IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO.902 OF 2006
IN
ADMIRALTY SUIT NO.15 OF 2001

Angsley Investments Limited a Company incorporated under the laws of St. Vincent And the Grenadines, and carrying on business at 112, Bonadie Street, Kingston, St. Vincent and the Grenadines	….Appellant (Original Defendant No.3/Intervener)
V/s.	
Jupiter Denizcilik Tasimacilik Mumessillik San. Ve TicaretLimited Sirketi, a company incorporated under the laws of Turkey and having its office at Kuyubasi Kayisdagi Caddesi Bureu Apt. No.122/5, 81030 Kadikoy, Istanbul, Turkey	(Original plaintiff)
m.v. Lima II, a motor vessel flying the Flag of Turkey and presently in Port and Harbor of Kandla within the Admiralty and Vice Admiralty jurisdiction of this Hon'ble Court.	(Original Defendant No.1)
Lima Denizcilik Ve Tic Ltd. Sti, a foreign Company organized under foreign laws and carrying on business at Altunizade, Erdem Sok. Sabuncuoglu Sit. C Block No.6, D:9 Uskudar, Istanbul, Turkey	(Original Defendant No.2) ….Respondents

WITH
NOTICE OF MOTION NO.4423 OF 2006
IN
APPEAL NO.902 OF 2006

Mr. Vishal Kanade a/w. Mr. Shadab Peerzade and Ms. Janhavee Joshi i/b. Mr. Munir Merchant for appellant.
Mr. Prathamesh Kamat, Amicus Curiae.

CORAM : K. R. SHRIRAM & RAJESH S. PATIL, JJ.
RESERVED ON : 17th FEBRUARY 2023
PRONOUNCED ON : 8th MARCH 2023

JUDGMENT (PER K.R. SHRIRAM, J.) :

1 Since nobody was appearing for respondent, this Court

appointed Mr. Prathamesh Kamat, Advocate, as Amicus Curiae. We must express our appreciation for the assistance rendered and endeavour put forth by Mr. Prathamesh Kamat, learned Amicus Curiae, for it has been of immense value in rendering the judgment.

2 This appeal impugns an order and judgment dated 8th November 2006 passed by the learned Single Judge decreeing the suit in terms of prayer clauses – (c) and (i). Prayer clauses – (c) and (i) read as under :

> *(c) For an order and decree in favour of the plaintiffs and against the defendants in the sum of US$ 100,798 as per the particulars of claim shown in Exhibit 'A' hereto with interest thereon at the rate of 30% p.a. from the date of institution of the suit till payment and/or realization.*
>
> *(i) Costs of the suit may otherwise be provided for.*

3 Plaintiff is a Turkish company carrying on business of supplying bunkers to various vessels. According to plaintiff, for the period between 9th October 2000 to 13th March 2001 plaintiff had supplied bunkers to defendant no.1 m.v. LIMA II on the basis of orders placed by defendant no.2, the owners of m.v. LIMA II.

4 As per the invoice raised, payment was to be made within 30 days or else plaintiff was entitled to charge interest at 30% p.a. Defendant no.2 committed default in payment and, therefore, plaintiff and defendant no.2 entered into a protocol in relation to the payment that was to be made by defendant no.2 to plaintiff. According to plaintiff, despite

entering into the protocol, an amount of US$ 100,798/- remained unpaid. Plaintiff, therefore, filed Admiralty Suit No.15 of 2001 to arrest defendant no.1 vessel which was at port of Kandla. The order of arrest was made on 17th May 2001, which was served upon the Port and Customs Authorities. So also upon agent of defendant no.1 vessel. The warrant of arrest could not be served on Master of m.v. LIMA II because she was in stream in the outer anchorage. m.v. LIMA II jumped arrest and escaped from the port of Kandla.

5 Later plaintiff got information that a vessel by the name m.v. LIMA I, which according to plaintiff was owned by defendant no.2, was at the port of Calcutta and, therefore, plaintiff moved a Notice of Motion bearing No.1970 of 2001 before the Admiralty Court. By an ad-interim order dated 14th August 2001 m.v. LIMA I was restrained from leaving the port of Calcutta. The notice of motion was finally disposed by an order dated 31st October 2001 confirming the ad-interim order. The Court clarified that on furnishing of security to the satisfaction of the Prothonotary and Senior Master, the said interim order shall cease to operate.

6 Defendant no.3, the present appellant, furnished security in terms of the orders of the Court while disposing the Notice of Motion No.1970 of 2001 on 31st October 2001. As a result, m.v. LIMA I was allowed to sail. Defendant no.3, i.e., appellant, thereafter, took out Notice of Motion No.529 of 2002 seeking leave of the Court to intervene in the suit. It was appellant's case that it was an interested party because it had purchased the

vessel from Mercury Shipholding Inc. (Mercury) of London which had purchased the vessel from defendant no.2. It had thereafter, sold the vessel to one Jain Udyog for demolition and Jain Udyog had asked appellant to have the vessel m.v. LIMA I released from various legal proceedings.

The said notice of motion was allowed and plaintiff was directed to join appellant as defendant no.3.

No written statement has been filed by defendant no.1 or defendant no.2. Only appellant as defendant no.3 filed written statement. It was appellant's case that :

(a) m.v. LIMA I is not the sister ship of m.v. LIMA II either at the time of filing the suit or at the time of grant of arrest (injunction) of m.v. LIMA I, i.e., 31st October 2001. m.v. LIMA I was sold by original defendant no.2 to Mercury under a Bill of Sale dated 10th April 2001 and was flying the flag of St. Vincent and Grenadines at the time of her arrest. Subsequently, m.v. LIMA I was purchased by appellant (original defendant no.3) from Mercury pursuant to a Bill of Sale dated 1st August 2001 and Memorandum of Agreement dated 21st May 2001. Appellant sold the vessel further to Jain Udyog by a Bill of Sale dated 6th August 2001 and a Memorandum of Agreement;

(b) Pursuant to the protocol dated 15th February 2001, respondent's (original plaintiff) claim could not be termed as a claim for necessaries under Section 5 of the Admiralty Courts Act 1861, but payment on balance of account, if any;

(c) This Court did not have jurisdiction to entertain the suit.

7 Before we proceed further, we have to note that since defendant no.3 was added as party defendant to the suit only on its application to be joined, no reliefs have been sought against defendant no.3. There are no averments against defendant no.3 and there is not even a cause of action alleged against defendant no.3 as the plaint was not amended to attribute any pleading against appellant as defendant no.3. In the absence of any pleading/relief against appellant, the prayer clause – (c) as sought against 'defendants' has to be read as prayer only against defendant no.1 and defendant no.2.

8 The Court framed the following issues :

> *(1) Whether the plaintiffs prove that the 1st defendant vessel is a foreign Flag vessel flying the flag of Turkey and owned by the 2nd Defendants?*
>
> *(2) Whether the plaintiffs prove that various orders for supply of bunkers as contended in the Plaint are placed by the owners of the 1st defendant vessel?*
>
> *(3) Whether the plaintiffs prove that they have made arrangement for supply of various bunker deliveries contractually as stated in the plaint?*
>
> *(4) Whether the plaintiffs prove that they had entered into a Protocol dated 15th February, 2001?*
>
> *(5) Whether the plaintiffs prove that the claim for supplies have not been novated by the Protocol dated 15th February, 2001 and is it thus maritime claim?*
>
> *(6) Whether the plaintiffs prove that the supplies made after signing of the protocol is a supply for necessaries/maritime claim as completed under Admiralty Court Act,1861?*
>
> *(7) Whether the plaintiffs are sellers of the bunkers and have raised invoices on Defendant no.2 for the supply of bunkers and/or claim monies thereof?*

(8) Whether the plaintiffs prove that the suit is tenable against the Defendant no.2?

(9) Whether the suit is tenable against the Defendants vessel without the plaintiffs having obtained arrest order of the said vessel?

(10) Whether the plaintiffs are entitled to an order and decree in their favour against the Defendants for the sum of US $ 100,798 and whether they are entitled to interest @ 30% p.a.?

(11) Whether the plaintiffs prove that the supplies of bunkers constitute into supply of necessaries and accordingly a Maritime claim/Maritime Lien against the 1st Defendant vessel and thus entitled to an arrest under the Admiralty Courts Act,1861?

(12) Whether the plaintiffs prove that m.v.LIMA I was the sister ship of the 1st Defendant vessel at the time of the grant of arrest of LIMA I on 31st October, 2001?

(13) Whether the plaintiffs prove that they are entitled to arrest another vessel (Respondent Vessel - m.v. Yim Kim ex Lima-1) in lieu of the 1st Defendant vessel?

(14) Whether the plaintiffs prove that the suit filed by them is within the period of limitation?

9 Oral evidence and documentary evidence was led by one witness on behalf of plaintiff. Similarly one witness for appellant was examined, who also produced documents. On 8th November 2006, the suit was decreed by the learned Single Judge of this Court holding in favour of respondent (original plaintiff) and decreeing the suit accordingly. On 8th December 2006, the present appeal was filed impugning the judgment dated 8th November 2006.

10 So far as issue nos.1 to 7 are concerned, the same pertain to the merits of the bunkers supplied to the vessel m.v. LIMA II. Facts concerning the said issues have not been denied by appellant (original defendant no.3) as it was not aware. The facts have also not been denied by defendant nos.1

and 2 as they have not filed written statement. In view thereof, issue nos.1 to 7 must be answered in favour of respondent (original plaintiff). However, the said fact does not entitle respondent (original plaintiff) to a decree against appellant. The issues that would be really relevant for this appeal would be issue nos.8, 9, 10, 11, 12 and 13.

11 Having heard Mr. Kanade and Mr. Kamat, in our view, the points which we have to answer are :

(a) whether the Court could have exercised jurisdiction against m.v. LIMA I by :

(i) not making m.v. LIMA I a party to the suit;

(ii) when, admittedly no order of arrest was issued against m.v. LIMA I and m.v. LIMA I was not arrested;

(iii) when, admittedly, even assuming m.v. LIMA I was a sister ship of m.v. LIMA II (defendant no.1), defendant no.2, the owner of both the vessels not being within the jurisdiction of this Court, could this Court have passed the order of restrain dated 14th August 2001 confirmed on 31st October 2001 stopping m.v. LIMA I from sailing from the port of Calcutta;

(b) if no decree has been passed against appellant (defendant no.3) and there is no decree against m.v. LIMA I because she was not a party to the suit, should the security given by appellant (defendant no.3) be returned to appellant (defendant no.3).

Mr. Kanade submitted as under :

12 *Issue no.9, i.e., "Whether the suit is tenable against the Defendants vessel without the Plaintiffs having arrest order of the said vessel?"* :

(a) m v. LIMA I was never made party defendant to the said suit. Respondent did not make a claim against m v. LIMA I *in rem* and, therefore, the Trial Court could not have exercised admiralty jurisdiction to entertain the said suit.

(b) The impugned order records essentially that, m v. LIMA I was restrained by an order of temporary injunction and not an order of arrest. The exercise of powers by the Trial Court while passing of an order of injunction was by way of exercising powers analogous to Order 39 and/or Order 38 Rule 5 of the Code of Civil Procedure, 1908 (CPC).

(c) It is pertinent to note that the vessel m v. LIMA I was at port of Calcutta and beyond the territorial jurisdiction of this Court. In the facts of the present case, the said m.v. Lima I being at Calcutta, the Trial Court did not have territorial jurisdiction to pass an order of restrainment. Such proceedings could have only been filed at an appropriate forum in Calcutta.

(d) The Trial Court could not have passed such an order of temporary injunction in respect of the property of appellant that was outside the local limits of the jurisdiction of this Court.

(e) Considering the aforesaid, it is apparent that no action *in rem* against m v. LIMA I was ever initiated by respondent. Hence, if only had respondent impleaded vessel m v. LIMA I as party defendant, a maritime claim perhaps could have survived against the said vessel to invoke admiralty jurisdiction of this Court.

(f) It was only as a result of an action *in personam* against defendant no.2, that m v. LIMA I was sought to be restrained as respondent believed it to be the property/asset of defendant no.2. Thus, it can be inferred that no maritime claim existed against m v. LIMA I. It is also pertinent to note that at the relevant time when the said suit was filed and interim order against m v. LIMA I was passed by this Court, defendant no.2 was not within the territorial jurisdiction of this Court. The Trial Court could not have exercised jurisdiction qua defendant no.2 being a company based in Turkey. In ***V. M. Salgaoncar & Bros. Ltd. V/s. M. V. Priyamvada***[1] this Court has held that unless the movables in respect of which adjudication of right, title, and interest is sought are situate within the jurisdiction of the particular Court, the Court will have no jurisdiction.

13 *Issue no.12, i.e., "Whether the Plaintiffs prove that m. v. LIMA I was the sister ship of the 1st Defendant vessel at the time of the grant of arrest of LIMA I on 31st October 2001?"* :

In the absence of jurisdiction, the said issue could not have been gone into by this Court.

1. 2015 SCC OnLine Bom 4174

14 Furthermore, in view of the above, issue no.13, i.e., "*Whether the Plaintiffs prove that they are entitled to arrest another vessel (Respondent Vessel – m v. Yim Kim ex LIMA I) in lieu of the 1st Defendant vessel?*" ought to have been answered in the negative by this Court. In fact, it is pertinent to note that no finding has been rendered to arrive at an affirmative finding for issue nos.9 and 13.

15 In view of the above and especially in the absence of jurisdiction as well as in the absence of any reliefs sought against appellant, the impugned order and decree against appellant has to be set aside.

16 Mr. Kamat submitted as under :

(a) The suit as against defendant no.2 was not tenable because an action *in personam* against defendant no.2 (foreign defendant) not within the jurisdiction of the Court is not maintainable. Respondent (original plaintiff) had sought to make a claim *in personam* against original defendant no.2. Original defendant no.2 is a foreign party who neither resides, nor carries on business within the jurisdiction of this Court. It is nobody's case that defendant no.2 even submitted to the jurisdiction of this Court. Defendant no.2 had not entered appearance and not furnished any security for release of defendant no.1 m. v. LIMA II.

(b) As held by ***World Tanker Carrier Corporation V/s. S.N.P. Shipping Services Pvt. Ltd.***[2] and followed in ***Kohinoor Carpet Manufacturers***

2. (1998) 5 SCC 310

V/s. Forbes Gokak Ltd. and Another[3], no action *in rem* can be maintained against a party which was not within the jurisdiction of the Court and which has not submitted itself to the jurisdiction of the Court.

(c) An action *in rem* is converted into an action *in personam*, if the owner of vessel enters appearance, furnishes security and submits to the jurisdiction of the Court. Until then the suit continues to be an action *in rem* against the vessel as held in ***Siem Offshore Redri AS V/s. Altus Uber***[4] and ***Owners and Parties Interested in the Vessel M.V. Polaris Galaxy V/s. Banque Cantonale De Geneve***[5]. Defendant no.2 has neither entered appearance nor furnished security or submitted to the jurisdiction of this Court.

(d) The learned Single Judge has erred in observing that since the Court had passed an order of arrest against defendant no.1 (m. v. LIMA II) it had assumed jurisdiction over the subject matter of the suit. An arrest of a vessel will only confer jurisdiction over the vessel arrested and not jurisdiction over the subject matter or over parties which are not within the territorial jurisdiction.

(e) m.v. LIMA I was not made a party to the suit and the settled position in law is that a party cannot be added to the interim application without being a party to the suit and on this ground also, the appeal deserves to be allowed (***Movin F. D'Souza V/s. Vivian daughter of Wilfred Foncesca and wife of Ravi Shetty and Ors.***[6]).

3. 2001 SCC OnLine Bom 1076
4. 2018 SCC OnLine Bom 2730
5. 2022 SCC OnLine SC 1293
6. Order dated 2nd September 2008 in Appeal No.41 of 2008

(f) Though Admiralty Act 2017 came into force only in 2018, the purport of all these provisions of Admiralty Act 2017 were always followed.

Section 5 of the Admiralty Act 2017 provides that in order to proceed against a sister vessel, assuming that m.v. LIMA I was arrested (instead of order of restrain being passed) and m.v. LIMA I and m.v. LIMA II were sister vessels at the time of arrest, the sister vessel has to be made a party to the suit and has to be proceeded against *in rem*. Section 5(1) of the Admiralty Act 2017 contemplates that to order arrest of a vessel for enforcement of a maritime claim, the vessel *inter alia* must be a subject of an admiralty proceeding. This would necessarily mean that the vessel has to be a party to the admiralty suit. Section 5(2) which contemplates arrest of a sister-ship is subject to Section 5(1) and, therefore, to obtain arrest of a sister-ship, plaintiff has to satisfy all tests of Section 5(1) which would include to make the sister-ship a party to the suit.

(g) Respondent (original plaintiff) could not have obtained an injunction against m.v. LIMA I because *in personam* action like an injunction is not maintainable against a vessel. The suit filed by respondent (original plaintiff) continued to be an action *in rem* against m.v. LIMA II. Even if m.v. LIMA I is assumed to be owned by original defendant no.2, respondent (original plaintiff) could not have obtained an injunction against m.v. LIMA I since an injunction is in the nature of an action *in personam*. This has been

so stated in the book Admiralty Jurisdiction and Practice[7].

(h) The Court should not approve the action of plaintiff who moved a hybrid action, i.e., *in rem* action against m.v. LIMA II and an *in personam* action by way of an injunction against m.v. LIMA I and that also without joining m.v. LIMA I in the suit. In Admiralty Law and Practice[8], the author has stated that jurisdictions like in England, Singapore and Malaysia do not permit bringing a hybrid writ conjoining an action *in rem* and an action *in personam*.

(i) It is settled law that a vessel is treated as a juristic entity for a limited purpose of an action *in rem* and it cannot be stretched to treat a vessel as a juristic entity to initiate an action *in personam* as held in ***M.V. Elisabeth & Ors. V/s. Harwan Investment and Trading Pvt. Ltd.***[9] and ***Georim Oil Corporation V/s. M.V. Flag Mersinidi & Ors.***[10]

(j) It needs to be borne in mind that a vessel can never satisfy a test of attachment before judgment or an injunction. An injunction is different from an arrest. For arrest, once the Court is satisfied with the test laid down in Section 5 of the Admiralty Act 2017, the Court will grant arrest. For injunction on the other hand, the test laid down in CPC has to be met as held in ***Raj Shipping Agencies V/s. Barge Madhwa & Anr.***[11]

(k) The learned Single Judge has erred in holding that it was not necessary for the Admiralty Court to pass an order of arrest against m.v.

7. Fourth Edition (2011) by Nigel Meeson and John A. Kimbell in paragraph 1.56 at page 22
8. 2nd Edition (2007) by Toh Kian Sing, SC at page 20
9. (1993) Supp. (2) SCC 433
10. (2014) SCC Online Bom 479
11. (2020) SCC OnLine Bom 651

LIMA I because m.v. LIMA II, which was owned by defendant no.2, was already arrested. That finding is erroneous. The Court assumes jurisdiction over a vessel not by an order of injunction but by an order of arrest and just because an order of arrest has been passed does not mean that it can pass an injunction against another vessel because the Admiralty Court had no jurisdiction *in personam* either against defendant no.2 or against m.v. LIMA I.

(l) Plaintiff was not entitled to a decree against defendant no.3 because there was no pleading or averment or cause of action disclosed against defendant no.3.

(m) As regards issue no.11 ("*Whether the plaintiffs prove that the supplies of bunkers constitute into supply of necessaries and accordingly a Maritime claim/Maritime Lien against the 1st Defendant vessel and thus entitled to an arrest under the Admiralty Courts Act,1861?")*, supply of bunkers certainly constitute supplies of necessaries and it will be a maritime Claim and not a maritime lien. Such a claim cannot be enforced against m.v. LIMA I because supply of bunkers only constitutes a maritime claim and not a maritime lien as held in ***Chrisomar Corporation V/s. MJR Steels Pvt. Ltd. & Anr.***[12]

(n) As regards issue nos.12 (*"Whether the Plaintiffs prove that m. v. LIMA I was the sister ship of the 1st Defendant vessel at the time of the grant of arrest of LIMA I on 31st October 2001?"*) and 13 ("*Whether the*

12. (2018) 16 SCC 117

Plaintiffs prove that they are entitled to arrest another vessel [Respondent Vessel – m v. Yim Kim ex LIMA I] in lieu of the 1st Defendant vessel?"), these will be purely academic because even assuming m.v. LIMA I was the sister-vessel of m.v. LIMA II, it would make very little or no difference because this, as the suit is framed, would not entitle plaintiff to a decree against m.v. LIMA I or the bail amount deposited by defendant no.3.

(o) Appeal, therefore, requires to be allowed.

OUR FINDINGS :

17 *Issue No.8 - "Whether the plaintiffs prove that the suit is tenable against the Defendant No.2?"*

(A) Action *in personam* against defendant no.2 (foreign defendant) not within the jurisdiction of the Court is not maintainable :

(i) Respondent (original plaintiff) has sought to make a claim *in personam* against original defendant no.2. Original defendant no.2, however, is a foreign party who neither resides, nor carries on business within the jurisdiction of this Court. There is also no record of defendant no.2 having voluntarily submitted to the jurisdiction of this Court. In fact, defendant no.2 has chosen to not enter appearance before this Court. Therefore, the suit filed before this Court against original defendant no.2 is not tenable.

(ii) It is trite law that a suit *in personam qua* a foreign defendant who is not within the jurisdiction of the Court and who has not voluntarily submitted himself to the jurisdiction, is not maintainable. This is

evident from the following judgments :

(a) *World Tanker Carrier Corporation V/s. S.N.P. Shipping Services Pvt. Ltd.* (Supra) -

> *"43. The presence of a foreign defendant who appears under protest to contest jurisdiction, cannot be considered as conferring jurisdiction on the court to take action. Unless a foreign defendant either resides within jurisdiction or voluntarily appears or has contracted to submit to the jurisdiction of the court, it is not possible to hold that the court will have jurisdiction against a foreign defendant. See in this connection R. Viswanathan v. Rukn-ul-Mulk Syed Abdul Wajid [AIR 1963 SC 1 : (1963) 3 SCR 22] (SCR at p. 51) and Raj Rajendra Sardar Moloji Nar Singh Rao Shitole v. Shankar Saran [AIR 1962 SC 1737 : (1963) 2 SCR 577] (SCR at pp. 587-588). This factor also, therefore, is against respondents in the present appeals.*
>
> *44. The Bombay High Court, therefore, should not have entertained the two admiralty suits."*
>
> *(emphasis supplied)*

(b) *Kohinoor Carpet Manufacturers V/s. Forbes Gokak Ltd. and Another* (Supra) -

> *"6. We then come to the other part of the argument namely whether the suit against defendant No. 2 who does not carry on business and or have the office within the jurisdiction of this Court could be maintained. From the pleadings, though it was contended that the suit is also filed as an action in rem against vessel, there is nothing on record to show that when the suit was filed that the vessel was within the admiralty jurisdiction of this Court. In other words, there would be no action in rem in so far as facts of the present case are concerned. At the highest it would be action in personam. Therefore, would an action in personam be maintained against defendant No. 2 in this Court. Defendant No. 2 has not submitted themselves to the jurisdiction of this Court. On the contrary they have raised a plea contesting the jurisdiction of this Court. In the light of that, the issue needs to be answered. Gainful assistance may be made from the judgment in the case of (World Tanker Carrier Corporation v. S.N.P. Shipping Services Pvt. Ltd.)2, 1999 (1) Bom. C.R. (S.C.) 196 : (1998) 5 SCC 310. The Apex Court dealing with this aspect of the matter held as under:*

> *"The presence of a foreign defendant who appears under protest to contest jurisdiction, cannot be considered as conferring jurisdiction on the Court to take action. Unless a foreign defendant either resides within jurisdiction or voluntarily appears or has contracted to submit to the jurisdiction of the Court, it is not possible to hold that the Court will have jurisdiction against a foreign defendant." See in this 4 connection (R. Vishwanathan v. Rukh-ul-Mulk Sayed Abdul Wajid)3, 1963 (3) S.C.R. 22 : A.I.R. 1963 S.C. 1 (Rajendra Sardar Moloji Nar Singh Rao Shitole v. Shankar Saran)4, 1963 (2) S.C.R. 577 : A.I.R. 1962 S.C. 1737.*
>
> *7. This statement of law, therefore, is against plaintiff in the present suit. That was action in what is known as limitation action. Needless to say that to sue a foreign defendant in this country, the foreigner either must be resident and or carry on business. These are the principles applicable in Private International Law. The only exception is if such party submits to the jurisdiction. In the instant case, defendant has not. In view of that, to my mind, suit against defendant No. 2 before this Court as filed was not maintainable. Issue No. 2 therefore, has to be partly answered in the affirmative in as much as the suit against defendant No. 2 will have to be dismissed on the ground of want of jurisdiction."*
>
> *(emphasis supplied)*

(B) Action *in rem* not converted to action *in personam* :

(i) Furthermore, as original defendant no.2 has neither entered appearance nor furnished security or submitted to the jurisdiction of this Court, the suit filed by respondent (original plaintiff) continues to be an action *in rem* against m.v. LIMA II, original defendant no.1. On this ground also the suit is not maintainable against original defendant no.2.

(ii) It is trite law that an action *in rem* gets converted into an action *in personam* if the owner of the vessel enters appearance, furnishes security and submits to the jurisdiction of this Court. Until then, the suit continues to be an action *in rem* against the vessel. In this regard, the following judgments are of relevance -

(a) *Siem Offshore Redri AS V/s. Altus Uber* (Supra) -

> *"47. It is clear from the above quoted portions from M.V. Smart (Supra) which relies upon paragraphs 55, 56 and 58 of M.V. Elizabeth (Supra) that 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. It is at this stage before proceeding further with the action in personam, the Court will adopt the procedure devised by the Full Bench in Golden Progress (Supra). 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 the Plaintiff as security in respect of its maritime claim which is the subject matter of in personam proceedings by way of arbitration 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.*
>
> *(emphasis supplied)*

(b) *Owners and Parties Interested in the Vessel M.V. Polaris Galaxy V/s. Banque Cantonale De Geneve* (Supra) -

> *"70. When two or more enactments operating in the same field contain a non obstante clause stating that its provisions will have effect notwithstanding anything inconsistent therewith contained in any other law, the conflict has to be resolved upon consideration of the purpose and policy underlying the enactments. Mr. Vishwanathan, learned Senior Counsel appearing for the Appellant, argued that Section 14 provides for appeals from an interim order of a Single Judge of a High Court under the Admiralty Act which means an interim order in relation to an action in rem. Once the owner of the Vessel enters appearance and submits to the jurisdiction and provides security for release of the Vessel, the Admiralty Action proceeds to trial as an action in personam as in any other suit. This view finds support from the judgment of this court in MV Elizabeth v. Harwan Investment and Trading Pvt. Ltd."*
>
> *(emphasis supplied)*

(C) Errors in the findings of the learned Single Judge on this issue :

(i) Though the learned Single Judge has framed the issue and

has sought to answer it in paragraph 7, the learned Single Judge held that since the Court had passed an order of arrest against defendant no.1 (Lima II), it had assumed jurisdiction over the "subject matter" of the suit. The judgment of the learned Single Judge overlooks the position that the arrest of a vessel will only confer jurisdiction over the vessel arrested and not jurisdiction over the "subject matter" or over parties which are not within its territorial jurisdiction.

Thus, the learned Single Judge has clearly erred in assuming jurisdiction either over defendant no.2 or the "subject matter" of the suit.

(ii) Defendant no.2 is a company based in Turkey. Therefore, defendant no.2 was not within the jurisdiction of this Court. If defendant no.2 had furnished security for release of defendant no.1 m.v. LIMA II, we could have held that an action *in rem* against defendant no.1 m.v. LIMA II got converted into an action *in personam* against the owner, i.e., defendant no.2, by virtue of defendant no.2 furnishing security and submitting to the jurisdiction of this Court. None of that happened and, therefore, the suit against defendant no.2 was a mere action *in personam*. The Court had no jurisdiction against defendant no.2. The suit against defendant no.2 was not maintainable. Therefore, there can be no decree against defendant no.2.

18 *Issue No.9 - "Whether the suit is tenable against the Defendants vessel without the plaintiffs having obtained arrest order of the said vessel?"*

(A) m.v. LIMA I was not made a party to the suit :

(i) m.v. LIMA I was restrained from moving out of the Port of

Calcutta by an ad-interim order dated 14th August 2001, confirmed thereafter by an order dated 31st October 2001. However, such an injunction was passed against m.v. LIMA I without it being added as a party to the suit.

(ii) It is settled position in law that a party cannot be added to an interlocutory application (here Notice of Motion) without the same being a party to the suit. Since, m.v. LIMA I was not a party defendant to the suit, she could not have been made a party to the notice of motion. On this ground also, the appeal deserves to be allowed.

In this regard, it has been held by this Court in *Movin F. D'Souza V/s. Vivian daughter of Wilfred Foncesca and wife of Ravi Shetty and Ors.* (Supra) that -

> *"14. While parting with the matter, it has come to our notice that in many matters, the Advocates join the parties directly in a Notice of Motion without joining them in original proceedings which is not in consonance with the Code of Civil Procedure and office has not taken any objection in this regard. We make an observation that whenever it is found in the suit while executing the interim orders that third party is in possession of the suit property, the interim order shall not be executed against the third party unless the third party is made a party to the main suit and pre-contests on merit to the interlocutory orders. Otherwise, the Plaintiffs and other parties to the suit may obtain interlocutory orders without disclosing to the Court that some other party is in possession of the property and which we find is a fraudulent move to be adopted in the Court and therefore, we have observed that henceforth no Notice of Motion should be entertained by the office wherein the party who is not party in the suit and is made a party in the Motion only."*
>
> *(emphasis supplied)*

(iii) Therefore, a party cannot be added simply as a party to a notice of motion without being a party to the suit.

(iv) Apart from the above, even under the Admiralty (Jurisdiction and Settlement of Maritime Claims) Act 2017 ("Admiralty Act 2017") in order to proceed against a sister vessel (assuming that m.v. LIMA I and m.v. LIMA II were sister vessels at the time of arrest), the sister vessel has to be made a party to the suit and has to be proceeded against *in rem*. This is evident from analysis of Section 5 of the Admiralty Act 2017. Though this Act came into force only on 1st April 2018, the purport of all these provisions were always followed. This Court in *Raj Shipping Agencies V/s. Barge Madhwa & Anr.* (Supra) in paragraphs 12 and 13 says :

> *12. Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017.*
>
> *13. 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."*

(v) Section 5 reads as under :

> *"Arrest of vessel in rem*
>
> *(1) The High Court may order arrest of any vessel which is within its jurisdiction for the purpose of providing security against a maritime claim which is the subject of an admiralty proceeding, where the court has reason to believe that—*
>
> *(a) the person who owned the vessel at the time when the maritime claim arose is liable for the claim and is the owner of the vessel when the arrest is effected; or*
>
> *(b) the demise charterer of the vessel at the time when the maritime claim arose is liable for the claim and is the demise charterer or the owner of the vessel when the arrest is effected; or*
>
> *(c) the claim is based on a mortgage or a charge of the similar nature on the vessel; or*
>
> *(d) the claim relates to the ownership or possession of the vessel; or*

> *(e) the claim is against the owner, demise charterer, manager or operator of the vessel and is secured by a maritime lien as provided in section 9.*
>
> *(2) The High Court may also order arrest of any other vessel for the purpose of providing security against a maritime claim, in lieu of the vessel against which a maritime claim has been made under this Act, subject to the provisions of sub-section (1).*
>
> *(emphasis supplied)*

Section 5(1) contemplates that to order arrest of a vessel for enforcement of a maritime claim, the vessel *inter alia* must be a subject of an admiralty proceeding. This would necessarily mean that the vessel has to be a party to the admiralty suit. Section 5(2) which contemplates arrest of a sister-ship is subject to Section 5(1). Therefore, to obtain arrest of a sister-ship, plaintiff has to satisfy all tests of Section 5(1) which would include to make the sister-ship a party to the suit.

(vi) As noted earlier, m.v. LIMA I was never made a party defendant to the suit. Hence, an order of arrest was never made against m.v. LIMA I. No order of arrest but only an injunction order dated 14th August 2001, which was confirmed on 31st October 2001, was passed. As observed in the subsequent paragraphs, it would be evident that the injunction cannot be equated to arrest.

(B) Respondent (original plaintiff) could not have obtained an injunction against m.v. LIMA I :

1. An *in personam* action like an injunction is not maintainable against a vessel :

(i) An injunction or even an attachment cannot be made against

a vessel. An injunction and attachment are actions in the realms of *in personam* proceedings. No action *in personam* can proceed against a vessel. Only an action *in rem* can be maintained against a vessel.

(ii) As stated above, in the present case, the suit filed by respondent (original plaintiff) continued to be an action *in rem* against m.v. LIMA II (where also the warrant was never executed upon the vessel). There was no action *in personam* against original defendant no.2. Therefore, even if m.v. LIMA I is assumed to be owned by original defendant no.2, respondent (original plaintiff) could not have obtained an injunction against m.v. LIMA I, especially since an injunction is in the nature of an action *in personam*.

In Admiralty Jurisdiction and Practice, Fourth Edition (2011) by Nigel Meeson and John A. Kimbell (See paragraph 1.56 at Page 22) (Supra), the author opines as under :

> *"It is a feature of the Admiralty procedure that not only may an action be brought in rem (so that jurisdiction may be founded by service of process upon the ship notwithstanding the absence of a means of establishing jurisdiction over the shipowner in personam) but the ship may also be arrested so as to provide security for the claim. This is often for practical purposes the reason to invoke Admiralty jurisdiction as opposed to proceeding by means of an ordinary in personam claim in the Commercial Court. By arrest security is obtained for the claim. This is to be contrasted to what is perceived to the obtaining of security by means of a freezing injunction. A freezing injunction is not security but an in personam procedure that merely preserves a fund against which execution may be taken if a judgment is subsequently obtained by the applicant..."*
>
> *(emphasis supplied)*

This clearly indicates that an attachment (equivalent to a freezing injunction) is clearly in the realms of *in personam* proceedings.

2. Conjoining actions of *in rem* and *in personam* :

(i) What respondent (original plaintiff) attempted to do in the present case was to move a hybrid action, i.e., *in rem* action against m.v. LIMA II and an *in personam* action (by way of an injunction) against m.v. LIMA I and that also without joining m.v. LIMA I as party defendant in the suit. It is now settled that such hybrid writ conjoining an action *in rem* and an action *in personam* is disapproved.

In Admiralty Law and Practice, 2nd Edition (2007) by Toh Kian Sing, SC (See page 20) (Supra), the author says as under :

> *"It is no longer possible to bring a hybrid writ conjoining an action in rem and an action in personam in England and Singapore. In England it used to be possible to begin such mixed actions in rem and in personam by means of a single writ. Similarly, in Singapore, it was assumed in The Eishian Maru that such a writ could be issued. The purpose of such hybrid writs appears to be saving of costs, which is achieved by issuing one writ instead of two. Such writs are no longer permitted in England. They have also been judicially disapproved of in Singapore because the Rules of the Court do not provide for them and that, in any event, such a practice of hybrid actions may in circumstances lead to embarrassing complications. It follows that in both these jurisdictions, admiralty jurisdiction must be invoked by proceedings either in rem or in personam. The Malaysian Rules of High Court 1980, similarly do not expressly provide for such hybrid writs. The English and Singaporean position has been adopted in Malaysia."*
>
> *(emphasis supplied)*

(ii) It is settled law that a vessel is treated as a juristic entity for a limited purpose of an action *in rem*. The same cannot be stretched to treat

a vessel as a juristic entity to initiate an action *in personam*.

(a) In *M.V. Elisabeth & Ors. V/s. Harwan Investment and Trading Pvt. Ltd.* (Supra), the Apex Court held :

> *"55. An action in rem is directed against the ship itself to satisfy the claim of the plaintiff out of the res. The ship is for this purpose treated as a person. Such an action may constitute an inducement to the owner to submit to the jurisdiction of the court, thereby making himself liable to be proceeded against by the plaintiff in personam. It is, however, imperative in an action in rem that the ship should be within jurisdiction at the time the proceedings are started. A decree of the court in such an action binds not merely the parties to the writ but everybody in the world who might dispute the plaintiff's claim.*
>
> *56. It is by means of an action in rem that the arrest of a particular ship is secured by the plaintiff. He does not sue the owner directly and by name; but the owner or any one interested in the proceedings may appear and defend. The writ is issued to "owners and parties interested in the property proceeded against". The proceedings can be started in England or in the United States in respect of a maritime lien, and in England in respect of a statutory right in rem. A maritime lien is a privileged claim against the ship or a right to a part of the property in the ship, and it "travels" with the ship. Because the ship has to "pay for the wrong it has done", it can be compelled to do so by a forced sale. [See Bold Buccleaugh (The) [Harmer v. Bell, (1851) 7 Moo PC 267 : 13 ER 884]]. In addition to maritime liens, a ship is liable to be arrested in England in enforcement of statutory rights in rem (Supreme Court Act 1981). If the owner does not submit to the jurisdiction and appear before the court to put in bail and release the ship, it is liable to be condemned and sold to satisfy the claims against her. If, however, the owner submits to jurisdiction and obtains the release of the ship by depositing security, he becomes personally liable to be proceeded against in personam in execution of the judgment if the amount decreed exceeds the amount of the bail. The arrest of the foreign ship by means of an action in rem is thus a means of assuming jurisdiction by the competent court.*
>
> *58. The real purpose of arrest in both the English and the Civil Law systems is to obtain security as a guarantee for satisfaction of the decree, although arrest in England is the basis of assumption of jurisdiction, unless the owner has submitted to jurisdiction. In any event, once the arrest is made and the owner has entered appearance, the proceedings continue in personam. All actions in the civil law — whether maritime or not — are in personam, and arrest of*

a vessel is permitted even in respect of non-maritime claims, and the vessel is treated as any other property of the owner, and its very presence within jurisdiction is sufficient to clothe the competent tribunal with jurisdiction over the owner in respect of any claim. [See D.C. Jackson, Enforcement of Maritime Claims, (1985) Appendix 5] [See D.C. Jackson, Enforcement of Maritime Claims, (1985) Appendix 5, p. 437 et seq.] . Admiralty actions in England, on the other hand, whether in rem or in personam, are confined to well defined maritime liens or claims and directed against the res (ship, cargo and freight) which is the subject-matter of the dispute or any other ship in the same beneficial ownership as the res in question."

(emphasis supplied)

(b) In *Georim Oil Corporation V/s. M.V. Flag Mersinidi & Ors.* (Supra), a learned Single Judge of this Court held :

"21. At the outset, Mr.Dhond very fairly agreed that in India, the law does not recognise claim for supply of bunkers or claim for necessaries can have a maritime lien. Mr. Dhond's submission was that the bunker supply contract provides that the provisions thereof shall be governed by the law of United States of America and under clause 14.4, it is provided that the contract shall be binding between the seller and any Buyer..... and the buyer includes master, owner of the vessel through which bunker was supplied and hence the defendant no. 3 was bound by it.

22. Mr. Dhond further submitted that the transaction in issue was admittedly for supply of bunkers which were supplied to and received by the vessel. Because the vessel received the bunkers, and under Maritime Law a ship has an independent juridical personality independent from its owners, a subsequent disclaimer by the Master of the vessel is of no avail. According to Mr. Dhond, the moment the supply is effected, a contract between the plaintiff and the said vessel sprang into existence. Mr. Dhond submits that whether the disclaimer endorsed by the vessel or the pre-emptive avoidance of such a disclaimer described by the plaintiff should prevail can only be decided at the trial. As the plaintiff has in its terms and conditions mentioned about US Law as the applicable law and the defendant no. 2 has accepted the same, the US Law must be enforced. As there is privity with the vessel, the owners namely defendant no. 3 cannot argue there is no privity and hence US Law is validly incorporated and applicable.

> *23. I totally disagree with Mr. Dhond. A vessel cannot enter into any contract with anybody. Only an owner or person authorised by the owner can enter into a contract and bind the vessel. In law a vessel may be looked at as an independent juridical personality. But to say that there is privity of contract with the vessel but not with the owners is stretching it too far and is incorrect. An action in rem against a vessel can be maintained only if there is an underlying obligation of the owner and an action in personam is maintainable against the owner. The contract is between the plaintiff and defendant no.2. Copy of the contract has not, admittedly, been even sent to the owner. There is not even an averment that the owner, defendant no. 3, has held out that they will be bound by the terms and conditions of the contract that has been entered into between the plaintiff and defendant no. 2.Therefore, it can never be accepted that U.S. Law is applicable vis-a-vis, the plaintiff and defendant no. 3."*
>
> *(emphasis supplied)*

(iii) In any event, it needs to be borne in mind that a vessel can never satisfy a test of attachment before judgment or an injunction. The purpose of the vessel itself is to travel and leave a jurisdiction of a Court in the course of its business. This is not done to defeat the claims of the creditors. In this regards an injunction is different from an arrest. For arrest, once the Court is satisfied with the test laid down in Section 5 of the Admiralty (Jurisdiction and Settlement of Maritime Claims) Act 2017, the Court will grant arrest. For injunction on the other hand, the test laid down in the Code of Civil Procedure, 1908 has to be met.

(a) In *Raj Shipping Agencies V/s. Barge Madhwa & Anr.* (Supra), a learned Single Judge of this Court held :

> *"88. 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."*
>
> *(emphasis supplied)*

(iv) For the reasons above, an injunction could not have been granted against m.v. LIMA I especially given that m.v. LIMA I was not a party to the suit and that it was not proceeded against *in rem* or any bail amount submitted in lieu of it.

(C) Errors in the findings of the learned Single Judge :

(i) The learned Single Judge held that it was not necessary for the Admiralty Court to pass an order of arrest against m.v. LIMA I. This was because the Court had already passed an order of arrest against m.v. LIMA II which was owned by defendant no.2. The said finding is clearly erroneous. The Court assumes jurisdiction over a vessel not by an order of injunction but by an order of arrest. Merely because the Court had ordered arrest of m.v. LIMA II (defendant no.1) does not mean that it can pass an injunction against another vessel. This is because the Admiralty Court has no jurisdiction *in personam* either against defendant no.2 nor against m.v. LIMA I. It was, therefore, not permissible for the Court to proceed against a vessel not a party to the Suit and *in personam* proceedings (by injunction) against m.v. LIMA I, which in any case was not within the ordinary original civil jurisdiction of the Court.

19 *Issue No.10 : "Whether the Plaintiff is entitled to a decree against Defendants for the sum of US$ 100,798 with interest at 30% per annum?"*

The suit as filed has only sought decree against defendant nos.1 and 2. Though defendant no.3 (i.e., appellant) was impleaded as party, no decree was ever sought against defendant no.3. Therefore, the term "defendants" will not include appellant (defendant no.3). In the plaint it is only averred that a decree was sought *in rem* against defendant no.1 (m.v. LIMA II) and *in personam* against defendant no.2. There is no pleading making a claim or alleging any cause of action against appellant (defendant no.3). Therefore, no decree could be granted against appellant (defendant no.3).

20 *Issue No.11 : "Whether Supply of bunkers constitute supplies of necessaries and whether the same constitutes a maritime Claim or a maritime lien?"*

(i) The issue is purely academic. There is no contest by either parties that supply of bunkers constitutes a supply of necessaries. However, the plaint proceeds on the basis that the said supply to m.v. LIMA II (defendant no.1) was at the instance of defendant no.2. m.v. LIMA II, to which bunkers were supplied, could not be eventually arrested, i.e., though the order of arrest was granted, the warrant of arrest was never effected on m.v. LIMA II (defendant no.1). Therefore, no arrest was effected.

(ii) m.v. LIMA I was injuncted but as mentioned above, it was never arrested or made a party. Therefore, the maritime claim cannot be

enforced against m.v. LIMA I. In any event, it is trite law that supply of bunkers only constitutes a maritime claim. The same is not a maritime lien. This position is clarified by the Hon'ble Supreme Court in *Chrisomar Corporation V/s. MJR Steels Pvt. Ltd. & Anr.* (Supra).

(iii) In any event, the issue whether supply of bunkers constitute a maritime claim or lien is academic. Plaintiff could not serve the warrant of arrest upon defendant no.1 vessel, i.e., m.v. LIMA II. Since, plaintiff wanted to proceed against another vessel in lieu of m.v. LIMA II, i.e., m.v. LIMA I, it could in any event, never enforce a maritime lien. It is settled position of law that a maritime lien can only be enforced against the very vessel in respect of which it arose. A maritime lien cannot be enforced against a sister-vessel.

21 *Issue Nos.12 and 13: "Whether MV Lima-I was the sister ship of Defendant No.1 vessel at the time of arrest of MV Lima-I on 31st October 2001?" and "Whether the Plaintiff was entitled to arrest MV Lima-I in lieu of Defendant No.1 vessel*?"

This issue is purely academic. Assuming m.v. LIMA I was the sister-vessel of m.v. LIMA II, it would make very little or no difference. This, as the suit is framed, would not entitle plaintiff to a decree against m.v. LIMA I or the bail amount deposited by defendant no.3 (i.e., appellant) in lieu of m.v. LIMA I. For the reasons above, since plaintiff could not proceed against m.v. LIMA I itself. Therefore, even if m.v. LIMA I is held to be the sister-vessel of m.v. LIMA II, plaintiff for the reasons aforesaid, still cannot get decree against m.v. LIMA I or the bail amount deposited.

22 For the reasons above, the appeal is liable to allowed and is hereby allowed.

23 Appeal disposed accordingly. No order as to costs. Consequently, interim application, if any, also stands disposed.

24 Appellant may apply to the Prothonotary and Senior Master for return of security deposited pursuant to order dated 31st October 2001 together with accumulated interest, if any.

(RAJESH S. PATIL, J.) (K. R. SHRIRAM, J.)