REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL No. 2617 of 2018
(Arising out of SLP(C) No. 18845/2013)

SUNIL B. NAIK ….Appellant

versus

GEOWAVE COMMANDER ..…Respondent

And:

CIVIL APPEAL No. 2618 of 2018
(Arising out of SLP(C) No. 18899/2013)

J U D G M E N T

SANJAY KISHAN KAUL, J.

1. Leave granted.

2. A maritime claim against the charterer of a ship, who is not the *de jure* owner of the ship, and the endeavor to recover that amount through a restraint order against the ship owned by a third party has

given rise to the present appeal.

3. Oil and Natural Gas Corporation Limited (for short 'ONGC') awarded a contract to one Reflect Geophysical Pte. Ltd., Singapore (for short 'Reflect Geophysical') for carrying out seismic survey operations off the coast of Gujarat near the Okha Port in the year 2012. In order to facilitate the carrying out of its obligations, Reflect Geophysical in turn entered into a Charter Party Agreement vide contract dated 29.6.2012 to charter the vessel 'Geowave Commander', the registered owner being Master and Commander AS Norway,(for short 'Geowave Commander') for a period of three years. The said vessel is stated to be a specialized ship equipped to carry out seismic survey operations. In terms of the said contract, it is defined as a 'Bareboat Charter'. The charterer also has the option to purchase the vessel and the owners' seismic equipment provided the purchase option is declared by the charterers to the owners in writing latest on 18.1.2015 being six months prior to the end of the charter period.

4. In order to fully appreciate the terms of the charter, it is necessary to discuss/reproduce some of the clauses of the Charter

Agreement:

"10. Maintained and Operation

(a)(i) Maintenance and Repairs: - During the Charter Period the Vessel shall be in the full possession and at the absolute disposal for all purposes of the Charters and under their complete control in every respect. The Charterers shall maintain the Vessel, her machinery, boilers, appurtenances and spare parts in a good state of repair. In efficient operating condition and in accordance with good commercial maintenance practice and except as provided for in Clause 14(1) if applicable at their own expense they shall at all times keep the Vessel's class fully upto date and free of overdue recommendations and/or conditions with the classification."

xxxx xxxx xxxx xxxx xxxx

"(ii) New Class and Other Safety Requirements – In the event of any improvement, structural changes or new equipment becoming necessary for the continued operation of the Vessel by reason of new class requirements or by compulsory legislation costing (excluding the Charterer's loss of time) more than the percentage stated in Box 23 or if Box 23 is left blank, 5 per cent of the Vessel's insurance value as stated in Box 29 then the extent, if any, to which the rate of hire shall be varied and the ratio in which the cost of compliance shall be shared between the parties concerned in order to achieve a reasonable distribution thereof as between the Owners and the Charterers having regard, *inter alia* to the length of the period remaining under this Charter shall, in the absence of agreement, be referred to dispute resolution method agree in Clause 30.

(iii) Financial Security: The Charterers shall maintain financial security or responsibility in respect of third party liabilities as required by any government including federal state or municipal or other division or authority thereof to enable the Vessel without penalty or charge, lawfully to enter, remain at or leave

any port, place territorial or contiguous waters of any country, state or municipality in performance of this Charter without any delay. This obligation shall apply whether or not such requirements have been lawfully imposed by such government or division or authority thereof. The Charterers shall make and maintain all arrangements by bond or otherwise as may be necessary to satisfy such requirements at the Charterers' sole expenses and the Charterers shall indemnify the Owners against all consequences whatsoever (including loss of time) for any failure or inability to do so.

(b) Operation of the Vessel: The Charterers shall at their own expense and by their own procurement man, victual, navigate, operate, supply fuel and whenever required, repair the Vessel during the Charter Period and they shall pay all charges and expenses of every kind and nature whatsoever incidental, to their use and operation of the Vessel under this Charter, including annual flag State fees and any foreign general municipality and/or state taxes. The master officers and crew of the Vessel shall be the servants of the Charterers for all purpose whatsoever, even for any reason appointed by the Owners."

xxxx xxxx xxxx xxxx xxxx

"(d) Flag and Name of Vessel: During the Charter period, the Charterers shall have the liberty to paint the Vessel in their own colours, install and display their funnel insignia and fly their own house flag. The Charterer shall also have the liberty, with the Owners' and Mortgagee's prior written consent, which shall not be unreasonably withheld to change the flag and/or the name of the Vessel during the Charter Period. Painting and re-painting, installment and re-installment, registration and re-registration if required by the Owners shall be at the Mortgage(s) bearing on the Vessel that would be required as a result of a change of flag initiated by the Charterers shall be Charterer's cost.

(e) Changes to the Vessel: Subject to Clause 10(a)(ii) the Charterers shall make no structural changes in the Vessel or changes the machinery, boilers, appurtenances or spare parts thereof without in each instance first securing the Owners approval thereof, if the Owners so agree, the Charterers shall, if the Owners so require, restore the Vessel to its former condition before the termination of this Charter."

…. …. …. …. ….

"11. Hire
(a) The charterers shall pay hire due to the Owners punctually in accordance with the terms of this Charter in respect of which time shall be of the essence."

…. …. …. …. ….

"17. Indemnity

(a) The Charterers shall indemnify the Owners against any loss, damage or expenses incurred by the Owners arising out of or in relation to the operation of the Vessel by the Charterers, and against any lien of whatsoever nature arising out of an event occurring during the Charter Period. If the Vessel be arrested or otherwise detained by reason of claims or liens arising out of her operation hereunder by the Charterers, the Charterers shall at their own expense take all reasonable steps to secure that within a reasonable time the Vessel is released, including the provision of bail.

Without prejudice to the generality of the foregoing, the Charterers agree to the indemnify the Owners against all consequences or liabilities arising from the Master, officers or agents signing Bills of Lading or other documents.

(b) If the Vessel be arrested or otherwise detained by reason of a claim or claims against the Owners the Owners shall at their own expenses take all reasonable steps to secure that within a reasonable time the Vessel is released, including the provision of bail.

> In such circumstances the Owners shall indemnify the Charterers against any loss, damage or expense incurred by the Charterers (including hire paid under this Charter) as a direct consequence of such arrest or detention."

5. Reflect Geophysical entered into a Charter Hire Agreement on 30.10.2012 with M/s. Sunil B. Naik, the appellant in SLP(C) No.18845/2013, in terms whereof the said appellant agreed to supply 24 fishing trawlers being the chase vessels to assist in survey operations to be conducted by the charterers seismic vessel Geowave Commander. The charter was initially for 16 chase vehicles out of 24 fishing trawlers. The said agreement contained a dispute resolution clause 18 providing for arbitration, which reads as under:

> "18. All disputes arising out of or in connection with this Charter Hire Agreement shall be finally settled in Mumbai under the rules of India Arbitration Act before three arbitrators appointed in accordance with the said Rules. Each party shall appoint one such arbitrator and the two so appointed by the parties shall jointly appoint the third."

6. It is the case of the appellant that the 16 vessels were made ready for Reflect Geophysical to ensure that fishing vessels were kept well clear of the towed in water seismic equipment so that their fishing equipment is not damaged. The daily hiring rate, as per the agreement,

varies for the different nature of vehicles. The said appellant also claims that the vessels were mobilized at Okha port but the fact remains that the respondent ship never went to Okha and was at the Pipavav port from where it went to Mumbai.

7. Similarly Yusuf Abdul Gani, appellant in SLP(C) No.18899/2013, agreed to give on hire the 'Orion Laxmi' to Reflect Geophysical to work in support with the survey vessel 'Geowave Commander' vide contract dated 1.10.2012. The purpose was to supply standby and emergency towing duties. The two appellants claim to have raised invoices on Reflect Geophysical from time to time, which are stated not to have been paid. Reflect Geophysical also failed to pay the owners of the respondent vessel and consequently the owners gave a notice of default dated 4.3.2013 to the charterers, Reflect Geophysical, for non-payment of charter hire aggregating to US$ 4,36,790 (approximately Rs.2.23 crore). Reflect Geophysical, however, filed an application in the Singapore Court for placing the company under judicial management, which was published in a notification dated 15.3.2013 in the Singapore Gazette.

8. Sunil B. Naik issued a demand notice to Reflect Geophysical for payment of outstanding dues on 16.3.2013. Yusuf Abdul Gani is also said to have raised various invoices to Reflect Geophysical in respect of the dues arising out of the contract, between 16.11.12 and 16.2.13.

9. Yusuf Abdul Gani, moved the Bombay High Court by filing a suit against the respondent vessel as an admiralty suit and obtained an order on 15.3.2013 for arrest of the vessel. Similarly, on Reflect Geophysical expressing its inability to make payments on account of lack of funds, Sunil B. Naik, filed an admiralty suit and obtained an order of arrest of vessel on 12.4.2013. As noted, the vessel was already under arrest in pursuance of the order passed in Yusuf Abdul Gani's case.

10. The owners of the respondent vessel, Master and Commander AS Norway, filed a notice of motion in the two proceedings for vacation of the *ex parte* arrest of vessel. On hearing being held, the learned single Judge on 17.4.2013 vacated the *ex parte* stay. The two appellants, as aggrieved parties, moved the Division Bench of the Bombay High Court, which dismissed the appeal on 10.5.2013. That is

how the present appeals were filed.

11. In the present appeals while issuing notice on 17.5.2013 an interim arrangement was made whereby the respondent was directed to deposit a sum of Rs.1 crore in each case as security before the Bombay High Court and on such deposit the vessels were permitted to sail. The amounts were directed to be kept in fixed deposits. We were informed that these amounts were accordingly deposited and are lying in fixed deposits. The ship set sail. The question, thus, would be whether the appellants are entitled to appropriate this amount along with interest against their dues or whether the respondent is entitled to release of the amount so deposited in Court.

The Legal Conundrum:

12. We are faced with the aforesaid factual position where there are actually three creditors of Reflect Geophysical, being the owners of the respondent ship and the appellants, who entered into contracts with Reflect Geophysical to provide assistance in the operation of the task for which the ship was engaged.

13. The first question, thus, which would arise is whether a maritime claim could be maintained under the admiralty jurisdiction of the High Court for an action in *rem* against the respondent ship in respect of the dues of the appellants when the charterer himself is in default of the payment to the owner. The case of the appellants, on the one hand, is that there is a liability of the respondent vessel on account of the charter agreement and the rights and obligations of the charterer while the respondent, who has succeeded before both the forums, seeks to establish that the claim of the appellants cannot be categorized as a maritime claim for invoking the admiralty jurisdiction of the High Court and that the vessel, thus, could not be arrested to secure such a claim of the appellants.

Bareboat Charter:

14. The charter party is defined as a contract by which an entire ship, or some principal part thereof, is let by the owner to another person for a specified time or use. The Charter can be of two kinds – (i) Charter of demise; and (ii) Contract of affreightment. In the present case, we are concerned with the charter of demise by which the whole vessel is let to the charterer with the transfer to him of its entire

command and possession and consequent control over its navigation. Such a charter is called a bareboat charter. It would be apposite at this stage to refer to the Mark Davis' Commentary on "Bareboat Charters" 2nd Edition where the nature and character of demised charters has been explained as follows:

> "A fundamental distinction is drawn under English law between charter parties which amount to a demise or lease of a ship, and those which do not. The former category, known as charters by demise, operate as a lease of the ship pursuant to which possession and control passes from the owners to the charterers whilst the latter, primarily comprising time and voyage charters, are in essence contracts for the provision of services, including the use of the chartered ship. Under a lease, it is usual for the owners to supply their vessel "bare" of officers and crew, in which case the arrangement may correctly be termed a "bareboat" charter. The charterers become for the duration of the charter the *de facto* "owners" of the vessel, the master and crew act under their orders, and through them they have possession of the ship.
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> A statement of the hallmarks of a demise charter can be found in the judgment of Evans LJ in *The Giuseppe di Vittorio [1998] 1 Lloyd's Rep 136 at p 156:*
>
> > "What then is the demise charter? Its hallmarks, as it seems to me, are that the legal owner gives the charterer sufficient of the rights of possession and control which enable the transaction to be regarded as a letting – a lease, or demise, in real property terms – of the ship. Closely allied to this is the fact that the charterer becomes the employer of the master and crew. Both aspects are combined in the common description of a 'bareboat' lease or hire arrangement."

As indicated, charter parties which do not amount to a demise or lease of a ship (Including time charters and voyage charters) are classified in English law as contracts of affreightment, pursuant to which the owners agree to carry goods by sea in return for a sum of money. Although the charterers have a right as against the owners to have their goods carried on the vessel, the ownership and the possession of the ship remains with the owners through the master and crew who remain their servants.

Whether or not a charter party amounts to a demise charter depends in every case upon the precise terms of the charter, taking the instrument as a whole. The test has been summarized as follows:

> "The question depends, where other things are not in the way, upon this: whether the owner has by the charter, where there is a charter, parted with the whole possession and control of the ship, and to this extent, that he has given to the charterer a power and right independent of him, and without reference to him to do what he pleases with regard to the captain, the crew, and the management and employment of the ship. That has been called a letter or demise of the ship. The right expression is that it is a parting with the whole possession and control of the ship."

Thus, although time charters almost always contain words such as "let", "hire", "delivery" and "redelivery", the use of such words are inapt in such a context, and are not in any sense to be regarded as conclusive, when determining the nature of the charter.

In Sea and Land Securities v. William Dickinson MacKinnon LJ traced the origin of these words to demise charters, and at page 163 emphasised the difference between demise and time charters thus: "there is all the difference between hiring a boat

> in which to row yourself about, in which case the boat is handed over to you, and contracting with a man on the beach that he shall take you for a row, in which case he merely renders services in rowing you about."

15. A demised charterer, like Reflect Geophysical, who is the owner for services stipulated, assumes in large measures the customary rights and liabilities of vessel owners in relation to third persons, who have dealt with him or with the ship, illustratively, repairs and supplies ordered for the vessel, wages of seamen, etc.

Maritime Claims & Admiralty Jurisdiction in India:

16. This Court in ***M.V. Elisabeth &Ors. v. Harwan Investment & Trading Pvt. Ltd.***[1] had an opportunity to discuss the scope of exercise of the admiralty jurisdiction and consequently of an action *in rem.* The Admiralty Court Act, 1861, was referred to in this behalf but that was stated not to inhibit the exercise of jurisdiction by the High Court subject to its own rules, in exercise of its maritime jurisdiction. The fact that the High Court continues to enjoy the same jurisdiction as it had immediately before the commencement of the Constitution (Article 225 of the Constitution of India) was to be read in the context of the judicial sovereignty of the country manifested in the jurisdiction

1 AIR 1993 SC 1014

of the High Courts as superior courts, thus, though the colonial statutes may remain in force, by virtue of Article 372 of the Constitution of India, that was observed not to stultify the growth of law or blinker its vision or fetter its arms. The latter Admiralty Act of 1890 was said not to incorporate any particular English statue into the Indian law for the purpose of conferring admiralty jurisdiction, but to assimilate the competent courts in India to the position of the English High Court. The lack of legislative exercise was noted with regret. The said lament apparently has still not had its full impact!

17. The draft Admiralty Act of 1987, did not see the light of the day. Section 3 of that Act seeks to define the admiralty jurisdiction of the court. The fate was no different for the draft Admiralty Act of 1999, Section 5 of which defines the admiralty jurisdiction. Finally, we have The Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017, which was passed by the Parliament and received the assent of the President of India on 9.8.2017 and was duly published in the Gazette on the said date but the date of its coming into force has still not been notified. Interestingly, the statement of object and reasons of this Act itself refers to the desirability of the codifying and clarifying

the admiralty law in view of the observations of this Court in ***M.V. Elisabeth &Ors.***[2]. The present dispute is, once again, a reminder to the Government of the necessity of bringing into force the said Act!

18. We may note that these Acts were referred to by Mr. Shekhar Naphade, learned Senior Advocate appearing for the appellant, Sunil B. Naik, for purposes of elucidating the expanding admiralty jurisdiction as observed in ***M.V. Elisabeth &Ors.***[3]. Thus, Section 3(1) (h),(j) & (l) of the 1987 Act was referred, which reads as under:

> "**3. Admiralty Jurisdiction of the Court.** – (1) The Admiralty Jurisdiction of the Court shall be as follows, that is to say Jurisdiction to hear and determine any of the following questions or claims:
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> xxxx xxxx xxxx xxxx xxxx
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> (h) Any claim arising out of any Agreement relating to the carriage of goods in a ship or to the use or hire of a ship;
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> xxxx xxxx xxxx xxxx xxxx
>
> (j) Any claim in the nature of towage in respect of a ship or any aircraft;
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> xxxx xxxx xxxx xxxx xxxx
>
> (l) Any claim in respect of goods, materials, bunker or other necessaries supplied to a ship for her operation of maintenance."

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2 supra
3 supra

19. The claim of the appellants was sought to be brought within the expression "or to use or hire of a ship". The same aforesaid clause of 1999 Act was also referred to state that the expression "operation or maintenance" was specified "operation or maintenance." The object, it was, thus, pleaded, in the expanding jurisdiction was to include any services rendered to the ship and it was claimed that the appellants had actually rendered those services in the form of the agreement with Reflect Geophysical. Insofar as 2017 Act is concerned, the provision of Section 4(1)(j) & (l) were referred to, which read as under:

> "**4. Maritime claim.** – (1) The High Court may exercise jurisdiction to hear and determine any question on a maritime claim, against any vessel, arising out of any –
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> xxxx xxxx xxxx xxxx xxxx
>
> (j) towage;
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> xxxx xxxx xxxx xxxx xxxx
>
> (l) goods, materials, perishable or non-perishable provisions, bunker fuel, equipment (including containers), supplied or services rendered to the vessel for its operation, management, preservation or maintenance including any fee payable or leviable."

20. In respect of the aforesaid clause (l), once again, it is claimed

that the appellant rendered services to the vessel for its operation and management. Section 6 of that Act also provides for admiralty jurisdiction in *personam* in respect of a maritime claim.

21. Mr. Prashant S. Pratap, learned Senior Advocate appearing for the respondent referred to the same judgment in ***M.V. Elisabeth &Ors.***[4] to emphasise that despite the expanding jurisdiction of the courts, certain fundamentals have to be kept in mind as reflected in the observations made in the said judgment. As to what is the object of exercise of jurisdiction in *rem* and the manner of exercise is discussed in the following paragraphs:

> "44. "The law of admiralty, or maritime law, …. (is the) corpus of rules, concepts, and legal practices governing … the business of carrying goods and passengers by water." (Gilmore and Black, The Law of Admiralty, page 1). The vital significance and the distinguishing feature of an admiralty action in rem is that this jurisdiction can be assumed by the coastal authorities in respect of any maritime claim by arrest of the ship, irrespective of the nationality of the ship or that of its owners, or the place of business or domicile or residence of its owners or the place where the cause of action arose wholly or in part.
>
> 45.… In admiralty the vessel has a juridicial personality, an almost corporate capacity, having not only rights but liabilities (sometimes distinct from those of the owner) which may be enforced by process and decree against the vessel, binding upon all interested in her and conclusive upon the world, for admiralty

4 supra

in appropriate cases administers remedies in rem, i.e., against the property, as well as remedies in personam, i.e., against the party personally ….” (Benedict, The Law of American Admiralty, 6th ed., Vol. I p. 3.)

46. Admiralty Law confers upon the claimant a right in rem to proceed against the ship or cargo as distinguished from a right in personam to proceed against the owner. The arrest of the ship is regarded as a mere procedure to obtained security to satisfy judgment. A successful plaintiff in an action in rem has a right to recover damages against the property of the defendant. “The liability of the ship owner is not limited to the value of the res primarily proceeded against …. An action … though originally commenced in rem, becomes a personal action against a defendant upon appearance, and he becomes liable for the full amount of a judgment unless protected by the statutory provisions for the limitation of liability”.' (Roscoe's Admiralty Practice, 5th ed. p. 29)

47. The foundation of an action in rem, which is a peculiarity of the Anglo-American law, arises from a maritime lien or claim imposing a personal liability upon the owner of the vessel. A defendant in an admiralty action in personam is liable for the full amount of the plaintiff's established claim. Likewise, a defendant acknowledging service in an action in rem is liable to be saddled with full liability even when the amount of the judgment exceeds the value of the res or of the bail provided. An action in rem lies in the English High Court in respect of matters regulated by the Supreme Court Act 1981, and in relation to a number of claims the jurisdiction can be invoked not only against the offending ship in question but also against a ‘sistership’ i.e., a ship in the same beneficial ownership as the ship in regard to which the claim arose.

“The vessel which commits the aggression is treated as the offender, as the guilty instrument or thing to which the forfeiture attaches, without any reference whatsoever to the character or

conduct of the owner ….” (Per Justice Story, The United States v. The Big Malek Adhel [43 US (2 How) 210, 233 (1844)]).

xxxx xxxx xxxx xxxx xxxx

59. The real purpose of arrest in both the English and the Civil Law systems is to obtain security as a guarantee for satisfaction of the decree, although arrest in England is the basis of assumption of jurisdiction, unless the owner has submitted to jurisdiction. In any event, once the arrest is made and the owner has entered appearance, the proceedings continue in personam. All actions in the civil law — whether maritime or not — are in personam, and arrest of a vessel is permitted even in respect of non-maritime claims, and the vessel is treated as any other property of the owner, and its very presence within jurisdiction is sufficient to clothe the competent tribunal with jurisdiction over the owner in respect of any claim. [See D.C. Jackson, Enforcement of Maritime Claims, (1985) Appendix 5] [See D.C. Jackson, Enforcement of Maritime Claims, (1985) Appendix 5, p. 437 et seq.] . Admiralty actions in England, on the other hand, whether in rem or in personam, are confined to well defined maritime liens or claims and directed against the res(ship, cargo and freight) which is the subject-matter of the dispute or any other ship in the same beneficial ownership as the res in question.”

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“99. What then was the jurisdiction that the Court of England exercised in 1890? The law of Admiralty was developed by English courts both as a matter of commercial expediency and due to equity and justice. Originally it was a part of common law jurisdiction, but the difficulty of territorial limitations, constraints of common law and the necessity to protect the rights and interests of its own citizens resulted in growth of maritime lien a concept distinct from common law or equitable lien as it represents a charge on maritime property of a nature unknown alike to the common law or equity. The Privy Council explained

it as ‘a claim or privilege upon a thing to be carried into effect by legal process’ [Harmer v. Bell, (1851) 7 Moo PC 267 : 13 ER 884] . Law was shaped by exercise of discretion to what appeared just and proper in the circumstances of the case. Jurisdiction was assumed for injurious act done on high seas and the scope was extended, ‘not only to British subjects but even to aliens’ [Hailey (The), LR 2 PC 193] . Maritime law has been exercised all over the world by Maritime powers. In England it was part of Municipal law but with rise of Britain as empire the law grew and it is this law, that is, ‘Maritime Law that is administered by the Admiralty Court’ [Halsbury's Laws of England, 4th Edn., Vol. 1] . From the Maritime law sprang the right known as Maritime lien ascribing personality to a ship for purposes of making good loss or damage done by it or its master or owner in tort or contract. In England it grew and was developed in course of which its scope was widened from damage done by a ship to claims of salvor, wages, bottomry, supply of necessaries and even to bills of lading. Its effect was to give the claimant a charge on res from the moment the lien arose which follows the res even if it changed hands. In other words a maritime lien represented a charge on the maritime property. The advantage which accrued to the maritime lienee was that he was provided with a security for his claim up to the value of the res. The essence of right was to identify the ship as wrongdoer and compel it by the arrest to make good the loss. Although the historical review in England dates back to the 14th Century but its statutory recognition was much later and ‘maritime law came to jurisprudential maturity in the first half of the 19th Century’ [Maritime Liens by D.R. Thomas]. And the first statutory recognition of such right came in 1840 when the Admiralty Court Act of 1840 was enacted empowering the admiralty court to decide all questions as to the title or ownership of any ship or vessel or the procedure thereof remaining in the territory arising in any cause of possession, salvage, damage, wages or bottomry. By clause (6) of the Act jurisdiction was extended to decide all claims and demands whatsoever in the nature of salvage for services rendered to or damage received by any ship or sea-going vessel or in the nature of towage or for necessaries

supplied to any foreign ship or sea-going vessel and the payment thereof whether such ship or vessel may have been within the body of a country or upon the high seas at the time when the services were rendered or damage received or necessary furnished in respect of such claims. But the most important Act was passed in 1861 which expanded power and jurisdiction of courts and held the field till it was replaced by Administration of Justice Act, 1920. The importance of the Act lay in introducing the statutory right to arrest the res on an action in rem. Section 35 of the 1861 Act provided that the jurisdiction by the High Court of Admiralty could be exercised either by proceedings in rem or proceedings in personam. “The essence of the rem in procedure is that ‘res’ itself becomes, as one might say, the defendant, and ultimately the ‘res’ the ship may be arrested by legal process and sold by the Court to meet the plaintiff's claim. The primary object, therefore, of the action in rem is to satisfy the claimant out of the res” [Maritime Lawby Christopher Hill] . If the 1840 Act was important for providing statutory basis for various types of claims then 1861 Act was a step forward in expanding the jurisdiction to claims of bill of lading. Section 6 of the Act was construed liberally so as to confer jurisdiction and the expression ‘carried into any port was’ was expanded to mean not only when the goods were actually carried but even if they were to be carried [(The) Ironsides, 167 ER 205(The) St. Cloud, 167 ER 29(The) Norway, 167 ER 347] . Further the section was interpreted as providing additional remedy for breach of contract [Carter: History of English Courts] . By the Jurisdiction Act of 1873 the court of Admiralty was merged in High Court of Justice. Result was that it obtained jurisdiction over all maritime cases. Therefore what was covered by enactments could be taken cognisance of in the manner provided in the Act but there was no bar in respect of any cause of action which was otherwise cognizable and arose in Admiralty. Section 6 of 1861 Act was confined to claim by the owner or consignee or assignee of any bill of lading of any goods carried into any port in England or Wales (to be read as India). But it did not debar any action or any claim by the owner or consignee or assignee of any bill of lading in respect of cargo carried out of the port. Even if there

> was no provision in 1861 Act, as such, the colonies could not be deprived under 1890 Act from exercising jurisdiction on those matters which were not provided by 1861 Act but could be exercised or were otherwise capable of being exercised by the High Court of England. 'The theory was that all matters arising outside the jurisdiction of common law i.e. outside the body of a country were inside the jurisdiction of Admiralty' [Carter: History of English Courts]. 'That this Court had originally cognizance of all transaction civil and criminal, upon the high seas, in which its own subjects were concerned, is no subject of controversy' [Lord Stowell in 'The Hercules' 2 Dod. 371] . To urge, therefore, that the Admiralty court exercising jurisdiction under 1890 Act could not travel beyond 1861 Act would be going against explicit language of the Statute. Even now, the Admiralty jurisdiction of the High Court of Justice in England is derived 'partly from Statute and partly from the inherent jurisdiction of Admiralty' [Maritime Liens by D.R. Thomas] . Observations of Lord Diplock in Jade (The) [See D.C. Jackson, Enforcement of Maritime Claims, (1985) Appendix 5, p. 437 et seq.] that Admiralty jurisdiction was statutory only have to be understood in the context they were made. By 1976 the statutory law on Admiralty had become quite comprehensive. Brother Thommen, J., has dealt with it in detail. Therefore those observations are not helpful in deciding the jurisdiction that was exercised by the High Court in England in 1890."
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> (emphasis supplied)

22. The emphasis of the respondent is, thus, on the maritime claim being maintained against the owner of the ship and detention of a ship as a sequitur thereto as security for a decree liable to be passed against the owners of the ship in *personam*. Since the claim is stated to be one against Reflect Geophysical and not against the owners, such a

detention could not have been made, it was contended. Reflect Geophysical, in fact, has not even been made a party to the suit, the entity, which would be liable in *personam*.

International Convention on Arrest of ship, 1999:

23. The provisions of the aforesaid Convention have been referred to especially keeping in mind the observations of this Court in ***Liverpool & London S.P. & I Association Limited v. M.V. Sea Success I & Anr.***[5]**,**which read as under:

> "57. This Court in M.V. Elisabeth [M.V. Elisabeth v. Harwan Investment and Trading (P) Ltd., 1993 Supp (2) SCC 433] observed that Indian statutes lag behind any development of international law and further it had not adopted the various conventions but opined that the provisions thereof having been made as a result of international unification and development of the maritime laws of the world should be regarded as the international common law or transnational law rooted in and evolved out of the general principles of national laws, which, in the absence of any specific statutory provisions can be adopted and adapted by courts to supplement and complement national statutes on this subject."
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> xxxx xxxx xxxx xxxx xxxx
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> "59.M.V. Elisabeth [M.V. Elisabeth v. Harwan Investment and Trading (P) Ltd., 1993 Supp (2) SCC 433] is an authority for the proposition that the changing global scenario should be kept in mind having regard to the fact that there does not exist any primary act touching the subject and in absence of any

5 (2004) 9 SCC 512

domestic legislation to the contrary; if the 1952 Arrest Convention had been applied, although India was not a signatory thereto, there is obviously no reason as to why the 1999 Arrest Convention should not be applied.

60. Application of the 1999 Convention in the process of interpretive changes, however, would be subject to: (1) domestic law which may be enacted by Parliament; and (2) it should be applied only for enforcement of a contract involving public law character."

24. Therefore, in the interest of international comity, though India is not a signatory to the Convention of 1999, the principles of the same are utilized and applied to appropriate situations to determine whether a 'maritime claim', as understood in the international context has arisen and whether the same warrants the arrest of the vessel in question as per its provisions.

25. Article 1 of the Convention defines 'Maritime Claim to include:

"Article 1
Definitions

For the purposes of this Convention:

1. "Maritime Claim" means a claim arising out of one or more of the following:

xxxx xxxx xxxx xxxx xxxx

"(f) any agreement relating to the use or hire of the ship, whether contained in a charter party or otherwise;"

xxxx xxxx xxxx xxxx xxxx

"(l) goods, materials, provisions, bunkers, equipment (including containers) supplied or services rendered to the ship for its operation, management, preservation or maintenance;"

26. Article 2 stipulates the powers of arrest and sub-clause (2) clarifies that the ship may be arrested only respect a maritime claim. Sub-clause (3) stipulates that ship may be arrested for purposes of obtaining security notwithstanding that by virtue of a jurisdiction clause or arbitration clause, it has to be adjudicated in a State other than the State where it has been arrested. For an elucidation we reproduce the said clauses:

"Article 2
Powers of arrest

xxxx xxxx xxxx xxxx xxxx

2. A ship may only be arrested in respect of a maritime claim but in respect of no other claim.

3. A ship may be arrested for the purpose of obtaining security notwithstanding that, by virtue of a jurisdiction clause or arbitration clause in any relevant contract, or otherwise, the maritime claim in respect of which the arrest is effected is to be adjudicated in a State other than the State where the arrest is effected, or is to be arbitrated, or is to be adjudicated subject to the law of another State."

27. Article 3 deals with the exercise of right of arrest, which reads as under:

> "Article 3
> Exercise of right of arrest
>
> 1. Arrest is permissible of any ship in respect of which a maritime claim is asserted if:
>
> (a) the person who owned the ship at the time when the maritime claim arose is liable for the claim and is owner of the ship when the arrest is effected; or
>
> (b) the demise charterer of the ship at the time when the maritime claim arose is liable for the claim and is demise charterer or owner of the ship when the arrest is effected; or
>
> (c) the claim is based upon a mortgage or a "hypothèque" or a charge of the same nature on the ship; or
>
> (d) the claim relates to the ownership or possession of the ship; or
>
> (e) the claim is against the owner, demise charterer, manager or operator of the ship and is secured by a maritime lien which is granted or arises under the law of the State where the arrest is applied for.
>
> 2. Arrest is also permissible of any other ship or ships which, when the arrest is effected, is or are owned by the person who is liable for the maritime claim and who was, when the claim arose:
>
> (a) owner of the ship in respect of which the maritime claim arose; or
>
> (b) demise charterer, time charterer or voyage charterer of that

ship.

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

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

28. We may note that the claim of the appellant, Sunil B. Naik, is based on the definition clause of the maritime claim clause (f) & (l) as discussed even in the impugned order while the claim of Yusuf Abdul Gani is restricted to clause (f).

29. The endeavour of the appellants to bring the claim within the aforesaid provisions is naturally opposed by the respondent on the ground that the agreement between the appellants and Reflect Geophysical is actually a charter hire agreement between Reflect Geophysical and the two appellants. It was contended that there were neither any goods supplied nor services rendered and, in fact, the survey operations never commenced as the ships remained stationed at the port at Okha whereas the respondent vessel never arrived at Okha. Reflect Geophysical is stated to have actually engaged the vessels of

the appellant through a charter hire agreement and this cannot form a part of the maritime claim against the respondent ship. In this behalf, reference has been made to the judgment in ***The "Eschersheim"***[6]. The relevant portion, which is also reproduced in the impugned judgment is extracted as under:

> "In my opinion there is no good reason for excluding from the expression "an agreement for the use or hire of a ship" any agreement which an ordinary ASN 12/14 Appeal-209-13.doc business man would regard as being within it. If which an ordinary business man would regard as being within it. If A and B make an agreement for A's ship to be used for carrying out any operation for B, I consider that the agreement is one for the use, if not for the hire of the ship. Thus an agreement for a ship to be employed for dredging, towing, cable laying and salvage would be an agreement for the use of the ship. But is an agreement for dredging or towage or cable laying or salvage an agreement for the use of a ship if there is no express reference in the agreement to any such use. If the operation can only be carried by means of a ship. I consider that the agreement must be one for the use or hire of a ship. A towage agreement would therefore always come within the words. Dredging or cable laying could conceivably be performed by other means but in the great majority of cases it would be so obvious that the use of a ship must be intended that this would be implied....."

30. Thus, the plea is that the charter hire agreement is for use of the appellant's vessel by Reflect Geophysical. The respondent is not liable personally for the maritime claim and, thus, there can be no arrest of the ship since the ship is not owned by Reflect Geophysical. The

6 [1976] Vol. I Lloyd's Law Reports 81

charter agreement provisions were referred to (extracted aforesaid) to substantiate that at present, at best Reflect Geophysical was only a *de facto* owner and not a *de jure* owner and that in order for Reflect Geophysical to be *de jure* owner the provisions provided how six months in advance of the expiry of the contract recourse could be had to the same. That occasion never arose.

31. A reference was, thus, made to Article 3(3) of the aforesaid Convention, which provides for arrest of the ship only if the judgment in respect of that claim can be enforced against the ship by judicial or forced sale of that ship and in the absence of any provision under the Indian law by which the ship not owned by a person could be made liable for a maritime claim, the arrest of the ship could not take place. The judgment could be obtained only under the contract which would be against Reflect Geophysical.

32. Mr. Naphade, learned Senior Advocate for the appellants has referred to the judgment in ***Medway Drydock & Engineering Co. Ltd. v. M.V. Andrea Ursula***[7] dealing with the action in *rem* on the question whether the ship under a demised charter is "beneficially owned as

7[1973] QB 265

respects all the shares therein" by the charterer, within the meaning of the expression in Section 3(4) of the Administration of Justice Act, 1956. It was observed that "a ship would be beneficially owned by the person who, whether or not he was the legal or equitable owner or not, lawfully had full possession and control of her, and, by virtue of such possession and control, had all the benefit and use of her which a legal or equitable owner would ordinarily have."

33. In the aforesaid context it may be noticed that in Section 1 of the Administration of Justice Act, 1956, the Admiralty jurisdiction could be invoked *inter alia* in the following case:

> "**1. Admiralty jurisdiction of the High Court**
>
> (I) The Admiralty jurisdiction of the High Court shall be as follows, that is to say, jurisdiction to hear and determine any of the following questions or claims -
>
> xxxx xxxx xxxx xxxx xxxx
>
> (h) any claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship;"

34. A reference, has, thus, also been made to the decision in ***The "Permina 3001"***[8] of the Singapore Court of Appeal, the relevant

8 (1979) Vol. 1 Lloyd's Law Reports 327

portion of which reads as under:

> "The question is what do the words "beneficially owned as respects all the shares therein" mean in the context of the Act. These words are not defined in the Act. Apart from authority, we would construe them to refer only to such ownership of a ship as is vested in a person who has the right to sell, dispose of or alienate all the shares in that ship. Our construction would clearly cover the case of a ship owned by a person, who whether he is the legal owner or not, is in any case the equitable owner of all the shares therein. It would not, in our opinion, cover the case of a ship which is in the full possession and control of a person who is not also the equitable owner of all the shares therein. In our opinion, it would be a misuse of language to equate full possession and control of a ship with beneficial ownership as respects all the shares in a ship. The word "ownership" connotes title, legal or equitable whereas the expression "possession and control", however full and complete, is not related to title. Although a person with only full possession and control of a ship, such as a demise charterer, has the beneficial use of her, in our opinion he does not have the beneficial ownership as respects all the shares in the ship and the ship is not "beneficially owned as respects all the shares therein" by him within the meaning of s.4(4)."

35. In an *ex parte* case in ***The "Leoborg"***[9] the Admiralty Judge dealt with a claim of escorting services provided by a tug from outside a port into a port for services in the nature of towage.

36. The Appellants have also placed reliance on the case of ***Epoch Enterrepots v. M.V. Won Fu***[10]to differentiate between different types

9 (1962) Vol.. 2. Lloyd's List Law Reports 146
10(2003) 1 SCC 305

of charter parties and to assert that in the case of a demise charter, the charterer has complete control of the vessel.

<u>The Legal view which prevailed with the Courts below:</u>

37. The bedrock of the submissions of Mr. Prashant S. Pratap, learned Senior Advocate, who appeared even in the proceedings before the Courts below would show that the plea of no right of arrest of the respondent vessel was based on Reflect Geophysical not being the owner but only a charterer of the vessel. The essential ingredients for maintaining a maritime claim for which a vessel may be detained were specified as under:

"In order to ascertain whether in an action in *rem* filed in the Admiralty jurisdiction of the court, the Plaintiff is entitled to an order of arrest of the Defendant vessel, the following needs to be established:

> (a) The plaintiff has a maritime claim;
>
> (b) The vessel in respect of which the plaintiff has a maritime claim;
>
> (c) The party liable *in personam* in respect of the maritime claim; and
>
> (d) The party liable *in personam* is the owner of the vessel sought to be arrested."

38. The learned single Judge opined that the claim in Yusuf Abdul Gani's case was in respect of use or hire of another ship Orion Laxmi and the claim, thus, could not be maintained against the respondent vessel. It was stated to be a claim in *personam* against Reflect Geophysical and thus, only a vessel owned by Reflect Geophysical could have been restrained. The learned single Judge also records that it has not been the case of Yusuf Abdul Gani that Reflect Geophysical is a de *facto* owner of the ship sought to be arrested and the position of an owner of a ship is different from a demised charter when it comes to the arrest of a vessel owned or chartered. In this behalf a reference has been made to the case of ***Polestar Maritime Ltd. v. M.V. Qi Lin Men & Ors.***[11] where Article 3(2) of the Arrest Convention was elucidated specifying that a ship can be arrested in respect of a maritime claim against another ship only in the following circumstances:

(a) The owner of both the ships is one and the same.

(b) In case a maritime claim exists qua the owner of a ship, which is taken on a demised charter then the liability can be recovered by restraint of the ship owned by the charterer.

11Admiralty Suit (Lodging) No.3547/2008 decided on 22.10.2008

This view originally elucidated by the learned single Judge of the Bombay High Court found favour with the Division Bench when the appeal was dismissed vide order dated 6.1.2009 in Appeal (Lodging) No.772/2008. The Special Leave Petition filed against the same was also dismissed vide order dated 23.1.2009.

39. The conclusion, thus, was that there was no principle or authority for proposition that a maritime claim for unpaid charter hire in respect of vessel 'A' against the hirer thereof can be enforced by arresting vessel 'B', which is on bareboat charter of the hirer of the former vessel *vis-à-vis* vessel 'A'.

40. The order passed by the learned single Judge in Sunil B. Naik's case merely referred to the said view adopted in Yusuf Abdul Gani's case to vacate the injunction. The Division Bench affirmed the orders of the learned single Judge by passing two separate orders in the appeals filed. The orders are of the same date, i.e. 10.5.2013, which have been assailed in the two appeals.

41. The Division Bench took note of the fact that though India is not

a signatory to the Arrest Convention, the same principles would apply while determining whether a maritime claim has arisen causing for such detention of the vessel. The Division Bench referred to the judgment in ***Epoch Enterrepots***[12] to conclude that the distinction sought to be drawn between a bareboat charter and a demised charter was an issue no more *res integra*. A reference was also made to the Commentary on "Maritime Law" 5th Edition by Christopher Hill, which explained that in a demised charter or bareboat charter the ship owner fades into the background and merely collects its hire payment for the period of the charter. It was stated to be akin to a lease of a ship, similar to a hire purchase arrangement rather than a simple agreement for hire or use of the ship. Thus, the so-called *de facto* ownership of Reflect Geophysical qua the respondent vessel was held to be immaterial in respect of a maritime claim arising from an agreement for use or hire of another vessel, which is the situation in both the cases.

42. Insofar as the respondent vessel is concerned, there is no agreement entered into by either of the two appellants and, thus, it

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cannot be a maritime claim in respect of Article 1(1)(f) of the Arrest Convention. Consequently, there would be no occasion to arrest the vessel under Article 3(1)(b) of the Arrest Convention as no maritime claim has resulted in the hands of the demised charterer with regard to the demised vessel. The maritime claim by either of the appellants could, thus, be enforced only by arresting another vessel owned by Reflect Geophysical and the *de facto* ownership, could not be converted into a *de jure* ownership. In respect of Article 1(1)(l), it was, once again, held that there was no supply of goods to the vessel or of supply of services to the vessel in question, which was the respondent vessel. Insofar as the reasoning in Sunil B. Naik's case, so far as Article 1(1)(l) is concerned, it has been categorically found that it was not a case where goods had been given on hire or for use of the respondent vessel.

Conclusion:

43. On giving our thoughtful consideration to the issue at hand, we are in full agreement with the view taken by the Courts below and find no reason to interfere in appeal.

44. We have referred to the various terms of the bareboat charter which make it quite clear that Reflect Geophysical had the status of a *de facto* owner. The charter agreement did contain a clause for conversion of the status into a *de jure* owner but the occasion for the same never arose. The option to purchase was to be exercised by an advance intimation of six months prior to the end of the charter period and the purchase price was also specified as US$ 3,01,50,000. The charterer could not make any structural changes in the vessel or in the machinery, boilers, appurtenances or space parts thereof without first securing the owner's approval and the vessel had to be restored to its former condition before the termination of the charter, if so required by the owners. This was, thus, a deed between the owner of the respondent and Reflect Geophysical.

45. The contracts entered into with the appellants by Reflect Geophysical are completely another set of charter hire agreements/contracts. The unpaid amounts under these contracts amount to claims against Reflect Geophysical. Thus, if there was another vessel owned by Reflect Geophysical, the appellants would have been well within their rights to seek detention of that vessel as

they have a maritime claim but not in respect of the respondent vessel. The maritime claim is in respect of the vessels which are owned by the appellants and the party liable in *personam* is Reflect Geophysical. Were the respondent vessel put under the *de jure* ownership of Reflect Geophysical, the appellants would have been within their rights to seek a detention order against that vessel for recovery of their claims.

46. In the facts of the present case the owners of the respondent vessel, in fact, also have a claim against Reflect Geophysical for unpaid charter amount. Thus, unfortunately it is both the owner of the respondent vessel on the one hand and the appellants on the other, who have a maritime claim against Reflect Geophysical, which has gone into liquidation. The appellants quite conscious of the limitations of any endeavour to recover the amount from Reflect Geophysical, have ventured into this litigation to somehow recover the amount from, in effect, the owners of the respondent vessel by detention of the respondent vessel. That may also be the reason why the appellants did not even think it worth their while to implead Reflect Geophysical against whom they have their claim in *personam*, possibly envisaged as a futile exercise.

47. It is in the aforesaid context that while discussing this issue in the impugned order, the essential ingredients for detention of a vessel in a maritime claim were specified (para 37 aforesaid).

48. The aforesaid issue has also been discussed in ***Polestar Maritime Ltd.***[13] while dealing with Article 3(2) of the Arrest Convention. The test of the ownership of both the ships as one and the same is not satisfied in the present case. The second situation envisaged is where another ship owned by the charterer is detained, i.e., he has taken 'A' ship on charter where he has only *de facto* ownership and his ship 'B' is detained where charterer has *de jure* ownership. It cannot be countenanced that where no in *personam* claim lies against an entity, still the ship of that entity taken on bareboat charter can be detained to recover the dues. The owner of the respondent vessel is as much a creditor of Reflect Geophysical as the appellants.

49. Mr. Naphade, learned Senior Advocate while relying on the

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judgment in ***M.V. Elisabeth &Ors.***[14] had referred to the expanding jurisdiction of a maritime claim. However, the observations made in the said judgment reproduced hereinabove in para 21 would show that the arrest of the ship is regarded as a mere procedure to obtain security to satisfy the judgment. To that extent it is distinguished from a right in *personam* to proceed against the owner but there has to be a liability of the ship owner and in that eventuality the legal proceedings commenced in *rem* would become a personal action in *personam* against the defendant when he enters appearance. There cannot be a detention of a ship as a security and guarantee arising from its owner for a claim which is in respect of a non-owner or a charterer of the ship.

50. On turning to the provisions of the Convention, a maritime claim is specified as relating to use or hire of a ship whether contained in a charter party or otherwise [clause (f)]. Insofar as clause (l) is concerned they relate *inter alia* to services rendered to the ship. The question, however, is – which is the ship in question? Such an order of detention can be in respect of a ship where there is identity of the

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owner against whom the claim in *personam* lies and the owner of the ship. It cannot be used to arrest a ship of a third party or a non-owner.

51. As an illustrative example if we consider the principles of a garnishee order where amounts held by a third party on behalf of a defendant can be injuncted or attached to satisfy the ultimate claim, which may arise against the defendant. It is not as if somebody else's money is attached in pursuance to a garnishee's order. Similarly for a claim against the owner of the vessel, a vessel may be detained and not that somebody else's vessel would be detained for the said purpose. The crucial test would be of ownership, which in the present case clearly does not vest with Reflect Geophysical and the *de facto* ownership under their bareboat charter cannot be equated to a *de jure* owner, which is necessary for an action in *personam*.

52. We may note that for the purposes of determining the controversy, it is not really of much relevance that effectively no work was carried out under the agreements between the appellants and Reflect Geophysical as the chartered ship never commenced its task and never reached the port from where the task was to be commenced.

53. One of the contentions advanced by the learned Senior Advocate for the appellant recorded by us relates to the plea of "beneficial ownership" of the respondent ship by Reflect Geophysical and, thus, the enforceability of a claim by the appellants against the respondent ship. In support of this plea reliance is placed on the judgment in ***Medway Drydock & Engineering Co. Ltd.***[15]. We must record at the inception itself that this issue appears not to have been raised either before the learned single Judge or the Division Bench as there is no discussion on this aspect. We, however, still feel necessary to deal with this aspect and in some detail largely based on our own foray into this area of law rather than simply relying on the judgment referred to aforesaid.

54. United Kingdom became a signatory to two international conventions – 'International Convention relating to Arrest of Sea Going Ships' and 'International Convention on certain Rules concerning Civil Jurisdiction in matters of Collision' signed at Brussels on 10.5.1952. Article 3 of the former in sub-clause (2) states that "Ships shall be deemed to be in the same ownership when all the

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shares therein are owned by the same person or persons." The context is, thus, the ownership of the ship when a reference is made to "shares therein" and whether they are owned by the same person or not. "Shares" in a ship owes its origination to sailing vessels being expensive items and subject to unexpected loss and thus, were not owned by one person. Thus, more than one person could own a share in a ship on the basis of capital tied up in the vessel. Such shares were fairly random but by mid 19th century it was usual for shares to be in multiples of 64 parts and, thus, ownership by 64th is still the norm in England. The various requirements of a ship, for example, rope-maker, sail maker, etc. were parts of a share owner and such shares could be sold or bought like any other commodity. Normally there would be a main owner who would have a large investment and be responsible for the sail and working of the ship called "ship's husband" while other owners were simply cash investors. The profits and liabilities were accordingly shared in the same ratio. This concept finds mention in The Merchant Shipping Act, 1958 under Section 25, which deals with 'Register Book' as under:

> "**25. Register book.**—Every registrar shall keep a book to be called the register book and entries in that book shall be made

in accordance with, the following provisions:—

xxxx xxxx xxxx xxxx xxxx

(b) subject to the provisions of this Act with respect to joint owners or owners by transmission, not more than ten individuals shall be entitled to be registered at the same time as owners of any one ship; but this rule shall not affect the beneficial interest of any number of persons represented by or claiming under or through any registered owner or joint owner;"

55. In view of United Kingdom signing the two Conventions referred to aforesaid and giving legislative backing, Section 3 of The Administration of Justice Act, 1956, incorporated the same. In sub-section (4) of Section 3, while dealing with the invocation of an action in *rem*, the concept of "beneficially owned" *vis-à-vis* a ship was introduced and the right to invoke it against the same.

56. The observations in ***Medway Drydock & Engineering Co. Ltd.***[16] referred to while recording the submissions of Mr. Naphade, have to be appreciated in that context. However, a deeper study of the issue shows that this judgment has been dissented from even by the Queen's Bench itself in ***I Congreso Del Partido***[17] by Robert Goff, J. This judgment debates the concept of "beneficially owned" in respect of

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17[1978] Q.B. 500

shares therein within the meaning of Section 3(4) of The Administration of Justice Act, 1956. There is a respectful disagreement with the line adopted by Brandon, J. in the ***Medway Drydock & Engineering Co. Ltd.***[18]. Thus, it is noticed that Brandon, J. construed the words "beneficially owned as respects all the shares therein" as not being restricted to legal or equitable ownership, but as being wide enough to include such "ownership" as is conferred by a demise charter. Robert Goff, J. recorded the reasoning of Brandon, J. for doing so as under:

> "The reasoning of Brandon J. which led him to reach this conclusion was as follows: (1) The expression "beneficially owned" in section 3 (4) is capable of more than one meaning: either owned by someone who, whether he is the legal owner or not, is in any case the equitable owner; or beneficially owned by a person who, whether he was the legal or equitable owner or not, lawfully had full possession and control of her, and, by virtue of such possession and control, had all the benefit and use of her which a legal or equitable owner would ordinarily have. An example of the latter would be such "ownership" as was conferred by a demise charter. A demise charterer has, because of the extent of his possession and control, often been described as the owner pro hac vice or the temporary owner. (2) Since the meaning of the words "beneficially owned" is not clear the court can and should look at the terms of the Brussels Convention of 1952, section 3 of the Act of 1956 being intended to give effect to article 3 of the Convention; and having done so the court should so construe the statute as to give effect, so far as possible, to the presumption that Parliament intended to fulfil, rather than

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> to break, its international obligations. If section 3 (4) of the Act is to give full effect to article 3, the expression "beneficially owned" in the section must be given the second of the two meanings of which it is capable, which embraces not only a demise charterer, but also any other person with similar complete possession and control. (3) Although Hewson J. had reached a different conclusion in The St. Merriel [1963] P. 247, Brandon J. felt justified in declining to follow that decision having regard in particular to two points. First, Hewson J. had not been invited to look at the Brussels Convention, because at that time it was commonly thought that it was not permissible to do so unless the Act contained an express reference to the Convention. Second, the view accepted by Hewson J. in The St. Merriel was no different in principle from one which was discussed and rejected by Lord Atkinson in Sir John Jackson Ltd. v. Steamship Blanche (Owners) (The Hopper No. 66) [1908] A.C. 126, 135–136."

57. Robert Goff, J. then records the significant factor, i.e., that ***Medway Drydock & Engineering Co. Ltd.***[19] was decided on a motion by plaintiffs for judgment in an *ex parte* proceedings while he had the benefit of submissions of both the sides and Robert Goff, J. sought to be persuaded by the counsel appearing for the ship Mr. Davenport in the following manner:

> "Mr. Davenport, for Mambisa, to whose argument I am much indebted, has however urged me not to follow The Andrea Ursula [1973] Q.B. 265. The decision in that case is not binding upon me and, while of course I have the greatest respect for any decision of Brandon J., I have reconsidered the matter and, having done so, I have reached the conclusion that the words "beneficially owned as respects all the shares

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> therein" refer only to cases of equitable ownership, whether or not accompanied by legal ownership, and are not wide enough to include cases of possession and control without ownership, however full and complete such possession and control may be. Since I have reached a different conclusion to Brandon J., I think it right to point out that I have had the benefit of a full argument by counsel for the defendants in this case, whereas The Andrea Ursula came before Brandon J. on a motion by plaintiffs for judgment in default of appearance, on which the defendants were not represented."
>
> (emphasis supplied)

58. Thereafter Robert Goff, J. records his conclusion in the following manner:

> "My approach to the case before me is as follows. I start with the statute, and the words with which I am particularly concerned, and which I have to construe in the context of the statute, are "beneficially owned as respects all the shares therein." In my judgment, the natural and ordinary meaning of these words is that they refer only to such ownership as is vested in a person who, whether or not he is the legal owner of the vessel, is in any case the equitable owner, in other words, the first of the two meanings of which Brandon J. thought the words to be capable. Furthermore, on the natural and ordinary meaning of the words, I do not consider them apt to apply to the case of a demise charterer or indeed any other person who has only possession of the ship, however full and complete such possession may be, and however much control over the ship he may have.
>
> Generally speaking, the essential characteristic of a demise charter is that it constitutes a contract of hire of the ship, under which the possession of the ship passes to the charterer, the master of the ship being the servant of the charterer, not of the owner. It is to be compared with the ordinary form of time

charter, which is not a contract of hire but a contract of services, under which the possession remains in the owner and the master is the servant of the owner: see Sea & Land Securities Ltd. v. William Dickinson & Co. Ltd . [1942] 2 K.B. 65, 69–70 per Mackinnon L.J. and Scrutton on Charterparties, 18th ed. (1974), articles 24–26. It is true that a demise charterer has in the past been described variously as “owner pro hac vice:” see, for example, Frazer v. Marsh (1811) 13 East 238, 239, per Lord Ellenbrough C.J., The Lemington (1874) 2 Asp.M.L.C. 475, 478, per Sir Robert Phillimore, and The Tasmania (1888) 13 P.D. 110, 118, per Sir James Hannen P.; or as a person who is “for the time the owner of the vessel:” see Sandeman v. Scurr (1866) L.R. 2 Q.B. 86, 96, per Cockburn C.J.; or as a person with “special and temporary ownership:” see The Hopper No. 66 [1908] A.C. 126, 136, per Lord Atkinson. I doubt however if such language is much in use today; and its use should not be allowed to disguise the true legal nature of a demise charter. Furthermore, no case has been drawn to my attention, and I am aware of more, in which a demise charterer has been described as a “beneficial owner,” still less as a “beneficial owner as respects all the shares in the vessel.” Indeed, any reference in this context to ownership “as respects all the shares in the vessel” is, in my judgment, inapt to describe the possession of a demise charterer; such words are only appropriate when describing ownership in the ordinary sense of the word, and not possession which is concerned with a physical relationship with the vessel founded upon control and has nothing to do with shares in the vessel. A demise charterer has, within limits defined by contract, the beneficial use of the ship; he does not, however, have the beneficial ownership as respects all the shares in the ship.

Furthermore, I can find nothing in the remainder of the statute to cause me to reject the natural and ordinary meaning of the words; certainly, I would not construe other references in the statute to “ownership” — as in section 1 (1) (a) — or “co-owner” — as in section 1 (1) (b) — as referring in any way to demise charterers. Indeed in Part V of the Act, which is

concerned with Admiralty jurisdiction and arrestment of ships in Scotland, the equivalent provision, section 47 (1) (b), requires that "all the shares in the ship are owned by the defendant." This provision, to which I can properly have regard: see The Eschersheim [1976] 1 W.L.R. 430, 436 per Lord Diplock, reinforces my conclusion that section 3 (4) of the Act is concerned with title, the word "beneficial" being introduced to allow for the peculiar English institution of the trust."

xxxx xxxx xxxx xxxx xxxx

"Accordingly, I do not regard the words "beneficially owned as respects all the shares therein" as being capable of more than one meaning; in the absence of ambiguity this is not, on the principles established by the Court of Appeal in Salomon v. Customs and Excise Commissioners [1967] 2 Q.B. 116, Post Office v. Estuary Radio Ltd . [1968] 2 Q.B. 740 and by the House of Lords in the Convention The Eschersheim [1976] 1 W.L.R. 430, an appropriate case in which to have recourse to the Convention. Even so, out of respect for the views of Brandon J., I propose to examine the Convention. The relevant provisions of article 3 of (the International Convention Relating to the Arrest of Sea-going Ships 1952) are as follows:

> "(1) Subject to the provisions of paragraph (4) of this article and of article 10, a claimant may arrest either the particular ship in respect of which the maritime claim arose, or any other ship which is owned by the person who was, at the time when the maritime claim arose, the owner of the particular ship, even though the ship arrested be ready to sail; but no ship, other than the particular ship in respect of which the claim arose, may be arrested in respect of any of the maritime claims enumerated in article 1, (1), (o), (p) or (q), (2) Ships shall be deemed to be in the same ownership when all the shares therein are owned by the same person or persons …. (4) When in the case of a charter by demise of a ship the charterer and not the registered owner is liable in respect of a maritime

> claim relating to that ship, the claimant may arrest such ship or any other ship in the ownership of the charterer by demise, subject to the provisions of this Convention, but no other ship in the ownership of the registered owner shall be liable to arrest in respect of such maritime claims. The provisions of this paragraph shall apply to any case in which a person other than the registered owner of a ship is liable in respect of a maritime claim relating to that ship."

As I read the Convention, article 3 (1), which is expressed to be subject to article 3 (4), provides for the arrest of either the particular ship in respect of which the maritime claim arose, or (except in certain specified cases) any other ship which is owned by the person who was, at the time when the maritime claim arose, owner of the particular ship. Furthermore, despite the argument of Mr. Alexander for the plaintiffs to the contrary, in this context I read the word "owner" as bearing its ordinary meaning, that is, the person with title to the ship; am confirmed in this view by the provision relating to ownership in article 3 (2) and by the fact that article 3 (4), to which article 3 (1) is expressed to be subject, makes special provision for the case of the demise charterer and others. It is to be observed that, if one puts article 3 (4) on one side, the draftsman of the Act of 1956 appears to have been seeking to give effect to article 3 (1) and (2) of the Convention, subject to the fact that he appears to have been concerned to extend the word "ownership" by the addition of the adjective "beneficial," very possibly to take account of the special English institution of the trust which may form no part of the domestic laws of other signatories to the Convention."

(emphasis supplied)

59. We have been persuaded to extract in *extensio* from the judgment in ***I Congreso Del Partido***[20] on account of the clarity of the

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20supra

view expressed by Robert Goff, J. finding it difficult to be put in better words. Thus, mere possession of the ship, however, complete and whatever be the extent of the control was not found good enough to confer the status of ownership. The "beneficial use" of a chartered ship would not *ipso facto* convert the status of a charterer into a "beneficial owner." The attention to the word "beneficial" in the Act of 1956 was, thus, attributed to the requirement to take into account the special English Institution of Trust which forms no part of domestic law of other signatories to the Convention.

60. In ***The "Father Thames"***[21] Sheen J. also declined to follow ***Medway Drydock & Engineering Co. Ltd.***[22] and followed ***I Congreso Del Partido***[23] and held that the phrase "beneficially owned" in the 1956 Act did not apply to a demise charter.

61. Similarly Wee Chong Jin, C.J. of the Singapore Court of Appeal in the decision of ***The "Permina 3001"***[24] has adopted the similar view that a ship in full possession and control of a person, who is also not an

21 [1979] 2 Lloyd's Rep. 364
22 supra
23supra
24 supra

owner of all the shares therein cannot be utilized for the purposes of restraint of the ship.

62. Even in Canada, the Federal Court of Appeal has taken the same view on the import of the words “beneficial owner” in the context of the Canadian ‘Federal Court Act 1985’ which confers courts with the jurisdiction to arrest a ship. In ***Mount Royal/Walsh Inc*. v. *The Ship Jensen Star el al,***[25] Marceau, J, writing on behalf of the Bench, stated as follows :

> “The problem, however, is that I simply do not see how a court could suppose that Parliament may have meant to include a demise charterer in the expression 'beneficial owner' as it appears in s-s. 43(3). Whatever be the meaning of the qualifying term 'beneficial', the word owner can only normally be used in reference to title in the *res* itself, a title characterized essentially by the right to dispose of the *res*. The French corresponding word 'proprietaire' is equally clear in that regard. These words are clearly inapt to describe the possession of a demise charterer…. In my view, the expression 'beneficial owner' was chosen to serve as an instruction, in a system of registration of ownership rights, to look beyond the register in searching for the relevant person. But such search cannot go so far as to encompass a demise charterer who has no equitable or proprietary interest which could burden the title of the registered owner of the registered owner. As I see it, the expression 'beneficial owner' serves to include someone who stands behind the registered owner in situations where the latter functions merely as an intermediary, like a trustee, a legal

25[1990] 1 F.C 199.

representative or an agent. The French corresponding expression 'veritable proprietaire' leaves no doubt to that effect."

63. The Supreme Court of Canada in ***Antares Shipping Corporation v. The Ship 'Capricorn' et al.***[26] also referred to the concept of beneficial ownership and cited with the approval, observations made in Halsbury's Laws of England at para 15 as follows:

> "Ownership in a British ship or share therein may be acquired in any of three ways – by transfer from a person entitled to transfer, by transmission or by building. Acquisition by transfer and transmission have been the subject of statutory enactment. Acquisition by building is governed by the common law. Ownership in a British ship or share therein is a question of fact and does not depend upon registration of title. Whether registered or unregistered, a person in whom ownership in fact vests is regarded in law as the owner if registered, as the legal owner; if unregistered, as the beneficial owner."
>
> (emphasis supplied)

64. The successor to the 1956 Act is the Supreme Court Act of 1981. Section 21(4) of that Act of U.K. recognizes the discussion in view of Robert Goff, J. by the following provision:

> "21. (4) In the case of any such claim as is mentioned in section 20(2)(e) to (r), where

26 [1980] 1 S.C.R. 553

(a) the claim arises in connection with a ship ; and

(b) the person who would be liable on the claim in an action in personam (" the relevant person ") was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship,

an action in rem may (whether or not the claim gives rise to a maritime lien on that ship) be brought in the High Court against -

i) that ship, if at the time when the action is brought the relevant person is either the beneficial owner of that ship as respects all the shares in it or the charterer of it under a charter by demise ; or

(ii) any other ship of which, at the time when the action is brought, the relevant person is the beneficial owner as respects all the shares in it."

65. There is a clear distinction between a beneficial ownership of a ship and the charterer of a ship.

66. In the aforesaid context, now turning to the Arrest Convention of 1999, Article 1 specifies that the maritime claim means a claim *inter alia* arising out of an agreement relating to use or hire of "the ship." The connotation of "the ship" would mean the 16 trawlers or the Orion Laxmi and not the respondent ship. Thus, there is no maritime claim against the respondent ship. Article 3 deals with the exercise of rights of arrest and the eventualities are specified thereunder. In terms of

clause (2) of Article 3 (these Articles are reproduced in paras 25 to 27 above), the arrest is permissible of any other ship (which would connote the respondent ship), which, when the arrest is effected is owned by the person who is liable for the maritime claim. The liability of the maritime claim is Reflect Geophysical and not the owners of the respondent ship. In terms of sub-clause (b) of clause (2) of Article 3, a demise charterer, time charterer or voyage charterer of that ship is liable. The ship in question, as noticed above, is not the respondent but the 16 trawlers or the Orion Laxmi. In view of the discussion aforesaid, really speaking Reflect Geophysical cannot be said to be the beneficial owner in the capacity of a demised charterer of the respondent ship. Reflect Geophysical is not the owner of the respondent ship and the owner cannot be made liable for a maritime claim, which is against the trawlers and Orion Laxmi.

67. We may also note that in the 2017 Act in India clause 5(b) states as under:

> "**5. Arrest of vessel in rem.**—(1) The High Court may order arrest of any vessel which is within its jurisdiction for the purpose of providing security against a maritime claim which is the subject of an admiralty proceeding, where the court has reason to believe that—

xxxx xxxx xxxx xxxx xxxx

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

68. The aforesaid is in consonance with Article 3 of the 1999 Convention and, thus, must be read in that context (incidentally the Bill was introduced on 21.11.2016 and passed by the Lok Sabha and the Rajya Sabha on 10.3.2017 and 24.7.2017 respectively. It was published in the Gazette on 9.8.2017 but is still not notified). The incident in this question is, thus, prior to beginning of this exercise. The expression "the vessel", "owner" and "demise charterer", thus, must be read in the aforesaid context and the maritime claims in respect of 16 trawlers and Orion Laxmi cannot be converted into a maritime claim against the respondent ship not owned by Reflect Geophysical.

69. The appellants have neither any agreement with the owners of the respondent vessel nor any claim against the respondent vessel but their claim is on account of their own vessels hired by the charterer of the respondent vessel. There is no claim against the owners of the

respondent vessel.

70. The result of the aforesaid is that the appeals are dismissed leaving the parties to bear their own costs.

71. The interim order dated 17.5.2013 stands dissolved and the amount along with accrued interest thereon is to be remitted back to the owners of the respondent vessel, who deposited the same before the Bombay High Court in pursuance of the interim order.

.....J.
(J. Chelameswar)

...J.
(Sanjay Kishan Kaul)

New Delhi.
March 09, 2018.