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

CHAMBER SUMMONS NO.66 OF 2018
IN
ADMIRALTY SUIT NO.6 OF 2015

The Board of Trustees of the Port Mumbai ….Applicant

In the matter between :

Raj Shipping Agencies ....Plaintiff

V/s.

Barge Madhwa And Anr. ….Defendants

WITH
ADMIRALTY SUIT NO.1 OF 2015

Atlantic Shipping Pvt. Ltd. ....Plaintiff

V/s.

Barge Madhwa And Anr. ....Defendants

WITH
COMMERCIAL ADMIRALTY SUIT NO.285 OF 2015

Tag Offshore Limited ....Plaintiff

V/s.

Barge Madhwa And Anr. ....Defendants

WITH
ADMIRALTY SUIT NO.6 OF 2015

Raj Shipping Agencies ....Plaintiff

V/s.

Barge Madhwa And Anr. ....Defendants

WITH
ADMIRALTY SUIT NO.11 OF 2015

Integr8 Fuels Inc. ....Plaintiff

V/s.

Madhwa And Anr. ....Defendants

WITH
COMMERCIAL ADMIRALTY SUIT NO.284 OF 2015

Raj Shipping Agencies Limited ....Plaintiff

V/s.

Barge Madhwa And Anr. ....Defendants

WITH
ADMIRALTY SUIT NO.17 OF 2015

Raj Transport & Trading Company ....Plaintiff

V/s.

Barge Madhwa And Anr. ....Defendants

WITH
COMMERCIAL SUIT NO.73 OF 2016

Sumayla Marine Service ....Plaintiff

V/s.

Dlb Nand Gaurav And Another ....Defendants

WITH
ADMIRALTY SUIT NO.20 OF 2015

Transtar Offshore Services Pvt. Ltd. ....Plaintiff

V/s.

Dlb Nand Gaurav And Another ....Defendants

WITH
COMMERCIAL NOTICE OF MOTION NO.74 OF 2015
IN
COMMERCIAL ADMIRALTY SUIT NO.284 OF 2015

Raj Shipping Agencies Limited ....Plaintiff

V/s.

Barge Madhwa And Anr. ....Defendants

WITH
NOTICE OF MOTION NO.1162 OF 2015
IN
ADMIRALTY SUIT NO.1 OF 2015

Atlantic Shipping Pvt. Ltd. ....Plaintiff

V/s.

Barge Madhwa And Anr. ....Defendants

WITH
COMMERCIAL NOTICE OF MOTION NO.75 OF 2015
IN
COMMERCIAL ADMIRALTY SUIT NO.285 OF 2015

Tag Offshore Limited ....Plaintiff

V/s.

Barge Madhwa And Anr. ....Defendants

WITH
NOTICE OF MOTION NO.1721 OF 2015
IN
ADMIRALTY SUIT NO.17 OF 2015

Raj Transport & Trading Company ....Plaintiff

V/s.

Barge Madhwa And Anr. ....Defendants

WITH
NOTICE OF MOTION NO.1161 OF 2015
IN
ADMIRALTY SUIT NO.6 OF 2015

Raj Shipping Agencies ....Plaintiff

V/s.

Barge Madhwa And Anr. ....Defendants

WITH
NOTICE OF MOTION NO.1166 OF 2015
IN
ADMIRALTY SUIT NO.17 OF 2015

Raj Transport & Trading Company ....Plaintiff

V/s.

Barge Madhwa And Anr. ....Defendants

WITH
COMMERCIAL NOTICE OF MOTION NO.73 OF 2015
IN
COMMERCIAL ADMIRALTY SUIT NO.284 OF 2015

Raj Shipping Agencies Limited ....Plaintiff

V/s.

Barge Madhwa And Anr. ….Defendants

WITH
NOTICE OF MOTION NO.1715 OF 2015
IN
ADMIRALTY SUIT NO.1 OF 2015

Atlantic Shipping Pvt. Ltd. ....Plaintiff

V/s.

Barge Madhwa And Anr. ....Defendants

WITH
COMMERCIAL NOTICE OF MOTION NO.76 OF 2015
IN
COMMERCIAL ADMIRALTY SUIT NO.285 OF 2015

Tag Offshore Limited ....Plaintiff

V/s.

Barge Madhwa And Anr. ....Defendants

WITH
NOTICE OF MOTION NO.1717 OF 2015
IN
ADMIRALTY SUIT NO.6 OF 2015

Raj Shipping Agencies ....Plaintiff

V/s.

Barge Madhwa And Anr. ....Defendants

WITH
COMMERCIAL SUIT NO.319 OF 2016

M/s. Supreme Hydro Engineering Pvt. Ltd. ....Plaintiff

V/s.

M.V. Tag 7 [IMO No.9379002] And Anr. ....Defendants

WITH
NOTICE OF MOTION (L) NO.180 OF 2016
IN
ADMIRALTY SUIT NO.20 OF 2015

Transtar Offshore Services Pvt. Ltd. ....Plaintiff

V/s.

Dlb Nand Gaurav And Anr. ....Defendants

WITH
NOTICE OF MOTION (L) NO.181 OF 2016
IN
COMMERCIAL SUIT NO.73 OF 2016

Sumayla Marine Service ....Plaintiff

V/s.

Dlb Nand Gaurav And Anr. ....Defendants

WITH
NOTICE OF MOTION NO.757 OF 2017
IN
ADMIRALTY SUIT NO.41 OF 2015

Dvb Group Merchant Bank (Asia) Ltd. ....Plaintiff

V/s.

M.V. Malaviya Twenty Three
(IMO No.9299082) And Ors. ....Defendants

WITH
COMMERCIAL NOTICE OF MOTION NO.743 OF 2019
IN
COMMERCIAL ADMIRALTY SUIT NO.36 OF 2018

IDBI Bank Ltd. ....Plaintiff

V/s.

M.V. Malaviya Thirty Three
(IMO No.7809118) And Ors. ....Defendants

WITH
NOTICE OF MOTION NO.1095 OF 2019
IN
ADMIRALTY SUIT NO.41 OF 2015

Dvb Group Merchant Bank (Asia) Ltd. ....Plaintiff

V/s.

M.V. Malaviya Twenty Three
(IMO No.9299082) And Ors. ....Defendants

WITH
NOTICE OF MOTION NO.1718 OF 2015
IN
ADMIRALTY SUIT NO.11 OF 2015

Integr8 Fuels Inc. ....Plaintiff

V/s.

Madhwa And Anr. ....Defendants

WITH
ADMIRALTY SUIT NO.1 OF 2017

Barkat Hiring Co. ....Plaintiff

V/s.

Malaviya Thirty Three And Anr. ....Defendants

WITH
ADMIRALTY SUIT NO.28 OF 2017

Vipu Thazhathupulikkal Purushothaman Nair ....Plaintiff

V/s.

Sale Proceeds of M.V. Malaviya 28 And Ors. ....Defendants

WITH
ADMIRALTY SUIT NO.33 OF 2017

Durva Engineering Works ....Plaintiff

V/s.

M.V. Malaviya Thirty Six (IMO No.8519083) ....Defendant

WITH
COMMERCIAL ADMIRALTY SUIT NO.482 OF 2017

Mars Petrochem Pvt. Ltd. ....Plaintiff

V/s.

Sale Proceeds of M.V. Malaviya 23
(IMO No.9299082) And Ors. ….Defendants

WITH
COMMERCIAL ADMIRALTY SUIT NO.121 OF 2017

Unique Marine Service ....Plaintiff

V/s.

Malaviya Thirty (IMO No.9333515) And Anr. ....Defendants

WITH
NOTICE OF MOTION NO.800 OF 2018
IN
ADMIRALTY SUIT NO.41 OF 2015

Dvb Group Merchant Bank (Asia) Ltd. ....Plaintiff

V/s.

M.V. Malaviya Twenty Three
(IMO No.9299082) And Ors. ....Defendants

WITH
NOTICE OF MOTION NO.1158 OF 2015
IN
ADMIRALTY SUIT NO.11 OF 2015

Integr8 Fuels Inc. ....Plaintiff

V/s.

Madhwa And Anr. ....Defendants

WITH
NOTICE OF MOTION NO.726 OF 2019
IN
ADMIRALTY SUIT NO.41 OF 2015

Dvb Group Merchant Bank (Asia) Ltd. ....Plaintiff

V/s.

M.V. Malaviya Twenty Three
(IMO No.9299082) And Ors. ....Defendants

WITH
NOTICE OF MOTION NO.1805 OF 2019
IN
ADMIRALTY SUIT NO.6 OF 2015

Raj Shipping Agencies ....Plaintiff

V/s.

Barge Madhwa And Anr. ....Defendants

WITH
COMMERCIAL ADMIRALTY SUIT NO.142 OF 2016

Raj Shipping Agencies ....Plaintiff

V/s.

M.V. Malaviya Thirty And Ors. ....Defendants

WITH
NOTICE OF MOTION NO.1215 OF 2019
IN
ADMIRALTY SUIT NO.65 OF 2015

Solitaire Marine And Offshore Pvt. Ltd. ....Plaintiff

V/s.

M.V. Pristine Gv (IMO No.9118422) And Anr. ....Defendants

WITH
NOTICE OF MOTION NO.2447 OF 2019
IN
ADMIRALTY SUIT NO.41 OF 2015

Dvb Group Merchant Bank (Asia) Ltd. ....Plaintiff

V/s.

M.V. Malaviya Twenty Three
(IMO No.9299082) And Ors. ....Defendants

WITH
NOTICE OF MOTION NO.1974 OF 2018
IN
ADMIRALTY SUIT NO.18 OF 2017

Melayi Kandi Jayarajan ....Plaintiff

V/s.

Ahtv Sangita And Anr. ....Defendants

WITH
ADMIRALTY SUIT NO.18 OF 2017

Melayi Kandi Jayarajan ....Plaintiff

V/s.

Ahtv Sangita And Anr. ....Defendants

WITH
ADMIRALTY SUIT NO.38 OF 2018

Amit Sharma ....Plaintiff

V/s.

M.V. Malaviya Thirty And Ors. ....Defendants

WITH
COMMERCIAL ADMIRALTY SUIT NO.36 OF 2018

IDBI Bank Ltd. ....Plaintiff

V/s.

M.V. Malaviya Thirty Three
(IMO No.7809118) And Ors. ....Defendants

WITH
COMMERCIAL ADMIRALTY SUIT NO.8 OF 2019

Sagar Yadav And Ors. ....Plaintiffs

V/s.

MSV Malaviya 36 (IMO No.8519083) And Anr. ....Defendants

WITH
COMMERCIAL ADMIRALTY SUIT NO.39 OF 2018

Capt. Jitendra Sama And Ors. ....Plaintiffs

V/s.

M.T. Maharshi Bhavatreya ....Defendant

Mr. Prashant Pratap, Senior Advocate - Amicus Curiae/Assisted by Mr. Nishaan Shetty.
Mr. V. K. Ramabhadran, Senior Advocate, Amicus Curiae.
Dr. Abhinav Chandrachud, Amicus Curiae assisted by Mr. Saurish Shetye and Mr. Shailendra A. Singh.
Mr. Rahul Narichania, Senior Advocate a/w. Ms. Pratiksha Avhad i/b. Mulla and Mulla and Craigie Blunt and Caroe for Plaintiff in ADMS/41/2015.
Mr. Sharan Jagtiani, Senior Advocate a/w. Ms. Surabhi Agrawal, Advocates for Official Liquidator.

Mr. Prasad Shenoy a/w. Mr. Prashant Ashar, Mr. Naishadh Bhatia, Ms. Bulbul Singh-Rajpurohit and Mr. Niraf Shroff i/b. Crawford Bayley and Co. for Plaintiff in ADMS/6/2015, ADMS/1/2015, ADMS/17/2015, COMAS/284/2015, ADMS/1/2017 and COMAS/121/2017.
Mr. Prathamesh Kamat, Advocate for Official Liquidator.
Mr. Ajai Fernandes a/w. Ms. Sneha B. Pandey for Applicant in CHS/66/2018 and for Defendant No.3 in ADMS/18/2017.
Mr. Ashwini Sinha i/b. Mr. Harsh G. Pratap for Plaintiff in ADMS/11/2015.
Ms. S. Priya a/w. Ms. Aparna Sinha, Advocates for Official Liquidator.
Mr. Kunal Naik i/b. Mr. Ashwin Shanker for Plaintiff in ADMS/20/2015, COMAS/73/2016 and ADMS/28/2017.
Mr. Kunal Naik i/b. Mr. Bimal Rajasekhar for Plaintiff in COMAS/142/2016.
Mr. Shrey Sancheti i/b. Theba and Associates for Plaintiff in COMAS/36/2018.
Mr. Kundanlal Patil i/b. Vyas and Bhalwal for Plaintiff in ADMS/18/2017.
Mr. Osama Butt i/b. Ganesh and Co. for Plaintiff in COMS/319/2016 and COMAS/8/2019.
Mr. R. P. Shirole a/w. Ms. Kunjita Shah i/b. Khare Legal Chambers for Plaintiff in ADMS/38/2018.
Dr. Shrikant Hathi a/w. Mr. Pritish Das i/b. Brus Chambers for Plaintiff in ADMS/33/2017.
Ms. Aneesa Cheema i/b. Charles De Souza for Respondent (EXIM Bank) in NMS/800/2018.
Ms. Lakshmi Bussa i/b. M. V. Kini and Co. for Defendant No. 9 in COMAS/36/2018.
Mr. Mahendhar Aithe, Company Prosecutor present.

CORAM : K.R. SHRIRAM, J.
RESERVED ON : 12th FEBRUARY 2020
PRONOUNCED ON: 19th MAY 2020

JUDGMENT:

1 These Admiralty Suits were filed and Orders of Arrest obtained from this Court in all or most of the suits. By Orders dated 05 May 2017 this Court, however, was pleased to admit Company Petition No. 119 of 2015 as well as Company Petition No. 756 of 2014 against GOL Offshore Ltd., the owner of Defendant Vessels in Admiralty Suit No. 1 of 2017 and Commercial Admiralty Suit No. 121 of 2017. Further, by its Order dated 04 December 2017, this Court was pleased to order GOL Offshore Ltd. (Company in liquidation), be wound up.

2 On 09 March 2018, when Admiralty Suit No. 1 of 2017 was listed and taken up for directions/orders, the Official Liquidator of GOL Offshore Ltd. (Company in

liquidation), through his assistant, objected to the Suit proceeding further without obtaining leave under S. 446 of the Companies Act, 1956 (hereinafter referred to as Companies Act). In response to the objection, it was submitted on behalf of Plaintiff in Adm. Suit no. 1 of 2017 that in light of the decision in ***Shanmugam Rajashekhar V/s. Owners and parties interested in the vessel m.t. Pratibha Cauvery***[1], no leave under S. 446 was required to be obtained. As this would be repetitive issue, this Court, therefore, by its Order dated 09 March 2018, was pleased to direct listing of all such suits together, to hear and decide upon the question as to whether leave under S. 446 of the Companies Act was required. This will be relevant in Adm. Suit no. 1 of 2017, Commercial Adm. Suit no. 121 of 2017, Adm. Suit no. 11 of 2015, Adm. Suit no. 20 of 2015, Commercial Adm. Suit no. 73 of 2016, Commercial Adm. Suit no. 142 of 2016, Adm. Suit 28 of 2017, Adm. Suit 33 of 2017, Commercial Adm. Suit no. 319 of 2016, Adm. Suit no. 41 of 2015, Commercial Adm. Suit no. 36 of 2018, Commercial Adm. Suit no. 482 of 2017, Ad. Suit 65 of 2015, Adm. Suit no. 18 of 2017, Adm. Suit no. 38 of 2018, Commercial Adm. Suit no. 8 of 2019, and Commercial Adm. Suit no. 39 of 2018 listed.

3 By an order dated 08 March 2019, in C.P. No. IB-731(PB)/ 2018, the National Company Law Tribunal, New Delhi, in the meanwhile, was pleased to admit a Petition under S. 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as IBC) against Punj Lloyd Ltd., the owner of Defendant Vessels in Admiralty Suit No. 1 of 2015, Admiralty Suit No. 6 of 2015, Admiralty Suit No. 17 of 2015, Commercial Admiralty Suit No. 284 of 2015, and Commercial Admiralty Suit No. 285 of 2015. Consequently, a Moratorium under S. 14 of the IBC was also declared by the said Order dated 08 March 2019. The moratorium period came to be extended from time to time, the last of which came to be passed on 31 January 2020 extending the period of moratorium by 60 days. However, on being questioned by this Court of the effect of the same upon the present Admiralty Suits, it was submitted on behalf of Plaintiffs in Adm. suit no. 6 of

1. 2018 SCC Online Madras 13

2015 that an Order of Moratorium under S. 14 of the IBC has no bearing whatsoever upon admiralty proceedings, which are prosecuted *in rem*. Issues as to the effect of other provisions of the IBC, on rights under the Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017 (hereinafter referred to as Admiralty Act) such as those with respect to statutory dues, crew wages etc. also came to be raised. As this would also be repetitive issue, this Court, therefore, was pleased to direct listing together such suits to hear and decide upon the applicability, effect and consequences of the proceedings under IBC as well, on the Admiralty Suits before this Court. This will be relevant in Adm. Suit no. 1 of 2015, Adm. Suit no. 6 of 2015, Adm. Suit no. 17 of 2015, Commercial Adm. Suit no. 284 of 2015 and Comm. Adm. Suit no. 285 of 2015 listed.

4 As very important questions of law were involved, this Court was pleased to appoint Dr. Abhinav D. Chandrachud as Amicus Curiae. Mr. Prashant S. Pratap, Senior Advocate and Mr. V. K. Ramabhadran, Senior Advocate, who regularly appear in admiralty matters also offered to assist the Court. Their gracious offer, and I say gracious because this was a very time-consuming matter, was welcomed by the Court and they were also appointed as Amicus Curiae. All counsels who were appearing for a contesting party and addressed the Court went beyond their brief at the request of the Court in order to assist the Court on the important questions of law. Most were concerned only with the provisions of Companies Act but made submissions even on the overlap between IBC and Admiralty Act. I must express my appreciation for the distinguished assistance by Dr. Chandrachud, Mr. Pratap and Mr. Ramabhadran, learned Amicus Curiae. So also, all the counsels who addressed the Court rendered distinguished assistance. The endeavour put forth by each counsel has been of immense value in rendering the judgement.

5 Two very interesting but complex questions have arisen in these groups of matters in the context of Admiralty Act and the provisions of the IBC and also the provisions of the Companies Act. These are crystallized as below:

Question No. 1

Is there a conflict between actions *in rem* filed under the Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017 and the provisions of Insolvency and Bankruptcy Code, 2016 and if so, how is the conflict to be resolved?

Question No. 2

Whether leave under Section 446(1) of the Companies Act, 1956 is required for the commencement or continuation of an Admiralty action *in rem* where a winding up order has been made or the Official Liquidator has been appointed as Provisional Liquidator of the company that owned the ship?

6 As both questions involve a consideration of the Admiralty Act, the discussions and observations in regard to the said act in general and actions *in rem* in particular under Question No.1 shall apply equally when it comes to Question No. 2.

Question No. 1

Is there a conflict between actions *in rem* filed under the Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017 and the provisions of Insolvency and Bankruptcy Code (IBC), 2016 and if so, how is the conflict to be resolved?

7 To answer this, we will have to first consider the objective of the two statutes and the purpose for which they have been enacted and then some of the relevant provisions of both acts to examine the nature of the conflict and how it can be resolved.

8 **Insolvency and Bankruptcy Code, 2016 (IBC)**

8.1 The preamble to IBC states *"This Act is to consolidate and amend the laws relating to re-organization and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all stakeholders."* It is an exhaustive Code on the subject matter of insolvency in relation to corporate entities (***Innoventive Industries Ltd. V/s. ICICI Bank & Anr.***[2]). As also held

2. (2018) 1 SCC 407

in ***Duncans Industries Ltd. V/s. A.J. Agrochem***[3] IBC is a special statute devoted entirely to resolution of insolvency, liquidation and bankruptcy of corporate persons and firms and individuals.

8.2 The following observations of the Hon'ble Supreme Court in ***Swiss Ribbons Pvt. Ltd. V/s. Union of India***[4] in para 27 and 28 make it clear as to what is sought to be achieved by the Code:

> 27: *"As is discernible, the Preamble gives an insight into what is sought to be achieved by the Code. The Code is first and foremost, a Code for reorganization and insolvency resolution of corporate debtors. Unless such reorganization is effected in a time-bound manner, the value of the assets of such persons will deplete. Therefore, maximization of value of the assets of such persons so that they are efficiently run as going concerns is another very important objective of the Code. This, in turn, will promote entrepreneurship as the persons in management of the corporate debtor are removed and replaced by entrepreneurs. When, therefore, a resolution plan takes off and the corporate debtor is brought back into the economic mainstream, it is able to repay its debts, which, in turn, enhances the viability of credit in the hands of banks and financial institutions. Above all, ultimately, the interests of all stakeholders are looked after as the corporate debtor itself becomes a beneficiary of the resolution scheme – workers are paid, the creditors in the long run will be repaid in full, and shareholders/investors are able to maximize their investment. Timely resolution of a corporate debtor who is in the red, by an effective legal framework, would go a long way to support the development of credit markets. Since more investment can be made with funds that have come back into the economy, business then eases up, which leads, overall, to higher economic growth and development of the Indian economy. What is interesting to note is that the Preamble does not, in any manner, refer to liquidation, which is only availed of as a last resort if there is either no resolution plan or the resolution plans submitted are not up to the mark. Even in liquidation, the liquidator can sell the business of the corporate debtor as a going concern. [See Arcelor Mittal (supra) at paragraph 83, footnote 3]."*
>
> 28: *"It can thus be seen that the primary focus of the legislation is to ensure revival and continuation of the corporate debtor by protecting the corporate debtor from its own management and from a corporate death by liquidation. The Code is thus a beneficial legislation which puts the corporate debtor back on its feet, not being a mere recovery legislation for creditors. The interests of the corporate debtor have, therefore, been bifurcated and separated from that of its promoters / those who are in management. Thus, the resolution process is not adversarial to the corporate debtor but, in fact, protective of its interests. The moratorium*

3. (2019) 9 SCC 725
4. (2019) 4 SCC 17

> *imposed by Section 14 is in the interest of the corporate debtor itself, thereby preserving the assets of the corporate debtor during the resolution process. The timelines within which the resolution process is to take place again protects the corporate debtor's assets from further dilution, and also protects all its creditors and workers by seeing that the resolution process goes through as fast as possible so that another management can, through its entrepreneurial skills, resuscitate the corporate debtor to achieve all these ends."*

8.3 It is quite clear from the above observations of the Apex Court that the primary focus of the IBC is to ensure revival and continuation of the Corporate Debtor within the framework of the IBC and only if no Resolution Plan is approved for revival of the Corporate Debtor, liquidation would follow. It is thus considered to be a beneficial legislation not only for the Corporate Debtor but also for all stakeholders including secured creditors.

9 **Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017**

9.1 The Admiralty Act came into force on 01 April 2018. The preamble to the Admiralty Act provides "*to consolidate the laws relating to Admiralty Jurisdiction, legal proceedings in connection with vessels, their arrest, detention, sale and other matters connected therewith or incidental thereto*."

It is settled law that a consolidating act forms a Code complete in itself and is exhaustive of matters dealt with therein (*Innoventive Industries*[5]). The Admiralty Act operates in a completely different sphere but is nonetheless a special act vesting Admiralty Jurisdiction in certain High Courts.

9.2 As can be seen from the preamble and the provisions of the Admiralty Act, it is a complete Code in itself as regards legal proceedings in connection with vessels (otherwise called actions *in rem*), their arrest, detention, sale and determination of priorities in respect of the sale proceeds of the vessels that were ordered to be arrested. Once the jurisdiction under the Admiralty Act is invoked by an action *in rem*, the

5. *Supra*

machinery of the act is set in motion. The arrest of the vessel leads to a sale of the vessel which leads to determination of priorities in respect of sale proceeds and payment to the successful Claimants from out of sale proceeds in the order of priorities as determined. This process is only halted by the appearance of the owner and provision of security or bail for release of the ship from arrest. If this happens and until this happens, the action continues as an action *in rem* with the consequences as provided in the act.

9.3 The rules framed by the High Court governing the exercise of admiralty jurisdiction set out the procedure to be followed in the matter of arrest of ships, sale of ships and determination of priority of claims.

9.4 The purpose of the Admiralty Act is to vest certain very valuable rights in respect of identified maritime claims. These are called rights *in rem* and a mechanism is provided in the Admiralty Act as to the manner of enforcement of such rights by arrest of a ship.

9.5 Under the Admiralty Act, jurisdiction is conferred on certain specified High Courts and impliedly, no other High Court has or is entitled to exercise Admiralty jurisdiction under the Admiralty Act. In this regards the following provisions may be seen:

Section 2(1)

(a) *"'admiralty jurisdiction' means the jurisdiction exercised by a High Court under section 3, in respect of maritime claims specified under this Act;"*

(b) *"'admiralty proceeding' means any proceeding before a High Court, exercising admiralty jurisdiction;"*

(e) *"'High Court', in relation to an admiralty proceeding, means any of the High Court of Calcutta, High Court of Bombay, High Court of Madras, High Court of Karnataka, High Court of Gujarat, High Court of Orissa, High Court of Kerala, High Court of Judicature at Hyderabad for the State of Telangana and the State of Andhra Pradesh or any other High Court, as may be notified by the Central Government for the purposes of this Act;"*

> **Section 3** : *"**Admiralty jurisdiction –** Subject to the provisions of sections 4 and 5, the jurisdiction in respect of all maritime claims under this Act shall vest in the respective High Courts and be exercisable over the waters up to and including the territorial waters of their respective jurisdictions in accordance with the provisions contained in this Act:*
>
> *Provided that the Central Government may, by notification, extend the jurisdiction of the High Court up to the limit as defined in section 2 of the Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976 (80 of 1976).*

9.6 Therefore, admiralty jurisdiction in respect of maritime claims shall vest in respective High Courts, subject to provisions of section 4 and section 5 of the Act. It will extend up to and including the territorial waters limits of India within their respective jurisdiction. The Central Government may notify any other High Court in line with limits defined in section 2 of the Admiralty Act.

9.7 At this stage, for a better understanding of what an action *in rem* under the Admiralty Act entails and the special jurisdiction vested in the High Court, a few salient features of actions *in rem*, maritime liens and maritime claims may be noticed.

10 Action *in rem* is against the ship and not the owner

10.1 A ship or a vessel as commonly referred to is a legal entity that can be sued without reference to its owner. The purpose of an action *in rem* against the vessel is to enforce the maritime claim against the vessel and to recover the amount of the claim from the vessel by an admiralty sale of the vessel and for payment out of the sale proceeds. It is the vessel that is liable to pay the claim. This is the fundamental basis of an action *in rem.* The Claimant is not concerned with the owner and neither is the owner a necessary or proper party. The presence of the owner is not required for adjudication of Plaintiff's claim. That is why no writ of summons is required to be served on the owner of the vessel. The service of the warrant of arrest on the vessel is considered sufficient.

10.2 For the purpose of an action *in rem* under the Admiralty Act, the ship is treated as "*a separate juridical personality, an almost corporate capacity, having not only rights but liabilities (sometimes distinct from those of the owner)*" - (***M.V. Elisabeth and Ors. V/s. Harwan Investments and Trading Pvt. Ltd.***[6]).

10.3 The Hon'ble Supreme Court of India, in ***M. Siddiqi V/s. Mahant Suresh Das & Ors.***[7] (referred to as *"**The Ram Janmabhumi Temple case")***, whilst considering independent legal personalities, made a reference to the conferment of legal personality on a ship. The following passages deserve to be reproduced:

> "*117. A more pertinent example for the present purposes is the conferment of legal personality on a ship. The concepts of a maritime lien and of actions in rem are established precepts of maritime law. A maritime lien may arise in the case of a wrongdoing or damage caused by a ship which gives the claimant a charge on the 'res' of the ship. The charge is crystallised by an action in rem under which the ship is directly proceeded against, as a legal person. In 1881, Sir George Jessel MR explained this in The City of Mecca[45], where he observed:*
>
> > *'You may in England and in most countries proceed against the ship. The writ may be issued against the owner of such a ship, and the owner may never appear, and you get your judgement against the ship without a single person being named from beginning to end. That is an action in rem, and it is perfectly well understood that the judgement is against the ship.'*
>
> *118. D.R. Thomas in his book titled Maritime Liens [D.R. Thomas, Maritime Liens in British Shipping Laws, Vol. 14 (Steven & Sons, London 1980).] traces the history of the judicial conferment of legal personality on ships. He speaks of two theories— the "personification theory" and the "procedural theory" in explaining the evolution of the concept:*
>
> *"The first [theory], commonly coined as the personification theory, traces the historical origin and development of maritime liens to the juristic technique, which has obtained since medieval times, of ascribing personality to a ship. Under this theory a ship is personified and regarded as a distinct juristic entity with a capacity to contract and commit torts. The ship is both the source and limit of liability."*
>
> ***
>
> *The second theory, known as the procedural theory, is based on the premise that maritime liens evolved out of the process of arrest of a vessel in order to compel the appearance of the res owner and to obtain a security."*
>
> ***

6. 1993 Supp (2) SCC 433
7. (2020) 1 SCC 1

Although the point is not free of uncertainty it is probably the case that a maritime lien is a substantive right whereas a statutory right of action in rem is in essence a procedural remedy. The object behind the availability of a statutory right of action in rem is to enable a claimant to found a jurisdiction and to provide the res as security for the claim." [D.R. Thomas, Maritime Liens in British Shipping Laws, Vol. 14 (Steven & Sons, London 1980) at pp. 7 and 38.]

119. There is a direct nexus between the conferral of a limited legal personality and the adjudicative utility achieved by the conferral. Courts treat the physical property of the ship as a legal person against which certain actions may be taken. Conferring legal personality on the ship allows for actions to be taken independent of the availability or presence of the ship's owners, who in a great many cases may be in other parts of the world. As a ship may only be in port for a brief period, an action in rem allows the claimant to ensure pre-judgement security. Thus, even absent an express personification, actions against the ship as a legal person ensure the effective adjudication of admiralty disputes.

120. In M V Elisabeth v Harwan Investment and Trading Pvt. Ltd., this Court noticed the underlying basis of this principle of Admiralty law. Justice Thommen, speaking for a two judge Bench traced the exercise of admiralty jurisdiction by English Courts:

> *44. ...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.*
>
> ***…In admiralty the vessel has a juridical 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 the decree against the vessel, binding upon all interested in her and conclusive upon the world**, for admiralty 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.)*
>
> *45. 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 obtain security to satisfy judgment.... (Emphasis supplied)*

121. In this view, the conferral of legal personality on a ship sub-served the purpose of business certainty and expediency. The decree against the ship binds all interested in her, and despite her nomadic nature, satisfies the requirement of ensuring pre-judgment security. Besides the UK and India, the attribution of legal personality to ships has been used extensively across jurisdictions. Illustrating the approach of American Courts, Professor Douglas Lind traces the evolution of the concept:

> *As the United States entered its first century, the greater part of the nation's trade and commerce, as well as much of the general transportation of persons, occurred on the high seas or along the country's abundant inland navigable waterways.* ***The constitution had extended the federal judicial power to all cases of admiralty and maritime jurisdiction****. ...*
>
> *The Brig James Wells v United States case raised what was quickly becoming a common issue: whether an American registered vessel should be condemned for violating a federal law. The Court held the Brig's condemnation inevitable. Noteworthy is the fact that* ***while the case was styled in the name of the vessel, neither the term 'maritime lien' nor 'in rem, appears, and there is no suggestion that the ship itself, rather than those in charge of it, was the offender*** *... **The practice of naming an action against a vessel did not, however, attest to the idea of vessel personification. The Court treated actions styled against a vessel as including everyone with an interest in her as "a party to the suit".***

Numerous cases had troubled the federal Courts regarding enforcement of liens when the principals (owners, masters) with interests in a ship had no active role or prior knowledge of the wrongdoing alleged. ***Traditional law of agency, with the ship as agent, worked against a coherent rule of responsibility and recovery*** *... Given the peculiar vitalism of the ship in lore, literature, and poetry, it took only a slight conceptual shift in the legal mind for the federal Courts to assume the "mental mode"l of adaptation to [the] reality of the vitalism of the ship. The doctrine gave the Courts the "control of the environment" over maritime law that they had been lacking ...* ***with the doctrine of the personality of the ship, the Supreme Court inverted the relationship of agency, making the ship the principal rather than the agent. In this way, the desirable consequences of a coherent, workable admiralty jurisdiction seemed possible.*** *The doctrine of the personality of the ship, that is, became a central hallmark of nineteenth century American admiralty law because it appeared to the Supreme Court —to be good in the way of belief ...* ***The idea originated in the practical efforts of the Supreme Court, especially Justices Marshall and Story, to meet critical social and political needs of the new American republic.***[49] *(Emphasis supplied)*

122. The experience of American Courts was that owners of offending ships regularly avoided the jurisdiction of Courts. The existing law of the day was inadequate to address the situation. The judges of the American Supreme Court therefore utilised the existing non-legal practice of anthropomorphising the ship and gave it legal significance by conferring legal personality on vessels within their jurisdiction. Significantly, the existing law of agency was ill equipped to deal with the unique features of Admiralty Law. Allowing actions against ships then created a vehicle through which the obligations of those with an interest in the ships and her actions, though outside the jurisdiction of Courts, would be fulfilled by the recognition by the law of the personality of the maritime vessel. Perhaps even more so than in the case of English admiralty Courts, the American experience demonstrates that the conferral of legal personality

> *on ships was a result of historical circumstances, shortcomings in the existing law and the need of Courts to practically and effectively adjudicate upon maritime claims. Over the course of several cases, the American Supreme Court solved the practical difficulties of attribution and agency by making the ship a distinct legal person for the purposes of adjudicating maritime claims."*

10.4 The fundamental legal nature of an action *in rem* as distinct from its eventual object is that it is a proceeding against *res.* Thus, when a ship represents such *res* as is frequently the case, the action *in rem* is an action against the ship itself. The action is a remedy against the corpus of the offending ship. It is distinct from an action *in personam* which is a proceeding inter-partes founded on personal service on Defendant within jurisdiction, leading to a judgment against the person of the Defendant. In an action *in rem* no direct demand is made against the owner of the *res* personally (***Maritime Liens by D R Thomas, Volume 14, British Shipping Laws***).

10.5 The distinction between an action *in rem* and an action *in personam* is therefore a matter of substance and not of mere form (*Maritime Liens by D R Thomas, Volume 14, British Shipping Laws*).

11 **Maritime Liens**

11.1 The maritime lien came to jurisprudential maturity in the first half of the 19th Century. It has since then been a part of English law and common law and consequently the law in India ever since Admiralty jurisdiction was vested in the three chartered High Courts of Bombay, Calcutta and Madras pursuant to the Colonial Courts of Admiralty Acts, 1890 and 1891.

11.2 The maritime lien represents one of the most striking features of contemporary maritime law and has, in recent times, been described as one of the first principles of the law of the sea. The expression *"maritime lien"* was probably first coined

in English law by Sir John Jervis when delivering the judgment of the Privy Council in ***The Bold Buccleugh***.[8] In the Learned Judge's opinion *"It is inchoate from the moment the claim or privilege attaches and when carried into effect by legal process by a proceeding in rem, relates back to the period when it first attached"(Maritime Liens by D R Thomas, Volume 14, British Shipping Laws*.).

11.3 A maritime lien is a concept of international familiarity and is recognized in most of the principal maritime jurisdictions. A maritime lien arises by operation of law and without any formal requirement, from the moment the circumstances which gave rise to the claim occur.

11.4 The fundamental principle is that a maritime lien attaches only to the *res* in respect of which the claim arises. No other property is capable of being charged, not even other property which is in the same ownership as the *res* in respect of which the claim arises.

11.5 The Supreme Court of India, in ***O. Konavalov V/s. Commander, Coast Guard Region & Ors***[9] has, in paras 22 to 28 and para 43, in great detail discussed the significance of Maritime Liens. It reads as under:

> "22. *The most unique concept of all in admiralty law is the maritime lien. It is a concept which is sui generis, but for practical purposes it may be considered as a charge upon maritime property, arising by operation of law and binding the property even in the hands of a bona fide purchaser for value and without notice, but which can only be enforced by an admiralty claim in rem.*
>
> *23. A maritime lien: "adheres to the ship from the time that the facts happened which gave the maritime lien, and then continues binding on the ship until it is discharged, either by being satisfied or from the laches of the owner, or in any other way which, by law, it may be discharged. It commences and there it continues binding on the ship until it comes to an end."*

8. (1852) 7 Moo PC 267
9. (2006) 4 SCC 620

24. Admiralty jurisdiction all over the world recognise the existence of maritime liens which have evolved over years of State and judicial practice. The existence and enforceability of such liens outside statute law is well established. The statutory law in regard to admiralty or maritime claims is not exhaustive of the subject.

25. Judicial opinion and textbook writers hold that a maritime lien such as seamen's wages is a right to a part of property in the res and a privileged claim upon a ship, aircraft or other maritime property and remains attached to the property travelling with it through changes of ownership. It is also acknowledged that it detracts from the absolute title of the "res" owners [see (1) Maritime liens by D.R. Thomas; British Shipping Laws, Vol. 14 at pp. 51-67; (2) Maritime Law by Christopher Hill, 2nd Edn. 1985 at pp. 107-11; and (3) Principles of Maritime Law by Susan Hodges and Christopher Hill, 2001].

26. The seamen's right to their wages have been put on a high pedestal. It is said that a seaman had a right to cling to the last plank of the ship in satisfaction of the wages or part of them as could be found in ***Neptune***[10] *and also* ***Ruta***.[11]

27. Having regard to the universally recognized status of maritime liens and, in particular, the position accorded to seamen's wages, and having due regard to the constitutional and statutory protection of such wages there can be no extinction of loss of such lien owing to the act of confiscation under Section 115 read with Section 126 of the Customs Act, 1962.

28. Seamen who have a right to wages, which right is enforceable against the ship can legitimately lay a claim to the payment of such wages out of the proceeds of the ship obtained by its sale. In our view, it is immaterial as to why and what process brings up the ship for sale either by way of proceedings in rem or otherwise. What is material is that the proceeds of the sale of the ship are available for satisfaction of the maritime liens. The absolute character of vesting, following confiscation can be absolute only against persons having proprietary right in the ship or goods and more particularly denoting a suspension or abeyance of such rights, till the confiscation is lifted in accordance with law. It would be misconceived to extend the scope of such vesting to the point of extinction of maritime liens particularly seamen's wages. It is equally well settled that public undertaking such as the port, dock or a harbour possessing statutory power to detain and sell a ship cannot sell the res free of the liens which have attached prior to the sale [See Corps & Corps vs. Queen of South [1968] 1 LLR 182]. The seamen's lien will follow the ship and its proceed in whatsoever hand they may come by title or purchase from the owner and the lien reattaches to the thing after sale and to whatever is substituted for it. [see James Sheppard vs. Lemuel Taylor 8 Led 269. See also Halsbury Laws of England para 1907 Vol.43 (2), 4th Edn. Re-issue] Obtaining jurisdiction to the res in pursuance of statutory powers should be put on the same footing as acquisition of the title following the transfer of res.
…..

10. 166 ER 81: 1 Hagg 227
11. (2000) 1 LLR 359

> *43. There exists a maritime lien on the vessel of its crew as established by judgments and authorities earlier cited. And also as understood maritime lien is a concept that evolved through the ages by way of customs prevailing in the law of the seas, no legislation specifically provides for maritime lien to the crew on the vessel. And it is very clear in judicial practice that no statutory rule can ever come in the way of the implementation of any customary practice which has the force of law. The requirement for any customary practice to have force of law is its practice for a long time and the absence of any statutory provision expressly prohibiting the implementation of that particular custom in force: the customary practice of the exercise of maritime lien by the crew members satisfies both these requirements. Thus Section 115 of the Customs Act which talks about confiscation will not operate to disentitle the crew of the lien that they can exercise on the vessel for the recovery of their wages which is an established practice in the law of the seas."*

11.6 Thus a maritime lien is a concept which is *Sui Generis,* can only be enforced by an Admiralty action *in rem* against the ship, adheres to the ship and continues to bind the ship until discharged, is not defeated by a transfer or sale of the Ship - *res* (except a judicial sale by an Admiralty Court), has the highest priority amongst all claims and there can be no loss of such lien in the absence of any statutory provision expressly prohibiting the exercise or implementation of such lien. This is an established practice in the law of the seas and is universal in nature. Personal liability of the owner of the ship is not necessary for a maritime lien to attach to the *res* and it follows the *res* even in the hands of a bonafide purchaser who may have no notice of the lien. Judicial opinion and textbook writers hold that a maritime lien such as seamen's wages is a right to a part of property in the res and a privileged claim upon a ship, aircraft or other maritime property and remains attached to the property travelling with it through changes of ownership. It is also acknowledged that it detracts from the absolute title of the "*res*" owners. As noted in *O. Konavalov*[12], the seamen's right to their wages have been put on a high pedestal. It is said that a seaman had a right to cling to the last plank of the ship in satisfaction of the wages or part of them as could be found.

12. *Supra*

11.7 Section 9 of the Admiralty Act lists as under, the following claims as maritime liens in order of *inter se* priority:

> *Section 9: Inter se priority on maritime lien:*
>
> *1. Every maritime lien shall have the following order of inter se priority, namely:*
> *a. Claims for wages and other sums due to the master, officers and other members of the vessel's complement in respect of their employment on the vessel, including costs of repatriation and social insurance contributions payable on their behalf;*
> *b. Claims in respect of loss of life or personal injury occurring, whether on land or on water, in direct connection with the operation of the vessel;*
> *c. Claims for reward for salvage services including special compensation relating thereto;*
> *d. Claims for port, canal, and other waterway dues and pilotage dues and any other statutory dues related to the vessel;*
> *e. Claims based on tort arising out of loss or damage caused by the operation of the vessel other than loss or damage to cargo and containers carried on the vessel.*

12 **Statutory rights in rem (Maritime Claims)**

12.1 A right to invoke the Admiralty jurisdiction by an action *in rem* in respect of a maritime claim, which is not a maritime lien, is also known as a statutory right *in rem.* Such rights are also described as statutory liens. A closed list of maritime claims is set out in Section 4 of the Admiralty Act. Maritime liens are also included in this as they are also maritime claims.

12.2 Although the owner must be liable *in personam* in respect of a maritime claim (which is not a maritime lien), the action *in rem* can proceed against the *res* independently of the owner and the claim can be adjudicated and decided without having to sue the owner *in personam*. The fundamental legal nature of an action *in rem* is that it is against the *res* and not the owner of the *res*. The personal liability of the owner of the *res* is not an essential characteristic of an action *in rem*.

12.3 Both maritime liens and statutory rights *in rem* entail the accrual of security by way of a charge. A charge of a maritime lienee accrues from the moment the maritime lien arises or attaches: It is inchoate from the moment the claim or privilege attaches. In case of a statutory lien the charge accrues upon the arrest of the *res*. Thus, the crystallization of a statutory lien would occur when the Admiralty jurisdiction *in rem* is invoked against the *res* and the warrant of arrest is executed. Under English law the security of a maritime Claimant is inchoate until either the writ *in rem* was served or the *res* arrested. Later judicial opinion, however, is in favour of equating the date of the creation of a secured creditor with the date of issue of a writ *in rem.* However, in the context of Indian law and procedure, this would be the date of service of the warrant of arrest on the *res*.

12.4 Although maritime liens attach to the vessel the moment the event giving rise to the claim arises and thereby a charge or encumbrance is created on the *res*, these are perfected only by an arrest of the vessel. All maritime claims against the vessel are only crystallized and perfected in the event they are enforced by an action *in rem* by arrest of the vessel. Thus, for both types of claims, arrest of the vessel is the only means of perfecting the lien or claim which may have arisen.

12.5 A person who has a maritime claim, and that would include maritime lien against a vessel, has a right *in rem* conferred by the Admiralty Act, to arrest the vessel to perfect his claim. It is a right provided by law. This is a very valuable right which cannot be taken away or destroyed by implication or inference unless there is an express provision in any law to this effect.

13 Section 10 of the Admiralty Act provides for the order of priority of maritime claims as follows:

Section 10: Order of priority of maritime claims:

1. The order of maritime claims determining the inter se priority in an admiralty proceeding shall be as follows:
a. A claim on the vessel where there is a maritime lien;
b. Registered mortgages and charges of same nature on the vessel;
c. All other claims.

2 ……..

13.1 In order of priority, maritime claims (excluding maritime lien and mortgages) fall in the category of *"All Other Claims"* appearing in Section 10 (1)(c) and rank below maritime liens and also below mortgages. Thus a financial creditor who has a registered mortgage on the ship would recover in priority over all parties who have maritime claims but not maritime liens. A vast majority of the claims are maritime claims (18 out of 23) which are listed in Section 4 of the Admiralty Act and which will rank below a mortgagee. Only those who have a maritime lien get priority over a registered mortgage. The reason why a maritime lien holder is given priority over a registered mortgage is to accord highest priority to crew wages and thereafter to claims involving loss of life or personal injury in connection with the operation of a ship and to Salvors but for whose efforts the ship would have been irretrievably lost or damaged thus destroying the security of a mortgagee. After these, rank statutory dues of a port, canal and other statutory dues related to the vessel and claims based on tort if the ship causes physical damage to another ship or property because the ship is considered to be the wrong doer. We need to highlight that even port dues are given priority only after crew wages and salvage claims are paid.

14 **Action in rem is distinct from an action in personam**

14.1 The nature of an action *in rem* as distinct from an action *in personam* is set out in several judgments. Notable amongst these is ***The Nordglimt***[13] and the following excerpts are instructive of the nature of an action *in rem.*

> *"In England, since the Judicature Acts, the means by which the judicial arrest of a ship has been obtained is by the commencing of an action in rem and the issue, by the Court in that action, of a warrant of arrest.*

13. [1988] 1 Q.B. 183

Therefore as a matter of English procedure there has to be an action before there can be an arrest and subject not to section 26 of the Civil Jurisdiction and Judgments Act 1982, the arrest has to be in aid of a judgment capable of being obtained in that action. The form of the writ in an Admiralty action in rem is one which describes the action as an action in rem against the ship but which also refers to parties as plaintiffs and defendants. No problem arises about the identity of the plaintiffs which equates with the 'claimant' in the 1952 Convention and is, in essence, the same as a plaintiff in an action in personam. But the defendants are customarily described as 'the owners of the ship' and the writ is addressed to 'the defendants and other persons interested in the hip'. Since the later part of the last century, the form of the writ has been used to support an argument that an action in rem is an action against the owners of the ship, but in every case the argument has been rejected. The most convenient statement is that of Fletcher Moulton L.J. in The Burns [1970] P. 137, 149-150:

> *'I am, therefore, of opinion that the fundamental proposition of the argument of the appellants' counsel fails, and that the action in rem is an action against the ship itself. It is an action in which the owners may take part, if they think proper, in defence of their property, but whether or not they will do so is a matter for them to decide, and if they do not decide to make themselves parties to the suit in order to defend their property, no personal liability can be established against them in that action. It is perfectly true that the action indirectly affects them. So it would if it were an action against a person whom they had indemnified...*

Unless and until anyone appears to defend an action in rem the action proceeds solely as an action in rem and any judgment given is solely a judgment given against the res. It is determinative and conclusive as against all the world in respect of the rights in the res but does not create any rights that are enforceable in personam. An action in rem may be defended by anyone who has a legitimate interest in resisting the plaintiffs' claim on the res. Such a person may be the owner of the res but equally it may be someone who has a different interest in the res which does not amount to ownership, or again it may be imply someone who also has a claim in rem against the res and is competing with the plaintiff for a right to the security of a res of an inadequate value to satisfy all the claims that are being made upon it. It will also be appreciated both from what I have said and from a general understanding of the law of maritime liens that the owner or other person defending the action may be under no personal liability to the plaintiff.

In the present case it is alleged that the owners of the Nordglimt are under a personal liability to the plaintiffs, but that is not part of the essential character of an action in rem as such. Unless and until a person liable in personam chooses to defend an action in rem the action in rem will not give rise to any determination as against such person of any personal liability on his part, nor will it give rise to any judgment which is enforceable in personam against any such person.

The consequence of this is that in my judgment on the correct interpretation of article 21 an Admiralty action in rem is not at the time of its inception an action between the same parties as an action in personam. It will only become an action between the same parties when and if a shipowner, liable in personam, chooses to appear in the action and defend it. It is from that moment and not before that the action first acquires the character of an action between the plaintiff and the shipowner; it will also be appreciated that it only acquires that character as the result of an act of the shipowner and that such a consequence does not inevitable follow from the act of the plaintiff in starting the action in rem.

A similar conclusion might be arrived at by a slightly different route adopting the reasoning of Brandon J. in The Rena K [1979] Q.B. 377, 405:

> *'It has, however, been held that a cause of action in rem, being of a different character from a cause of action in personam, does not merge in a judgment in personam, but remains available to the person who has it so long as, and to the extent that, such judgment remains unsatisfied…'*

Brandon J. is thus distinguishing between a cause of action in rem and a cause of action in personam.

In The Cella (1888) 13 P.D. 82, 85; Sir James Hannen P said 'an unsatisfied judgment in personam is no bar to proceedings in rem'. It is of the character of proceedings in rem that they are not alternative to proceedings in personam; they are cumulative. The cause of action in rem does not merge with a judgment in personam given in respect of a cause of action in personam arising from the same facts. However, proceedings in rem to which the shipowner has entered an appearance, although they can continue as proceedings in personam, are not deprived of their character as proceedings in rem and can still give rise to a judgment in rem against the res."

(Emphasis Supplied)

14.2 The observations of the English Court of Appeal in the case of The *"**Anna H**"*[14] are also illustrative:

> *"The right being enforced in an action in rem is a right against the res. It may be a proprietary right; it may be a maritime lien to the existence of which the current ownership of the res is wholly irrelevant; or it may be analogous 'statutory' lien where the ownership of the vessel at the time of the issue of the writ (though not at the time of her arrest) is relevant.*
>
> *The problem for the application of the Judgments Convention arises from the historic rule of English procedural law that, if a party who is liable in personam enters an appearance in an action in rem, he is liable to have judgment given against him in personam. Thus, the result of such an*

14. 1995 (1) LLR 11

appearance will be that, although the action proceeds as an action in rem and may give rise to a judgment in rem against the res (The Nordglimt: The Maciej Rataj, [1992] 2 Lloyd's Rep 552), the person who has entered an appearance is liable to have judgment given against him in the full amount of the claim notwithstanding the fact that the res may be of a lesser value.

After conflicting earlier decisions, this rule of English procedural law was only finally settled by Mr. Justice Jeune in 1892 in The Dictator, [1892] P. 304 and subsequently by the Court of Appeal in The Gemma, [1899] P. 285. The origins of this rule derive from a medieval doctrine that jurisdiction could be founded and an appearance before the Court compelled by the arrest of the defendant himself or the seizure of his property. This procedure had become obsolete by the end of the 18th Century (see The Beldis, (1935) 53 Ll.L. Rep. 255 at p. 274; [1936] P. 51 at p. 85 per Lord Justice Scott) but nevertheless provided the historical basis for the law as declared in The Dictator. In that case Mr. Justice Jeune, in discussing the various decisions of Dr. Lushington, commented (at p. 319):

> *'I cannot help thinking that the fallacy lies in considering that to enforce a judgment beyond the value of the res, against owners who have appeared and against whom a personal liability, enforceable by Admiralty process, exists, is the grafting of one form of action on to another. The change, if it be a change, in the action is effected at an earlier stage, namely when the defendant by appearing personally introduces his personal liability.'*

On the following page (p. 320) he said:

> *'It may well be that, if the owners do not appear, the action only enforces the lien on the res, but that, when they do, the action in rem not only determines the amount of the liability, and in default of payment enforces it upon the res, but is also a means of enforcing against the appearing owners, if they could have been made personally liable in the Admiralty Court, the complete claim of the plaintiff so far as the owners are liable to meet it … If the owners appear to contest or reduce their liability, they should be placed in the same position as if they had been brought before the Court by a personal notice.'*

He is thus identifying a special rule of Admiralty procedure which makes such a person, by virtue of his appearance, liable in personam as if a writ in personam had been issued against him and served upon him within the jurisdiction notwithstanding that the original action did not make any in personam claim against him."

14.3 The observations in the judgment in ***Republic of India and Anr. V/s. Indian Steamship Co. Ltd.*** (***The Indian Grace No.2)***[15] have been explained in a later

15. [1997] 3 WLR 818

judgment of the English Court of Appeal in the case of ***Stolt Kestrel B.V. & Sener Petrel Denizcilik Ticaret AS*** (***Stolt Kestrel)***[16] where the observations in respect of actions *in rem* and actions in *personam* in the judgment in *The Indian Grace No.2*[17] have been held to be of limited effect and only for the purpose of consideration and interpretation of Section 34 of the Civil Jurisdiction and Judgments Act, 1982. It does not change the legal position that prevailed in England for over a century and set out succinctly in *The Nordglimt*[18] and the *Anna H.*[19]

14.4 The nature of an action *in rem* has also been explained by a Division Bench of this Court in the case of ***Sparebanken SOGN OG FJORDANE V/s. M.V. Bos***

Angler and Others[20], where in paragraph 12 the Court observes:

> *"Now before we construe the provisions contained in the Rules, it would be at the outset necessary to revisit some of the fundamental principles in regard to the exercise of the jurisdiction in rem in admiralty proceedings. When an action is brought against the vessel in rem, the Court exercises its jurisdiction treating the vessel which is sued as an entity in itself. When the Court orders the sale of the vessel, it has the inherent power in the exercise of its Admiralty jurisdiction to convey upon the purchaser a valid title to the res that is sold free of all charges and encumbrances. This principle was established in common law as one fundamental to public policy since it would be manifestly contrary to the evolution of maritime law if a Court of competent jurisdiction which effected the sale of a ship were unable to convey a valid title to an innocent purchaser. Consequently, once a vessel has been sold in the exercise of the jurisdiction in rem, all claims against the vessel have to be enforced against the proceeds of the sale and before the Court which exercises jurisdiction to arrest and thereafter sell the vessel. Equally, it is a matter of settled principle that the Court which holds the proceeds of the sale holds them not merely for the benefit of the plaintiff who moves the Court in the jurisdiction in rem but for and on behalf of all persons who may have claims in respect of the property of the vessel and, after the sale, in respect of the sale proceeds....."* (Emphasis supplied)

16. (2015) EWCA Civ 1035
17. *Supra*
18. *Supra*
19. *Supra*
20. (2013) 3 Mh. L.J. 898

14.5 Reference may also be made to the judgment of a learned Single Judge of this Court in the case of ***ICICI Ltd. V/s. MFV Shilpa***[21]. This case concerned an Admiralty Suit filed by ICICI Ltd., a financial institution, for recovery of their loan which was secured by a mortgage on the ship. ICICI Ltd. sought an arrest of the ship and its sale by filing proceedings *in rem.* An objection was raised that the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (hereinafter referred to as RDDB Act) was applicable and in view of section 18 of the said act the jurisdiction of the High Court was barred and it was only the tribunal under the said act which had the jurisdiction to entertain and decide the Bank's application. This contention was rejected by the Court, which in paragraph 7 held as follows:

> *"It is thus clear that under admiralty law, a vessel or ship itself is treated as a person and a suit can be instituted only against the vessel against which the plaintiff has a claim and its owner who may not be named. Thus, under the admiralty law, the ship or vessel itself can be held liable for a claim and it is a peculiar feature of the admiralty jurisdiction that a vessel or ship is treated as a person against which a civil suit can be filed which is capable of being arrested for satisfying the claim of the plaintiff. When a plaintiff brings an action against a vessel for recovery of his claim, the suit is called as an action in rem and in such a suit, an application is made for arrest of the ship. Thus for the purpose of admiralty jurisdiction, the vessel itself is treated as a person from whom an amount is due to the plaintiff. Perusal of the provisions of S. 17 shows that jurisdiction has been conferred on the Tribunal constituted under the D.R.T. Act to entertain and decide applications from the Banks and financial institutions for recovery of debts due to such Banks. Sub-sec. (1) of Sec. 17 of the D.R.T. Act reads as under:-*
>
> > *17. Jurisdiction, powers and authority of Tribunals (1) A Tribunal shall exercise, on and from the appointed day, the jurisdiction, powers and authority to entertain and decide applications from the banks and financial institutions for recovery of debts due to such banks and financial institutions."*
>
> *The term 'Debt' has been defined by Sec. 2(g) of the D.R.T. Act which reads thus:*
>
> > *"(g) 'debt' means any liability (inclusive of interest) which is alleged as due from any person by a bank or a financial institution or by a consortium of banks or financial institutions during the course of any business activity undertaken by the bank or the financial institution or the bank or the financial institution or the consortium under law for the time being in force, in cash or otherwise, whether secured or unsecured, or whether payable under a decree or order of the civil Court or otherwise and*

21. AIR 2002 Bom 371

> *subsisting on, and legally recoverable on the date of the application."*

It is clear from the definition of the term 'Debt' that debt means any liability which is claimed as due by Bank or financial institution from any person. The D.R.T. Act does not define the term 'Person' but the term is defined by the General Clauses Act. The definition is to be found in Section 3(42) of the General Clauses Act which reads as under:

> *"3(42) 'person' shall include any company or association or body of individuals, whether incorporated or not."*

It is thus clear that a person is a living person as also a company or association or body of individuals can also be treated as person. Thus, in my opinion, for the purpose of the provisions of the D.R.T. Act, a vessel cannot be treated as a person and therefore, when a financial institution brings an action in rem in the admiralty Court against a vessel, it cannot be said that the claim that Bank or financial institution is making in the admiralty suit in so far as the vessel is concerned, is a debt within the meaning of S. 2(g) of the said Act. Thus, a suit instituted by a Bank or financial institution for recovery of its claim against a vessel in the admiralty jurisdiction of the High Court, cannot be termed as a debt and therefore, the D.R.T. will not have jurisdiction to entertain that suit in terms of the provisions of S. 17 of the Act."

(Emphasis Supplied)

14.6 As regards the non-obstante provision contained in Section 34 of the RDDB Act which provided that the provisions of the act shall have effect notwithstanding anything inconsistent contained in any other law, the Court held in paragraph 8, that this is a general provision and it is not an express provision made to curtail or exclude the operation of Section 51 of the Merchant Shipping Act, 1958 which empowered a High Court to entertain a claim by a mortgagee for recovery of his dues by sale of the mortgaged ship. The jurisdiction of the High Court to entertain the suit would not be ousted by the provisions of the RDDB Act.

14.7 As regards sale of the vessel, the High Court observed in paragraph 11 that:

> *"It is further to be seen here that S.51 of the Merchant Shipping Act makes a specific provision for recovery of the mortgage money by the mortgagee by sale of the vessel, which is mortgaged. Perusal of the provisions in Part II of the Rules and Forms of the high Court of Judicature at Bombay on the Original Side, shows that when a person has a claim against a vessel, he can bring an action in rem and there is a special and effective procedure provided for recovering the claim of the person in such a suit. It*

is further to be seen here that the rules provide a special procedure for sale of a ship or vessel pursuant to its arrest. It provides for determination of various claims that may be lodged against the vessel and distribution of the sale proceeds amount the claimants, with the result any person who buys a vessel sold in the admiralty jurisdiction gets a clear title and he gets the vessel free from all encumbrances. By virtue of the provisions of S. 41 of the Evidence Act, the sale certificate issued by this Court in favour of the purchaser is a conclusive proof of his title to the ship and any person who may have a claim against that vessel cannot make any claim against the purchaser or the vessel in his hand. On the contrary when a vessel would be sold in execution of a certificate issued by the D.R.T. the sale certificate may not confer a clear title on the purchaser. It is further to be seen that in admiralty jurisdiction, the plaintiff can proceed against the vessel itself and can get the vessel arrested in the first instance and the Court can proceed to sell the vessel after its arrest immediately unless within a stipulated time, the owner appears and furnishes security and get the vessel released. Thus, in admiralty jurisdiction, the claim of the plaintiff is secured firstly by arrest of the ship and secondly, when the ship is released from arrest by the security furnished. Thus, the procedure that is followed by this Court in its admiralty jurisdiction is efficacious and effective procedure than the procedure provided by the D.R.T Act. It is clear from the preamble of that Act that that Act has been enacted for providing speedy recovery of the claims of the Banks and financial institutions. Thus, it cannot be said that in enacting the D.R.T Act, it was the intention of the Legislature to deprive the Banks and financial institutions of an existing more effective and efficacious remedy, in my opinion, therefore, requiring the Banks and financial institutions to go to the D.R.T. for recovering of their claims against the vessels would defeat the purpose for which the D.R.T. Act has been enacted and therefore, in my opinion, it cannot be said that the suit of the Plaintiffs is not maintainable." (Emphasis Supplied)

15 Having noted the salient features of the Admiralty Act and the special jurisdiction vested in certain High Courts under the said act and the nature of actions *in rem* and maritime claims, I now proceed to summarize the various submissions made by the parties.

Submissions of the parties: Elaborate submissions were made by the counsels, which are summarized below.

16 **Dr. Abhinav Chandrachud**, the *amicus curiae* submitted that the moratorium under the IBC will not apply to Admiralty suits for the following reasons:

a) According to the principles laid down in ***Damji Valji Shah & Ors. V/s. Life Insurance Corporation of India & Ors.***[22], ***Allahabad Bank V/s. Canara Bank and Anr.***[23], ***Indorama Synthetics (I) Ltd., Nagpur V/s. State of Maharashtra and Ors.***[24], ***Ashoka Marketing Ltd. & Anr. V/s. Punjab National Bank***[25] and ***Jotun India P. Ltd. V/s. PSL Ltd***[26], the Admiralty Act will be a special act which deals with Admiralty matters whilst the IBC is a general act which deals with corporate insolvency. Thus, in accordance with the principle of interpretation that the special act overrides the general act, the Admiralty Act will prevail. In the event both are considered special acts, Admiralty Act being the later one, the Admiralty Act will prevail.

b) The fact that section 238 of the IBC contains a non-obstante clause giving overriding effect to the provisions of the Code is no ground to hold that the IBC will prevail over the Admiralty Act. This is because the jurisdiction of civil Courts is impliedly barred by the Admiralty Act and therefore there is an implied non-obstante clause in the Admiralty Act.

c) A proceeding *in rem* is not a proceeding against the corporate debtor within the meaning of the IBC and Section 14(1) (a) to 14(1) (d) does not apply to the Admiralty suits.

16.1 Since the Admiralty Act confers Admiralty jurisdiction on certain High Courts only which are empowered to entertain an action *in rem*, it impliedly bars the jurisdiction of all other Civil Courts. Dr. Chandrachud relied upon the judgment of the Supreme Court in the case of *Damji Valji Shah*[27] and in particular paragraph 19 thereof and submitted that a later act which impliedly excluded the jurisdiction of Civil Courts would prevail over an earlier special act which also contained a non-obstante clause and a

22. AIR 1966 SC 135
23. (2000) 4 SCC 406
24. 2016 (4) Mh. L. J. 249
25. (1990) 4 SCC 406
26. (2019) 213 Comp Cas 61 Bom
27. *Supra*

clause barring the jurisdiction of Civil Courts. He also relied upon a judgment of the Constitution bench of the Apex Court in *Ashoka Marketing Ltd. & Anr. V/s. Punjab National Bank & Ors.*[28] and submitted that if there are two special acts, then the later act shall prevail as even though the prior act contains a non-obstante clause, the later act impliedly bars the jurisdiction of Civil Courts and vests exclusive jurisdiction in certain High Courts to entertain actions *in rem.*

17 **Mr. Prasad Shenoy**, Advocate, appearing for a contesting party, to a large extent supported the submissions of Dr. Chandrachud. Mr. Shenoy also submitted that a moratorium under Section 14 of the IBC would not affect an action *in rem* filed under the Admiralty Act. According to Mr. Shenoy, if the owner of the ship who may be the Corporate Debtor deposits security and obtains release of the ship, then, on a declaration of moratorium under Section 14 of the IBC, the proceedings would have to be stayed but in the event of liquidation, Plaintiff in such a suit would be allowed to realise his security under Section 52 of the IBC.

17.1 The procedure for sale of a Defendant Vessel and distribution of proceeds thereof, is entirely different under the Admiralty Act read with The Bombay High Court (Original Side) Rules, 1980. It is *ex facie* impossible to reconcile the procedure with the one set out under Reg. 37 (Realisation of security interest by secured creditor) of the Liquidation Process Regulations, 2016 of the IBC.

17.2 A sale by an Admiralty Court will always fetch a higher price for the vessel than sale under the IBC as the sale by the admiralty Court will be free from encumbrances, as section 8 of the Admiralty Act codifies the traditional position in Admiralty Law that on the sale of a vessel under the Admiralty Act by the High Court in exercise of its admiralty jurisdiction, the vessel shall vest in the purchaser free from all

28. *Supra*

encumbrances, liens, attachments, registered mortgages and charges of the same nature on the vessel.

18 **Mr. Rahul Narichania**, Senior Advocate, appearing for a contesting party also submitted that the provisions of the Admiralty Act will override and prevail over the IBC where there is a conflict, as the Admiralty Act is a special statute dealing with special claims which are recognized as maritime claims and maritime liens. The Admiralty Act operates in a separate and distinct field to confer Admiralty jurisdiction on High Courts of coastal States for enforcement of a closed list of maritime claims including liens, arrest of vessels for security of maritime claims / liens. The action *in rem* is against the ship and the ship is treated as a person and a wrong doer and is liable to satisfy the claim. An action *in rem* is not against the property of the Corporate Debtor but an action against a juristic person, namely, the ship.

18.1 According to Mr. Narichania:

a) Section 238 of the IBC does not override the Admiralty Act and an express provision is required to oust the applicability of the Admiralty Act. He also relied upon the judgment of this Court in the case of *ICICI Ltd. vs. MFV Shilpa & Ors.*[29] wherein it was held that Section 34 of the RDDB Act which contained a non-obstante clause did not override the provisions of Section 51 of Merchant Shipping Act in regard to the sale of a ship by a financial institution to recover a debt due to it which was secured by a mortgage of the vessel.

b) Neither Section 14(1)(a) nor Section 14(1)(c) of IBC operates as a bar to the institution of an action *in rem* and even if they do, at best the action must be stayed until the period of the moratorium. Similarly, Section 33(5) of IBC also does not operate as a bar to an action *in rem* against the ship but only applies to the corporate debtor. In any event it is subject to Section 52(4) of IBC which

29. *Supra*

permits a secured creditor to enforce and realise his security in accordance with the applicable law which in this case would be the Admiralty Act.

c) Can it be argued that a maritime lienee, such as a salvor, who has salvaged a ship and saved it from sinking or being irretrievably lost, be told that Section 53 of the IBC will prevail over Section 9 of the Admiralty Acton priorities of claims? Mr. Narichania submitted,

(i) The Priorities under the IBC essentially relate to an action brought against the corporate debtor (company) whereas priorities under the Admiralty Act invariably relate to an action in rem brought against the ship. The nature of these claims operate in separate and distinct fields and consequently claimants such as secured creditors and those having maritime claims/liens against the ships cannot be considered to be subservient to claimants who have claims under the IBC.

(ii) Maritime claimants have a right to proceed against particular *res*, i.e., ship, as opposed to a general creditor who has no such right against particular *res*. This distinction is very important when one considers the interplay between the two statutes, i.e., the IBC and the Admiralty Act. If the IBC is to prevail, a salvor who has saved property may lose his priority altogether even though he has preserved valuable property of the company which is available for the benefit of several other claimants. He would also be at the mercy of financial creditors who despite having benefitted from the salvage service may claim higher priority over the salvors claim. Therefore, whilst determining priorities, the IBC cannot prevail over the Admiralty Act. It must be borne in mind that prior to the Admiralty Act, in India priorities were determined following common law and precedence. It is for the first time that the Admiralty Act actually specifies the order of priorities of maritime liens and claims. This being a special statute and later in point of time to the IBC, priorities under the Admiralty Act must necessarily prevail

vis-a- vis maritime claims/liens in the event of a conflict on the issue of priorities. Therefore, distribution of sale proceeds of the ship and the order of priorities will have to be considered under the Admiralty Act and not in accordance with the priorities to be determined under the IBC. Surplus, if any, shall be paid over to the Liquidator.

d) The claim of a party who has a maritime claim against a ship is to be distinguished from that of an ordinary creditor who has a claim against the corporate debtor but not against particular *res*. In the event the ship is sold and the proceeds paid into the Court, the interest of the owner is only to the extent of receiving the balance of the proceeds of sale after satisfaction of the claims of all maritime claimants. Mr. Narichania relied on ***Re: David Lloyd and Company***[30] and the judgment of a single Judge of this Court in the case of ***Corporation Bank V/s. M.V. Pratibha Indrayani***[31] as also the judgment in ***Re: Lineas Navieras Bolivianos SAM***[32]*(m.v. Bolivia)* which holds that once the vessel is arrested and the ship enters the custody of the Admiralty Marshall on behalf of the Admiralty Court, the company's interest in the ship is limited to a right to receive the balance of the proceeds of sale remaining after satisfaction of the various maritime claimants.

19 Per contra **Mr. V.K. Ramabhadran**, Senior Advocate, *Amicus Curiae,* submitted that:

a. The Apex Court in *Swiss Ribbons (P) Ltd.*[33] has exhaustively dealt with the objects and the purpose of IBC Code and moratorium under section 14 of IBC.

b. In ***Anand Rao Korada, Resolution Professional V/s. Varsha Fabrics (P) Ltd. And Others***[34] the Supreme Court has set aside the auction of an immoveable

30. (1877) 6 Ch. D. 339
31. Notice of Motion No. 8 of 2014 in Commercial Suit No.15 of 2014 Order dated 17 April 2017
32. (1995) B.C.C. 666 (Chancery Division)
33. *Supra*
34. 2019 SCC online SC 1508

property of a corporate debtor during the period of moratorium after considering the scope of S. 231 and S. 238 of the IBC because S. 231 of IBC bars Civil Court from exercising jurisdiction in respect of any matter over which adjudicating authority is empowered to pass any order.

c. In *Duncans Industries Ltd.*[35], the Supreme Court has held that the provisions of IBC will have an overriding effect over the Tea Act, 1953 and consequently upheld the right of an operational creditor to initiate proceedings u/s. 9 of the IBC without the consent of the Central Government as required under the Tea Act, 1953.

d. The entire object and scheme of IBC is to ensure revival and continuation of corporate debtor from corporate death by liquidation.

e. It is the obligation of the resolution professional to take custody and control of all the assets of the corporate debtor and to preserve and protect the assets of the corporate debtor under S. 25 of the IBC.

f. Even though Admiralty Act is a later enactment, even assuming it is a special Act, the question as to which Act shall prevail must be considered with respect to the purpose of enactment as held in ***KSL & Industries Ltd. V/s. Arihant Threads Limited & Ors***[36], wherein the Court held that Sick Industrial Companies Act, 1985 (SICA) (though an earlier enactment) would prevail over RDDB Act which is a later enactment. The object and purpose of the IBC is clear in that it is a Code for re-organisation and insolvency resolution of corporate debtors as against which Admiralty Act is like any other Act confined to enforcement of certain restricted claims through a special method. It would therefore be obvious that the IBC is enacted for re-organisation and insolvency resolution of corporate debtors with an emphasis being laid on the recovery of money by the secured creditor. The purposes of two enactments are completely different. It matters not that Admiralty Act is a later enactment.

35. *Supra*
36. (2015) 1 SCC 166

Indeed, looking into the purpose, the IBC Code would prevail over the proceedings in the form of Suits under the Admiralty Act.

g. If the admiralty action against the vessel *in rem* is allowed to be pursued, the entire scheme and object of the IBC would come to a naught. Therefore, applying the ratio in ***State Bank of Travancore V/s. Mohammed Mohammed Khan***[37] on the principles of interpretation of statutes, there is a need for purposive interpretation of the words "corporate debtor" to include not only the suits against corporate debtor but also against the assets of the corporate debtor. It is trite law that such interpretation is to be adopted, which advances the object sought to be achieved by the legislation rather than the one which defeats the object. If the suit against the vessel being *in rem* proceeding is excluded, the whole object of moratorium under Section 14 of the IBC would stand defeated.

h. The unsecured creditors who have obtained order of arrest against the vessel prior to moratorium under S. 14 of the IBC would equally stand along with other operational creditors as defined in the IBC. S. 14 (1) (c) of the IBC would apply not only to secured creditor but also to unsecured creditors. If the application of S. 14 (1) (c) of the IBC is restricted to financial creditor as defined in IBC, it would create an anomalous situation, in that, while financial creditor is prohibited from enforcing his security, unsecured creditor would not be. Unsecured creditors will not have any priority since by arrest of the vessel no lien is created in favour of the unsecured creditor.

i. However, if the amount to secure the claim of the unsecured or secured creditor is deposited in Court, (prior to order granting moratorium) such amount would inure to the benefit of such claimant(s) alone and it would not form part of the assets of the corporate debtor. This is so because the corporate debtor, prior to the order of moratorium under S. 14 of the IBC, can be said to have discharged

37. (1981) 4 SCC 82

its liability by depositing the amount in Court. Since it is no longer a liability of the corporate debtor, such unsecured / secured creditor is not bound by the approval of the resolution plan under S. 31 of the IBC. Moreover, such claim of unsecured / secured creditor would not form part of "claims" as enumerated in S. 25 (2) (e) of the IBC.

j. If a secured creditor (financial creditor as defined in the IBC) has obtained order of arrest of the vessel prior to grant of moratorium and if security in the form of deposit of the amount in Court or bank guarantee is not furnished, his position would be same as other financial creditors and he shall be bound in the event of the resolution plan being approved as envisaged under S. 31 of the IBC.

k. However, any expenses incurred towards maintenance of the vessel could be treated as "the insolvency resolution process costs" in terms of S. 30 (2) (a) of the IBC.

l. Therefore, in so for as claims as defined as maritime lien under S. 2 (g) of the Admiralty Act and statutory dues of the Harbour authority in respect of which they have a lien over the vessel, considering the special nature of its claim the resolution plan as envisaged under S. 30 of the IBC could provide for their entire claim and not restrict it to the amount which is otherwise required to be paid to the operational creditor under S. 53 of the IBC. This is so because, in respect of claim in the nature of maritime lien, if they do not make such provision, the vessel is liable to be arrested in a foreign jurisdiction. Similarly, the Harbour authority that has a lien over the vessel would refuse to release, following the ratio in ***Board of Trustees of Port of Mumbai V/s. Indian Oil Corporation Ltd. And Anr.*** [38].

m. Similarly, the Liquidator while considering the distribution of assets under Section 53 of the IBC shall ensure payment in respect of the entire claim in the

38. 1998 (4) SCC 302

nature of maritime lien and the dues of the Harbour authorities by following the dictum of the Supreme Court in ***ICICI Bank Ltd. V/s. SIDCO Leathers Ltd. & Ors.*** [39]**.** S. 53 of the IBC would stand overridden to that extent.

19.1 The summary of Mr. Ramabhadran's submissions is:

i. Admiralty suit filed either against the vessel or against the owner or against both gets interdicted once an order is passed under S. 14 of the IBC by which moratorium come into force.

ii. Arrest of a vessel prior to moratorium setting in would not create lien in favour of the Claimant (unsecured creditor) and consequently such Claimant would be treated as operational creditor under the IBC and he is bound by the resolution plan as envisaged under S. 31 of the IBC. However, if the amounts are deposited, in such event, such amount would be to the benefit of that Claimant alone and he would not be bound by the order of the adjudicating authority approving the resolution plan under Sec. 31 of the IBC.

iii. Expenses incurred towards the vessel under arrest could be treated as "the insolvency resolution process costs" in terms of S. 30 (2) (a) of the IBC.

iv. A claim in the nature of maritime lien, though may not fall under the definition of "secured creditor" as defined under S. 2 (30) of the IBC, nevertheless considering the nature of the claim the corporate resolution plan as envisaged under S. 30 of the IBC shall necessarily have to make provision for its entire claim.

v. Similarly, if the adjudicating authority passes an order requiring the corporate debtor to be liquidated, the liquidator while undertaking distribution of assets shall ensure the highest priority to the claim in the nature of maritime lien and to that extent S. 53 of the IBC would stand overridden.

39. 2006 (10) SCC 452

20 **Mr. Sharan Jagtiani**, Advocate, appearing for a contesting party (Official Liquidator), would submit that:

a) Principles of insolvency would apply even to Admiralty law and therefore a solution to protect a maritime claimant would have to be found within the umbrella of the IBC and not *de-hors* the IBC. The IBC as understood by the Hon'ble Supreme Court is an all-encompassing and a comprehensive code. Therefore, whilst maintaining that the sanctity of the *sui generis* nature of the Admiralty Act should be preserved and not be rendered meaningless by the operation of the IBC, it has to be seen as to how an admiralty action can retain its provisions within the scope of the IBC. While interpreting the IBC *viz-a-vis* the Admiralty law there are provisions in the IBC which permit the secured creditor under the Admiralty law to protect their security and to realize their security. Therefore, the status of an admiralty creditor or a maritime lien holder would have to be found within the umbrella of the IBC and not *de hors* the IBC.

b) Section 14 of the IBC provides for Declaration of moratorium and public announcement. Where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33 of the IBC, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.

The moratorium under Section 14 of the IBC is wide and puts a complete bar against the institution or continuation of suits or any legal proceedings against the corporate debtor. Therefore, during the period of the moratorium, the Admiralty claimant will not proceed with the suit for sale of the vessel.

c) Section 31 of the IBC effectively speaks about the approval of resolution plan. Once the resolution plan is approved the moratorium comes to an end. If the restructuring fails, Section 33 of the IBC automatically provides for liquidation

process. This occurs when the process of restructuring of the Corporate Debtor fails.

An enforcement of security interest is prohibited by Section 14 of the IBC and there is no provision in the IBC for seeking leave of the National Company Law Tribunal (NCLT) or the Company Court to proceed as available under Section 446 of the Companies Act. However, Section 52 provides a mechanism for realizing the secured creditor's security outside the process of liquidation and under Admiralty law a maritime lien holder acquires security interest by operation of law which falls within the IBC definition of security interest. Thus, in the event of liquidation, a secured creditor under the Admiralty Act can stand outside liquidation and is not subject to Section 53 which provides for distribution of assets consequent upon liquidation. Such a secured creditor who wants to stand outside liquidation, however, has to inform the liquidator of his intention along with details of his security interest so as to enable the liquidator to identify the same. Once this condition is satisfied the maritime claimant would be entitled to realise its security under the applicable law which would be the Admiralty Act. Sections 3(31), 35(f), 52 and 53 of IBC suggest this.

d) Thus, the IBC cannot be ignored by invoking the principle of the Admiralty Act being a later and special act. A solution, however, has to be found within the framework of the IBC so as to permit Admiralty claimants to exercise their rights.

21 **Ms. S. Priya**, Advocate appearing for a contesting party, submitted that even though an action *in rem* is against the ship it includes *in personam* liability of the owner and consequently the owner would be a *de facto* Defendant in the action. The Claimant is required to establish *in personam* liability of the owner and therefore the action is really a claim against the owner and his property. Ms. Priya relied upon a judgment of the House of Lords in the case of ***Republic of India & Anr. V/s. India***

Steamship Co. Ltd. (**The Indian Grace No.2**)[40]**,** which was primarily concerned with interpretation of section 34 of the Civil Jurisdiction and Judgment Act, 1982 in the context of an Admiralty action *in rem.* The submissions of Ms. Priya seem to suggest that according to her in the event of a conflict the provisions of the IBC would prevail and the moratorium under Section 14 of the IBC would apply equally to an action *in rem* as it would to a suit *in personam.*

22 **Mr. Prathamesh Kamat**, Advocate appearing for one of the parties submitted that if a Plaintiff in an action *in rem* has arrested the vessel and obtained security prior to the order of liquidation, that Plaintiff is a secured creditor and stands outside liquidation and is entitled to continue the suit under the provisions of the Admiralty Act, in view of section 52(4) of the IBC.

22.1 Even if liquidation is ordered there is no bar in proceedings against the vessel *in rem* as section 33(5) of the IBC does not bar any suit or *in rem* proceedings initiated against the assets of the company nor does it bar continuation of any proceedings initiated prior to Corporate Insolvency Resolution Process (CIRP).

23 **Mr. Ajai Fernandes**, Advocate appearing for the Board of Trustees for the Port of Mumbai, a contesting party, made the following submissions:

a) Admiralty Act is a later act and will prevail over the IBC;

b) Non-obstante clause in Section 238 of IBC only applies to existing enactment and not to future enactment. Mr. Fernandes relying upon ***State of West Bengal and others V/s. Madan Mohan Ghosh and others***[41] submitted that non-obstante clause has overriding effect only on rules which were in existence at the time when the said rule was brought into force and it cannot be construed so as to mean that all future rules and notifications will be subject to such a non-obstante clause;

40. *Supra*
41. (2002) 9 SCC 177

c) Sections 9 and 10 of the Admiralty Act give effect to the provisions of the International Convention on Maritime Liens and Mortgages, 1993 and ought to prevail over the provisions of Section 52 of the IBC when it comes to determining priorities in regard to the sale proceeds of a ship. If it were otherwise then it would be contrary to the position in most countries which have ratified this Convention and which give priority to maritime liens in respect of a company in liquidation. Thus, a person who has a maritime lien against an Indian ship would be disadvantaged as the same person would be better placed if the maritime lien was against a foreign ship.

24 **Mr. Prashant S. Pratap**, Senior Advocate, who was also an *Amicus Curiae* made the following submissions, which I must admit, impressed me the most. Mr. Pratap submitted that a harmonious construction between IBC and Admiralty Act can be arrived at and that will not hurt anybody. His submissions were as under:

i. The IBC has been held to be a special law and held to be an exhaustive code on the subject of insolvency in relation to corporate entities (*Innoventive Industries Ltd.*[42]). It contains a non-obstante provision (section 238) and also a provision barring the jurisdiction of Civil Courts (section 231). The Admiralty Act came into force on 1 April 2018. It is a special act vesting admiralty jurisdiction in certain High Courts to the exclusion of all others. It is also a consolidating act in connection with vessels, their arrests, detention, sale and other matter connected therewith or incidental thereto. Once the jurisdiction of the Admiralty Court under the Admiralty Act is invoked, the machinery prescribed under the said act applies and once the ship is arrested all other consequences flow as provided in the said act.

ii. Where there are two special enactments, one of which contain a non-obstante provision and bars the jurisdiction of Civil Court and the other which does not

42. *Supra*

contain a non-obstante provision, the legal position is that in the event of conflict the former act will prevail. However, an attempt should be made to achieve a harmonious construction in the case of conflict or inconsistency between the provisions of two enactments. The Constitution Bench of the Supreme Court in the case of *Ashoka Marketing Ltd. & Anr. V/s. Punjab National Bank*[43], after reviewing the law on the subject of conflict between the provisions of two enactments both of which can be regarded as special in nature, held that the conflict has to be resolved by reference to the purpose and policy underlying the two enactments and the clear intendment conveyed by the language of the relevant provisions therein.

iii. The Admiralty Act vests very valuable rights in regard to identified maritime claims in respect of a vessel and their enforcement by arrest and sale of the vessel. These rights are enforced by actions *in rem* against the vessel. A maritime claim is crystallized and perfected by arrest of the vessel. Certain categories of maritime claims which are given the status of maritime liens, are *sui generis* and attach to the vessel at the time when the incident giving rise to the claim arises.

iv. A claimant having a maritime claim becomes a secured creditor when he causes the ship to be arrested and the vessel is effectively encumbered with the claim. His security, however, is limited to the value of the *res* and subject to other competing maritime claims.

v. The distinction between an action *in rem* under the Admiralty Act and an action *in personam* is of considerable significance when considering the provisions of the IBC. An action *in rem* operates only against the *res,* which is considered to be a legal person and having a personality independent from that of the corporate owner. In this manner, an action *in rem* is not against the owner of or the company that owns the ship. If a ship is arrested in an action *in rem* and no

43. *Supra*

appearance is entered by the owner the action proceeds *in rem,* the ship is sold and the proceeds are paid out to the successful claimant after determination of priorities if there are multiple claims. If the owner enters appearance but no security is furnished the action will still proceed as an action *in rem* against the ship and an action *in personam* against the owner. Thus, even when the owner is contesting the claim, it is still open to the Admiralty Court to sell the vessel if circumstances require it to do so and no security is furnished for its release. The action will then proceed *in rem* against the sale proceeds which represent the vessel. It will also proceed *in personam* against the owner, if he has entered appearance . (See ***International Transportation Service Inc. V/s. The Owners and / or Demise Charterers of the ship or Vessel "Convenience Container"***[44]***, Sparebanken V/s. MV Bos Angler***[45]***, The Engedi***[46]).

vi. On the other hand, proceedings under IBC are proceedings against a corporate debtor who is defined as a corporate person meaning a company or any other person incorporated with limited liability. A ship against whom a maritime claimant can proceed in an action *in rem* does not fall within the definition of a corporate debtor under the IBC and neither is the ship being proceeded against as an asset of the corporate debtor. It is the ship itself which is liable as an independent juridical entity *de-hors* the status of its owner and without reference to its owner. The ship is arrested for perfecting the maritime claim which is in respect of the ship. Thus, an action *in rem* filed under the Admiralty Act for arrest of a ship would not amount to an institution of a suit against a corporate debtor as defined under the IBC nor would continuation of an action *in rem* amount to continuation of a suit against the corporate debtor. Consequently, the declaration of a moratorium under section 14 of the IBC will not prohibit the institution of an action *in rem* or continuation of a pending

44. 2006 (2) LLR 556
45. *Supra*
46. (2010) 3 SLR 409

action *in rem*. However, in the event a moratorium is declared under section 14 of the IBC then an action *in rem* if instituted prior to or after the declaration of the moratorium, cannot be continued during the corporate insolvency resolution process as this would defeat the very purpose of insolvency resolution under the IBC.

vii. In the event an order for liquidation of the corporate debtor is made under Section 33 of the IBC and a Liquidator is appointed, this by itself will not bar institution of an action *in rem* against the ship as it is not a suit instituted against the corporate debtor which is barred under Section 33(5) of the IBC. The Liquidator is empowered under Section 35(1)(k) of the IBC to defend the proceedings. If the ship is sold by the Admiralty Court then the sale proceeds will be available to satisfy the maritime claims in respect of that ship. The priorities of maritime claims will be decided in accordance with the provisions of the Admiralty Act. Any surplus will be paid over to the liquidator.

viii. Section 33(5) of the IBC is subject to Section 52 of the IBC. Section 52(1)(b) of the IBC permits a secured creditor to realise its security interest in the manner specified in this section and Section 52(4) of the IBC permits a secured creditor to enforce, realise, settle, compromise or deal with the secured assets in accordance with such law as applicable to the security interest being realised and to the secured creditor and apply the proceeds to recover the debts due to it. Thus, even on this score a secured creditor by virtue of having obtained an order of arrest will be entitled to proceed with the suit in accordance with the Admiralty Act as that is the applicable law. Consequently, determination of priorities will also be in accordance with the Admiralty Act.

ix. Based on the above, the following would be the position if an action *in rem* is filed before or after the declaration of a moratorium under the IBC or after a Liquidator is appointed:

a) If a Plaintiff has commenced Admiralty proceedings *in rem* and obtained an order of arrest of a ship from an Admiralty Court subsequent to which insolvency proceedings are filed against the corporate owner of the ship and a moratorium is declared, the suit will not proceed in the light of Section 14(1)(a) of the IBC. If security has already been provided for release of the vessel prior to declaration of moratorium then Plaintiff will be considered as a secured creditor and the security will be exclusively for the Plaintiff's claim. On the other hand, if security has not been furnished at the time when the moratorium is declared, the Admiralty Court will not proceed further with the suit. The vessel will remain arrested until the end of the corporate insolvency resolution process period. Plaintiff's maritime lien or maritime claim which is a perfected claim against the vessel by virtue of the arrest will operate as a charge on the vessel and Plaintiff will be considered as a secured creditor qua the vessel.

b) If a resolution plan is approved then all parties who have arrested the ship would be considered as secured creditors who will be accorded priority in respect of the value ascribed to the vessel in the resolution plan and paid on a proportionate basis in accordance with the priorities *qua* the value of the vessel as per the provisions of section 10 of the Admiralty Act. Such parties will, however, count as unsecured creditors to the extent of the unrealized portion of their claim.

c) On the other hand, if the company is liquidated, the suit *in rem* will proceed and the vessel will be sold by way of an admiralty sale to maximize its realisation value. Since the sale proceeds will represent the *res*, the Admiralty Court will be entitled to invite claims against the sale proceeds by following the Admiralty procedure prescribed by the Rules under the act and determination of priorities will also be done in accordance with section 10 of the Admiralty Act. In short, the machinery of the Admiralty Act will apply

and section 53 of the IBC which refers to distribution of assets of the corporate debtor will not apply. All those maritime claimants who are unable to recover their claim from the sale proceeds will have to pursue their claim in liquidation as unsecured creditors.

d) In a case where a moratorium has been declared under section 14 of the IBC before any Admiralty suit *in rem* is filed for enforcement of a maritime lien or a maritime claim then also the action *in rem* would be permissible as it is for arrest of a vessel and is not against the corporate debtor. However, once an order of arrest is made and the warrant of arrest executed, the suit will not proceed *in rem* so as not to defeat the objective of the IBC which is for insolvency resolution of the corporate debtor. The action *in rem* will be stayed till such time as the insolvency resolution process is completed or a liquidator appointed. Plaintiff will be considered as a secured creditor and the submissions in paragraphs (b) and (c) above will apply in the event the corporate insolvency resolution process is successful or a Liquidator is appointed. If the vessel is a trading vessel it will be permitted to trade under arrest with appropriate safeguards.

x. The entire purpose of the rights conferred under the Admiralty Act is to enable a maritime claimant to have his claim perfected in law by arrest of the ship. If a claimant is not permitted to do so, then his right *in rem* may stand extinguished and be lost forever. On the other hand, care must be taken so that the objectives of the IBC are not defeated.

The above interpretation would achieve the objectives of the IBC and facilitate the CIRP. It would, at the same time, protect and preserve the rights *in rem* made available to maritime claimants by the Admiralty Act in a manner so as not to jeopardize the CIRP under the IBC.

xi. Under the Admiralty Act, a mortgagee has priority over all other maritime claims. It is only a very limited category of claims which are considered as

maritime liens that get priority over a mortgagee, e.g., crew wages. Thus, a financial creditor who has a registered mortgage on a ship will get priority even under the Admiralty Act.

xii. Only a judicial sale by an Admiralty Court is recognized the world over as extinguishing all maritime liens against the *res* thereby giving a clear title to the buyer. A sale by the Liquidator will not extinguish maritime liens and therefore the vessel will not attract a bidder or will fetch a lower value as it would not be free of all liens and encumbrances. Thus, in the event of liquidation, it is in the interest of the Liquidator that the vessel is sold by the Admiralty Court. It is also in the interest of any financial creditor who has a mortgage registered on the ship to have the vessel sold by the Admiralty Court.

25 **Mr. Ashwini Sinha**, Advocate, for one of the contesting parties adopted the submissions of Dr. Chandrachud, Mr. Rahul Narichania, Mr. Pratap, Mr. Shenoy and Mr. Fernandes.

Relevant provisions of IBC

26 I would now turn to the provisions of the IBC and the nature of conflict if any, with the provisions of the Admiralty Act and the manner in which it can be resolved.

27 Some of the provisions of the IBC that are required to be noted are as follows:

> **Section 3(8)** : *"'corporate debtor' means a corporate person who owes a debt to any person;"*
>
> **Section 3(7)** : *"'corporate person' means a company as defined in clause (20) of section 2 of the Companies Act, 2013 (18 of 2013), a limited liability partnership, as defined in clause (n) of sub-section (1) of section 2 of the Limited Liability Partnership Act, 2008 (6 of 2009), or any other person incorporated with limited liability under any law for the time being in force but shall not include any financial service provider;"*

Section 3(30) : *"'secured creditor' means a creditor in favour of whom security interest is created;"*

Section 3(31) : *"'security interest' means right, title or interest or a claim to property, created in favour of, or provided for a secured creditor by a transaction which secures payment or performance of an obligation and includes mortgage, charge, hypothecation, assignment and encumbrance or any other agreement or arrangement securing payment or performance of any obligation of any person:*
Provided that security interest shall not include a performance guarantee;"

Section 13 :*"**Declaration of moratorium and public announcement –** (1) The Adjudicating Authority, after admission of the application under section 7 or section 9 or section 10, shall, by an order-*

(a) declare a moratorium for the purposes referred to in section 14;

(b) cause a public announcement of the initiation of corporate insolvency resolution process and call for the submission of claims under section 15; and

(c) appoint an interim resolution professional in the manner as laid down in section 16.

(2) The public announcement referred to in clause (b) of sub-section (1) shall be made immediately after the appointment of the interim resolution professional."

Section 14 : *"**Moratorium –** (1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Officer shall by order declare moratorium for prohibiting all of the following, namely:*

(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any Court of law, tribunal, arbitration panel or other authority;

(b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);

(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

(2) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

(3) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

(4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process:

Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be."

Section 25: *"**Duties of resolution professional** – (1) It shall be the duty of the resolution professional to preserve and protect the assets of the corporate debtor, including the continued business operations of the corporate debtor.*

(2) For the purposes of sub-section (1), the resolution professional shall undertake the following actions, namely:

(a) take immediate custody and control of all the assets of the corporate debtor, including the business records of the corporate debtor;

(b) represent and act on behalf of the corporate debtor with third parties, exercise rights for the benefit of the corporate debtor in judicial, quasi-judicial or arbitration proceedings;

(c) raise interim finances subject to the approval of the committee of creditors under section 28;

(d) appoint accountants, legal or other professionals in the manner as specified by Board;

(e) maintain an updated list of claims;

(f) convene and attend all meetings of the committee of creditors.

(g) prepare the information memorandum in accordance with section 29;

(h) invite prospective resolution applicants, who fulfil such criteria as may be laid down by him with the approval of committee of creditors, having regard to the complexity and scale of operations of the business of the corporate debtor and such other conditions as may be specified by the Board, to submit a resolution plan or plans;

(i) present all resolution plans at the meetings of the committee of creditors;

(j) file application for avoidance of transactions in accordance with Chapter II, if any; and

(k) such other actions as may be specified by the Board.

Section 31: *"**Approval of resolution plan** – (1) If the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors under sub-section (2) of section 30, it shall by order approve the resolution plan which shall be binding on the corporate debtor and its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan.*

(2) Where the Adjudicating Authority is satisfied that the resolution plan does not confirm to the requirements referred to in sub-section (1), it may, by an order, reject the resolution plan.

(3) After the order of approval under sub-section (1),-

(a) the moratorium order passed by the Adjudicating Authority under section 14 shall cease to have effect; and

(b) the resolution professional shall forward all records relating to the conduct of the corporate insolvency resolution process and the resolution plan to the Board to be recorded on its database."

Section 33 : ***Initiation of liquidation*** *–(1) Where the Adjudicating Authority –*

(a) before the expiry of the insolvency resolution process period or the maximum period permitted for completion of the corporate insolvency resolution process under section 12 or the fast track corporate insolvency resolution process under section 56, as the case may be, does not received a resolution plan under sub-section (6) of section 30;

(b) rejects the resolution plan under section 31 for the non-compliance of the requirements specified therein, it shall –

(i) pass an order requiring the corporate debtor to be liquidated in the manner as laid down in the Chapter;

(ii) issue a public announcement stated that the corporate debtor is in liquidation; and

(iii) require such order to be sent to the authority with which the corporate debtor is registered.

(2) Where the resolution professional, at any time during the corporate insolvency resolution process but before confirmation of resolution plan, intimates the Adjudicating Authority of the decision of the committee of creditors to liquidate the corporate debtor, the Adjudicating Authority shall pass a liquidation order as referred to in sub-clauses (i), (ii) and 9iii) if clause (b) of sub-section (1).

(3) Where the resolution plan approved by the Adjudicating Authority is contravened by the concerned corporate debtor, any person other than the corporate debtor, whose interests are prejudicially affected by such

contravention, may make an application to the Adjudicating Authority for a liquidation order as referred to in sub-clauses (i), (ii) and (iii) of clause (b) of sub-section (1).

(4) On receipt of an application under sub-section (3), if the Adjudicating Authority determines that the corporate debtor has contravened the provisions of the resolution plan, it shall pass a liquidation order as referred to in sub-clauses (i), (ii) and (iii) of clause (b) of sub-section (1).

(5) Subject to section 52, when a liquidation order has been passed, no suit or legal proceeding shall be instituted by or against the corporate debtor:

Provided that a suit or other legal proceeding may be instituted by the liquidator, on behalf of the corporate debtor, with the prior approval of the Adjudicating Authority.

(6) The provisions of sub-section (5) shall not apply to legal proceedings in relation to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

(7) The order for liquidation under this section shall be deemed to be a notice of discharge to the officers, employees and workmen of the corporate debtor, except when the business of the corporate debtor is continued during the liquidation process by the liquidator."

Section 35 : *"**Powers and duties of liquidator** – (1) Subject to the directions of the Adjudicating Authority, the liquidator shall have the following powers and duties, namely:*

(a) to verify claims of all the creditors;

(b) to take into his custody or control all the assets, property, effects and actionable claims of the corporate debtor;

(c) to evaluate the assets and property of the corporate debtor in the manner as may be specified by the Board and prepare a report;

(d) to take such measures to protect and preserve the assets and properties of the corporate debtor as he considers necessary;

(e) to carry on the business of the corporate debtor for its beneficial liquidation as he considers necessary;

(f) subject to section 52, to sell the immovable and movable property and actionable claims of the corporate debtor in liquidation by public auction or private contract, with power to transfer such property to any person or body corporate, or to sell the same in parcels in such manner as may be specified:

[Provided that the liquidator shall not sell the immovable and movable property or actionable claims of the corporate debtor in liquidation to any person who is not eligible to be a resolution applicant;]

(g) to draw, accept, make and endorse any negotiable instruments including bill of exchange, hundi or promissory note in the name and on behalf of the corporate debtor, with the same effect with respect to the liability as if such instruments were drawn, accepted, made or endorsed by or on behalf of the corporate debtor in the ordinary course of its business;

(h) to take out, in his official name, letter of administration to any deceased contributory and to do in his official name any other act necessary for obtaining payment of any money due and payable from a contributory or his estate which cannot be ordinarily done in the name of the corporate debtor, and in all such cases, the money due and payable shall, for the purpose of enabling the liquidator to take out the letter of administration or recover the money, be deemed to be due to the liquidator himself;

(i) to obtain any professional assistance from any person or appoint any professional, in discharge of his duties, obligations and responsibilities;
(j) to invite and settle claims of creditors and claimants and distribute proceeds in accordance with the provisions of this Code;

(k) to institute or defend any suit, prosecution or other legal proceedings, civil or criminal, in the name of on behalf of the corporate debtor;

(l) to investigate the financial affairs of the corporate debtor to determine undervalued or preferential transactions;

(m) to take all such action, steps, or to sign, execute and verify any paper, deed, receipt documents, application, petition, affidavit, bond or instrument and for such purpose to use the common seal, if any, as may be necessary for liquidation, distribution of assets and in discharge of his duties and obligations and functions as liquidator;

(n) to apply to the Adjudicating Authority for such orders or directions as may be necessary for the liquidation of the corporate debtor and to report the progress of liquidation process in a manner as may be specified by the Board; and

(o) to perform such other functions as may be specified by the Board.

(2) The liquidator shall have the power to consult any of the stakeholders entitled to a distribution of proceeds under section 53;

Provided that any such consultation shall not be binding on the liquidator:

Provided further that the records of any such consultation shall be made available to all other stakeholders not so consulted, in a manner specified by the Board."

Section 52 : *"**Secured creditor in liquidation proceedings –** (1) A secured creditor in the liquidation proceedings may –*

(a) relinquish its security interest to the liquidation estate and receive proceeds from the sale of assets by the liquidator in the manner specified in section 53; or

(b) realise its interest in the manner specified in this section.

(2) Where the secured creditor realises security interest under clause (b) of sub-section (1), he shall inform the liquidator of such security interest and identify the asset subject to such security interest to be realised.

(3) Before any security interest is realised by the secured creditor under this section, the liquidator shall verify such security interest and permit the secured creditor to realise only such security interest, the existence of which may be proved either –

(a) by the records of such security interest maintained by an information utility; or

(b) by such other means as may be specified by the Board.

(4) A secured creditor may enforce, realise, settle, compromise or deal with the secured assets in accordance with such law as applicable to the security interest being realised and to the secured creditor and apply the proceeds to recover the debts due to it.

(5) If in the course of realising a secured asset, any secured creditor faces resistance from the corporate debtor or any other person connected therewith in taking possession of, selling or otherwise disposing off the security, the secured creditor may make an application to the Adjudicating Authority to facilitate the secured creditor to realise such security interest in accordance with law for the time being in force.

(6) The Adjudicating Authority, on receipt of an application from a secured creditor under sub-section (5) may pass such order as may be necessary to permit a secured creditor to realise security interest in according with law for the time being in force.

(7) Where the enforcement of the security interest under sub-section (4) yields an amount by way of proceeds which is in excess of the debts due to the secured creditor, the secured creditor shall –

(a) account to the liquidator for such surplus; and

(b) tender to the liquidator any surplus funds received from the enforcement of such secured assets.

(8) The amount of insolvency resolution process costs, due from secured creditors who realise their security interests in the manner provided in this section, shall be deducted from the proceeds of any realisation by such secured creditors, and they shall transfer such amounts to the liquidator to be included in the liquidation estate.

(9) Where the proceeds of the realisation of the secured assets are not adequate to repay debts owed to the secured creditor, the unpaid debts of such secured creditor shall be paid by the liquidator in the manner specified in clause € of sub-section (1) of section 53.

Section 53 : ***Distribution of assets*** *– (1) Notwithstanding anything to the contrary contained in any law enacted by the Parliament or any State Legislature for the time being in force, the proceeds from the sale of the liquidation assets shall be distributed in the following order of priority and within such period and in such manner as may be specified, namely:*

(a) the insolvency resolution process costs and the liquidation costs paid in full;

(b) the following debts which shall rank equally between and among the following:-

(i) workmen's dues for the period of twenty-four months preceding the liquidation commencement date;

(ii) debts owed to a secured creditor in the event such secured creditor has relinquished security in the manner set out in section 52;

(c) wages and any unpaid dues owed to employees other than workmen for the period of twelve months preceding the liquidation commencement date;

(d) financial debts owed to unsecured creditors;

(e) the following dues shall rank equally between and among the following:

(i) any amount due to the Central government and the State Government including the amount to be received on account of the Consolidated Fund of India and the Consolidated Fund of a State, if any, in respect of the whole or any part of the period of two years preceding the liquidation commencement date;

(ii) debts owed to a secured creditor for any amount unpaid following the enforcement of security interest;

(f) any remaining debts and dues;

(g) preference shareholders, if any; and

(h) equity shareholders or partners, as the case may be.

(2) Any contractual arrangements between recipients under sub-section (1) with equal ranking, if disrupting the order of priority under the sub-section shall disregarded by the liquidator.

(3) The fees payable to the liquidator shall be deducted proportionately from the proceeds payable to each class of recipients under sub-section (1), and the proceeds to the relevant recipient shall be distributed after such deduction.

Explanation – For the purpose of this section-

(i) it is hereby clarified that at each stage of the distribution of proceeds in respect of a class of recipients the rank equally, each of

the debts will either be paid in full, or will be paid in equal proportion within the same class of recipients, if the proceeds are insufficient to meet the debts in full; and

(ii) the term 'workmen's dues' shall have the same meaning as assigned to it in section 326 of the Companies Act, 2013 (18 of 2013)."

Section 54 : ***Dissolution of corporate debtor*** *– (1) Where the assets of the corporate debtor have been completed liquidated, the liquidator shall make an application to the Adjudicating Authority for the dissolution of such corporate debtor.*

(2) The Adjudicating Authority shall on application filed by the liquidator under sub-section (1) order that the corporate debtor shall be dissolved from the date of that order and the corporate debtor shall be dissolved accordingly.

(3) A copy of an order under sub-section (2) shall within seven days from the date of such order, be forwarded to the authority with which the corporate debtor is registered."

Section 63 : *"**Civil Court not to have jurisdiction** – No Civil Court or authority shall have jurisdiction to entertain any suit or proceedings in respect of any matter on which National Company Law Tribunal or the National Company Law Appellate Tribunal has jurisdiction under this Code."*

Section 231 :*"**Bar of jurisdiction** – No civil Court shall have jurisdiction in respect of any matter in which the Adjudicating Authority is empowered by, or under, this Code to pass any order and no injunction shall be granted by any Court or other authority in respect of any action taken or to be taken in pursuance of any order passed by such Adjudicating Authority under this Code."*

Section 238 : *"**Provisions of this Code to override other laws** – The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law."*

Findings on Conflict

28 Section 238 of the IBC contains a non-obstante provision giving the Code overriding effect over any other law. Section 63 of the IBC bars the jurisdiction of Civil Courts. Section 231 of the IBC also bars the jurisdiction of Civil Courts in respect of any matter in which the Adjudicating Authority is empowered under the Code to pass an order and no injunction shall be granted by any Court in respect of any action taken or to be taken in pursuance of any order passed by the Adjudicating Authority under the Code. On

the other hand, civil Courts do not have jurisdiction to entertain an action *in rem.* This jurisdiction has been vested specifically in certain High Courts only. However, the Admiralty Act does not contain a non-obstante clause.

29 Thus, where there are two special enactments, one of which contains a non-obstante provision and bars the jurisdiction of the Civil Court and the other which does not contain a non-obstante provision, the clear legal position is that in the event of conflict the former Act will prevail. The principal of interpretation that the later Act overrides the earlier Act is not applicable in such a situation. It applies only where both special acts contain non-obstante provision and there is a conflict. In ***Solidaire India Ltd. V/s. Fairgrowth Financial Services Ltd.***[47], the Apex Court noted that Sick Industrial Companies (Special Provisions) Act, 1985 contained in Section 32 a non-obstante clause. A similar non-obstante provision was also contained in Section 13 of the Special Court Act, 1992. The Apex Court then held in paragraph 9 that *"It is clear that both these Acts are special Acts. This Court has laid down in no uncertain terms that in such an event it is the later Act which must prevail."*

30 In a case where each enactment is a special Act the Apex Court in the case of ***Ram Narain V/s. Simla Banking and Industrial Company Ltd.***[48]**,** observed as follows:

> *"7. …Each enactment being a special Act, the ordinary principle that a special law overrides a general law does not afford any clear solution in this case. … It is, therefore, desirable to determine the overriding effect of one or the other of the relevant provisions in these two Acts, in a given case, on much broader considerations of the purpose and policy underlying the two Acts and the clear intendment conveyed by the language of the relevant provisions therein."*

31 A similar view was expressed by the Constitution Bench of the Supreme Court India in *Ashoka Marketing Ltd. V/s. Punjab National Bank*[49] *where,* in paragraph 61, after reviewing the law on the subject the Court stated:

47. (2001) 3 SCC 71
48. AIR 1956 SC 614
49. *Supra*

> *"The principle that emerges from these decisions is that in the case of inconsistency between the provisions of two enactments both of which can be regarded as special in nature, the conflict has to be resolved by reference to the purpose and policy underlying the two enactments and the clear intendment conveyed by the language of the relevant provisions therein."*

Both these passages are extracted in ***Employees Provident Fund Commissioner V/s. Official Liquidator of Esskay Pharmaceuticals Ltd.***[50].

32 The non-obstante clause in the IBC gives overriding effect to the provision of the IBC only if there is anything inconsistent contained in any other law for the time being in force or any instrument having effect by virtue of any such law. Consequently, if there is no provision in the Admiralty Act which is inconsistent with the IBC then the provisions contained in the IBC cannot override the provisions of the Admiralty Act. See ***Central Bank of India V/s. State of Kerala***[51] paragraph 116:

> ***"****The non-obstante clauses contained in Section 34(1) of the DRT Act and Section 35 of the Securitisation Act gives overriding effect to the provisions of those Acts only if there is anything inconsistent contained in any other law or instrument having effect by virtue of any other law. In other words, if there is no provision in the other enactments which are inconsistent with the DRT Act or the Securitisation Act, the provisions contained in those Acts cannot override other legislations."*

33 In other words what is required is to first attempt a harmonious construction which is intended to give effect to both statutes bearing in mind the purpose and policy underlying them. Only in the event there is a conflict and the conflict cannot be resolved, the IBC will prevail because even though the Admiralty Act is a later Act, it does not contain a non-obstante clause and the Parliament is presumed to have had knowledge of the non-obstante clause contained in the IBC when it enacted the later Act.

Harmonious Construction

50. (2011) 10 SCC 727
51. (2009) 4 SCC 94

34 With this principle in mind an attempt should be made to resolve the traditional conflict between Admiralty and Insolvency so as not to defeat the intendment and objectives of the IBC which is essentially corporate insolvency resolution and at the same time give full play to the rights *in rem* created and conferred by the Admiralty Act. Only in the event there is a conflict and the conflict cannot be resolved then due regard will be given to the conflicting provision to understand the nature of the conflict and which provision must prevail bearing in mind the above principles.

35 The distinction between an action *in rem* under the Admiralty Act and an action *in personam* is of vital importance when considering the provisions of the IBC. An action *in rem* is only against the ship which is considered as having a legal personality independent of that of the corporate owners. This allows an action to be maintained against the ship as a legal person. If a ship is arrested in an action *in rem* and no appearance is entered by the owner, the action proceeds *in rem,* the ship is sold and the proceeds are paid out to the successful Claimant after determination of priorities if there are multiple claims against the ship. If the owner enters appearance but no security is furnished the action will still proceed as an action *in rem* against the ship. It will also proceed as an action *in personam* against the owner. Thus, even when the owner is contesting the claim it is still open to the Admiralty Court to sell the vessel if circumstances require it to do so and the action will proceed *in rem* against the sale proceeds which represent the vessel. In *m.v. Convenience Container*[52]*, in* paragraphs 59 to 63, the Court observed:

> 59: *"In admiralty law and practice, there is no difference in nature between action in rem against an unsold ship and action in rem against the proceeds of sale of that ship. The writ is issued against the ship and when the ship is not yet sold by the Court, the writ can be served on the ship, but after the sale by the Court then service of the ship is effected on the Registrar as provided by Order 75 rule 8(1)(b) which reads:*
>
> > *(b)where the property has been sold by the bailiff, the writ may not be served on that property but a sealed copy of it must be*

52. (2006) 2 L.L.R 556

filed in the Registry and the writ shall be deemed to have been duly served on the day on which the copy was filed."

60: "*The service of the writ on the registrar representing the proceeds of sale of the ship (as the registrar was the custodian of the proceeds of sale of the ship) is merely the modern development of a long-standing admiralty procedure where the proceeds of sale of a ship is to stand in the place of the ship once the ship has been sold by the Court."*

61: "*The power of the Court to order a sale of the ship pendent lite (before judgment is entered against the ship) is derived from the inherent jurisdiction of the Court where property held by the Court is perishable. (See Meeson on Admiralty Practice and Procedure, 3rd ed., pages 157-162; The Myrto [1977] 2 Lloyds's Rep 243, 259-261.)*

62: "*The correct analysis of this well known admiralty practice is that the proceeds of sale of the ship and her appurtenance including bunkers become the res. All claims against the ship, upon the sale of the res, are transferred to the fund in Court being the proceeds of sale of the ship. (See McGuffie on Admiralty Practice (1964) para 6; Halsbury's Laws of Hong Kong, volume 18(1), para 250.145; The Queen of the South [1968] 1 Lloyd's Rep 182, 191-192; The Leoborg (No 2) [1963] 2 Lloyd's Rep 441; The Silia [1981] 2 Lloyd's Rep 534, 538.)*

63: "*The Leoborg (No 2) is particularly revealing as it shows how the admiralty judge, Hewson J. regarded as accepted law and practice in admiralty that writs can be issued subsequent to the sale of the ship by the Court. The unspoken but universal assumption underlying such acceptance by Hewson J is that such writ (so issued after the sale) will be directed against the proceeds of sale of the ship which stands in for the ship sold."* It was also observed in paragraph 64 that "*Maritime claims are brought by different claimants at different times against a ship, both before as well as after sale and that the proceeds of sale has always been regarded in Admiralty as standing in for the ship."*

36 So also, the Privy Council in ***The August 8***[53] held at 456:

"By the law of England, once a defendant in an Admiralty action in rem has entered an appearance in such action, he has submitted himself personally to the jurisdiction of the English Admiralty Court, and the result of that is that, from then on, the action continues against him not only as an action in rem but also as an action in personam: The Gemma [1899] P. 285, 292 per A.L. Smith L.J. There is no reason to suppose that the Admiralty law of Singapore differs from the Admiralty law of England so far as this important principle is concerned. On the contrary there is every reason to suppose that it is the same. If then that principle is applied in the present case, the situation is that, from the time when the shipowners entered an appearance in the Master's action, as they did on February 2, 1978, the action continued not only in rem against the property proceeded against, viz., the ship, but also in personam against the shipowners themselves."

53. (1983) 2 AC 450

37 Also, in the case of *Bos Angler*[54], a Division Bench of this Court observed in paragraph 12 that:

> *".....Consequently once a vessel has been sold in the exercise of the jurisdiction in rem all claims against the vessel have to be enforced against the proceeds of the sale and before the Court which exercises jurisdiction to arrest and thereafter sell the vessel. Equally it is a matter of settled legal principle that the Court which holds the proceeds of the same holds them not merely for the benefit of the Plaintiff who moves the Court in the jurisdiction in rem but for and on behalf of all persons who may have claims in respect of the property of the vessel and after the sale, in respect of the sale proceeds. Consequently, even if in a given case the claim of the plaintiff were to fail, that would not obviate the fundamental duty and obligation of the Court in the exercise of the admiralty jurisdiction to ensure that the monies which it holds are properly distributed to persons whose claims have been adjudicated upon for realization. Upon the process of adjudication, the issue of determining priorities would arise. The issue of determining priorities comes up before the Court in a situation where the amount representing the aggregate of the claims against the vessel exceeds the amount which has been realized upon the sale of the vessel. Obviously in a situation where the aggregate of the claims is equal to or less than the amount which lies deposited with the Court every one of the claims can be paid in full and it is in a situation where the aggregate of the claims represents a value in excess of what is realized upon the sale of the vessel that the determination of priorities assumes importance. These principles of law have been consistently followed and reiterated in the exercise of the admiralty jurisdiction in common law countries."*

Thus, the Court is duty bound to invite claim against the sale proceeds in accordance with the Admiralty rules framed in this regard.

38 Speaking of the difference between an action *in rem* and an action *in personam*, the Singapore High Court in the case of *"The Engedi"*[55] stated in paragraph 17 that:

> *"The action in rem operates only against the res, but once the defendant enters an appearance, he submits to the jurisdiction of the Court and from then onwards the action continues as an action in rem against the res and in personam against the shipowner defendant (see The Damavand [1963] 2 SLR® 136 at [18]; The Fierbinti [1993] SGHC 319; The August 8 [1983] 2 AC 450). <u>While an action in personam and an action in rem may involve the same cause of action, it must be stressed that the defendants of the respective actions are regarded as different parties.</u> In Kuo Fen Ching v Dauphin Offshore Engineering & Trading pte Ltd [1999] 2 SLR® 793 at [23], <u>the Court of Appeal specifically rejected the proposition</u> of the house*

54. *Supra*
55. *Supra*

> *of Lord in Republic of India v India Steamship Co Ltd (No 2) [1998] 1 AC 878 that in substance the owner of the res, and not the res itself, was the defendant to an action in rem."* (Emphasis Supplied)

39 Once this fundamental distinction between an action *in rem* against a vessel which is a distinct and separate entity dehors its owner is recognized, it is easy to reconcile the ostensible conflict between Admiralty and Insolvency. Thus, an action *in rem* against the ship is not an action against the owner of the ship who may be the corporate debtor as defined under the IBC. Neither is the action *in rem* considered as a proceeding against the asset of the owner / corporate debtor. It is a proceeding against the ship to recover the claim from the ship, not an action against the owner / corporate debtor to recover the claim by attachment of the asset of the owner / corporate debtor.

40 Also, to be borne in mind is the principle that an action *in rem* continues as an action *in rem* notwithstanding that the owner may have entered appearance, if security is not furnished for release of the vessel. The action will continue *in rem* against the ship which will be sold and the sale proceeds paid out to the successful claimants after determination of priorities amongst the various maritime claimants. As the sale proceeds represent the ship, the action continues *in rem* against the sale proceeds and a notice is published inviting claims against the sale proceeds as per established Admiralty rules or procedure. Thus, whilst the judicial sale by the Admiralty Court extinguishes all maritime liens and the claims, thus giving a free and clear title to the purchasers, all those who have maritime liens and claims can still enforce them by filing an action against the sale proceeds.

41 Another feature of an action *in rem* is that once a ship is arrested, it is *custodia legis* and if it is sold by the Admiralty Marshall / Sheriff under the orders of the Admiralty Court, the interest of the owner is limited to the extent of receiving the balance of the sale proceeds after satisfaction of all maritime claims in the order of priorities

provided in Section 10 of the Admiralty Act. The Chancery Division in England in the case of *m.v. Bolivia*[56] held:

> *In my judgment, a critical feature of this case was that on 18 March 1994 Tramp Oil obtained an order for the sale of the ship. Once that happened, the proceeds of sale were held by the Admiralty Court to be applied in accordance with its procedures…The effect of the order for sale made by the Admiralty Court on the assets of the company must, it seems to me, have been to convert the company's interest in the ship into a right to receive the balance of the proceeds of sale remaining after satisfaction of the prior claimants. As a result of conversion it would appear that the present applicants do not in fact require leave under s. 130(2) because they are not proceeding against either the company or the company's property. Furthermore, if it is necessary so to hold to avoid the effect of s. 129(2), I hold that such conversion must, in the event of an order for sale, be deemed in law to have taken effect from the execution of the warrant for arrest, when the ship entered the custody of the Admiralty Marshal on behalf of the Admiralty Court* . (Emphasis supplied)

42 The authorities also are unanimous in stating that once a ship is arrested in respect of a maritime lien or a maritime claim, the Claimant becomes a secured creditor *qua* that arrested vessel and the vessel is effectively encumbered with the Plaintiff's claim. In ***In re ARO Company Ltd***.[57] it was held that Plaintiffs having arrested the ship and perfected the security of their claim were thus secured creditors with the result that the vessel was effectively encumbered with their claim. In the book ***Admiralty Jurisdiction and Practice by Nigel Meeson and John A. Kimbell,*** **(**5th Edition) (hereinafter referred to as *Meeson*), paragraphs 3.89 and 3.90, the authors say in paragraph 3.89 that *"The holder of a maritime lien is also a secured creditor from the moment the maritime lien arises which is simultaneously with the claim".* And in paragraph 3.90, *"A claimant having only a statutory right of action in rem becomes a secured creditor at the latest when he causes the ship to be arrested."* The Claimant is not a secured creditor of the owner but only that of the particular ship and to the extent of the value of the ship. This also meets with the definition of *"secured creditors"* as per Section 3(30) and *"security interest"* as per Section 3(31) of the IBC.

56. *Supra*
57. (1980) 1 Ch 196 (C.A.)

43 Also, to be borne in mind is the difference between an arrest and an attachment. An arrest cannot be equated to an attachment. A maritime claimant has a right *in rem* which he is entitled to exercise by an arrest of the ship. The only test he has to satisfy is to show that he has *prima facie* a maritime claim and identify the ship. As against this, an attachment before judgment is a discretionary interim order that any type of Claimant would be entitled to apply upon satisfying the requirements of the Code of Civil Procedure (CPC). He is not entitled to an attachment as a matter of right or as a manner of enforcement of a right.

44 The arrest of a ship in an Admiralty claim *in rem* is "sequestration" and not an "execution". In *Meeson* paragraph 3.81 refers to the judgment in ***In re Australian Direct Steam Navigation Company***[58] where the Master of the Rolls Sir George Jessel said *"The term 'sequestration' has no particular technical meaning; it simply means detention of property by a Court of Justice for the purpose of answering a demand which is made. That is exactly what the arrest of a ship is ....."*.

45 Once these salient features of the Admiralty law and jurisdiction are appreciated, it will be seen from a reading of the IBC that there is little conflict between them. The provisions of the two acts can be read and construed harmoniously so as to give effect to both.

46 The IBC defines a corporate debtor in Section 3(8) to mean *"corporate person who owes a debt to any person"*. Corporate person is defined in Section 3(7) to mean *"a company …. a limited liability partnership …. or any other person incorporated with limited liability under any law for the time being in force"*. A ship against whom a maritime Claimant can proceed in an action *in rem* does not fall within the definition of a corporate debtor under the IBC. Neither is the ship being proceeded against as an asset of

58. (1875) LR 20 Eq 325

the corporate debtor. It is the ship itself which is liable and which is arrested for crystallizing the maritime claim which is in respect of the ship. The ship is an independent juridical entity which is sued in its own name dehors the status of its owner (who may be the corporate debtor) and without reference to its owner.

47 Thus, an action *in rem* filed under the Admiralty Act for arrest of the ship would not amount to an institution of a suit against a Corporate Debtor as defined under the IBC nor would continuation of an action *in rem* amount to continuation of a suit against the Corporate Debtor. Consequently, declaration of moratorium under Section 14 of the IBC will not prohibit the institution of an action *in rem* or continuation of a pending action *in rem*. However, in the event a moratorium is declared under Section 14 of the IBC, then an action *in rem,* if instituted prior to the declaration of the moratorium, will not be continued during the CIRP as this would defeat the very purpose of insolvency resolution under the IBC. Institution of an action *in rem* even after a moratorium is declared would also be permitted as the action *in rem* is not against the corporate debtor. However, the action will not be allowed to proceed after the arrest of the ship so as to allow for the CIRP to be effective.

48 In the event an order for liquidation of the corporate debtor is made under Section 33 of the IBC and a Liquidator is appointed, this by itself will not bar institution of an action *in rem* against the ship as it is not a suit instituted against the corporate debtor which is barred under Section 33(5) of the IBC. The Liquidator is empowered under Section 35(1) (k) of the IBC to defend the proceedings. If the ship is sold then the sale proceeds will be available to satisfy the maritime claims including maritime liens. The priorities of maritime claims will be decided in accordance with the provisions of the Admiralty Act.

49 It may also be noted that Section 33(5) of the IBC is subject to Section 52. It may be seen that Section 52(1)(b) of the IBC permits a secured creditor to realise its security interest in the manner specified in that section and Section 52(4) permits a secured creditor to enforce, realise, settle, compromise or deal with the secured assets *in accordance with such law as applicable to the security interest being realised* and to the secured creditor and apply the proceeds to recover the debts due to it. Thus, even on this score the suit will proceed in accordance with the Admiralty Act as that is the applicable law. Consequently, determination of priorities will also be in accordance with the Admiralty Act. This will be the position in case the action *in rem* is instituted before or after the order of liquidation.

50 Considering the above features of Admiralty law in general and the Admiralty Act in particular and the definition of corporate debtor under the IBC, various possible scenarios are now considered where the provisions of both statutes get involved and will play out.

51 **Scenario I**

If a Plaintiff has commenced Admiralty proceedings *in rem* and obtained an order of arrest of a ship from an Admiralty Court, subsequent to which insolvency proceedings are filed against the owner of the vessel and the adjudicating authority declares a moratorium under Section 14 of the IBC.

51.1 *If in such a situation security has been provided* to the Admiralty Court for release of the vessel prior to the declaration of moratorium then the Suit is no longer an action *in rem.* It is *in personam* against the corporate debtor who has furnished security. The Suit will not proceed against the corporate debtor in the light of Section 14(1)(a) of the IBC. However, Plaintiff will be considered to be a secured creditor having obtained security in respect of his claim. That security will be exclusively for Plaintiff’s claim.

51.2 *If the CIRP is successful* and a Resolution Plan is approved, then the claim of Plaintiff for which he has obtained security, will be determined in accordance with the resolution plan approved by the COC and the adjudicating authority. Plaintiff's status as a secured creditor who is entitled exclusively to the security provided for release of the vessel will be considered by the COC / Adjudicating Authority (AA) in determining the entitlement of Plaintiff. In such a situation Plaintiff should ordinarily be entitled to realise his claim to the full extent of the security provided. To this extent the Admiralty Court will protect the interest of Plaintiff and its right to the security provided to the Admiralty Court for release of the ship.

51.3 *If the CIRP is not successful* and the company is ordered to be liquidated, the security provided for Plaintiff's claim will inure to the benefit of Plaintiff alone. In such a case Plaintiff will be a secured creditor in liquidation and will be entitled to realise its security interest as provided in Section 52(4) of the IBC which provides *"A secured creditor may enforce, realise, settle, compromise or deal with the secured assets in accordance with such law as applicable to the security interest being realised and to the secured creditor and apply the proceeds to recover the debts due to it."* The law as applicable would be the Admiralty Act. Consequently, upon an order of liquidation being made and a liquidator being appointed, the Suit will proceed *in personam* under the Admiralty Act and Plaintiff will be entitled to realise its security. It will be open to the Liquidator to defend the suit which right is available to him as provided in Section 35(1)(k) of the IBC.

51.4 *If security has not been furnished at the time when the moratorium is declared* by the adjudicating authority under the IBC, then the Admiralty Court will not proceed further with the Suit *in rem* because to do so would defeat the reorganization and insolvency resolution of the corporate person which is the objective of the Code. In such a situation if the Suit is allowed to proceed *in rem*, the CIRP is bound to be frustrated and

will fail. Hence the Admiralty process will have to yield to the objective of the IBC. This, however, does not prejudice the maritime claimant or affect his right *in rem* and entitlement to recover his claim from the *res*. Since the vessel will remain under arrest, it would be up to the Resolution Professional to decide whether security ought to be furnished for release of the vessel. If no security is furnished, the vessel will remain under arrest until the end of the CIRP period. In that event, Plaintiff's maritime lien or claim which is a perfected claim against the vessel by virtue of the arrest, will operate as a charge on the vessel and Plaintiff will be considered as a secured creditor.

51.5 *If the company is liquidated* then Plaintiff's action being an action *in rem* will proceed and the vessel will be sold by way of an Admiralty sale to maximize its realisation value. Section 33(5) of the IBC does not prohibit the continuation of pending suits and the liquidator will be entitled to defend it as this power is expressly provided in Section 35(1)(k) of the IBC. Viewed at from another angle, Plaintiff and any other claimant who has a maritime claim or a maritime lien and has obtained an order of arrest before liquidation, will be considered a secured creditor and will be entitled to enforce and realize his security interest in accordance with the applicable law, viz., Admiralty Act, as provided in Section 52(4) of the IBC.

51.6 Since the sale proceeds represent the *res*, the Admiralty Court will be entitled to invite claims against the sale proceeds by following the Admiralty procedure prescribed in the Rules. In admiralty law there is no difference between an action *in rem* against a ship and an action *in rem* against the proceeds of sale of that ship (See *m.v. The Convenience Container*[59]). Parties having a maritime lien or a maritime claim will be entitled to file an action *in rem* against the sale proceeds. The determination of priorities will also be done in accordance with Section 10 of the Admiralty Act and *inter se* priorities of maritime liens will be decided in accordance with Section 9 of the said Act.

59. *Supra*

Section 53 of the IBC which refers to distribution of assets will not apply. If the ship is sold by the Admiralty Court in exercise of its jurisdiction *in rem* then the machinery of the Admiralty Act will apply and the sale proceeds will be distributed on the basis of priorities determined under the Admiralty Act.

51.7 All those claimants who are unable to recover their claim from the sale proceeds will have to pursue their claim in the liquidation as unsecured creditors.

51.8 *If on the other hand a Resolution Plan is approved* then the Plaintiff's claim together with that of all other Claimants who have obtained an order of arrest and have become secured creditors qua the ship will be determined in accordance with the approved plan. Being secured creditors their rights and claims in respect of the vessel under arrest shall be considered by the COC / Adjudicating authority whilst approving the Resolution Plan when it comes to payments to be made to them from the amounts made available to secured creditors by the successful Resolution applicant. As guidance, the claim of Plaintiff and all other maritime Claimants who have arrested the vessel before a moratorium was declared shall be accorded priority in respect of the value ascribed to the vessel in the Resolution Plan. The principle to be applied would be as if, but for the Resolution Plan, the assets would have been liquidated and the vessel would have been sold by the Admiralty Court and the priorities would have been determined in accordance with the Admiralty Act. Consequently, the same priority as per Section 10 of Admiralty Act will be applied *inter se* amongst all secured creditors including any registered mortgagee who has a charge on the vessel. However, the ship value for the purpose of ascertaining the proportionate and priority entitlements of the maritime claimants will be the liquidation value assigned to that particular vessel.

51.9 Since the ship was arrested before the declaration of moratorium under section 14 of the IBC, the Admiralty Court will protect the interests of Plaintiff and release the ship from arrest only upon being satisfied that the claim of Plaintiff has been

accorded priority as required under the Admiralty Act in respect of the value ascribed to the ship and paid accordingly.

51.10 All those claimants who had arrested the vessel but are unable to recover their claim under the Resolution Plan in part or in full because the value ascribed to the ship is not sufficient to pay all claims against the vessel in full, will rank as operational creditors of the corporate debtor as regards their unrecovered claim and may recover depending on what payment is offered to operational creditors in the resolution plan. They are not secured creditors of the corporate debtor's other assets.

51.11 *If security has not been furnished and the vessel remains under arrest,* the Admiralty Court will not order the sale of the vessel during the moratorium period in order to allow the insolvency resolution process to fructify, unless an application for sale is made by the Resolution Professional or if the vessel is not being manned, equipped and maintained by the Resolution Professional during the moratorium and all charges for the same are not being paid by the Resolution Professional including port charges or if the vessel becomes a navigational hazard. In such a case the Admiralty Court will have the discretion to sell the vessel at the instance of any party who has filed an Admiralty Suit and has a maritime claim. The order of sale is made to ensure that the value of the vessel is not put at risk and the vessel is preserved and / or is not allowed to waste and deteriorate and further encumbered with claims and liabilities during the moratorium period. This is done with a view to maximize the value of the ship (asset) and also to secure the interests of the secured creditors qua the ship in question which is also the objective of the IBC. This will be a matter entirely in the discretion of the Admiralty Court.

51.12 In all such cases notice will be given to the owner who may be represented by the Resolution Professional before any sale of the ship is carried out by the Admiralty Court.

51.13 In all cases of sale of the vessel during the moratorium period in view of exigencies mentioned in the preceding paragraph, the proceeds will not be distributed but will be retained by the Admiralty Court to await the outcome of the CIRP or liquidation, as the case may be. Once either of these events happen, the procedure laid down in the preceding paragraphs 51.5, 51.6 and 51.8 will apply as regards distribution of the sale proceeds and priorities.

51.14 All expenses incurred for preservation and maintenance of the vessel during the period of arrest with the permission of the admiralty Court will be treated as sheriff's expenses in Admiralty and Resolution Process costs under the IBC and paid out in priority from the sale proceeds of the ship if the company is liquidated or be accorded priority in the resolution plan as resolution process costs.

52 **Scenario II**

If a moratorium has been declared under Section 14 of the IBC before any Admiralty Suit *in rem* is filed for enforcement of a maritime lien or maritime claim.

52.1 An action *in rem* for arrest of a vessel is not against the corporate debtor. Consequently, there is no bar to filing such an action and it is not hit by the moratorium provisions of Section 14(1)(a) of the IBC. If an order of arrest is made, the warrant of arrest will be executed against the vessel. Upon the Resolution Professional entering appearance on behalf of the owner/corporate debtor, the Suit will not proceed *in rem* so as not to defeat the objective of the insolvency resolution of the corporate debtor and the objective sought to be achieved by the IBC. Hence in view of the conflict which would

occur and frustrate the objectives of the IBC if the Suit *in rem* were to proceed, the Admiralty action *in rem* will have to be stayed and not proceeded with after the vessel has been arrested, till such time as the insolvency resolution process is completed or a Liquidator is appointed.

52.2 If the vessel is trading during the moratorium period the vessel will be permitted to trade under arrest once the Resolution Professional enters appearance on behalf of the corporate debtor and appropriate undertakings are provided in respect of the vessel. This will ensure that trading of the vessel is not impaired or affected, if this is in the interest of the corporate debtor or the CIRP.

52.3 The Claimant will be considered as a secured creditor and the observations set out above in paragraphs 51.5, 51.6 and 51.8 will apply if the insolvency resolution process is successful and a resolution plan is approved or if the resolution process fails and the liquidator is appointed, as the case may be. At all stages, in such a situation it would be open to the Resolution Professional acting on behalf of the owner to furnish security for release of the vessel if he deems fit. The Resolution Professional, however, will be under an overriding obligation to maintain the vessel in any event and if this is not being done by making payment of crew wages, necessary costs, charges and expenses it will be open to the Admiralty Court to consider an application for sale of the vessel at any stage during the CIRP. The sale is in fact to preserve and maximize the value of the vessel and protect the interests of all secured creditors to ensure that the vessel does not waste or deteriorate or is put at risk and is not further encumbered with claims during the CIRP. The sale proceeds will, however, not be distributed and will be retained by the Admiralty Court to await the outcome of the CIRP or liquidation as the case may be.

52.4 All expenses incurred with the permission of the Court for preservation and maintenance of the vessel during the period of arrest will be treated as sheriff's

expenses in Admiralty and Resolution Process costs under the IBC and paid out in priority from the sale proceeds of the ship if the company is liquidated or be accorded priority in the resolution plan as resolution process costs.

53 The above interpretation would harmonize the provisions of the IBC *vis-à-vis* the Admiralty Act in the matter of protecting the right *in rem* given to maritime claimants and at the same time giving effect to the moratorium provisions of the IBC which have been enacted to facilitate the CIRP. The purpose of the moratorium would be served and this takes care of the apprehensions expressed that the object of the moratorium would stand defeated if actions *in rem* against ships are permitted. This would also ensure that the assets of the corporate debtor are made available for the CIRP. At the same time, the rights available to a person who has a maritime lien or maritime claim are protected and preserved such that during the CIRP and / or liquidation he will be able to maintain his position as a secured creditor and as a maritime claimant who has a right *in rem* against the ship and is entitled to recover his claim from the ship and / or its sale proceeds.

54 It was submitted by Mr. Narichania that the moratorium under section 14 of the IBC would come in the way of any suit that a mortgagee would file in regard to a registered mortgage of a ship and such a suit would fall under section 14(1)(c) of the IBC. This, in my view, is not so.

54.1 Section 14(1) (c) of the IBC is as follows:

> *"any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002)"*

54.2 Sub-section (c) refers to *"any action"* and thereafter refers to *"including any action under the Securitization and Reconstruction of Financial Assets and*

Enforcement of Security Interest Act, 2002". Sub-section (c) uses the word *"action"* in contradistinction to the word *"suits"* which appears in sub-section (a) of section 14(1) of the IBC. Thus, sub-section (c) refers to any action other than by way of a suit and this is made clear by reference to an action under the Securitization Act, 2002 which does not involve filing of a suit. Similarly, a mortgagee of a ship is also entitled to take possession of the ship and sell it without intervention of the Court by exercising rights under section 51(1) of the Merchant Shipping Act, 1958 without approaching the High Court. It is such an action without intervention of the Court that would fall under section 14(1) (c) of the IBC to which the moratorium declared by the adjudicating authority would apply. Section 14 (1) (c) of the IBC does not come in the way of a maritime claimant filing an action *in rem*

54.3 An action *in rem* against a ship under the Admiralty Act is by way of a suit but it is not against the corporate debtor. A mortgage on a ship also gives rise to a maritime claim under the Admiralty Act. An action *in rem* by a mortgagee to enforce any security interest would be considered as any other action *in rem* by way of a suit under the Admiralty Act and the same consequences would follow as an action *in rem* filed by any other maritime claimant for arrest of the ship. Such an action *in rem* filed by a mortgagee of a ship to foreclose, recover or enforce its security interest in the ship would not be affected by the bar under section 14(1)(c) of the IBC.

54.4 The purposive interpretation suggested by counsel Shri Ramabhadran is not warranted given the clear distinction between an action *in rem* against a ship and an action *in personam* against the corporate debtor (owner). An action *in rem* against a ship cannot be equated to an action against the asset of the corporate debtor. Merely because the corporate debtor (owner) of the ship is also liable *in personam* does not detract from the essential characteristic of an action *in rem* which is only against the ship and the sale

proceeds of which will be used to satisfy the claim. A judgement *in rem* against the ship does not bind the owner (corporate debtor).

55 **Scenario III**

If the owner of the vessel (corporate debtor) is in liquidation at the time the Plaintiff commences Admiralty proceedings *in rem* for arrest of the vessel.

55.1 Section 33(5) of the IBC provides that when a liquidation order is passed, "no Suit or other legal proceedings shall be instituted by or against the corporate debtor." Unlike the Companies Act, there is no provision in the IBC for obtaining leave to institute a Suit against the Company in liquidation. Hence there is a complete bar. This bar, however, applies to Suits against the corporate debtor and this necessarily means a Suit *in personam.* An action *in rem* is not against the corporate debtor for reasons already explained. The vessel is a distinct juridical entity and the action proceeds without reference to the owner who is not a party to the Suit when filed. Liquidation of the corporate debtor does not affect the ownership of the *res* so as to defeat a maritime claim in respect of the ship. The *res* continues to be in the ownership of the corporate debtor and the Liquidator merely acts as a Custodian. The status of the *res* does not change (***Rikhabchand Mohanlal Surana V/s. The Sholapur Spinning and Weaving Company Ltd.***[60]*)*.

55.2 Thus, an action *in rem* can be entertained even at the stage of liquidation of the corporate debtor as the claim is against the *res* and not against the corporate debtor. By arrest of the ship, Plaintiff would become a secured creditor to the extent of the value of the *res* only but not a secured creditor of the corporate debtor's other assets. Hence, this will not affect other secured creditors of the corporate debtor. However, by not permitting the action *in rem* and arrest of the vessel, the rights *in rem* given to a maritime claimant under the Admiralty Act (whether a maritime lien or a maritime claim) would be

60. (1978) 76 Born. L.R. 748

defeated and denied. The entire purpose of these rights is to enable such a claimant have his claim perfected in law by arrest of the ship. If a claimant is not permitted to do so then his right *in rem* may stand extinguished and be lost forever.

55.3 Once a Plaintiff obtains an order of arrest, the vessel can then be sold by the Admiralty Court in order to realize maximum value as it is only a judicial sale by an Admiralty Court that is recognized the world over as extinguishing all maritime liens against the *res* and thereby giving a clear title to the buyer. A sale by the Liquidator will not extinguish maritime liens and therefore the vessel may not attract any bidders and even if it does, will fetch a lower value as it would not be free of all liens and encumbrances. Once the sale proceeds are realized and deposited in Court, the Submissions set out in paragraph 51.6 will apply and the matter will proceed on that basis. The Liquidator will be entitled to defend the suit as this power and duty is expressly conferred on the Liquidator by Section 35(1)(k) of the IBC.

55.4 This may also be seen from another perspective. Once Plaintiff obtains an order of arrest, Plaintiff would then become a secured creditor and enforce / realize the security interest in accordance with the applicable law which would be the Admiralty Act, as provided in Section 52(4) of the IBC. Plaintiff would, in accordance with Section 52(4) of the Code, be entitled to apply for sale of the ship and realise his claim in accordance with the provisions of the law applicable to the security interest and Plaintiff. The applicable law would be the Admiralty Act.

55.5 Viewed in this manner, there is no conflict in allowing a maritime claimant to perfect his right *in rem* by arrest of the ship even if the corporate debtor is in liquidation and ensure that the vessel is sold by the Admiralty Court in a manner such as to maximize its value which is in the interest of all creditors and consistent with the intent and purpose of the IBC.

Conclusion

56 Thus, an action *in rem* can be filed and the ship arrested before the moratorium under Section 14 of the IBC comes into force or during the moratorium period or even when the corporate debtor is ordered to be liquidated. A maritime claimant ought to be permitted to enforce his right *in rem* and obtain an order of arrest of the ship in question. This will enable him to perfect and / or crystallize his maritime lien or maritime claim as available to him under the Admiralty Act. The action *in rem* will not proceed till the moratorium is in place. This will ensure that the rights under the Admiralty Act are not defeated and at the same time this does not create any conflict with the provisions of the IBC. The action *in rem* will proceed if the corporate debtor is ordered to be liquidated. As the action *in rem* will proceed in accordance with the applicable law namely the Admiralty Act, the priorities for payment out of the sale proceeds will also be determined in accordance with the said Act. Section 53 of the IBC will not apply.

57 Instances have been seen in cases involving a fleet of vessels owned by Varun Resources Ltd. and GOL Offshore Ltd. where the Resolution Professional took no steps to man, preserve and maintain the ships during the CIRP. Some of the ships of Varun Resources Ltd. were arrested before declaration of moratorium under Section 14 of the IBC. The crew members were left stranded on the ships and without adequate food, drinking water and essential fuel for survival on board. The owners had practically abandoned the ships. All of this was noted in an order dated 12 October 2017 passed by a learned single judge of this Court in Comm. Adm. Suit no. 499 of 2017 which also recorded that the sale of the vessel was opposed by COC who contended that the vessel may not be sold in the Admiralty Jurisdiction of the High Court. The Court was constrained to observe that *"despite this plea, strangely, the Committee of Creditors is*

not in a position to indicate as to whether and in what manner the arrested vessel ought to be maintained. Apparently, the crew of the vessel must fend for themselves and suffer whilst the Committee of Creditors takes its own time to take a call on these issues which required urgent attention."[61]. Whilst the Court gave the COC further time to decide on the maintenance of the ships and crew as well as essential supplies, it directed the managers of the ships to continue to pay wages and provide essential supplies which would be accorded top priority in regard to payment whether in the insolvency jurisdiction or the Admiralty jurisdiction. Even after several months this situation continued and the COC did not take any steps to maintain the ships despite the fact that all of these ships were mortgaged to various banks which formed a part of the COC and it was their duty to protect their own security. It was also the duty of the Resolution Professional to preserve and protect the assets of the corporate debtor as expressly provided in Section 25(1) of the IBC. Eventually the crew on board the various ships refused to stay any longer and left the vessels. The Resolution Professional entered into fresh agreement with another manager to employ new crew on board and provide essential supplies for the maintenance of the ships and crew. Eventually after six months the banks requested the Admiralty Court to sell all the ships and gave their No Objection. By this time a huge amount of expenses had been incurred in maintenance of the ships and the value of the ships had also considerably eroded. The ships were eventually sold at scrap value by the Admiralty Court. The sale proceeds were deposited in Court. The corporate debtor was ordered to be liquidated. All costs and expenses incurred by the new managers in respect of the crew and for essential supplies made to the vessel during this period pursuant to contracts entered into by the Resolution Professional, were not paid despite these obviously forming a part of the insolvency resolution process costs and liquidation costs and considered as Sheriff's expenses in the Admiralty proceedings. Payment was opposed by the various banks and this led to more litigation.

61. Order dated 12th October 2017 in Notice of Motion (L) No. 608 of 2017 in Commercial Suit (L) No. 499 of 2017

58 The above is a stark example as to how banks which are secured creditors function once it is clear to them that the corporate debtor is insolvent. They do not wish to spend any money in protecting their own mortgaged ships and leave the crew on board these ships to fend for themselves without even providing for essential supplies to be made to the vessels for the crew to stay on board and look after the ships, let alone pay their wages. This has been noticed in a few matters where ships have been arrested before and during insolvency proceedings and even in cases involving appointment of the Official Liquidator as Provisional Liquidator under the Companies Act, 1956. In these situations the Admiralty Court must have the discretion to step in and protect not only the ship but also the rights of crew members who continue to remain on board these ships in order to maintain and preserve the ships and ensure that the ships remains safe and are not involved in any incident which may cause damage or jeopardize other property and also are not the cause of any oil pollution or other incident which may damage the environment. Abandoned ships pose a great risk not only to the port where they are lying but also to the environment as any accident or incident involving such ships would cause colossal damage. To say that the Admiralty Court is powerless and cannot take steps to protect the ships and ensure that they realise maximum value, would be detrimental to the interest of stakeholders and contrary to the objectives of the IBC.

59 This solution that has come about in the process of interpretation of the provisions of the IBC and the Admiralty Act would, in the opinion of this Court, serve the interests of all stakeholders under both statutes and would be consistent with the objectives of both acts and give effect to the same. Exercise of Admiralty jurisdiction would in such cases will be beneficial and assist rather than hinder insolvency resolution. It would protect the ship and in turn the security of a mortgagee who is a financial creditor. At the same time this would also indicate to the mortgagee that they must take steps to protect and preserve their security and if they do not then the Admiralty Court will step in.

60 I hasten to add that the above analysis only applies to actions *in rem* filed under the Admiralty Act for arrest of ships in respect of maritime claims. In a suit *in rem*, however, if the Owner enters appearance and furnishes security for release of the ship then the suit will proceed *in personam* against the owner and the provisions of section 14 of the IBC would apply and also section 33 if a liquidator is appointed. Until this happens, the suit proceeds as an action *in rem.* The Admiralty Act also permits actions *in personam* against the owner of the ship. Such suits which are *in personam*, as against the owner, would have to abide by the provisions of section 14 of the IBC in the event a moratorium is declared by the NCLT or a liquidator is appointed under section 33 of the IBC.

Question No.2

Whether leave under Section 446(1) of the Companies Act, 1956 is required for the commencement or continuation of an Admiralty action *in rem* where a winding up order has been made or the Official Liquidator has been appointed as Provisional Liquidator of the company that owned the ship?

61 This question needs to be resolved on a consideration of whether the Companies Act, 1956 is a general act relating to companies and whether the Admiralty Act is a special act dealing with Admiralty jurisdiction and actions *in rem*, such that, the Admiralty Act being a Special and later act prevails over the Companies Act. It also needs to be considered whether a Company Court would be entitled to exercise Admiralty jurisdiction *in rem* and entertain and dispose of a suit *in rem* by virtue of Section 446(2) of the Companies Act.

62 Section 446 of the Companies Act, 1956 provides as follows:

> **Section 446** : *"**Suits stayed on winding up order -***
>
> *(1) When a winding up order has been made or the Official Liquidator has been appointed as provisional liquidator, no suit or other legal*

proceeding shall be commenced, or if pending at the date of the winding up order, shall be proceeded with, against the company, except by leave of the Court and subject to such terms as the Court may impose.

(2) The Court which is winding up the company shall, notwithstanding anything contained in any other law for the time being in force, have jurisdiction to entertain, or dispose of

(a) any suit or proceeding by or against the company;

(b) any claim made by or against the company (including claims by or against any of its branches in India);

(c) any application made under section 391 by or in respect of the company;

(d) any question of priorities or any other question whatsoever, whether of law or fact, which may relate to or arise in course of the winding up of the company;

whether such suit or proceeding has been instituted, or is instituted, or such claim or question has arisen or arises or such application has been made or is made before or after the order for the winding up of the company, or before or after the commencement of the Companies (Amendment) Act, 1960 (65 of 1960).

(3) Any suit or proceeding by or against the company which is pending in any Court other than that in which the winding up of the company is proceeding may, notwithstanding anything contained in any other law for the time being in force, be transferred to and disposed of by that Court.

(4) Nothing in sub-section (1) or sub-section (3) shall apply to any proceeding pending in appeal before the Supreme Court or a High Court."

Companies Act and the Admiralty Act

63 The Companies Act is an act relating to companies in general as held by the Apex Court in *Damji Valji Shah*[62]. In the case of ***International Coach Builders Ltd. V/s. Karnataka State Financial Corporation***[63] also, the Supreme Court took the view that the Companies Act is general law.

62. *Supra*
63. (2003) 10 SCC 482

64 On the other hand, the Admiralty Act is a consolidating act and a complete Code as regards the matters dealt with by it. It is a special law as regards Admiralty jurisdiction, legal proceedings in connection with vessels, their arrest, detention, sale and other matters connected therewith and incidental thereto. Determination of priorities is a matter connected to and / or incidental to the sale of ships.

65 The Admiralty act concerns a special type of proceedings, viz., an action *in rem* against a ship which is treated as a separate juridical entity, distinct from its owner. An action *in rem* is not an action against the Company but a suit against the vessel and recovery of the claim from the sale proceeds of the vessel. It is not a recovery action against the Company nor is an arrest of a ship an attachment of the asset of the Company. The distinctive features of the Admiralty Act and an action *in rem* are referred to and explained in the preceding paragraphs pertaining to the IBC.

66 Since an action *in rem* is against the ship and not against the company which may be the corporate debtor, the same considerations apply as under the IBC when it comes to considering the provisions of Section 446(1) of the Companies Act. The said section refers to suit or other legal proceeding against the company. An Admiralty action *in rem* is not a suit against the company. It is a suit against a ship which is a legal personality independent of the owner and is proceeded against not as an asset of the owner who may be a company but as an independent juridical entity.

67 An action *in rem* can only be filed in certain specified High Courts that have been vested with Admiralty jurisdiction pursuant to Section 3 of the Admiralty Act. The corollary to this is that no other High Court and no Civil Court can exercise Admiralty jurisdiction under the act. Certain specific High Courts have been given exclusive jurisdiction over matters specified in the Admiralty Act.

68 The Admiralty Act, thus, is a Special Act and a later act whereas the Companies Act is a general act. The Admiralty Act is also a consolidating act and a complete code as regards Admiralty jurisdiction, arrest of ships, maritime claims, sale of ships and determination of priorities.

69 Considering the aforesaid features of both acts, I now propose to set out the submissions of the counsels on the question of whether leave under Section 446(1) is required.

Summary of the submissions of the Counsels: Elaborate submissions were made by the counsels, as summarized below.

70 **Dr. Abhinav D. Chandrachud**, the *Amicus Curiae,* submitted that no leave is required of the Company Court under Section 446 of the Companies Act for either instituting or continuing a suit under the provisions of the Admiralty Act for the following reasons:

a) The Admiralty Act being a special enactment will prevail over the Companies Act.

a) Even if both the Admiralty Act and Companies Act are considered to be special enactments, the Admiralty Act will prevail over the Companies Act as the former is a later enactment to the latter.

b) The Company Court cannot exercise Admiralty jurisdiction under Section 446(2) of the Companies Act as the jurisdiction of the Civil Courts is impliedly barred by the Admiralty Act.

c) In any event a proceeding for arresting the ship *in rem* under the Admiralty Act (so long as the company which owns the ship does not enter appearance) is not against the company as contemplated under Section 446(1) of the Companies Act.

70.1 Relying upon *Damji Valji Shah*[64], Dr. Chandrachud submitted that no leave under S.446 (1) of the Companies Act was required. In *Damji Valji Shah*[65] the question was whether leave of the company Court was required for proceeding with an application before the Life Insurance Tribunal, Nagpur, under the provisions of the Life Insurance Corporation Act, 1956 ("LIC Act") against a company which had gone into liquidation. Under Section 7 of the LIC Act, the life insurance business of all insurance companies was transferred to the Life Insurance Corporation of India ("LIC"). Under Section 15 of the LIC Act, LIC could apply to the tribunal to set aside a transaction by which the life insurance business of a company was transferred to another department within that company. While answering this question in the negative, the Court held that no leave of the company Court was required for two reasons: (i) Section 41 of the LIC Act barred the jurisdiction of civil Courts which indicated that the tribunal constituted under the LIC Act had exclusive jurisdiction to hear and decide the applications in question; and (ii) the LIC Act was a special act which overrode the provisions of the Companies Act which was a general act.

70.2 Dr. Chandrachud further submitted that the Court's reasoning in *Damji Valji Shah*[66] applies in the instant case as well, for the reason, though there is no specific bar of jurisdiction clause in the Admiralty Act, akin to Section 41 of the LIC Act, the jurisdiction of civil Courts is impliedly barred under the Admiralty Act. An ordinary civil Court in, say, Pune or Daman, does not have the power to exercise jurisdiction *in rem* under the Admiralty Act over disputes involving maritime claims.

70.3 In *Allahabad Bank V/s. Canara Bank*[67], where the question before the Supreme Court was : "A*fter a winding-up order is passed under Section 446(1) of the Companies Act or a provisional liquidator is appointed, whether the Company Court can*

64. *Supra*
65. *Supra*
66. *Supra*
67. *Supra*

stay proceedings under the RDDB Act, transfer them to itself and also decide questions of liability, execution and priority under Section 446(2) and (3) read with Sections 529, 529-A and 530 etc. of the Companies Act or whether these questions are all within the exclusive jurisdiction of the Tribunal?". The judgment of the Supreme Court in *Allahabad Bank vs. Canara Bank*[68] applies in the instant case for the following reasons:

a. As held by the Court in its judgment, if the leave of the Company Court is required under Section 446(1) of the Companies Act in admiralty suits, it would follow that the company Court in, say, Jabalpur or Gauhati would be able to withdraw admiralty suits filed before one of the eight High Courts designated as Courts having admiralty jurisdiction under the Admiralty Act and decide such suits themselves, under Section 446(2) of the Companies Act. This would be contrary to the intent of the Admiralty Act which confers exclusive admiralty jurisdiction over only eight High Courts in India and impliedly excludes the jurisdiction of other Courts.

It may be contended that *Allahabad Bank's vs. Canara Bank*[69] is distinguishable from the instant case because the Admiralty Act contains no provision akin to Section 34 of the RDDB Act, which gives the RDDB Act overriding effect over all other laws. However, the answer to this argument is that the LIC Act did not contain a provision akin to Section 34 of the RDDB Act either, and despite this, the Supreme Court, in *Damji Valji Shah's case*[70], held that the LIC Act prevailed over the Companies Act and Section 34 of the RDDB Act provided "34. Act to have over-riding effect.—*(1) Save as provided under subsection (2), the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act……*

68. *Supra*
69. *Supra*
70. *Supra*

b. Like the RDDB Act which is a special law which applies to banks, the Admiralty Act is a special law which applies to admiralty matters. It therefore prevails over the Companies Act, which is a general law.

70.4 In *Indorama Synthetics* [71], a Division Bench of the Bombay High Court was considering whether leave of the Company Court would be required under Section 446 of the Companies Act to institute or proceed with a case under Section 138 of the Negotiable Instruments Act, 1881 ("NI Act"). Answering this question in the negative, the Court held the predominant purpose of the provisions empowering the Court to stay actions against the Companies in liquidation or to seek permission of the Company Court before proceeding with any action launched against the Company, which is already wound-up, is to ensure that the ultimate distribution of the assets of an insolvent company is *pari passu* among its creditors.

70.5 However, while dealing with the above question in *Indorama Synthetics*[72], the Court also referred to (i) ***S.V. Kondaskar, Official Liquidator and Liquidator of the Colaba Land and Mills Co. Ltd. (In Liquidation) V/s. V.M. Deshpande, Income Tax Officer, Companies Circle I (8), Bombay***[73]; (ii) ***Joshi Trading Co. (P.) Ltd. V/s. Essa Ismail Sait***[74]; and (iii) ***B.V. John V/s. Coir Yam and Textiles Ltd.***[75]. Relying on these and other judgments, the Court, in *Indorama Synthetics*[76] held, *'Thus, the sum and substance of all these judicial decisions is that the provisions of section 446(1) of the Companies Act are to be invoked judiciously only when it has got any concern with either the winding-up proceedings or with the assets of the Company. The expression "suit or other proceedings", therefore, as used in section 446(1) of the Companies Act, has to be construed accordingly and not to be interpreted so liberally and widely so as to include*

71. *Supra*
72. S*upra*
73. (1972) 1 SCC 438
74. (1980) 50 Kerala 801
75. [1960] 30 Comp Cas 162 (Ker)
76. *Supra*

each and every proceeding of whatsoever nature initiated against the Company, including even the criminal proceedings like for the offence under section 138 of N.I. Act, which has got no bearing on the winding-up proceedings of the Company and are not concerned with, directly with the assets of the Company, but are mainly dealing with the penal and personal liability of the Directors of the Company.'

70.6 The judgment of this Hon'ble Court in *Indorama Synthetics*[77] applies to the instant case for the following reasons:

a. The judgments of the Supreme Court and Kerala High Court make it clear that leave of the company Court will not be required under Section 446 of the Companies Act if the company Court is not the appropriate forum for withdrawing the proceeding in question and hearing the case itself. In the instant case, the Admiralty Act confers exclusive jurisdiction on eight High Courts in India. It impliedly excludes the jurisdiction of civil Courts and it will therefore not be appropriate for the Company Court to withdraw such a case and hear it before itself.

b. This Court has made it clear that the provisions of Section 446 of the Companies Act are not to be construed liberally to include each and every kind of proceeding.

c. The Court has also applied the principle that since the NI Act was amended in 1988, it is a subsequent enactment which will therefore override the Companies Act which is a general enactment. The Admiralty Act, being a subsequent and special act, must therefore also override the Companies Act, which is an earlier and general enactment.

70.7 As regards, reliance by the counsel appearing on behalf of the Official Liquidator ***In Re: Modi Stone Ltd. (in liquidation)***[78], in which this Hon'ble Court took

77. *Supra*
78. 2017 SCC Online Bom 665

the view that the leave of the Company Court would be required in order to institute or continue such proceedings before the Small Causes Court, Dr. Chandrachud submitted and rightly so that the said view taken by this Hon'ble Court was based on a concession made by counsel appearing on behalf of the parties, and can therefore not be considered.

70.8 As regards the judgment of a Single Judge of the Madras High Court in ***Shanmugam Rajasekar V/s. Owners and Parties interested in the vessel M.T. Pratibha Cauvery***[79], Dr. Chandrachud submitted that though the Court was correct in holding that the provisions of a special enactment will prevail over the provisions of a general enactment, the said judgement does not lay down the correct position in law because the Court wrongly identified the Merchant Shipping Act, 1958 as the special enactment instead of the Admiralty Act. He also submitted that the finding of the Court that even when an owner enters appearance the proceedings continue to be *in rem* is incorrect.

70.9 However, according to Dr. Chandrachud, the judgment of the Division Bench of the Madras High Court in ***Pratibha Shipping Company Ltd. V/s. Praxis Energy Agents SA***[80] lays down the correct position of law except that it erroneously holds that *"such maritime claims deserve to be adjudicated and proceeded further without any intervention of the official liquidator attached to the Bombay High Court."* According to the Learned *Amicus* the Admiralty Court would have to issue notice to the Official Liquidator prior to distributing the proceeds of the sale.

71 **Mr. Sharan Jagtiani**, Advocate, appearing for the Official Liquidator in Company Petition No.756 of 2014, submitted as follows:

71.1 It is clear from the plain and unambiguous language of Section 446 that it is extremely wide in its scope. Every sub-part of Section 446 uses expressions that are

79. A. nos 2997/2013 in C.S. No. 89 of 2013- (2018) 1 High Court Cases (Mad) 133
80. (Unreported) Dt. 9.8.2019 in OSA Nos. 20, 317 to 349, 363 & 264 of 2018 & W.A. Nos 738 to 751 of 2013

unqualified and unconditional. Section 446(1), uses the expression "*no suit or other legal proceeding*". These are expressions without any qualifications. It cannot be read into this language that certain suits which are filed before certain Courts of special jurisdiction are outside the purview of Section 446(1). If a particular action fits within the plain meaning of the words *suit or other legal proceedings*, it falls within the ambit of Section 446(1).

71.2 Similarly, Section 446(2) which was subsequently introduced by an amendment in 1960 bolsters the wide import of Section 446 by introducing a *non-obstante* clause. It clearly states that it will operate notwithstanding anything contained in *any other law for the time being in force*. Section 446 (2) of the Companies Act invests a special jurisdiction in a company Court to entertain or dispose of "any suit or proceeding". This leads to the unmistakable conclusion that the legislature intended to confer special jurisdiction on the company Court in the widest possible terms.

71.3 Therefore, leave under Section 446 of the Companies Act would be required to be obtained by the claimants / plaintiff in Admiralty action even if such action is against the vessel or the *res* alone and regardless of whether the claimant is a maritime lien holder or secured creditor / mortgagee of the vessel. Mr. Jagtiani relied upon ***Hansraj and Ors. V/s. The Official Liquidators, Dehra Dun Mussoorie Electric Tramway Company Ltd.***[81] ; ***Sudarsan Chits (I) Ltd. V/s. O. Sukumaran Pillai and Ors***.[82] and ***S.V. Kandeakar V/s. V.M. Deshpande & Anr***.[83] in support of these submissions. Mr. Jagtiani also submitted as to why ***Corona Ltd. V/s. Sumangal Holdings***[84]***; Bangur Brothers Ltd. (in liquidation) V/s. Official Liquidator***[85] and ***K.R. Steel Union Ltd. V/s. Poysha Industrial Company Ltd***.[86] relied upon by Dr. Chandrachud, won't be applicable in the facts and circumstances of the case.

81. 1929 Allahabad Series Vol. LI 695
82. (1984) 4 SCC 657
83. (1972) 1 SCC 438
84. 2007 (4) Mh. L.J. 551
85. (2013) SCC Online 1175
86. 2007(4) Mh. L.J 280

71.4 *Meeson* has, upon consideration of statutory provisions of the English law in Insolvency Act, 1986 and the Admiralty laws, stated that the commencement of an insolvency proceeding itself prevents legal proceedings from being continued against the vessel of the company in liquidation. Moreover, when a claim gives rise to a statutory action *in rem*, the effect of this action results in encumbering the *res* against which the claim is brought amounting to creation of security interest in the ship. This appears to be '*disposition of company's assets'* and would be void under Section 536 of the Companies Act unless otherwise ordered. From the reading of *Meeson* it also becomes clear that the Admiralty claimant's claim being secured creditor will rank *pari passu*, with the claim of the workmen, however, the priorities of the Admiralty claimants are to be determined by applying the principles of Admiralty law. It was therefore submitted that, this is the underlying principle of Section 446 (2) wherein once the Court hearing company matters assumes jurisdiction, the priorities shall be determined under Admiralty Act, 2017 and not the Companies Act.

71.5 Therefore, even in an action against the *res* which is the asset of the company undergoing liquidation, leave of Company Court is required to be taken. Leave in such a case may be ordinarily granted depending upon the facts and circumstances of the case, however, in case the Court refuses to grant such leave then the Court under Section 446(2) would assume jurisdiction as laid down in Admiralty Act and accordingly adjudicate the *lis*. This view was also taken by this Court in ***Praxis Energy Agents SA V/ s. M.T. Pratibha Neera***[87] wherein it was held leave was required. This is in consonant with the position in law in England that it is mandatory to apply for leave under Section 446. Although, this judgment does not consider the law under Section 446 at length, but does give a finding based on a specific submission and thus ought not to be written off as

87. 2018 SCC Online 957

obiter. In any view of the matter, this judgment respectfully lays down the correct legal position.

71.6 Mr. Jagtiani also analysed the judgment of a learned single judge of the Madras High Court in the case of *Shanmugam Rajasekar V/s. Owners and Parties Interested in the vessel M.T. Pratibha Cauvery*[88] where the primary question was whether leave under section 446 is necessary for proceeding for a maritime claim *in rem*. He submitted that this judgement is *per incuriam* on various accounts primarily because it does not consider the wide import of Section 446 as laid down in the plain reading of Section 446 of the Companies Act as well as in *Sudarsan Chits*[89]. The Madras High Court in this judgment completely overlooks the existence of Admiralty Act and proceeds on the basis that Admiralty law in India is governed by the Merchant Shipping Act, 1958. Moreover, it fails to consider the specific *non-obstante* provision in Section 446 the Companies Act. According to Shri Jagtiani even the judgment of the Division Bench of the Madras High Court in *Pratibha Shipping Company Ltd. vs. Praxis Energy Agents SA*[90] has to be faulted as it does not provide any reasoning as to why the Admiralty Act is to be treated as a special law in a situation of winding up. Therefore, the law laid down in these judgments ought not to be relied upon whilst deciding the present case.

71.7 Relying upon ***Principal Commissioner of Income Tax, Central V/s. Income Tax Settlement Commission***[91] Mr. Jagtiani submitted that in a situation where the later or special legislation does not provide for a specific *non-obstante* clause, it would not be for the Court to read within the act any such provision only to provide for an overriding effect. Clear provision must specifically exist in the later legislation as held by the Supreme Court in ***Kerala State Financial Enterprises Ltd. V/s. Official Liquidator, High Court of Kerala***[92] .

88. *Supra*
89. *Supra*
90. *Supra*
91. R/Special Civil Application No. 9883 of 2019; Decided on 22.10.2019
92. (2006) 10 SCC 709

71.8 There is no inconsistency when the Company Court under Section 446(2) transfers the proceeding to itself. Transferring the proceeding to itself only means that that Court which hears the Winding up matter will now adjudicate the *lis* as opposed to the Courts identified in Section 3 of the Admiralty Act. It is, however, very important to note that, the rights of Plaintiff, whether *in rem* against the *res* or *in personam* or hybrid, are not taken away. Therefore, no part of this result in a situation of inconsistency as, both legislations are perfectly capable of being given full effect. In a situation where pursuant to rejecting leave under Section 446, if the company Court transfers to itself a suit, it is not that the Company Court is hearing the Admiralty action. Once it transfers to itself a Suit, it then hears it as a civil Court. Thus, in absence of any specific non-obstante clause in the Admiralty Actthe act cannot be said to have an overriding effect on the Companies Act only on the ground that it is a special and later Act.

71.9 From the above position it is clear that even in a case where the later act explicitly provides for a *non-obstante* clause, there has to be a direct conflict and inconsistency between two enactments to give an overriding effect. In the present case there is no such inconsistency between the provisions of the Admiralty Act and Companies Act. Moreover, assuming one has to cull out any inconsistency, the Admiralty Act does not provide for a *non-obstante* clause for it to give an overriding effect. Therefore, if two legislations can be harmonized, all the *sui generis* aspects of the Admiralty Act shall remain intact. All that changes is the venue where such proceeding is carried out.

71.10 In the circumstances, though the Admiralty Act is a later act it does not contain a non-obstante clause or any overriding provision. Consequently Section 446 would apply to an Admiralty action for arrest of a ship.

71.11 The whole purport of the winding up is realisation and distribution of the assets of the company and the same would be defeated if an Admiralty action is allowed to be proceeded against the ship which is an asset of the company.

71.12 When a maritime lien holder applies for leave under Section 446, the Company Court would, almost always, if not invariably, grant such leave subject to appropriate conditions.

71.13 Leave may be applied for specifically during the pendency of the suit and does not *per se* invalidate the suit filed.

71.14 Even if Admiralty law is a special law, Section 446 and companion provisions under the Companies Act are themselves also special law in respect of matters pertaining to liquidation of a company.

71.15 A company Court which is seized of a winding up of a company that owns any vessel which is the subject matter of an Admiralty action may exercise powers under Section 446(2). However, in deciding the suit, the Court that is winding up the company will continue to apply the body of substantive law that would otherwise apply to such suit or proceeding.

72 **Mr. V. K. Ramabhadran**, Senior Advocate, *Amicus Curiae,* supported the submissions of Mr. Jagtiani. In addition, Mr. Ramabhadran submitted that:

a. A bare reading of S. 446 of the Companies Act would reveal that "when a winding up order has been made or official Liquidator has been appointed as Provisional Liquidator, "leave of the Company Court is mandatorily required to be obtained either for instituting the suit or proceedings with the suit where the company Court is empowered to deal

with such proceedings, unless the company Court's jurisdiction is ousted as was held *S. V. Kandeakar V/s V. M. Desphande & Anr.*[93], *Damji Valji Shah*[94] *and*

Allahabad Bank V/s. Canara Bank[95].

b. Leave of the Company Court would be required as even though the subject matter is dealt with under a Special Act namely the Admiralty Act, the jurisdiction of the Civil Court is not ousted and consequently the Court that is winding up the company will have the necessary power and jurisdiction to decide the Admiralty suit by virtue of Section 446(2). Moreover, there is no overriding provision in the Admiralty Act to oust the jurisdiction of the Civil Court.

c. The words *"against the company"* in Section 446 of the Companies Act must be interpreted to mean *"against the Company and its assets"*. An action *in rem* being an action against the asset of the company would be covered by Section 446. He relied upon ***Rajasthan State Financial Corporation V/s. Official Liquidator***[96]***; Bank of Maharashtra V/.s Pandurang Keshav Gorwardkar & Ors.***[97]***; The Governor General In Council V/s. Shiromani Sugar Mills Ltd. (In Liquidation)***[98]*; and* ***M. K. Ranganathan V/s. Government of Madras & Ors***[99]**.**

d. An arrest of a ship is analogous to attachment before judgment and any such arrest would be void as per Section 537 of the Companies Act.

e. The Admiralty Act is general law insofar as enforcement of maritime claim is concerned but can be considered special law for enforcement of a maritime lien, a concept which is *sui generis.* Hence the Company Court whilst ordering distribution of sale proceeds would have to accord higher priority to claimants

93. *Supra*
94. *Supra*
95. *Supra*
96. (2005) 8 SCC 190
97. (2013) 7 SCC 754
98. 1946 8 FCR 40 page 55 of the Federal Court
99. AIR 1955 SC 604

whose claim is maritime lien as defined in the Admiralty Act. This does not, however, mean that the person who has a maritime lien does not require leave under Section 446 but would only get priority in the distribution of sale proceeds by the winding up Court.

73 **Mr. Rahul Narichania**, Senior Advocate, appearing for a contesting party submitted the Admiralty Act is a special act whereas the Companies Act is not a special act and does not contain any provision which overrides any other law. Section 446(2) of the Companies Act does not make it a special act. *Relying upon* ***Gobind Sugar Mills Ltd. V/s. State of Bihar and Ors***[100]. Mr. Narichania submitted that while determining the question whether a statute is a general or a special one, focus must be on the principal subject-matter coupled with particular perspective with reference to the intendment of the Act.

73.1 Admiralty Act is special because,

(i) Admiralty jurisdiction is restricted to only certain Courts. Section 2(e) of the Admiralty Act confers admiralty jurisdiction only on the High Court of Calcutta, Bombay, Madras, Karnataka, Gujarat, Orissa, Kerala, Hyderabad and the State of Andhra Pradesh or any other High Court, as may be notified by the Central Government. Therefore, no other Courts will have admiralty jurisdiction and No Civil Court will have jurisdiction.

(ii) Only specific claims are recognised as maritime claims under Section 4 of the Admiralty Act. Maritime claims are thus of a special character and special rights are conferred on maritime claimants.

(iii) Priorities of Claims are stipulated under the Admiralty Act. Section 9 of the Admiralty Act for the first time under Indian law stipulates the order of

100. (1999) 7 SCC 76

priority of competing maritime claims and liens. Prior to this, priorities of rival claims were decided under common law and precedents.

(iv) The Jurisdiction of the Admiralty Court is special unlike the Civil jurisdiction of a Court. Admiralty jurisdiction is not dependent on the presence of the Defendant within the jurisdiction of the Court or the cause of action arising within the jurisdiction of the Court. The Admiralty jurisdiction is dependent only on the presence of the ship within its jurisdiction as held in *m.v. Elizabeth*[101].

(v) Unlike the Companies Act or the IBC, a sale of the property viz., a ship by an Admiralty Court in a public auction is free from all prior claims, liens and encumbrances and the purchaser at the auction acquires a clean title free from any maritime lines or encumbrances. This has been so held in *ICICI Ltd., Bombay V/s. M.F.V. 'SHILPA' And Ors.*[102] *AND in M.V. Bos Angler* and *Ors.*[103]

(vi) Maritime claims and liens are enforceable by an action *in rem* as well as an action *in personam*. However, the distinctive feature of an admiralty action is one in the nature of an action in rem and as such jurisdiction is specially conferred by the statute.

(vii) Only an Admiralty Court can exercise jurisdiction in an action in rem. An action in rem is directed against the ship.

(ix) The ship is treated as a person and is treated as a wrong doer liable to pay for the wrong.

(x) The ship is made a Defendant in the suit and a decree of condemnation and sale is passed against the ship.

(xi) A vakalatnama is required to be filed on behalf of the ship.

101. *Supra*
102. *Supra*
103. *Supra*

(xii) In an action in rem, if the ship is served with a warrant of arrest, a writ of summons is not required to be served on the owner of the ship.

73.2 The Admiralty Act is later in point of time to the Companies Act. Consequently, the later special act prevails over the earlier special or general act especially in the context of the Admiralty Court exercising *in rem* jurisdiction. Even though there is no express provision in the Admiralty Act which overrides the jurisdiction of other Courts or statutes, impliedly it has an overriding effect. It is not necessary that there must be an express provision to override an earlier statute such as the Companies Act and the IBC.

73.3 Furthermore, in the context of precedence between the Companies Act and Admiralty jurisdiction, the Madras High Court in the case of *Shanmugam Rajasekar V/s. Owners and Parties Interested in the vessel m.t. Pratibha Indrayani*[104], has, *inter alia*, held the proceedings could neither be stayed under Section 446(2) of Companies Act nor the applicants will be directed to obtain leave of the Company Court to proceed with the Applications. It is therefore evident that the Admiralty jurisdiction is treated to be on a different footing and will prevail over the Companies Act.

73.4 In *Rikhabchand Mohanlal Surana V/s. The Sholapur Spinning and Weaving Company Ltd.*[105] the Bombay High Court held that the property of a company does not vest in the Official Liquidator on winding up. The property if at all continues to remain as the property of the company and the Official Liquidator is only given custody thereof (under Section 456). Once property or money comes into the possession of the Court at the instance of a Plaintiff then it would follow that they are constructively held by the Court for the judgment creditor. The Official Liquidator cannot just take away the money from the Court. The Plaintiff, on monies coming into Court becomes a secured creditor.

104. *Supra*
105. *Supra*

The same principle applies when a ship owner furnishes security in the Admiralty Court. The Official Liquidator cannot touch these monies if the company goes into winding up subsequently. This may also apply to a situation where a ship has been sold and the sale proceeds are lying in Court. As held in ***Chidambaram Chettiar V/s. The Tinnevelly Sarangapani Sugar Mills***[106], a lien holder does not lose his right of lien on making of a winding up order as long as his possession continues. He stands in the position of a secured creditor against the properties. Thus, the Official Liquidator cannot deprive the creditor of his security.

73.5 If a Company Court were to exercise powers under Section 446(2) over Admiralty proceedings, it would have to decide it under Admiralty law as the Companies Act cannot and does not override the law applicable to the subject matter of the suit.

73.6 Mr. Narichania analyzed four situations and submitted:

i. If a Suit for arrest is filed before presentation of a winding up petition, so also an Order of arrest is obtained before presentation of a winding up petition, then, in that case no leave is required under Section 446 because there are no proceedings pending at all.

ii. If a Suit for arrest is filed after presentation of a winding up petition and Order of arrest is obtained before appointment of a Provisional Liquidator/Official Liquidator, no leave is required. Mere pendency of winding up proceedings do not bar the filing of an admiralty suit for arrest of a ship as it is possible that even a winding petition though presented may be withdrawn or dismissed.

iii. Suit for arrest is filed after the Provisional Liquidator/Official Liquidator is appointed and Order of arrest is obtained before final winding up Order is passed, leave is required. Once the Provisional Liquidator/ Official Liquidator is

106. ILR (1908) 31 Mad 123 = 1907 SCC OnLine Mad 49

appointed, though property continues to be beneficially owned by the company, the Provisional Liquidator is in custody.

iv. Suit for arrest filed and Order of arrest is obtained after final winding up Order is passed, the assets remain with the Official Liquidator who is in custody of the assets and therefore leave would be required. It is the Official Liquidator's responsibility to distribute the assets by liquidating it and by paying of the creditors, etc.

74 **Mr. Prasad Shenoy**, Advocate, appearing for a contesting party submitted that an attempt to equate an action *in rem* with an action *in personam* or to suggest that they were in no 'real' way different was rejected as early as 1907, by the Court of Appeal in ***The "Burns"***[107] in which the issue in question was whether section 1(a) of the Public Authorities Protection Act, 1893 , applied to an Admiralty action *in rem* so as to preclude such an action being instituted against a vessel belonging to a public authority after the expiration of six months from the default complained of. The Court of Appeal upheld the decision of the Court below that an action *in rem* is not an action *in personam* against the owners. The observations of Fletcher Moulton L.J. therein,

> "*..... and that the action in rem is an action against the ship itself. It is an action in which the owners may take part, if they think proper, in defence of their property, but whether or not they will do so is a matter for them to decide, and if they do not decide to make themselves parties to the suit in order to defend their property, no personal liability can be established against them in that action. It is perfectly true that the action indirectly affects them."*

have now long been considered as a precise articulation of the nature of an action *in rem* This proposition has been affirmed and reiterated by the Court of Appeal in *The Nordglimt*[108], *The Anna H*[109] and *The Stolt Kestrel*[110].

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107. [1907] P 137 (CA)
108. *Supra*
109. *Supra*. The Hon'ble Hobhouse LJ's analysis of "*the relationship between the Admiralty jurisdictions in rem and in personam*" shows that an exclusion of jurisdiction generally is to be interpreted as an exclusion of the *in personam* jurisdiction and not the *in rem* one.
110. [2016] 1 LLR125

74.1 The said position and the aforesaid authorities have also been cited by *Meeson* as laying down the present position of law today.[111] However, the distinction drawn by Meeson as to *quasi in rem* claims has been drawn on the basis of decision of the House of Lords in *Indian Grace (No.2)*[112]. The said distinction does not exist in Indian Admiralty jurisprudence (statutory and case law). It is therefore wholly irrelevant to the issues at hand.

74.2 This Court in ***Crescent Petroleum Ltd. V/s. M.V. Monchegorsk & Anr.*** [113] also recognised this position that the plaintiffs are entitled to maintain action *in personam* and action *in rem* simultaneously in different jurisdictions. In the case of ***m.v. Altus Uber***[114] a learned single judge of this Court after tracing the aforesaid century long jurisprudence of both the Indian and English Courts *inter alia* observed that another facet of the use of an action *in rem* for the purpose of obtaining security for a claim which is the subject matter of *in personam* proceedings turns on the well settled distinction between *in rem* and *in personam* proceedings. The Court also held that commencement of *in personam* proceedings is no bar to an action *in rem*. This is because the two sets of proceedings are cumulative and not in the alternative. It is only after the owner enters appearance and submits to jurisdiction and furnishes security that the action *in rem* gets converted into an action *in personam*. Until such time as the owner has entered appearance and submitted to jurisdiction and furnished security, the action *in rem* remains an action *in rem* and the vessel is available to Plaintiff as security in respect of its maritime claim which is the subject matter of *in personam* proceedings against the owner or the party liable *in personam.* Furnishing of security is also essential for the action *in rem* to be converted to an action *in personam* because until such time security is furnished, the vessel remains under arrest and the action against the vessel continues *in rem*. The Court also observed that the admiralty jurisdiction of the Court is invoked by

111. Para 3.5, 3.7, 3.8 and 3.11.
112. *Supra*
113. AIR 2000 Bom 161.
114. 2018 SCC Online BOM 2730

an action *in rem* when the Court arrests the vessel for securing a maritime claim. It is only when the owner of the vessel enters appearance and gives security that the action becomes an action *in personam*. The clause for arbitration is not between Plaintiff and the vessel but between Plaintiff and the owner of the vessel. This clause for arbitration will be given effect to after the Court exercises its jurisdiction to arrest a ship. It is from that stage that the provisions pertaining to arbitration have to be considered. The Court added a right in rem is a valuable right that a party has for the purpose of obtaining security in respect of a maritime claim. To debar a party from approaching the Court on the ground that the party has agreed to arbitration would tantamount to depriving a party of his vested right to file an action in rem under the Admiralty Act. This right cannot be taken away unless there is a statutory bar or an express provision denying such a right to a Claimant. There is no such bar or prohibition under existing law. Neither is there any bar to the exercise of this right merely because *in personam* proceedings have been commenced by way of arbitration or in Court. On the contrary considering the distinction between in rem and *in personam* proceedings, it is manifestly clear that a right *in rem* is available to a Claimant notwithstanding commencement of *in personam* proceedings in respect of the same claim and cause of action. This is because a right *in rem* in admiralty jurisdiction is essentially available to secure a maritime claim by arrest of a ship. It is only after the owner of the ship enters appearance and submits to jurisdiction and provides security that the action *in rem* would proceed as an action *in personam*. In Appeal, a Division Bench of this Court has upheld the findings of the Learned Single Judge, reinforcing the distinction between *in rem* and *in personam* proceedings[115]. The aforesaid observations of the Hon'ble Supreme Court of India in *m.v. Elisabeth*[116] as well as of this Hon'ble Court in *m.v. Altus Uber*[117] are also enlightening with respect to the question as to when a proceeding initiated *in rem* can be said to have also become a

115. (2019) 5 Bom CR 256
116. *Supra*
117. *Supra*

proceeding *in personam*, i.e., on the appearance of the owner and deposit of security in lieu of Defendant Vessel.

74.3 Mr. Shenoy summarized by submitting:

a) Since the suit is commenced as an action *in rem* against the *res* alone, no leave under Section 446 is required.

a) In the event appearance is entered by the company claiming to be the owner of the ship, no leave under Section 446 would be required in the event Plaintiff is enforcing a maritime lien as ownership of the vessel is immaterial for enforcement of the same.

b) If Plaintiff limits its claim to the value of the *res* and does not claim any amount against the owner *in personam*, leave under Section 446 would not be required.

c) In all cases if the owner deposits security in order to obtain release of the ship, then leave under Section 446 would be required for continuing such an action which would be an action *in personam.*

d) In the event an action *in rem* is instituted before the presentation of a winding up Petition under the Companies Act and the vessel is arrested, the vessel ceases to be a property of the owner and the owner's only surviving right, as held in *m.v. Bolivia*[118], would be to receive the residual proceeds of sale after satisfaction of all claimants. In such a case no leave under Section 446 would be required to proceed with the suit.

75 **Ms. Priya**, Advocate, for the Official Liquidator of GOL Offshore Ltd. supports the submissions made by Mr. Sharan Jagtiani and submits that leave is required under Section 446 of the Companies Act before commencing an action *in rem* or to proceed with the action already commenced if the Official Liquidator has been appointed as Provisional Liquidator of the company. In order to assert an action *in rem* and liability

118. *Supra*

on the *res*, the claimant is required to establish *in personam* liability of the owner as set out in Section 5(1) of the Admiralty Act. Thus, even though it is only the vessel which is the Defendant in the proceedings, the owner is also included as a Defendant in the suit even though not expressly named and joined.

76 **Mr. Prathamesh Kamath**, Advocate, supported the submissions of Mr. Sharan Jagtiani and in addition submitted as follows:

a) Obtaining leave under section 446 of the Companies Act is mandatory when the suit or legal proceedings are filed against the assets of the company. The main purpose or object behind section 446 is to ensure that the assets of the company are not recklessly given away or frittered but are utilized to meet the debts of the company's secured or unsecured creditors as also to its shareholders irrespective of whether the suit is an action *in rem* or *in personam*. The assets are deemed to be in the custody of the company Court through the official liquidator who acts as a guardian of the assets as provided under section 456 of the Companies Act.

b) Even if it is an *in rem* action only against the vessel, grant of leave under section 446 will still be required as it is against the asset of the company (in liquidation).

c) In the alternative, an admiralty suit against a vessel would be a blended action *in rem* as well as *in personam*. Thus, even assuming that the requirement of leave is restricted to *in personam* action against the company and does not apply to an action *in rem* against a vessel, such leave will have to be obtained before continuing such a blended action.

d) The Admiralty Act does not have any non-obstante clause and does not exclude or prohibit the applicability of the mandatory provisions of the Companies Act.

For his submissions of point (a) and (b) above Mr. Kamat relied upon ***Central Bank of India V/s. Elmot Engineering Pvt. Ltd. & Ors***.[119]***; Central Bank of India V/s. Elmot Engineering Pvt. Ltd. & Ors.***[120]***; Harihar Nath & Ors. V/s. State Bank of India & Ors***[121]***; Erach Boman Khavar V/s. Tukaram Shridhar Bhat and Another***[122]***; Indorama Synthetics***[123].

For his submissions on point (c) above, Mr. Kamat relied upon (a) ***THE AUGUST 8***[124] delivered by the Privy Council and (b) ***THE GEMMA***[125] of the English Court of Appeal.

76.1 A learned single judge of this Court in *Praxis Energy Agents SA V/s. M.T. Pratibha Neera*[126] while dismissing a Chamber summons to add sale proceeds of sister vessels, *inter alia,* held that leave of company Court under Section 446 is mandatory. The Madras High Court has, however, given a contrary finding in the case of *Shanmugam Rajasekar V/s. Owners and Parties Interested in the vessel m.t. Pratibha Indrayani*[127] by holding that no leave under S. 446 of the Companies Act was required. The said Judgment with respect is *per incuriam* and does not lay down the correct position for various reasons, *inter alia,*:

i. It does not consider Section 456 of the Companies Act and its effect, more particularly with respect to the custody of all the assets of the Company (in Liquidation) vesting in the Company Court;
ii. It proceeds on the basis that Admiralty law in India is governed by the Merchant Shipping Act 1958. It ignores Admiralty Act and fails to consider the absence of any non-obstante clause which is present in the Companies Act;

119. (1993) 1 Mh. L.J. 671
120. (1994) 4 SCC 159
121. (2006) 4 SCC 457
122. (2013) 15 SCC 655
123. *Supra*
124. *Supra*
125. 1899 PD 285 (C.A.)
126. *Supra*
127. *Supra*

iii. It does not take into consideration the Judgments of Supreme Court in *Elmot Engg. Ltd.*[128], *Hari Har Nath*[129] and the Judgments on Section 446 which hold that leave is necessary if the Suit or Legal proceedings is against the asset of the company (in Liquidation);

iv. It fails to appreciate that the exclusion of Jurisdiction of any Court has to be express and cannot be implied. There cannot be an implied exclusion of Courts unless the statute so specifically mentions;

v. It does not consider that there is no repugnancy between the Admiralty Act and the Companies Act, as the Admiralty Act, does not contemplate a situation of winding up of a company.

77 **Mr. Ajai Fernandes**, Advocate, appearing for the Board of Trustees for the Port of Mumbai submitted that as far as the statutory claim of the Port Trust towards their rates and penalties is concerned, there is no question of the Port having to obtain leave under Section 446 of the Companies Act. Section 64 of the Major Port Trusts Act, 1963 gives the power to the Board to distraint or arrest the vessel and detain the same until the amount due to the Board is paid and to sell the vessel and appropriate the sale proceeds in satisfaction of their dues and pay the surplus if any to the master of such vessel on demand. He submitted that the Apex Court in *Board of Trustees, Port of Mumbai V/s. Indian Oil Corporation and Anr.*[130] has, in paragraphs 13, 17 and 19, held as follows:

> 13: *"Therefore, the lien of a harbour authority over the vessel is a paramount lien and realization of its dues by the harbour authority by the sale of the vessel is above the priorities of secured creditors. In other words, the statutory lien of a harbour authority has paramountcy even over the claims of secured creditors in a winding up. In exercise of its right under Section 64 the appellant is, therefore, entitled to sell the vessel without the intervention of the Court. In exercise of that paramount right which overrides the claims of all other creditors including secured creditors, the appellant has a right to arrest the vessel and sell it. Without the consent of the appellant, this right cannot be transferred to the sale proceeds of the vessel."*
>
> **……**

128. *Supra*
129. *Supra*
130. *Supra*

> 17: *"The appellant has a supervening priority in respect of its claims against the vessel. It has a right to sell that vessel and realise the sale proceeds. The appellant cannot be divested of this statutory right without its consent or be subjected to other priorities under the Companies Act."*
> **…..**
>
> 19: *"The appellant shall be entitled to realise its statutory dues as per law from the sale proceeds of the said vessel and the balance, if any, of the sale proceeds shall be deposited by the appellant with the Official Liquidator in winding up. The appellant shall also file an account of its dues and the realisation of the same from the sale proceeds of the vessel in the winding up proceedings before the Official Liquidator. The appellant has no objection to doing so. In respect of any shortfall in the realisation of dues, the appellant may file its claim for the balance in winding-up proceedings in accordance with law.*

78 Mr. Shrikant Hathi, Advocate, did not make any oral submissions but with the leave of the Court tendered written submissions. In short, Mr. Hathi also supported the view that no leave under S. 446 of the Companies Act was required. Mr. Hathi also submitted that the sale proceeds or security should be distributed as per the priorities prescribed under the Admiralty Courts Act.

79 The submissions of Mr. Prashant S. Pratap, Senior Advocate, *Amicus Curiae,* could be summarized as under:

i. The Companies Act is an act relating to companies in general as held by the Apex Court in *Damji Valji Shah*[131]. The Companies Act is general law as held in *International Coach Builders Ltd. vs. Karnataka State Financial Corporation*[132] .

ii. The Admiralty Act is a consolidating act and a complete Code as regards the matters dealt with by it. It is a special law as regards Admiralty jurisdiction, legal proceedings in connection with vessels, their arrest, detention, sale and other matters connected therewith and incidental thereto. Determination of priorities is a matter connected to and / or incidental to the sale of ships.

131. *Supra*
132. *Supra*

iii. The Companies Act is a general act relating to companies and refers to suits against the company in general. The Admiralty Act is a special act concerning suits *in rem* against a ship and vests Admiralty jurisdiction exclusively in certain High Courts only to entertain such actions *in rem.* Applying the principle of interpretation that special overrides the general the Admiralty Act will prevail over the Companies Act. Even if the Companies Act is considered as a special act in relation to Companies, the Admiralty Act being a later special Act will prevail over the Companies Act. Thus, no leave is required under Section 446(1) of the Companies Act for commencement or continuation of an action *in rem* against a vessel.

iv. Section 446(1) of the Companies Act refers to suit against the company. Under Section 446(2), jurisdiction is given to the Court to entertain or dispose of any suit against the company. An action *in rem* is against the ship which is an independent legal entity and distinct from the company owning it. It is not a suit against the company. Hence by this reasoning also no leave is required under Section 446(1) of the Companies Act as the Court which is winding up the company may not have jurisdiction to entertain and dispose of an action *in rem* filed against a ship (and not against the company owning it) under the Admiralty Act which is conferred only on certain specified High Courts under the said act.

v. As regards Sections 529 and 529A of the Companies Act although these have been held by the Apex Court in *International Coach Builders*[133] as conferring special rights on workmen and must be treated as special law made by the Parliament, these amendments were introduced in 1985. The Admiralty Act is also a special Act and a later enactment of the year 2017. Section 10 of the Admiralty Act which deals with priorities in the matter of distribution of sale

133. *Supra*

proceeds of a ship sold by the Admiralty Court will prevail over the priorities as regards to payments under section 529A of the Companies Act.

vi. Section 10 of the Admiralty Act is a special provision enacted for the purpose of dealing with priorities in respect of certain identified maritime claims against particular ship. This arises only when in an action *in rem* the ship is arrested and sold and the sale proceeds are deposited with the Admiralty Registrar in the High Court and are within the control of the Admiralty Court. Sections 529 and 529A of the Companies Act give priority to workmen in respect of the general assets of the company. Hence Section 10 of the Admiralty Act is special law relating to priorities in respect of the sale proceeds of a particular ship *vis-à-vis* Sections 529 and 529A which is general law in regard to priorities over the general assets of the company. Consequently, the special law must prevail in the matter of priorities of claimants to the sale proceeds of a ship.

vii. Even applying the principles of what is just and fair, crew members who work on a ship are workmen in every sense and their wages get the highest priority under the Admiralty Act. This is consistent with the objectives of section 529 and section 529A of the Companies Act which is to give priority to dues of workmen. Crew wages rank higher than the dues of all other creditors including secured creditors.

Conflict, Interpretation and Analysis

80 It is clear from the submissions of the parties that the first question to be examined is whether the provisions of the Admiralty Act have an overriding effect and prevail over the provisions of the Companies Act such that no leave under Section 446(1) would be required for the commencement of an action *in rem* against a ship or continuation of the action once commenced, where a winding up order has been made or if the Official Liquidator is appointed as Provisional Liquidator of the company which owns the ship.

81 The case of *Damji Valji Shah*[134] *dealt with* a conflict between Section 41 of the LIC Act, which conferred exclusive jurisdiction on the tribunal constituted under the said Act in respect of certain matters and Section 446(2) of the Companies Act which conferred exclusive jurisdiction on the Company Court to entertain or dispose of any suit or proceeding by or against a Company where a winding up order has been made or the Official Liquidator is appointed as Provisional Liquidator of the Company. The Apex Court held that the provisions of the special act, i.e., the LIC Act will override the provisions of the general act, viz., the Companies Act, which is an Act relating to Companies in general. Paragraphs 16 to 19 of the said judgment read as under:

> 16. *"Sub-section (1) of Section 446 of the Companies Act provides that when a winding-up order has been made or the Official Liquidator has been appointed as Provisional Liquidator. no suit or other legal proceeding shall be commenced or, if pending at the date of the winding-up order, shall be proceeded with against the company except by leave of the Court and subject to such terms as the Court may impose. Sub-section (2) provides. inter alia, that the Court which is winding-up the company shall, notwithstanding anything contained in any law for the time being in force, have jurisdiction to entertain or dispose of any suit or proceeding and any claim made by or against the company. Sub-section (3) provides that any suit or proceeding by or against the company which is pending in any Court other than that in which the winding-up is proceeding may, notwithstanding anything contained in any other law for the time being in force, be transferred to and disposed of by that Court. The question is whether these provisions would affect the proceedings of the Tribunal."*
>
> 17. *"In this connection, reference may be made to Section 41 of the LIC Act which provides that no civil Court shall have jurisdiction to entertain or adjudicate upon any matter which a Tribunal is empowered to decide or determine under that Act. It is not disputed that the Tribunal had jurisdiction to entertain the application of the Corporation and adjudicate on the matters raised thereby. The Tribunal is given the exclusive jurisdiction over this matter.*
>
> 18. *"It is in view of the exclusive jurisdiction which sub-section. (2) of Section 446 of the Companies Act confers on the company Court to entertain or dispose of any suit or proceeding by or against a company or any claim made by or against it that the restriction referred to in sub-section (1) has been imposed on the commencement of the proceedings or proceeding with such proceedings against a 'company after a winding-up order has been made. In view of Section 41 of the LIC Act the company Court has no jurisdiction to entertain and adjudicate upon any matter*

134. *Supra*

> *which the Tribunal is empowered to decide or determine under that Act. It is not disputed that the Tribunal has jurisdiction under the Act to entertain and decide matters raised in the petition filed by the Corporation under Section 15 of the LIC Act. It must follow that the consequential provision of sub-section (1) of Section 446 of the Companies Act will not operate on the proceedings which be pending before the Tribunal or which may be sought to be commenced before it."*
>
> 19: *"Further, the provisions of the special Act, i.e., the LIC Act, will override the provisions of the general Act viz., the Companies Act which is an Act relating to companies in general.*
>
> (Emphasis Supplied)

82 Applying the ratio of the judgment in *Damji Valji*[135], in view of Section 3 of the Admiralty Act which confers Admiralty jurisdiction exclusively on certain High Courts as defined in Section 2(1) (e) to the exclusion of all other High Courts and Civil Courts, the Company Court does not have jurisdiction to entertain and adjudicate upon any matter which the High Court vested with Admiralty jurisdiction is empowered to decide or determine under the Act. It must follow that provisions of Section 446(1) of the Companies Act will not operate on the proceedings which are pending before the High Court or which may be sought to be commenced before it.

83 When one statute is a general statute covering a large number of matters in general and another covering only some of them the intention is that the latter should prevail as regards these matters whilst as regards the rest the earlier should have effect. In this context the following passage in para 47 in ***Commercial Tax Officer, Rajasthan V/s. Binani Cements Ltd. & Anr***[136] is relevant:

> 47: *"Having noticed the aforesaid, it could be concluded that the rule of statutory construction that the specific governs the general is not an absolute rule but is merely a strong indication of statutory meaning that can be particularly applicable where the legislature has enacted comprehensive scheme and has deliberately targeted specific problems with specific solutions. A subject-specific provision relating to a specific, defined and descriptable subject is regarded as an exception to and would prevail over a general provision relating to a broad subject."*

135. *Supra*
136. (2014) 8 SCC 319

84 In the Admiralty Act, the Parliament has enacted a comprehensive Code in relation to the Admiralty jurisdiction of High Court, arrest of ships, maritime claims and determination of priorities. Hence, it is a subject specific provision relating to specific, defined and descriptable subject and is therefore regarded as an exception to and would prevail over a general provision relating to a broad subject as found in the Companies Act.

85 Having noted that the Companies Act is a general Act relating to companies and refers to suits against the company in general and having also noted that the Admiralty Act is a special act concerning suits *in rem* against a ship and vests Admiralty jurisdiction exclusively in certain High Courts only to entertain such actions *in rem*, it is quite clear that applying the principle of interpretation that special overrides the general, the Admiralty Act will prevail over the Companies Act. This also accords with the observations of the Apex Court in the case of *Damji Valji*[137] wherein the provisions of the special Act, i.e., the LIC Act were held to override the provisions of the general Act. Even if the Companies Act is considered as a special act in relation to Companies as contended by some of the appearing parties, the Admiralty Act being a later special Act will prevail over the Companies Act.

Company Court's jurisdiction under Section 446

86 The historical evolution as well as the present setting of Section 446(2) has been traced by a three Judge Bench of the Apex Court in *Sudarsan Chits (I) Ltd. V/s. O. Sukumaran Pillai*[138]. The need for S. 446(2) was felt because the predecessor Act had provided only for stay of suits and proceedings pending at the commencement of winding up proceeding, along with the embargo against the commencement of any suit or other legal proceedings against the company except by the leave of the Court. There was no

137. *Supra*
138. *Supra*

specific provision conferring jurisdiction on the winding up Court analogous to the one conferred by Section 446(1) of the Companies Act. Thus, a liquidator who would have to realise and recover various claims on behalf of the company would be required to file suits in different Courts which would be prolix and expensive. Thus Section 446(2) of the Companies Act provided a cheaper and summary remedy by conferring required jurisdiction on the Company Court.

87 The object and purpose of Section 446 of the Companies Act has been set out succinctly by the various judgments referred to in a judgment of a Division Bench of this Court in *Indorama Synthetics*[139] and in particular paragraph 20:

> *20. "In the case of Joshi Trading Co. (P.) Ltd. Vs. Essa Ismail Sait, [1980] 50 Kerala 801, the Kerala High Court, while dealing with the issue as to whether for continuing with the proceeding for eviction filed before the Rent Controller, leave of the Company Court under Section 446 (1) of the Companies Act was essential, was pleased to hold that,*
>
> > *'The object of Section 446 of the Companies Act, 1956, is to see that the assets of the company are brought under the control of the winding up Court; to avoid wherever possible expensive litigation and to see that all matters in dispute which are capable of being expeditiously disposed of by the winding up Court are taken up by that Court. This does not, however, mean that all disputes wherein a company is involved should be proceeded with only by the company Court or that if they are pending with other statutory bodies, leave of the company Court should be obtained. Matters where collection or distribution of assets are not involved, those which are outside the purview of the winding up Court and other Courts of law and those which are within the exclusive jurisdiction of other statutory bodies may not come under the purview of Section 446.*
> >
> > *A proceeding for eviction not being a proceeding which can be appropriately dealt with by the winding up Court, does not come under the category of "other legal proceeding" in Section 446(1) and, therefore, leave of the winding up Court is not necessary for proceeding with a petition filed against a company in liquidation.*
> >
> > *A similar reasoning was adopted in B.V. John Vs. Coir Yarn and Textiles Ltd., [1960] 30 Comp Cas 162 (Ker), which related to proceedings under the Industrial Disputes Act. Raman Nayar J., as he then was, held that a suit or proceeding for which leave is necessary under Section 446 (1) must be a suit or proceeding*

139. *Supra*

capable of being withdrawn and disposed of by the winding-up Court.

88 It is apparent from the above that a suit or proceeding for which leave is necessary under Section 446(1) of the Companies Act must be a suit or proceeding capable of being withdrawn and disposed of by the winding up Court. The object is no doubt to avoid expensive litigation and ensure that all assets of the company are brought under the control of the winding up Court so as to ensure fair and equitable treatment of all secured creditors.

89 The question therefore is - whether the winding up Court has jurisdiction to entertain or dispose of an action *in rem* filed in a Court vested with Admiralty jurisdiction under the Admiralty Act? An action *in rem* is against the ship which is an independent legal entity and distinct from the company owing it. It is not a suit against the company. Consequently, the Court which is winding up the company will not have jurisdiction to entertain or dispose of a suit *in rem* against a ship under the Admiralty Act by taking recourse to the provisions of Section 446(2) of the Companies Act. The Court which is winding up the company may not possess admiralty jurisdiction to entertain an action *in rem* which is conferred only on certain specified High Courts of Coastal States. Hence by this reasoning also no leave is required under Section 446(1) of the Companies Act as the Court which is winding up the company may not have jurisdiction to entertain and dispose of an action *in rem* filed against a ship under the Admiralty Act.

90 As regards avoiding expensive litigation, this is not really a concern as Admiralty jurisdiction is vested in only a limited number of High Courts and confined to the territorial waters of the state. Thus, all actions *in rem* in respect of a particular ship will have to be filed in one High Court only within whose territorial waters the ship is located. Thus, it would not be that proceedings in various Courts are required to be defended. It would be just one High Court in respect of a ship.

91 As regards ensuring equal distribution of assets amongst secured creditors, the priorities set out in the Admiralty Act do to a large extent ensure that all those persons who have maritime claims against the ship are paid in the order of priorities provided. No maritime creditor gets any special treatment in regard to payment out of the sale proceeds of that particular ship. It may be remembered that such a claimant is only a secured creditor to the extent of the value of the ship. He is not a secured creditor in respect of the other assets of the company in liquidation. This principle of payment to a maritime creditor in the order of priorities set out in the Admiralty Act is just and equitable and does not give preference to one creditor over another. Maritime claimants stand on a completely different footing as far as the ship and its sale proceeds are concerned *vis-à-vis* the general secured creditors of the company.

92 It was observed by the apex Court in ***Industrial Credit and Investment Corporation of India Ltd. V/s. Srinivas Agencies & Ors.***[140] that the integrity of a secured creditor who has taken recourse to an independent proceeding to realise his debt cannot be preserved at the cost of another secured creditor. The integrity of both has to be of equal concern. This is one of the reasons why leave of the Company Court under Section 446(1) has been mandated so that the Company Court can consider grant of leave or deny the same depending on the facts of each case. The position is completely different when it comes to proceedings under the Admiralty Act. A maritime claimant who may have filed proceedings *in rem* and obtained an order of arrest thereby becoming a secured creditor who has a charge on the ship would not be stealing a march over other similarly placed creditors. The integrity of both types of creditors would be preserved because the Admiralty Court seized of the matter would invite claims from all such claimants who will then also become secured creditors in respect of the sale proceeds of the vessel. Maritime lien holders being a special class of maritime claimants have been given priority

140. (1996) 4 SCC 165

under the Admiralty Act and within these maritime lien holders, the crew have been given highest priority in respect of their wages. Other secured creditors of the company who do not have a specific charge in the form of a maritime claim over any vessel would nonetheless be secured creditors of the other assets of the Company. The differentiation is between a class of claimants who have a maritime claim and thereby become secured creditors and other secured creditors of the assets of the Company. This differentiation is based upon the nature of their claims and does not amount to preserving the integrity of one creditor at the cost of the other. It is the law which differentiates between the two categories.

Sections 529 and 529A of the Companies Act

93 As regards Sections 529 and 529A of the Companies Act although these have been held by the Apex Court in *International Coach Builders*[141] as conferring special rights on workmen and must be treated as special law made by the Parliament, these amendments were introduced in 1985. The Admiralty Act is also a special Act and a later enactment of the year 2017. Section 10 of this act which deals with priorities in the matter of distribution of sale proceeds of a ship sold by the Admiralty Court will prevail over the priorities as regards to payments under section 529A.

94 There is another way of looking at this. It may be seen that the provisions of Section 10 of the Admiralty Act which deal with priorities is a special provision enacted for the purpose of dealing with priorities in respect of certain identified maritime claims against a particular ship. This arises only when, in an action *in rem*, the ship is arrested and sold and the sale proceeds are deposited with the Admiralty Registrar in the High Court and are within the control of the Admiralty Court. As against this, the general class of workmen have been given priority under Sections 529 and 529A in

141. *Supra*

respect of the general assets of the company. Hence Section 10 of the Admiralty Act is special law relating to priorities in respect of the sale proceeds of a particular ship *vis-à-vis* Sections 529 and 529A which is general law in regard to priorities over the general assets of the company. Consequently, even on this basis applying the principle that a general provision should yield to a specific provision, the priorities in Section 10 of the Admiralty Act will prevail over Section 529 and Section 529 A of the Companies Act.

95 In any event, this interpretation does not produce an unjust result as regards dues of workmen. Crew members are also considered to be workmen in a broader sense and their claims indeed get topmost priority and rank the highest in the order of priorities under Section 10 of the Admiralty Act which provides for a special right given to this category of workmen and special machinery for recovery of their wages. In fact, they rank higher than other secured creditors under the Admiralty Act as against a mere *pari passu* change given to them under Section 529 of the Companies Act. The workmen's priority in the matter of payment from the general non-maritime assets of the Company is not affected.

The Madras High Court judgment

96 I also refer to the judgment of the Division Bench of the Madras High Court in *Pratibha Shipping Co. Ltd. (in liquidation) V/s. Praxis Energy Agencies S.A. and others*[142] where the Court framed a question of law as follows:

> "*Whether in Admiralty suits filed in the original jurisdiction of this Court, the leave of the High Court / Tribunal under Section 446 of the Companies Act, 1956 (now Section 279 of new Companies Act, 2013) to file or proceed with such a suit is required to be obtained by the plaintiffs or not, after the Winding Up Order is passed by the Court and an Official Liquidator or Provisional Liquidator is appointed by that Court / Tribunal*?".

97 After considering the provisions of the Admiralty Act and the Companies Act and rival submissions the Court held that:

142. *Supra*

(a) *"The Admiralty Act 2017 is special law governing the adjudication of maritime claims by various coastal High Courts."*

(a) *"No leave is required under Section 446(1) of the Companies Act even though the Bombay High Court has passed a winding up order against the owner of the ship and that the maritime claim deserves to be adjudicated and proceed further without intervention of the Official Liquidator in pursuance of the winding up order made by the Bombay High Court. It is further held that only if the decree holders / plaintiffs are unable to satisfy their claim out of the sale proceeds in accordance with the priorities of their inter se claims as stipulated under the Admiralty Act, 2017 and shall wish to recover the balance amount from the owner company, they will be at liberty to approach the Official Liquidator in the winding up proceedings in accordance with the provisions of the Companies Act, 1956.".*

(b) *In view of the subsequent developments of law, in the field of recovery of dues from the corporate entities, we are of the opinion that putting the requirement of obtaining prior leave to undertake these proceedings under these enactments or Special Laws from the winding up Court or Company Court, is not envisaged in the Scheme of the development of laws and therefore, any contra opinion on that would lead to unnecessary obstacles and hindrance in the exercise of special jurisdictions by the special Tribunals or Courts under these special recovery laws as well as the special law like the Admiralty jurisdiction of this Court."*

(c) *"We, therefore, answer the aforesaid question of law in negative and hold that the leave of the Company Court / Tribunal under the provisions of Section 446 of the Companies Act, 1956 or Section 279 of the new Companies Act, 2013, is not required to institute or proceed with the suit / trial under the Special Law like under Admiralty Jurisdiction of this Court."*

98 I agree with the conclusion reached by the Division Bench of the Madras High Court though my reasons are different. In my view, however, notice must be given to the Official Liquidator prior to the sale of the ship in an action *in rem* under the Admiralty Act, unless the Official Liquidator has already entered appearance.

99 In the case of *Praxis Energy Agents SA V/s. Pratibha Neera*[143] the Court had no occasion to consider the Admiralty Act as the said act had not come into force when the matter was reserved for judgment on 21 February 2018. The act came into force on 1 April 2018. Consequently, the observations made in paragraph 26 of the said judgment can no longer apply when considering the position in the light of the coming into force of the Admiralty Act with effect from 1 April 2018. This Court is now required

143. *Supra*

to examine the issue afresh on the touchstone of the new act which is a special act that vests Admiralty jurisdiction in certain High Courts and codifies the law in respect of arrest and sale of ships and maritime claims and determination of priorities. This is precisely what this Court has done and articulated its views in the light of the position that emerges on a consideration of actions *in rem* and the new Admiralty Act which consolidates and codifies the law on the subject.

Conclusion

100 In this view of the matter on a macro basis the Admiralty Act which is a special act prevails over the Companies Act which is a general act and no leave is required under Section 446(1) of the Companies Act for commencing a suit under the Admiralty Act or proceeding with a pending suit against the Company under the Admiralty Act when a winding up order has been made or the Official Liquidator has been appointed as Provisional Liquidator. Likewise, on a micro basis Section 10 of the Admiralty Act will prevail over Sections 529 and 529A of the Companies Act in the matter of determination of priorities.

101 Further, the Court which is winding up the Company would not have jurisdiction to entertain or dispose of an action *in rem* against a ship filed in a High Court which has been conferred with Admiralty jurisdiction under the Admiralty Act. Such a suit *in rem* is not against the company and can only be entertained by the High Court under the provisions of the special Act, viz., the Admiralty Act.

102 The submission of counsel that in an action *in rem* the owner is also included as a defendant though not named or joined is not correct. The true legal position is that an action *in rem* can proceed to judgement against the ship or its sale proceeds without the presence of the Owner. The resultant decree does not bind the Owner unless he has entered appearance and submitted to jurisdiction.

103 Likewise the true nature of an action *in rem* against a ship is that it is not an action against the Owner (company) or asset of the Owner (company).

104 If leave is not required under Section 446(1) of the Companies Act then Section 537 of the Companies Act is not applicable and the sale of the vessel by the Admiralty Court cannot be treated as void.

105 Similarly, the powers of the Court to stay or restrain proceedings against the company as provided under Section 442 of the Companies Act, do not affect the question of leave under Section 446 of the Companies Act.

106 I would therefore answer Question No.2 in the negative and hold that no leave is required under Section 446 of the Companies Act, 1956 for the commencement or continuation of an Admiralty Suit *in rem* where a winding up order has been made or the Official Liquidator has been appointed as Provisional Liquidator of the company.

(K.R. SHRIRAM, J.)