cargo. It is alleged that from the beginning of the voyage the ship was not seaworthy in all respects and in particular the air-conditioning equipment had serious defects exposing the engineers and engine crew to a high degree of risk to their lives. These defects were present while the ship was at Mizushima. Defendant No.2 had failed to exercise due diligence and care to make the ship seaworthy in all respects before commencement of the voyage. Since long before the voyage the air-conditioning equipment in the vessel had been deliberately or negligently kept in a state of disrepair, thereby endangering the lives of the crew. Defendant No.2 had taken no steps to remove the defects either before the voyage or during the voyage. On the 20th of July, 1978, while the ship was at Mizushima port and Rabindranath was working in the room housing the air-conditioning equipment, there was an explosion in the said equipment. Rabindranath who was injured in the said explosion succumbed to his injuries on the 25th July, 1978 at Mizushima Seamen's Clinic. Mizushima Daiichi Hospital (Annexe). Kurashiki City, Okayama, Prefecture, Japan. It is stated that on account of Rabindranath's death, his estate and the plaintiffs suffered loss amounting to Rs. 15,14,000.00 as described in Schedules B, C and D appended to the plaint. According to the plaintiffs, the aforesaid amount constitutes a maritime lien on the vessel M.V. Jagdhir and all her engines, gear, tackles, machinery. Plants, apparel and furniture. It is asserted that Rabindranath's death took place on board the ship upon the waters of Mizushima harbour which is a part of the 'high seas' as that term is understood in Admiralty law and that the present suit lies only in the Admiralty jurisdiction of this High Court and not within the jurisdiction of any other Civil Court anywhere else in India. In the absence of any Admiralty Rules of the High Court of Orissa, a sum of Rs. 15.00 has been paid as court-fees according to Rule 49 of the Admiralty Rules of the Calcutta High Court. The cause of action is stated to have arisen the 20th July, 1978 when the explosion took place on board the ship and on the 25th July, 1978 when Rabindranath succumbed to the injuries he had suffered in the said explosion. The plaintiffs have accordingly prayed that the defendants be ordered to pay a sum of Rs. 15,14,000.00 with pendente lite and future interest. Prayers (ii), (iii) and (iv) in the plaint have not been pressed by the plaintiffs as they have confined their present claim to item (i) being an action in personam against the defendants.

3. The defendants have challenged the maintainability of the suit. It is stated in their objection that the Admiralty jurisdiction vested in the Calcutta High Court was transferred by Letters Patent to the Patna High Court. Under the Orissa High Court Order, 1948 the Admiralty jurisdiction of the Patna High Court has been transferred to this High Court. It is stated that the Admiralty Court Act, 1861 (24 and 25 Vict. c.10) (hereinafter referred to as the 1861 Act) governs the field of Admiralty law in the State of Orissa. Section 7 of the said Act provides for jurisdiction in case of damage done by any ship and the present cause involving a fatal accident to an employee cannot be entertained within the Admiralty jurisdiction of the 1861 Act. The expression "by a ship" in Section 7 of the 1861 Act refers to external and extraneous action by an offending ship when any such ship is an active instrument of any damage, it does not include a cause of action on board the ship when on voyage. The right of action under the Fatal Accidents Act in a case like the present one, cannot be said to be a "claim for damage done by a ship"

within the meaning of section 7 of the 1861 Act. The suit discloses a cause of action under the Fatal Accidents Act, 1855 and such action cannot be entertained by the High Court in its Admiralty jurisdiction. It is stated that no action in rem lies against the defendants. It is further asserted that a suit in personam can be instituted where the defendants reside or the cause of action arises. In the present case the defendants do not at the time of commencement of the suit or thereafter actually and voluntarily reside or carry on their business or personally work for gain within the jurisdiction of this High Court nor has the cause of action arisen within the jurisdiction of this High Court and therefore the present action is not maintainable. It is stated that the plaint should be rejected under Order 7. Rule 11. Civil Procedure Code as it does not disclose any cause of action, the plaint is written on insufficiently stamped paper and the suit appears from the statement of plaint as barred by the law of Admiralty. It is pointed out that the Calcutta High Court Admiralty Rules cannot govern the suits instituted in Orissa. The defendants have accordingly prayed that the plaint should be rejected with costs.

4. First it is necessary to indicate the scope, nature and extent of the Admiralty jurisdiction of this High Court. It would not be out of place to briefly refer to the origin and growth of the Admiralty law and practice in England which is the source of the Admiralty jurisdiction of the Courts in India. We may begin with the following passage at pages 2 and 3 of Roscoe's Admiralty Practice (5th Edition) extracted in *Kamalakar Mahadev Bhagat v. Scindia Steam Navigation Co. Ltd., Bombay*<sup>1</sup> - vide para. 17

"In medieval times not only was there a Lord High Admiral, but also Admirals for different portions of the seas around the British Islands; there was, for instance an Admiral of the West and an Admiral of the North. These officers necessarily possessed disciplinary powers over vessels under their command, and in addition were in a sense sea magistrates, for they were the only maritime officials with both authority and power. They had especially to determine disputes in regard to the capture at sea of enemy property: in other words, in regard to prize. By a natural evolution they became also arbitrators in maritime disputes. It was an obvious step from the exercise of a personal jurisdiction of rude legal kind by officials whose functions were primarily executive to the appointment of deputies who became recognized judges. Finally there emerged from among these deputies a personage who, from deputy of the Lord High Admiral, became the appointed judge of the English High Court of Admiralty, who had criminal jurisdiction, who in time of war fulfilled duties as a judge of the Prize Court and exercised in the Instance Court jurisdiction finally limited to certain maritime causes. The terms of these two jurisdictions, which eventually became quite separate, we have already noted in the functions in medieval times of the Lord High Admiral and his fellows. This is in a few lines an epitome of the genesis of the High Court of Admiralty which struggled on for centuries side by side with the Common Law and Chancery Courts of England the one seeking to enlarge the others to limit its jurisdiction."

5. This old conflict and rivalry between the jurisdiction of the High Court of Admiralty and the Common Law and Chancery Courts of England were eventually taken note of by the British Parliament which in 1389 passed an Act (13 Ric. 2 (1389) -- Jurisdiction of Admiral and

Deputy), to prescribe the limits of the jurisdiction of the High Court of Admiralty. The Act provided –

"That the Admirals and their deputies shall not meddle from henceforth of anything done within the realm, but only of a thing done upon the sea as it hath been used in the time of our noble prince King Edward grandfather of our Lord the King that now is."

In spite of legislation forbidding the High Court of Admiralty from meddling in things not wholly and exclusively done upon the sea, the said Court continued to encroach upon the jurisdiction forbidden to it. It is on account of this attitude of the High Court of Admiralty that in 1391 another Act (15 Ric. 2 (1391) Jurisdiction of the Admiral) was passed which provided-

"It is declared, ordained and established that of all manner of contracts, pleas, and quarrels, and all other things rising within the bodies of the counties, as well by land as by water, and also of wreck of the sea, the Admiral's Court shall have no manner of cognizance, power, nor jurisdiction; but all such manner of contracts, pleas, and quarrels and all, other things rising within the bodies of counties, as well by land as by water, as afore, and also wreck of the sea, shall be tried, determined, discussed and remedied by the laws of the land, and not before nor by the Admiral nor his lieutenant is any wise."

This Act made it clear that the jurisdiction of the High Court of Admiralty was confined to things done upon the high seas and it had absolutely no jurisdiction to deal with things arising out of the body of a county. However the 1391 enactment also failed to bring about cessation of the conflict of jurisdiction. Even after further legislation the contest of jurisdiction did not fully disappear. The ultimate fate of the rivalry as to jurisdiction has been extracted from Roscoe's Admiralty Practice in *K.M. Bhagat v. Scindia Steam Navigation Co. Ltd., Bombay*<sup>2</sup>

"To examine the various cases of prohibition relating to the Admiralty, which are to be found in the early reports, would be a long and tedious labour. It is sufficient to observe that although the common lawyers were notable always to hold, firmly and consistently, the ground which they had taken, they seem, so far as they could, to have acted upon the broad rule that nothing was to be left to the Admiralty of which the common law could conveniently take

cognizance. This principle, though not always and often hidden behind quaint arguments, and sometimes only loosely enforced, seems to have been the guiding principle of all the early decisions. Had the system of common law procedure been more elastic than it was, doubtless it would have been made to embrace the whole jurisdiction of the Admiralty, and one great anomaly in our law would thus have been removed. But the technical process of the Courts of common law limited their jurisdiction, and hampered their procedure: and it was impossible, with any show of justice, to prohibit suitors from resorting to the Admiralty in cases where the Court alone could afford a satisfactory remedy. So that as matters at last adjusted themselves, the Admiralty judges, although compelled to abandon all claim to general maritime jurisdiction, were yet suffered to

exercise undisputed authority in all maritime cases where the common law could not give redress."

"The Admiralty Court was left in possession of its jurisdiction over torts committed on the high seas, for that had never been disputed, and in suits of salvage also its authority prevailed for that was regarded as a branch of the royal prerogative, with the exercise of which the Court was properly entrusted. The Court had jurisdiction over tortious acts done upon the high seas. This jurisdiction has not been affected or altered by modern legislation, and has been exercised by the High Court in recent times to restrain such acts by injunction. In suits of possession the Admiralty acquired jurisdiction because it afforded a summary process unknown to the common law, by which the possession of the very thing in dispute was at once dealt with. Again, in cases of hypothecation the Admiralty was suffered to exercise jurisdiction, because the contract of hypothecation was not recognized by the common law, and it was only in the Admiralty that the thing hypothecated could be directly proceeded against. Over seamen's wages the Court, though only after a severe struggle, obtained jurisdiction, apparently, on the grounds that as the crew could sue together in the Admiralty Court, the remedy there was more convenient than, at law, and that seamen were entitled to the advantage the Admiralty afforded them of having the ship itself arrested as a security for their wages. These were the principal matters left within the jurisdiction of the Court, and even as to some of these the Admiralty judges were compelled to move within very limits..."

6. An Ordinance was passed in 1648 prescribing the jurisdiction of the Court of Admiralty, but it was set aside and thereafter the High Court of Admiralty lost its importance for nearly two centuries. Then in 1840 the British Parliament passed an Act (3 and 4 Vict. c. 65 - The Admiralty Court Act, 1840 hereinafter referred to as the 1840 Act) to improve the practice and extend the jurisdiction of the High Court of Admiralty. A significant feature of this Act is that the High Court of Admiralty could also take cognizance of the things arising within the body of a county in the same manner as the Common Law Courts. The 1840 Act *inter alia* provided for claims in respect of damage received by a ship. By 1861 Act the Parliament further extended the jurisdiction of the High Court of Admiralty. One of the significant changes introduced by the 1861 Act was that the High Court of Admiralty instead of confining its jurisdiction only to cases of "damage received by a ship" could now entertain claims in regard to "damage done by a ship". An important thing to note is that the jurisdictions of the High Court of Admiralty and the Common Law and Chancery Courts in respect of "damage received by a ship" were concurrent under the 1840 Act, but the jurisdiction of the High Court of Admiralty in regard to "damage done by a ship" under the 1861 Act was exclusive. The 1861 Act further provides that in cases of damages done by a ship on the high seas the aggrieved party had the choice to move the High Court of Admiralty either for an action in rem or for an action in personam.

7. We may next turn to the origin and development of the Admiralty jurisdiction in India with particular reference to Calcutta High Court. It appears that the first Charter granted to the United Company (after the union of the old and new Companies) was that of the 13th Geo. I in 1726, and it established at the settlements of Madras, Bombay and Calcutta, the Mayors' Courts each comprising of a Mayor and nine Aldermen. The Mayor's Court was a Court of Record and it had jurisdiction to try, hear and determine all civil suits, actions and pleas within the respective

towns. "The Governor and the 5 Seniors of the Council" were appointed justices of the peace with power to hold Quarter Sessions of the Peace and they were constituted into a Court of Record for the trial of all offences (except high treason) committed within the said towns or within ten miles of the same. By Charter 26th Geo. II. 1753 the Mayor's Courts, the Courts of Quarter Sessions, etc., were re-established with re-distribution of jurisdiction amongst them. In 1773 the Committee of Secrecy appointed to enquire into the state of the East India Company submitted its report. This report led to the passing of "the Regulating Act", 13 Geo.III c.63. This Act authorised His Majesty to establish a Supreme Court of Judicature at Fort William in Bengal, to consist of a Chief Justice and three other Judges to exercise and perform all Civil, Criminal, Admiralty and Ecclesiastical jurisdiction. The Supreme Court of Judicature at Fort William was to be a Court of Record. Accordingly the Charter dated 26th March, 1774, established a Court of Record to be called "the Supreme Court of Judicature at Fort William in Bengal" consisting of a Chief Justice and three other Judges. Thus from 1774 the Supreme Court of Judicature at Fort William began to exercise Admiralty jurisdiction. Clause 26 of the Charter dated 26th March, 1774, declared the Supreme Court of Judicature at Fort William in Bengal to be a "Court of Admiralty" in and for the provinces, countries, or districts, of Bengal, Bihar, and Orissa, and all other dependent territories and islands adjacent thereunto. The said Supreme Court was given full power and authority to take cognizance of hear, examine, try and determine all causes, civil and maritime, and all pleas of contracts, debts, exchanges, policies of assurance, accounts, charter-parties, agreements, leading of ships and all matters and contracts, which in any manner whatsoever relate to freight, or money due for ships hired and let out transport-money, maritime usury or bottmry, and matters civil and maritime, whatsoever, between merchants, owners, and proprietors of ships and vessels, employed or used within the jurisdiction aforesaid, or between others contracted, done, had, or commenced, in, upon or by the sea, or public rivers, or ports, creeks, harbours, and places over- flown, within the ebbing and flowing of the sea, and high-water mark, within about, and throughout Bengal, Bihar and Orissa and the dependent territories adjacent thereunto, the cognizance whereof belonged to the jurisdiction of the Admiralty, as the same was used and exercised in that part of Great Britain called England. Clause 27 of the Charter gave to the said Supreme Court full power and authority to exercise jurisdiction in regard to maritime crimes according to the laws and customs of the Admiralty in England committed upon the high seas within the aforesaid limits of jurisdiction, to punish offenders according to the civil and maritime laws and to deliver and discharge them and to take recognizances, etc. and to arrest ships, persons, goods etc. Clause 27 further prescribed that the proceeding in such cause or causes were to be according to the civil and maritime laws and customs and also according to the course, and order of the Admiralty, as the same was then used in England. Clause 28 of the said Charter dated 26th March, 1774 *inter alia* provided that jurisdiction in causes maritime extended only to the subjects of the King residing in the kingdoms or provinces of Bengal, Bihar and Orissa and to persons in the service of the Company or of any of the subjects.

8. An Act (Stat. 24 and 25 Vict. Cap. 104) was passed by the British Parliament in 1861 for establishing High Courts of Judicature in India which *inter alia* authorised Her Majesty to establish a High Court of Judicature at Fort William in Bengal for the Bengal Division of the Presidency of Fort William by Letters Patent under the Great Seal of the United Kingdom. Section 9 of the Act authorised the High Courts established under the Act to exercise all such civil, criminal, admiralty and vice admiralty, testamentary, intestate, and matrimonial jurisdiction, original and appellate, and all such powers and authority for and in relation to the administration of justice in their respective presidencies as Her Majesty might by Letters patent grant and direct.

Letters Patent dated 14th May, 1862 established the High Court of Judicature at Fort William in Bengal on 1st, July, 1862, Clause 31 of the Letters Patent of 1862 *inter alia* provided that the High Court was to have such civil and maritime jurisdiction as was then exercised by the Supreme Court of Admiralty. Clause 32 also gave the High Court such criminal jurisdiction as was then exercised by the Supreme Court as a Court of Admiralty. The jurisdiction vested in the High Court by the aforesaid Clauses 31 and 32 of the Letters Patent, 1862 was continued by Clauses 32 and 33 of the Letters Patent dated 28th December, 1865.

9. In 1890, the British Parliament passed the Colonial Courts of Admiralty Act (53 and 54 Vict. c.27) (hereinafter referred to as the 1890 Act). Section 3 of the Act provides as follows :-

"3. Power of Colonial legislature as to Admiralty jurisdiction. - The legislature of a British possession may by any Colonial law

(a) declare any court of unlimited civil jurisdiction, whether original or appellate, in that possession to be a Colonial Court of Admiralty, and provide for the exercise by such Court of its jurisdiction under this Act, and limit territorially, or otherwise, the extent of such jurisdiction; and

(b) confer upon any inferior or subordinate court in that possession such partial or limited Admiralty jurisdiction under such regulations and with such appeal (if any) as may seem fit :

Provided that any such Colonial law shall not confer any jurisdiction which is not by this Act conferred upon a Colonial Court of Admiralty."

Pursuant to the aforesaid provision contained in Section 3 of the 1890 Act, the Indian Legislature passed Act XVI of 1891. The Colonial Courts of Admiralty (India) Act, 1891 (hereinafter referred to as the 1891 Act) wherein the High Court of Judicature at Fort William in Bengal, being a Court of unlimited civil jurisdiction, was declared to be a Colonial Court of Admiralty along with the High Courts at Madras and Bombay and some other Courts. Sub-section (2) of Section 2 of the Colonial Court of Admiralty Act, 1890 provides that the jurisdiction of a Colonial Court of Admiralty shall be the same as the Admiralty jurisdiction of the High Court in England, whether existing by virtue of any statute or otherwise, and the Colonial Court of Admiralty may exercise such jurisdiction in like manner and to as full an extent as the High Court in England, and shall have the same regard as that Court to international law and the comity of nations. The effect of this sub-section is to limit the jurisdiction of Colonial Court of Admiralty established under the 1890 Act to the Admiralty jurisdiction of the High Court of England as it existed at the time of passing of the Act. As already indicated, the jurisdiction of the High Court of Admiralty in England had been considerably expanded by the Acts of 1840 and 1861 passed by the British Parliament. This expanded jurisdiction of the High Court of Admiralty in England was conferred on the Colonial Court of Admiralty by the 1890 Act and the High Courts including the High Court of Judicature at Fort William in Bengal derived the authority to exercise such jurisdiction upon necessary declaration made by the Indian Legislature by Act XVI of 1891.

10. Post 1890 British Statutes affecting the Admiralty jurisdiction of the High Court in England do not apply to the Colonial Courts of Admiralty. This view was first authoritatively laid down

by the Privy Council in *The Yuri Maru. The Woron.* (1927 AC 906). Their Lordships held :-

"A construction of the statute of 1890 which would have the singular effect of introducing by an automatic process unasked changes in the jurisdiction and procedure of the Courts of self governing dominions, with possible power in the local legislature by a cumbrous process to revoke an extension of jurisdiction in rem but no power to undo on unwelcome abatement, manifestly could not be adopted unless the words of the statute should be found to leave no alternative.

Neither, the early history of the overseas Courts, the course of modern legislation, continuity of policy, nor practical convenience appear to their Lordships to require that the jurisdiction defined in the Act shall be declared to be that "from time to time existing" in the High Court in England. On the whole, the true intent of the Act appears to their Lordships to have been to define as a maximum of jurisdictional authority for the Courts to be set up thereunder, the Admiralty jurisdiction of the High Court in England as it existed at the time when the Act passed. What shall from time to time be added or excluded is left for independent legislative determination."

The Calcutta High Court in *National Co. Ltd, v. Asia Mariner. M.S. The Owners and Parties interested*<sup>3</sup> held :

"The High Court at Calcutta as a Court of Admiralty is, therefore, a Court of prescribed jurisdiction. Its jurisdiction is prescribed by Clause 26 of the Charter of 1774 and by Section 2(2) of the Colonial Courts of Admiralty Act, 1890. The jurisdiction has not been extended or modified by any statute. None of the subsequent British statutes by which the Admiralty Jurisdiction of the High Court in England has been extended or affected has been made applicable to India."

(Emphasis added)

The aforesaid decision has been noted with approval in a recent decision of the same High Court in *Mohamed Saleh Behbehari and Co.,* also known as *Md. Saleh Behbehari v. owners and Parties interested in the Vessel M.V. "Notis" also known as "Broia Trader"*<sup>4</sup> The same view has been expressed by the Bombay High Court in *K.M. Bhagat v. Scindia Steam Navigation Co. Ltd.*<sup>5</sup> and in *Mrs. Sahida Ismail v. Petko R. Salvejkov*<sup>6</sup> Thus, the Admiralty jurisdiction of the Calcutta High Court commenced with the Charter of 1774 and without extension or expansion continued by the Letters Patent of 1862 and 1865. It was finally "extended and improved, by the Colonial Courts and Admiralty Act, 1890 and the Colonial Courts of Admiralty (India) Act, 1891 and it was the same as the Admiralty jurisdiction of the High Court in England in 1890. The said jurisdiction was preserved and continued by Section 106 of the Government of India Act, 1915. This was the Admiralty jurisdiction of the Calcutta High Court in the year 1916.

11. On 22nd March, 1912, Bihar and Orissa were taken out of the limits of the Presidency of Fort William in Bengal and constituted into a separate province. The High Court of Judicature at Patna was constituted as a Court of Record in 1916 by Letters Patent. Clauses 24 and 25 of the

Letters Patent, 1916 provide as follows :-

"24. And we do further ordain that the High Court of Judicature at Patna shall have and exercise in the Province of Bihar and Orissa all such civil and maritime jurisdiction as was exercisable therein immediately before the publication of these presents by the High Court of Judicature at Fort William in Bengal as a Court of Admiralty, and also such jurisdiction for the trial and adjudication of prize causes and other maritime questions as was so exercisable by the High Court of Judicature at Fort William in Bengal.

25. And we do further ordain that the High Court of Judicature at Patna shall have and exercise in the Province of Bihar and Orissa all such criminal jurisdiction as was exercisable therein immediately before the publication of these presents by the High Court of Judicature at Fort William in Bengal as a Court of Admiralty. or otherwise in connection with maritime matters or matters of prize."

The Admiralty jurisdiction of the Patna High Court is founded upon the aforesaid two clauses. Patna High Court has not been declared as a Colonial Court of Admiralty under Section 3 of the 1890 Act. However, it is clear from Clauses 24 and 25 that the entire Admiralty jurisdiction of the Calcutta High Court including the jurisdiction under the 1890 Act which it possessed in 1916 as a Court of Admiralty or otherwise

was transferred to the Patna High Court by Letters Patent. The words in Clauses 24 and 25 are not at all suggestive of the inference that with regard to the province of Bihar and Orissa the jurisdiction of the Calcutta High Court under the 1890 Act was to be retained by it or that the same was to be denied to Patna High Court. On the other hand, Clause 39 of the Letters Patent provides that the jurisdiction of the Calcutta High Court ceased with regard to matters in respect of which jurisdiction was transferred to the Patna High Court on coming into force of the Letters Patent. Thus from 1916, the Patna High Court became authorised to exercise Admiralty jurisdiction in the Province of Bihar and Orissa. There is however no instance of Patna High Court having ever exercised its Admiralty jurisdiction. As regards Admiralty, what was transferred from Calcutta High Court to Patna High Court was the Admiralty jurisdiction of the former High Court conferred on it under the Charter of 1774 continued under the Letters Patent of 1862 and 1865 and the jurisdiction conferred by the Colonial Court of Admiralty Act, 1890. The Admiralty jurisdiction of the Patna High Court was preserved by Section 223 of the Government of India Act, 1935.

12. Orissa was created a separate Province on the 1st, of April, 1936. In exercise of the powers conferred by Sub-section(1) of Section 229 of the Government of India Act, 1935 as adapted by the India Provisional Constitution (Amendment) Order, 1948 the then Governor-General of India made the Orissa High Court Order, 1948. -vide Notification No.S.O. 10 dated the 30th April, 1948. Government of India. Ministry of Law, (Reforms), and had constituted the High Court of Orissa as a Court of Record for the Province of Orissa. There is no specific mention of Admiralty jurisdiction in any of the Articles of the Orissa High Court Order, 1948. However, Article 4 provides as follows :-

"4. The High Court of Orissa shall have, in respect of the territories for the time being

included in the Province of Orissa, all such original appellate and other jurisdiction as under the law in force immediately before the prescribed day is exercisable in respect of the said territories or any part thereof by the High Court of Patna."

The expression "all such original, appellate and other jurisdiction" must by necessary implication include the Admiralty jurisdiction. Under Article 12, subject to the exceptions contained therein with which we are not concerned, the Patna High Court ceased to have jurisdiction in respect of the Province of Orissa on the coming into force of the Orissa High Court Order. The Orissa High Court derives its Admiralty jurisdiction solely from the Orissa High Court Order, 1948. It has not been declared as a Colonial Court of Admiralty under Section 3 of the 1890 Act. However, by operation of the Orissa High Court Order from 1948 the entire Admiralty jurisdiction of the Patna High Court was transferred to the High Court of Orissa and the Patna High Court ceased to have jurisdiction with regard to the Province of Orissa. The Admiralty jurisdiction of the Patna High Court which was transferred to Orissa High Court in 1948 was the jurisdiction which had been conferred by the Charter of 1774 on the Supreme Court of Judicature at Fort William in Bengal, continued and conferred on the Calcutta High Court by Letters Patent of 1862 and 1865 and the jurisdiction of the Calcutta High Court under the 1890 Act. That in essence is the Admiralty jurisdiction of Orissa High Court up-to-date. The Admiralty jurisdiction of the Orissa High Court was preserved and continued by Article 225 of the Constitution of India. It has been urged by learned Counsel for the plaintiffs that even in the absence of internal municipal law in that regard, the Admiralty jurisdiction of this High Court should include "international law maritime". Learned counsel has not cited any authority to show that this principle has been accented by any Court in India. With regard to Admiralty, this High Court is a Court of prescribed jurisdiction. It cannot go beyond the instrumentalities of internal municipal law which have conferred upon it the Admiralty jurisdiction. In England, an attempt to enter the field of "maritime law of the world" beyond the internal municipal law of England was disapproved by the House of Lords on the ground that such a theory was based upon a misconception. In *The Tojo Maru* (1972) AC 242. Lord Diplock held :-

"...Outside the special field of "prize" in times of hostilities there is no "maritime law of the world" as distinct from the internal municipal laws of its constituent sovereign states, that is capable of giving rise to rights or liabilities enforceable in English Courts....."

What has been said in respect of English Courts should also hold good for this High Court. This contention of the learned counsel must accordingly be rejected.

13. As regards maintainability of the suit filed by the plaintiffs, one of the main questions which arises for determination is whether the High Court has jurisdiction to entertain this suit in view of the admitted position that the cause of action for the suit arose within the territorial waters of Japan and the assertion of the defendants that they do not reside or carry on their business or personally work for gain within the territorial jurisdiction of this Court. The plaintiffs' case is that Rabindranath, husband of plaintiff No.1 and father of minor Plffs.2 and 3. died in Japan on account of injuries received by him in an explosion which took place on board the ship, of which the defendants are the owners, on the 20th July, 1978, while the ship was docked at Mizushima harbour in Japan. In their objection, the defendants have positively asserted that they do not reside or carry on their business or, personally work for gain within the jurisdiction of this High

Court. Mr. Mohanty, learned counsel, for the plaintiffs without disputing this stand of the defendants, urged that for a cause of action which has arisen in the high seas or foreign territorial waters, all the High Courts in India exercising Admiralty jurisdiction have concurrent powers to entertain the cause irrespective of where in India the defendants reside or carry on their business or personally work for gain. On the other hand, Mr. Das appearing on behalf of the defendants, contends that this High Court cannot entertain the claim against the defendants who do not reside or carry on their business or personally work for gain within Orissa and, therefore, not amenable to the jurisdiction of this Court. The contention of learned counsel for the plaintiffs that all the High Courts in India exercising Admiralty jurisdiction have concurrent powers to entertain causes of action arising in the high seas or foreign territorial waters irrespective of where the defendants reside, carry on their business or personally work for gain, is not supported by any text or authority and is also too far-fetched and wide to be accepted. On the other hand, the Letters Patent of 1916 under which the Admiralty jurisdiction of the Calcutta High Court was passed on to the Patna High Court in respect of the Province of Bihar and Orissa and the Orissa High Court Order, 1948 under which the Admiralty jurisdiction in respect of Orissa was passed on from Patna High Court to Orissa High Court clearly indicate that the Admiralty jurisdiction of the Orissa High Court is exclusive, distinct and separate from that of any other High Court. Law in all civilized Countries tends to prescribe the definite forum where dispute of any particular nature would be entertainable. This is done with a view to avoiding uncertainty and conflict of jurisdiction. There can be no force in the submission of Mr. Mohanty for the plaintiffs that the law is such that plaintiffs' claim could be entertained anywhere in India. There may be an occasion where from out of the same incident more than one claim would arise and if what Mr. Mohanty contends is true, separate claims arising out of the same event, could be laid before different High Courts in India. This could not have been the intended position of procedure. So far as this High Court is concerned, I would unhesitatingly reject the theory of concurrent jurisdiction. It has already been pointed out that the law as developed in England after 1890 has no application to India, but it is useful to take note of the fact that in England, in "Admiralty actions to enforce a claim for damages of life or personal injury arising out of collision, carrying out or omission to carry out manoeuvres in the case of one or more of two or more ships, or non-compliance with collision regulations, and limitation actions, service may be effected outside the jurisdiction with leave of the Court only in cases where either (1) the defendant has his habitus residence or a place of business within England and Wales, or (2) the cause of action arose within inland waters or port limits in England and Wales or (3) an action arising out of the same incident or series of incidents is proceeding in the High Court, or has been heard and determined in the High Court, or (4) the defendant has submitted or agreed to submit to the jurisdiction of the High Court," *i.e.*? (Halsbury's Laws of England, Fourth Edition, Volume I. page 260).

14. Learned counsel for the plaintiffs drew our attention to the following extract in para 5 of the "Statement of objects and Reasons of the Colonial Courts of Admiralty (India) Act, 1891 published at page 197 of Volume IV of the AIR Manual, Third Edition :-

"5. The Governor-General in Council accepted the opinion of the Governor of Bombay in Council, and the unanimous opinion of the Honourable the Chief Justice and the Judges of the Calcutta High Court, that the jurisdiction of Colonial Courts of Admiralty in India should not be limited territorially or otherwise."

As already stated, the Orissa High Court has not been declared as a Colonial Court of Admiralty and the 1891 Act has application to this High Court. Hence the above extracted passage from the "Statement of Objects and Reasons" of the 1891 Act cannot throw any light on the territorial limits of the Admiralty jurisdiction of this High Court. On this question I would rather go back to Clause 28 of the Charter dated 26th March, 1774. This clause first deals with Court affidavits and affirmations, their form and manner, their weight, authority and effect and then states—

"...provided always that the several powers and authorities hereby to proceed in maritime causes, and according to the laws of the Admiralty shall extend and be construed to extend only to the subjects of us, our heirs, or successors, who shall reside in the Kingdoms or provinces of Bengal, Bihar and Orissa, or some of, them and to persons who shall, when the cause of suit for complaint shall have arisen, have been employed by, or shall then have been, directly or indirectly, in the service of the said United Company, or of any of our subjects."

Subsequent laws dealing with Admiralty and maritime jurisdiction applicable to this High Court have left this clause untouched. The proviso is as much alive to-day as it was in 1774 though to-day in respect of Orissa it would obviously mean that the powers and authorities under it to proceed in maritime causes and according to the laws of the Admiralty shall extend and be construed to extend only to the citizens of India residing in the State of Orissa and to persons who on the date of the cause of action were in the service of the Government or in the service of the citizens who are residents of Orissa. In the present case, the defendants do not belong to any of the three categories of persons described above. Accordingly, it must follow that the defendants cannot be proceeded against in an action in personam in the Admiralty jurisdiction of this High Court in view of the provisions contained in Clause 28 of the 1774 Charter.

15. It has been urged on behalf of the defendants that the cause of action in the present suit did not arise within the local limits of the jurisdiction of this High Court and the defendants do not actually or voluntarily reside or carry on their business or personally work for gain within the said jurisdiction and as such Section 20 of the Civil Procedure Code is a bar to the institution of the suit before this Court. In order to meet this objection learned counsel for the plaintiffs relies on sub-section (2) of Section 112 of the Civil Procedure Code wherein it is provided that nothing therein contained applies to any matter of criminal or admiralty or vice-admiralty jurisdiction, or to appeals from orders and decrees of Prize Courts. It may be seen that Section 112 comes within Part VII of the Civil Procedure Code. Part VII deals with "appeals". Sections 96 to 99A are placed under the sub-heading "Appeals from original Decrees"; Sections 100 to 103 are placed under the sub-heading "Appeals from Appellate Decrees"; Sections 104 to 106 are placed under the sub-heading "Appeals from Orders"; Sections 107 and 108 are placed under the sub-heading "General Provisions relating to Appeals"; and finally, Sections 109 to 112 are placed under the sub-heading "Appeals to the Supreme Court". The scheme of Part VII and the language of Section 112 suggest that only the provisions as to appeals do not apply to matters coming within the Admiralty jurisdiction. The present suit is however, not concerned with any appeal in the Admiralty jurisdiction. Support is available for the proposition that the Civil Procedure Code applies to civil action under the admiralty jurisdiction from the fact that provision had to be made under sub-section (2) of Section 112 of the Code to exclude the application of some provision in the Code to a given situation. If the entire Code was not applicable to disputes under the

admiralty jurisdiction, a provision as found in sub-section (2) of Section 112 of the Code would have been made elsewhere and possibly under Section 9, to indicate the legislative intention of the Code being kept out. Therefore, the bar of sub-section (2) of Section 112, Civil Procedure Code does not apply to the present suit. Undoubtedly the present dispute relates to a claim of civil nature. Civil courts are courts of general jurisdiction and the people have a right to insist for free access to the courts. Plaintiffs have in the instant case invoked the admiralty jurisdiction of this Court with reference to a civil action. Unless there be exclusion of the procedure prescribed for civil courts or there be an independent set of rules different from the procedure normally applicable to civil proceedings, the Civil Procedure Code which applies to civil proceedings before Courts would also have application to civil disputes in admiralty jurisdiction. That again is a feature in support of the contention of counsel for defendants that jurisdiction of this Court has to be tested by the rules of procedure laid down in the Code. Section 20, Civil Procedure Code provides :-

"20. Other suits to be instituted where defendants reside or cause of action arises :

Subject to the limitations aforesaid, every suit shall be instituted in a Court within the local limits of whose jurisdiction -

(a) the defendant or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain : or

(b) any of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the Court is given, or the defendants who do not reside or carry on business, or personally work for gain, as aforesaid acquiesce in such institution; or

(c) the cause of action, wholly or in part, arises.

Explanation : A corporation shall be deemed to carry on business at its sole or principal office in India or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place."

There can be no doubt that the cause of action can never arise within the local limits of a Court's jurisdiction in cases of maritime torts committed upon the high seas or foreign territorial waters. Section 20(c), Civil Procedure Code cannot be invoked in such cases. Therefore, either the conditions laid down in Section 20(a) or those laid down in Section 20(b), C.P.C, must be satisfied before the Court can entertain a suit. In the present case the defendants do not voluntarily reside or carry on their business or personally work for gain within the local limits of the jurisdiction of this Court. Hence section 20, Civil Procedure Code bars the jurisdiction of this Court to entertain the present suit.

16. Learned counsel on both sides had addressed the Court at length as to whether the accident on the 20th July, 1973 on board the ship at Mizushima harbour resulting in the death of Rabindranath can be said to be damage done by that ship within the ambit of Section 7 of the 1861 Act and if so, whether the provisions of the Fatal Accidents Act 1885 bar the application of the said Section 7 of the 1861 Act. I have already held that this Court has no jurisdiction to entertain the present suit. Order 14, Rule 2(2) of the Civil Procedure as amended in 1976

provides that an issue relating to jurisdiction of the Court should be decided preliminarily and law is fairly settled that where it is a case of absence of total jurisdiction, findings on questions of fact should not be given. Hence, it is not necessary that the said matter which requires consideration and determination of factual aspects of the case should be decided by this Court.

17. The Letters Patent of 1916 constituting the High Court of Judicature at Patna and the Orissa High Court Order, 1948 constituting the High Court of Orissa do not contain any provision making the Calcutta High Court Admiralty Rules, 1912 applicable to the Admiralty jurisdiction of this Court. The said Rules cannot apply to regulate the procedure and practice in cases instituted in the Admiralty jurisdiction of this Court. In the absence of any law or rules relating to court-fees payable in an action in the Admiralty jurisdiction of this Court, the question whether court-fees paid by the plaintiffs in the present suit are sufficient or not does not arise for determination by this Court.

18. For the reasons stated above, the present suit cannot be entertained by this Court in its Admiralty jurisdiction. The plaint be returned to the plaintiffs' counsel for presentation before a proper Court of law. There shall be no order as to costs.

**P. K. Mohanti, J .**

19. I agree.

Order accordingly.

Cases Referred.

<sup>1</sup>(AIR 1961 Bom 186)

<sup>2</sup>(AIR 1961 Bom 186)

<sup>3</sup>(1968) 72 Cal WN 635

<sup>4</sup>(1981) 2 Cal LJ 129

<sup>5</sup>(AIR 1961 Bom 186)

<sup>6</sup>(AIR 1973 Bom 18)