**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**

**ADMIRALTY AND VICE-ADMIRALTY JURISDICTION**

**NOTICE OF MOTION NO. 22O2 OF 2015**
**IN**
**COUNTER CLAIM NO. 19 OF 2012**
**IN**
**ADMIRALTY SUIT NO.3 OF 2011**

m.v. Tongli Yantai ...Plaintiff
vs.
Great Pacific Navigation (Holdings) Corporation Ltd. ...Defendant

**WITH**

**NOTICE OF MOTION NO. 1770 OF 2015**
**IN**
**ADMIRALTY SUIT NO. 66 OF 2015**

Eastshine Limited And Anr. ...Plaintiffs
vs.
Great Pacific Navigation (Holdings) Corporation Ltd. ...Defendant

...

Mr. Rahul Narichania, Senior Advocate, a/w. Mr. Vishal Muglikar and Ms. Pooja Kapadia, i/b. M/s. Mulla & Mulla & C.B. & C., for the Plaintiff in CC No.19/2012 and for Defendant in ADMS/3/2011.

Mr. Zarir Bharucha, a/w. Mr. Bimal Rajasekhar, Mr. Shivam Singh and Mr. Vikrant Shetty, i/b. Mr. Bimal Rajasekhar, for the Plaintiff in ADMS/3/2011 and for Defendant in CC No.19/2012 and in ADMS/66/2015.

Mr. Prashant Pratap, Senior Advocate, a/w. Mr. Abhishek Kumar and Mr. Shubham Agrahari, i/b. Mr. Abhishek Kumar, for the Plaintiffs in ADMS/66/2015.

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**CORAM : S.C. GUPTE, J.**

**RESERVED ON : 29 AUGUST 2018**

**PRONOUNCED ON : 17 SEPTEMBER 2018**

**<u>JUDGMENT</u>:**

. By an order passed in Notice of Motion No.2202 of 2015 in Admiralty Suit No.3 of 2011, the following issue has been framed as a preliminary issue under Order 14 Rule 2 of the Code of Civil Procedure.

"Whether the suit is barred by the law of limitation?"

2. By consent, this issue is treated as a preliminary issue even in the companion admiralty suit, namely, Admiralty Suit No.66 of 2015. The parties in both admiralty suits have been heard on this preliminary issue. The issue is being decided by the present order.

3. Admiralty Suit No.3 of 2011 is filed by a time charterer of a vessel called "Nasco Diamond". The vessel was chartered to the Plaintiff by one Da Sin Shipping Pte Limited, who are said to be the despondent owners of the vessel, having time chartered the same from the head owner of the vessel, M/s. YDM Shipping Company Ltd. The vessel was sub-chartered by the Plaintiff to Tongli Shipping Ltd. ("Tongli"), a company incorporated in the People's Republic of China, acting through its agent/nominee/alter ego, Tongli Shipping Co.Ltd., Samoa ("Tongli Samoa") pursuant to a time charter document termed as 'fixture recap'. Pursuant to this fixture recap, Tongli, acting through Tongli Samoa, ordered the vessel to proceed to Kolonodale

(Indonesia) to load a cargo of nickel ore. It is the Plaintiff's case that contrary to the express warranty in the fixture recap to load the cargo harmless/safe, Tongli Samoa, the agent/nominee/alter ego of Tongli, loaded the nickel ore cargo in wet condition, which was prone to liquefaction of the cargo. As a result of the liquefaction, which in fact followed, the vessel became unstable and sank. It is the Plaintiff's case that as a result of the loss of the vessel together with the loss of life of twenty two of its crew members caused by the wrongful and negligent act or omission of Tongli, acting through its agent/nominee/alter ego, Tongli Samoa, the Plaintiff has been saddled with a claim of a minimum amount of approximately USD 42 million. Adding uplift interest and costs, the Plaintiff seeks to recover a sum of USD 56.6 million (subsequently amended to USD 72.5 million). The Plaintiff has, accordingly, filed the present suit seeking to recover this sum against the Defendant vessel, m.v. Tongli Yantai, which is said to be beneficially owned and controlled by Tongli.

4. The Defendant vessel was arrested in the present admiralty suit by an order passed by this Court on 9/10 December 2010. A notice of motion was, thereupon, taken out by one Halcyon Ocean Shipping Ltd. ("Halcyon"), who claim to be registered owners of the Defendant vessel, to vacate the order of arrest and claim damages for wrongful arrest. By an order dated 12 July 2011, this Court vacated the order of arrest, but granted liberty to Halcyon to pursue its claim for damages by a separate application. The order of release of the vessel was challenged by the Plaintiff in an appeal (Appeal No.559 of 2011). A notice of motion was taken out by Halcyon in that appeal (Notice of Notion No.2429 of 2011), seeking

security for damages for wrongful arrest. By an order dated 14 October 2011, the Division Bench allowed the appeal and reinstated the order of arrest. A review petition filed in respect of the appellate order was dismissed by the Division Bench. A special leave petition filed by Halcyon from that order was disposed of by the Supreme Court. In the meantime, another notice of motion was filed by Halcyon (Notice of Motion No.1439 of 2012) seeking damages for wrongful arrest in the sum of USD 9.3 Million (approx.) This motion was filed in pursuance of the liberty reserved by this Court in its order dated 12 July 2011. On or about 22 June 2012, in pursuance of a settlement agreement between the Plaintiff and the beneficial owner of the vessel, the vessel was ordered to be released by this Court. The notice of motion seeking damages/release order filed by Halcyon (Notice of Motion No.1439 of 2011) was ordered to be kept for hearing on the next date. On 13 July 2012, a counter claim was filed by Halcyon in Admiralty Suit No.3 of 2011 (Counter Claim No.19 of 2012), seeking damages in the sum of USD 13.282 Million (approx.) for wrongful arrest against the Plaintiff. It is the case of Halcyon that this counter claim was also filed in pursuance of the liberty granted by this Court in its order dated 12 July 2011. The notice of motion was, thereafter, heard by this Court. During the course of the hearing, Halcyon offered to withdraw the notice of motion and instead pursue its counter-claim in the admiralty suit. By an order dated 3 September 2014, this Court permitted Halcyon to do so upon payment of costs.

5. On 19 June 2015, Eastshine Ltd. ("Eastshine") filed the companion admiralty suit, namely, Admiralty Suit No.66 of 2015, against the Plaintiff in Admiralty Suit No.3 of 2011 for damages for

wrongful arrest of the Defendant vessel. This suit was filed by Eastshine in its capacity as the demise charterer of the Defendant vessel.

6. As noted above, a common issue of bar of limitation arises in the counter claim of the Defendant filed through Halcyon, namely, Counter Claim No.19 of 2012, and the companion admiralty suit, Admiralty Suit No.66 of 2015, both of which seek damages for wrongful arrest of the Defendant vessel m.v. Tongli Yantai. Whereas it is the case of the Defendant in its counter claim that the counter claim is covered by Article 90 since it is in respect of an injunction wrongfully obtained or, in the alternative, by the residuary article, namely, Article 113 of the Limitation Act, since arrest is not specifically covered by any of the other articles of the Limitation Act and the right to seek damages for wrongful arrest arises only upon the arrest being vacated unconditionally or the suit being dismissed, it is the case of Eastshine in its admiralty suit that it is seeking to invoke the undertaking given by the defendant to its suit (Plaintiff in Admiralty Suit No.3 of 2011) at the time of seeking arrest under the Rules of the High Court framed in its admiralty jurisdiction and that the arrest, which was wrongfully sought, afforded a continuous cause of action to the Plaintiff, whose losses/damages were crystallized only on the date when the vessel was released, that is to say, on 22 June 2012. On the other hand, it is the case of the Plaintiff in Admiralty Suit No.3 of 2011 (who is the defendant in the companion Admiralty Suit No.66 of 2015) that arrest amounts to seizure and, hence, the applicable article for the purposes of limitation for seeking damages for wrongful arrest is Article 80 and both the counter claim and the

companion admiralty suit, having been filed after one year of arrest, are beyond time and not maintainable. Correctness of these rival claims is being decided by the present order.

7. What we are concerned with here is the nature of injury complained of, for which compensation is claimed in the present suit. The grievance is of wrongful arrest of a vessel. A vessel is a movable property and cannot sail out of the harbour as a result of the arrest. Article 80 of the schedule to the Limitation Act, 1963 deals with suits for compensation for wrongful seizure of movable property under legal process, whereas Article 90 deals with suits for compensation for injury caused by an injunction wrongfully obtained. Article 113, on the other hand, is a residuary article providing for suits for which no period of limitation is provided elsewhere in the schedule. The question is : which of these three articles applies to a suit for compensation for wrongful arrest. Is it a suit for compensation for wrongful seizure? Or is it for compensation for injury caused by an injunction wrongfully obtained? If it is the former, Article 80 would apply; If latter, Article 90; and if neither, Article 113 would govern the case. Besides, in each of these cases, limitation would operate differently. Under Article 80, the period of limitation is one year and it begins from the date of the seizure. Under Article 90, it is three years, but begins when the injunction ceases. On the other hand, under Article 113, it is three years, but it begins when the right to sue accrues. In plain terms, thus, the inquiry boils down to this : Is an arrest seizure of property or is it simply an injunction or is it neither? If it is seizure, the suit has to be brought within one year of arrest. The present suit (i.e. Counter-claim No.19 of 2012 as well as Admiralty

Suit No.66 of 2015) can, in that case, be said to be clearly barred. If it is an injunction, the suit is within time, since, in that case, the period of limitation is of three years starting from the date the arrest is vacated. If it is neither, the period of limitation is three years, but in that case we need to further consider when the right to sue accrues. If such right accrues on the date of the arrest, the counter-claim may be within time, but the companion admiralty suit may be barred. If the right accrues on the date when the arrest is vacated, i.e. when the injury for wrongful arrest is fully and finally crystallized, both the counter-claim and the suit would be within time.

8. Coming first to the nature of the injury resulting from an arrest of a vessel in admiralty jurisdiction, it is argued by Mr. Bharucha for the Defendant that arrest is nothing but seizure of the vessel; the court (through the admiralty registrar) has full dominion and control over an arrested ship; and the possessory right of the owner of the vessel is akin to that of a bailee, who must at all times act under, and in accordance with, the direction and control of the bailor (in this case, the court or the admiralty registrar). Mr. Narichania and Mr. Pratap for the Plaintiffs in the two admiralty claims, on the other hand, contend that arrest is either an injunction or, if it cannot be termed as an injunction, falls under the residuary category, since none of the other Articles of the Limitation Act applies to it. Learned Counsel insist that seizure necessarily implies transfer of possession and since arrest does not entail transfer of possession, it is not seizure. Mr. Bharucha joins issue there. He submits that there is no requirement of law that seizure of property must entail actual transfer of possession to the court; seizure can well be by a symbolic act

without actual possession and can even be implied from the facts and circumstances of the case. Learned Counsel submits that arrest implies custody of the court and, distinguishing possession from custody, argues that for seizure, custody may be sufficient; we may not have to further see if there is possession. He compares arrest to attachment, which does not require transfer of possession to the court, and yet amounts to seizure so as to attract Article 80 if alleged to be wrongful. Both sides rely on several judgments, some of which are discussed in detail hereinbelow.

9. Arrest, attachment, injunction, seizure, custody, possession are all terms having different connotations in different situations and may be used in legal provisions or precedents as ordinary words or terms of art depending on the context of the inquiry. At the very outset, it is, therefore, necessary to bear in mind the context for our purposes. We are considering here 'arrest' from the point of view of an article of a limitation statute and must, accordingly, view it from the standpoint of the wrong committed by the defendant, or the injury it causes to the plaintiff and for which he claims compensation. With that context in mind, let us now examine the kind of wrong committed by the arrester of a ship in case of a wrongful arrest or what injury does it cause to the owner of the ship and then see whether it is included in the term “seizure” in Article 80 or covered by the word “injunction” in Article 90 or neither is a case. This exercise would naturally involve questions of interpretation of these two latter expressions in the respective articles of the limitation law.

10. Before we do so, however, we may deal with one particular submission of Mr. Bharucha. He contends that the law of limitation must be construed strictly. Learned Counsel submits that limitation law, by its very nature, is a technical law and must be construed as such; it is by definition a harsh law and it would be a mistake to look for ethical principles in that law; and if the court comes to the conclusion that the legislature clearly intended that a suit or an application should be barred after the lapse of a particular time, the court must give effect to such provision, whichever way the parties be placed *vis-a-vis* the merits of the case and whatever be the fallout of the decision in terms of hardship to the loser. Learned Counsel relies on the decisions of our court in **Jehangir Bomanji Wadia vs. C.D. Gaikwad**[1] and **Maharashtra State Road Transport Corporation vs. Raoji Hari Lad**[2]**,** in this behalf. Learned Counsel is right there. Whilst construing the relevant provisions of the limitation law, we are not going to either consider the merits of the case or see if hardship may result in case of a particular construction which otherwise commends itself. Limitation Statutes are enactments prescribing a period for initiating proceedings and their sole purpose is to intimate the people that after the lapse of a certain time from a certain event the proceeding will not be entertained and, accordingly, a strict grammatical construction is normally the only safe guide. Though, as in the case of any other provision of law, the focus of the inquiry is to find out the true intent of the legislature as it is expressed in the words of the statute and it is open to us to employ all well-known rules of statutory interpretation to ascertain such intent. The object and purpose of a limitation provision, thus, would definitely have an

1 1954 The Bombay Law Reporter (Vol. LVI) 478
2 AIR 1977 Bombay I

impact on its interpretation (See the case of **Anandilal vs. Ram Narain**[3]**.)**

11. The second point, which it is important to remember, is that it is a settled law that Article 113 is a final and residuary article. The statute of limitation is intended to cover all suits conceivable and that is the *raison d'etre* of an omnibus article like Article 113. Wherever specific articles providing for individual cases do not cover any particular case, such omnibus article would. By the very same logic, it is not to be resorted to unless the court is clearly satisfied that the case before it does not come under any of the other articles dealing with specific cases.

12. With this prelude, let us consider the issue at hand. At the outset, we may note that there is at least one authority of a High Court in India for the proposition that arrest amounts to seizure. In **Madras Steam Navigation Co. Ltd. vs. Shalimar Works Ltd.**[4], a Division Bench of Calcutta High Court considered the nature of a suit for compensation for wrongful arrest. The Court held it to be a suit claiming damages for wrongful seizure under legal process, covered by Article 29 of Limitation Act, 1908 (which is an equivalent of Article 80 of Limitation Act, 1963). The matter having been extensively and ably argued by both sides and the judgment of Calcutta High Court having been submitted to a close scrutiny, I would not like to simply follow the dicta of that judgment, but would rather deal with the issue at length both on principle and authority. The Plaintiffs' case is that arrest is not a seizure, but an injunction. Principally, that case is based

3 (1984) 3 S.C.C. 561 P.567
4 28 Ind Cas 463

upon their contention that arrest of a ship under admiralty jurisdiction does not transfer possession of the vessel to the court or the admiralty marshal. What passes on from the owner to the marshal upon arrest, the Plaintiffs would submit, is only the custody of the vessel and not its possession; the possession continues with the owner. It is submitted that transfer of possession is a necessary ingredient of seizure; without such transfer there could be no seizure in law. The submissions raise two crucial questions: (a) What is 'custody' in the context of an arrest in admiralty law? and (b) How different is it from 'possession' in the context of a seizure, as understood by law? And, as we have noted above, these questions have to be answered from the standpoint of a limitation statue, that is to say, from the point of view of the wrong committed by the defendant or the injury caused to the plaintiff, were the arrest to be caused wrongfully.

13. As explained by the Supreme Court in **M. V. Elisabeth Vs. Harwan Investment & Trading Pvt. Ltd.**[5], the vital significance and distinguishing feature of an admiralty action in rem is that this jurisdiction can be assumed by a coastal state in respect of any maritime claim by arrest of a ship. Admiralty law confers upon the maritime claimant a corresponding 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 or cargo is the starting point of such action. It is both an act by which the Court assumes jurisdiction to proceed to recover the maritime claim and also a procedure to obtain security to satisfy any judgment that may be delivered in the action. There is ample authority to hold that arrest of a ship is by detention or restriction on removal of the ship by an order

5 AIR 1993 SC 1014

of a Court. In **Elisabeth**, the Supreme Court, in the context of arrest, referred to Section 443 of the Merchant Shipping Act, which authorizes the High Court in case of any damage to property by a ship to issue an order directing any proper officer to detain the ship until such time as the owner, master or consignee thereof has satisfied any claim is respect of the damage or given security to the satisfaction of the High Court to pay all costs and damages that may be awarded. Even the Arrest Convention of 1999 defines arrest as meaning *"any detention or restriction on removal of a ship by order of a Court to secure a maritime claim but does not include the seizure of a ship in execution or satisfaction of a judgment or other enforceable instrument."* As held by the Supreme Court in **Liverpool & London S.P. & I Association Limited vs. M.V. Sea Success I**[6] and judgments of our Court in **M.V. Nordlake vs. Union of India**[7] and **J.S. Ocean Liner Llc vs. M.V. Golden Progress**[8]**,** Arrest Convention, 1999, is part of the admiralty law applied by Indian courts.( In fact both parties here rely on this definition of 'arrest' under the Convention. The plaintiffs rely on it to distinguish arrest from seizure laying emphasis on the latter part of the above definition. We will have something to say about this later, whilst dealing with the Plaintiff's contentions for distinguishing arrest from seizure.) To detain is to restrain from proceeding or to hold in custody. Detention thus implies a restraint or custody. As explained by Nigel Meeson in his treatise **"Admiralty Jurisdiction And Practice"**[9]**,** arrest is effected by issuance and execution of a warrant for arrest. Once the warrant has been executed, the property is arrested and is in

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6 Appeal (Civil) 5665/12 dtd. 20/11/2003, Coram CJI S.B. Sinha

7 Appeal No.30/12 in NMS/1525/11 dtd. 7 March 2012, Coram: Mohit S. Shah, C.J. & Ranjit More, J.

8 2007(2) ARBLR 104 Bom

9 4th Edition (2011), Para 4.61, P.163

the custody of the Admiralty Marshal on behalf of the Court. What is important to note here is that the warrant is executed on the ship so that it is a notice to the world at large. Any interference by any party with the arrest such as removal of the property arrested (with the knowledge of the arrest) is a contempt of court punishable by committal. (See, **The "Petrel"**[10] and **The "Harmonie"**[11]**.)** So also, moving the property within the jurisdiction without authority, or removing it from the jurisdiction. (See, **The "Jarlinn"**[12]**, The "Merdeka"**[13]**.**) Unlike an injunction, which is a command to an individual or, more particularly, to the defendant, which is enforceable against him and no other person who is not claiming under or through him, arrest of a ship is enforced against the world at large. As we shall see later, this is one important feature which distinguishes an arrest from an injunction and makes it more like a seizure.

14. It is said that when property is arrested the Admiralty Marshal thereby obtains custody of the property, but not possession. It is important for our purposes to find out what exactly is meant by this. The proposition was mentioned for the first time by the House of Lords in **The Arantzazu Mendi**[14]. That case was an appeal by the Spanish Republic Government from a decision of the Court of Appeal. That Government had got issued a writ *in rem* claiming to have the possession of the steamship Arantzazu Mendi adjudged to them. The ship was a Spanish ship registered in the port of Bilbao. Bilbao was captured by the forces of General Franco, who formed a rival

10 (1836) 3 Hagg. 299
11 (1841) 1 Wm Rob 178
12 (1965) 1 WLR 1098
13 (1982) 1 Lloyd's Rep 401
14 (1939) AC 256 (HL)

Government, the Nationalist Government of Spain. Sometime later, the ship was requisitioned by the original Government, namely, Republican Government of Spain, in pursuance of a decree of that state. Later, when the ship was arrested in London, the owners moved for possession of the ship. A conditional appearance was entered by the Republican Government of Spain. Though the owners' action was eventually discontinued, the arrest had not been raised. Whilst the ship was under arrest, by a subsequent decree of the Spanish state under General Franco, i.e. the Spanish Nationalist Government, which was by then recognized by Great Britain as the real Government of Spain, it was requisitioned for public services connected with national defence. Though the writ was stated to be between the Spanish Republican Government on the one hand and the steamship and its master on the other, the real respondents to the appeal were the Spanish Nationalist Government who had entered a conditional appearance. The latter had moved to set aside the writ and arrest on the ground that the action involved a sovereign State who was in possession of the ship. Upon a formal notice of requisition under that decree being served upon the master of the ship, owners made a declaration that they submitted to the decree of the Nationalist Government and consented to the requisition, placing the ship at the free disposal of the Nationalist Government. On the same day, the Republican Government issued the writ *in rem* referred to above. The Judge ordered the writ to be set aside. The Court of Appeal affirmed that order. On these facts, the question to be considered by the House of Lords was whether the ship was in possession of a foreign Government, namely, the Nationalist Government of Spain. One of the contentions of the Republican Government was that the ship, by

reason of its arrest and custody of the Marshal pursuant thereto, could never be in possession of the Nationalist Government; the possession was with the Marshal. In answer, the House of Lords held that the "ship arrested does not by the mere fact of arrest pass from the possession of its then possessors to a new possession of the Marshal. His right is not possession but custody. Any interference with his custody will be properly punished as a contempt of the court which ordered arrest, but subject to his complete control of the custody all the possessory rights which previously existed continue to exist, including all the remedies which are based on possession".

15. What is important for our purposes to note is that the question of possession considered by the House of Lords in **Arantzazu Mendi** was with reference to possessory rights to be exercised by the original possessor (i.e. one who was in possession on the date of the arrest) against others and not against the Marshal. There is no question of such possessor exercising his possessory rights against the Marshal. The word "possession", as explained by the Supreme Court in **Superintendent and Remembrancer of Legal Affairs, West Bengal vs. Anil Kumar Bhanja**[15], is a polymorphous term which may have different meanings in different contexts. Possession, for example, of a bailee of a res may be defended against the bailor, who may even be the owner of the res, in a case where the res is under arrest, that is to say, under the custody of the court, for in that case the possessory right belongs to the bailee and not the bailor. But as between the Marshal holding custody of the res and the owner, the latter cannot be allowed to enforce possession. For here, possession implies physical capacity to deal with the thing as the possessor likes to the exclusion

15 1980 AIR 52

of everyone else and a determination to exercise that physical power on one's own behalf. Madras High Court in **Re Pachiripalli Satyanarayanan**[16] held this particular meaning of the term 'possession' to be relevant. In **Ashan Devi vs. Phulwasi Devi**[17], Supreme Court referred to **Salmond on Jurisprudence** explaining the word "possession" as a word of "open texture". The court observed that its meaning had to be ascertained from the context. The property involved in that case was an open vacant land. Such property, the court held, was possessed by a person who had control over the same. This "control" over the property meant "power to exclude others." As the court noted, the test for determining whether the man is in possession of anything is "whether he is in "general control" of it – may be, that he is not in actual and physical possession or using the same". Surely, no such possession could be claimed by the owner or the then possessor of the res against the Marshal holding custody of the res by virtue of the arrest. In **Arantzazu Mendi,** the right to possess the vessel belonged to the Nationalist Government of Spain as against the other Government or the owners of the vessel by reason of the decree of the Nationalist Government to which the owners had submitted. But that right could be claimed by the Nationalist Government against the Republican Government and the owners, and not against the Marshal. As between the Nationalist Government and the Marshal, the former could not have enforced possessory rights so long as the arrest subsisted. For during the arrest, it is the court which has full dominion and control over the arrested ship. Even if physical possession may be said to be with the owner, he must act in accordance with and under the directions and control of the court. He

16 AIR 1953 Mad. 534
17 (2003) 12 SCC 219

cannot claim to have physical capacity to deal with the ship the way he likes, or of his own free will and on his own behalf. In other words, he cannot assert to be in possession as against the Marshal in any worthwhile practical respect.

16. Arguments on similar lines, as suggested by the Plaintiffs herein, were advanced in a New Zealand case, **Abel Fisheries Ltd. vs. Stuart**[18], based on the dicta of House of Lords in **Arantzazu Mendi** (supra). The defendant, in his capacity as a fishery officer, had seized and taken custody, for the Chief Executive of the Ministry of Fisheries, of several of the plaintiff's fishing boats in exercise of his power under Section 80 of the Fisheries Act, 1983 applicable there. He then issued a notice requiring the crews of the vessels to be removed. An injunction was sought by the plaintiff in respect of the removal. The argument of the plaintiff was that there was no power in the Chief Executive to require removal of the crew. The argument in support of removal was that such power was the necessary ingredient of the Crown's custody of the vessels. The issue therefore turned on what rights vis-a-vis the crew the Crown had by the dint of its having custody of the vessels. The issue was answered by the Court in the following words :

> " What then are the incidents of custody for the purposes of s 80 of the Fisheries Act 1983? When property is held in the custody of the Crown under s 80(6) the Crown must generally have a right to physical possession of the property. How else can the Crown effectively hold the property in its custody? In addition the Crown must have the right to decide where and under what conditions the property is to be held. Obviously fishing vessels raise different issues from fishing gear and other like property. The difference derives in major part from the fact that vessels require a crew and

18 2 NZLR 87

will often have a crew on board when they are seized.

> When validly claimed the Crown's right to possession of a vessel as an incident of custody must prevail over the rights of the owner through the crew. While the owner's rights, and through the owner the rights of the crew are not extinguished by seizure and the Crown's custody, those rights, including the right to possession, are obviously subject to the rights inherent in the Crown's custody. The next step is to identify the circumstances in which the Crown is entitled to claim physical possession of a vessel ahead of the owner and the crew. The answer, in my judgment, is when it is necessary for the Crown to go into possession by its own agents and thus displace the crew.
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> That necessity will exist if and when the chief executive, acting in good faith, considers the removal of the crew is necessary in order properly to safeguard the Crown's interests in or in relation to the vessel. In such circumstances the chief executive on behalf of the Crown has the power to require the removal of the crew. The Crown's interests in or in relation to the vessel include both the physical integrity of the vessel itself and the Crown's potential liabilities as custodian. The ultimate question is whether the circumstances are such in the present case that the Crown is entitled to go into physical possession and displace the crew."

17. Coming now to seizure, though it implies putting the thing seized into legal possession, the power of seizure does not necessarily involve the physical possession of the person having the right to seize. The Supreme Court has clarified this point in its judgment in the case of **Durga Prasad Vs. H.R. Gomes, Superintendent (Prevention) Central Excise, Nagpur[19].** In that case, which *inter alia* involved seizure of documents under Section 110(3) of the Customs Act, the argument before the court was that the documents were not in physical possession of the Superintendent of Customs (who was authorized by the Collector of Customs to seize them) and as a result, there was no valid seizure as contemplated by Section 110(3) of the Customs Act. The appellant's argument was that

19 AIR 1966 SC 1209 (V 58 C 235)

when seizure orders were passed by the Collector of Customs, the documents were not within the territorial jurisdiction of the Collector of Customs; they were sent to Delhi for translation. The Supreme Court accepted that position, but refused to accept the argument of the appellant that the power to seize must necessarily involve, in every case, the act of physical possession of the person who had the right to seize the articles. The court held that though the documents were sent to Delhi (for a limited purpose and a limited period), the Superintendent was still in legal possession of them, “for he had the right to control the use of the documents and to exclude persons who should or should not have access to the documents.” It is this control which is characteristic of a seizure. The Court, in this behalf, quoted the law of bailor and bailee stated by Mellish L.J. in **Ancona vs. Rogers**[20] and held that, as stated in that case, the word 'possession' is not to be taken in this context in a popular sense, meaning actual or manual possession, but in a broader and legal sense as indicated above. The appellant cited before the Supreme Court its ruling in the case of **Gian Chand vs. State of Punjab**[21], where there was a reference to 'seizure' under the authority of law involving deprivation of possession and not merely of custody. The Supreme Court held that the ratio of that case was of no assistance to the appellant since **Gian Chand's** case involved an altogether different point, namely, the burden of proof under Section 178A of Sea Customs Act and the presumption under that section.

18. Delhi High Court in **Krampe Hydraulik (India) vs. Union of India**[22] also considered whether clear and categorical directions

20 (1876) 1 Ex.D.285: 46 LJ Ex121
21 AIR 1962 SC 496 (V 49 C 75)
22 (2003) ILR Delhi 73

given by the customs officers to the party importing the goods not to deliver the goods without the consent of the Assistant Collector of Customs, amounted to 'seizure' of goods within the meaning of Section 110 of the Customs Act. A few days after these directions, by a memo, actual physical possession of the goods was taken over by the Customs Officers. The question before the court was what was the date of seizure – was it when the earlier directions were issued or was it when actual physical possession was taken. The Court held the seizure to be of the date of the directions and not of taking over of actual possession, in the following words:

> "6. It is the petitioners' contention that the direction that was given on 3.11.1976 amounted to a seizure of goods contemplated under Section 110 of the said Act. On the other hand, learned counsel appearing for the respondents submitted that the seizure memo is, in fact, dated 11.11.1976 and it is on that day that actual physical possession of the said goods were taken over by the Customs Officers. Accordingly, he submits that, the date of seizure of the said goods would be 11.11.1976 and not 3.11.1976. The meaning of the word "seizure" is, inter alia, given in Black's Law Dictionary, Sixth Edition as under:-
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> "Seizure. The act of taking possession of property, e.g. For a violation of law or by virtue of an execution of a judgment. Term implies a taking or removal of something from the possession, actual or constructive, of another person or persons. Molina v. State, 53 Wis.2d 662, 193 N.W.2d 874, 877.
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> The act performed by an officer of the law, under the authority and exigence of a writ, in taking into the custody of the law the property, real or personal, of a person against whom the judgment of a competent court has passed, condemning him to pay a certain sum of money, in order that such property may be sold, by authority and due course of law, to satisfy the judgment. Or the act of taking possession of goods in consequence of a violation of public law.
>
> A "Seizure" of property (under Fourth Amendment) occurs when there is some meaningful interference with an individual's

possessory interest in that property. U.S. v. Jacobsen, U.S.Minn., 466 U.S. 109, 104 S.Ct. 1652, 1656, 80 L.Ed.2d 85."

From the above definition, it is clear that "seizure" implies the taking or removing of something from the possession of another person, be it actual or constructive. Seizure of property is also used in the sense whenever there is some meaningful interference with an individual's possessory interest in that property. The direction given on 3.11.1976 to the petitioners was clear and categorical and was to the effect that the petitioners were not to deliver the said goods without the consent of the Assistant Collector of Customs. This, to my mind, clearly implies an interference with the petitioner's possessory interests in the said goods and would, therefore, amount to seizure of the said goods. Moreover, the seizure does not necessarily imply actual taking of possession. Even taking of constructive possession would amount to seizure. When a direction is given to a person that he shall not remove or otherwise part with or dealt with the goods, albeit in his possession, such a direction would amount to a seizure of the goods."

19. In **Pinnamaraju Rajamraju vs. Potturi Tirupatiraju**[23]**,** the Madras High Court has held that actual seizure of movable property to be attached does not always require physical contact. Whether it is so required in any particular case must be decided upon the peculiar facts of that case. The court gave an example of the case of **Multan Chand Kanyalal vs. Bank of Madras**[24]**,** where property in a locked room was said to be attached without even seeing the goods, by putting a lock upon the outer door. It also quoted the following passage from Halsbury's Laws of England :

"for an act of the Sheriff or his bailiff to constitute a seizure of goods, it is not necessary that there should be any physical contact with the goods seized, nor does such contact necessarily amount to seizure. An entry upon the premises on which

23 AIR 1930 Mad.670

24 Vol.XXVII ILR 346

the goods are situate together with an intimation of an intention to seize the goods, will amount to a valid seizure even where the premises are extensive and the property seized widely scattered. But some act must be done sufficient to intimate to the judgment-debtor or his servants that seizure has been made”

In the case before the court, the goods to be seized were cattle. For attaching them, it was not necessary that they should have been seized by their horns or even by their ropes. The evidence before the court showed that they were already tied and secured so that they themselves could not run away of their own accord. The court held that all that was necessary to constitute attachment by seizure was that the officer of the court should go sufficiently near to them to explain to the others that he had come to attach the property and to intimate his intention to do so.

20. **Corpus Juris Secundum** defines “custody” as follows:

**“CUSTODY**

77.10 **Similarly defined**

(1) “Custody” means judicial or penal safekeeping, control with such actual or constructive possession as fulfills purpose of law or duty requiring it, or imprisonment or durance; it is detainer of person by virtue of lawful process of authority or actual imprisonment, detention, charge, control, or possession; term is elastic and may mean actual imprisonment or physical detention or mere power, legal or physical, of imprisoning or of taking manual possession - People v. Arnold, 58 Cal. Rptr. 115, 120, 436 P.2d 515, 66 C.2d 4.

81.5 **Not free to go**

A person is in “custody” when that person is not free to go.-People v. Schwartz. 279 N.Y.S.2d 477, 480, 481, 53

Misc.2d 635."

21. What the custody of the court, thus, really implies is a degree of domination and control which is ordinarily an important incidence or ingredient of possession. It cannot be fully separated from possession. As held by the Supreme Court in **Bank of India vs. Vijay Transport**[25], property in *custodia legis* means that the property is kept under the protection of court and any litigative disturbance of the court's control, which is in the nature of its possession, without its permission amounts to contempt of its authority. It is thus possible to say that in one sense custody involves a certain kind of possession at least for the purpose of protection against any interference. In another, and equally important sense, it involves in the minimum a meaningful interference with the original possessor's possessory interest in the property committed to court custody. It, thus, is no different from seizure as understood in law.

22. At this place, we may conveniently deal with one particular argument of Mr. Narichania and Mr. Pratap. Learned Counsel, relying on the definition of "arrest" in the Arrest Convention of 1999, submit that the definition makes a distinction between a mere detention of a vessel pending an admiralty action and its seizure in execution. Learned Counsel submit that this is a clear indication that seizure is different from arrest and is not included within its connotation. The definition, in the first place, does not contrast "detention or restriction on removal" with "seizure" of a ship, but with "seizure in execution or satisfaction of a judgment or other enforceable instrument" of a ship. It is perfectly legitimate to say that in both

25 (2000) 8 SCC 512

cases it is an arrest by detention or restriction on removal by an order of a court, in the first case to **secure** a maritime claim and in the other to **satisfy** a decreed maritime claim. The only difference between the two is that the one is a pre-judgement action to secure a claim sued for, and the other is a post-judgment action to satisfy a claim decreed. In a sense, the first is like an attachment before judgment and the second is like an attachment in execution.

23. Order 21 Rule 43 requires attachment of movables to be effected by seizure. In a Bombay case, **Sadashiv Govind Samant vs. Sheduram Sukhdev**[26]**,** which was a suit filed for damages for wrongful seizure, it was argued by the defendant that the Sheriff had not actually executed the warrant of attachment by seizing the plaintiff's goods. The bailiff had visited the plaintiff's shop and served the writ of attachment, whereupon the Plaintiff went around, gathered the amount mentioned in the writ of attachment and paid the same under protest. The defendant's argument was that the cause of action of wrongful attachment was not complete unless there was actual seizure of the plaintiff's goods. Our court held that physical contact was not necessary to constitute actual seizure; symbolical acts might satisfy the requirement of Rule 43 of Order 21. The court referred to **Multan Chand Kanyalal's** case (referred to above). It also referred to the decision in **Grainger vs. Hill**[27] where it was held that if the party was under a restraint and the officer manifests his intention to make a capture, it was not necessary that there should be any physical contact to amount to an arrest. The court held that the analogy applied where the question was whether any actual seizure was necessary in carrying

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26 (1953) Bombay Law Reporter (Vol. LVI) 984
27 (1838) 4 Bing. 212

out attachment of goods. The court observed that the matter might be approached by asking : Was there at any time any restraint on the goods of the plaintiff in execution of the order. Applying that test, the court held that for at least over an hour and a half (when the plaintiff was arranging money to pay to the bailiff so as to avoid the attachment), the plaintiff's goods remained under restraint and this amounted to seizure. That clearly shows that attachment of movable property, whether under Order 21 Rule 43 or Order 38 Rule 5, which is to be effected by seizure of goods, does not require transfer of possession; mere custody is good enough.

24. It is not open to debate that Article 80, which is an equivalent of Article 29 of the Old Limitation Act, dealing with wrongful seizure, applies to all cases of attachment of movables under an order of a court, whether such order is made without jurisdiction or on insufficient grounds or extended to third party property. (See, **Pannaji Devi Chand vs. Sanaji Kapur Chand**[28] and **Ram Narain vs. Umrao Singh**[29]) There is also good deal of authority for the proposition that an arrest of a vessel may be effectively compared to attachment before judgment. In fact, that is the very basis on which poundage is recovered by the Sheriff from the party at whose instance the vessel is arrested. The High Court Rules, which are applied for claiming such poundage, are Rules 474 to 476. Rule 474 provides for liability to pay Sheriff's fees or poundage in cases of arrest of a person or attachment of property. As this Court held in **Malpani Brothers vs. Ramjidas Shyamlal Saboo**[30]**,** poundage is levied when there is actual attachment or seizure. The poundage is recovered from the plaintiff

28 AIR 1930 Mad 635
29 Vol.XXIX Allahabad Series 615
30 1987 Mh.L.J. 223

under Rule 462 which makes it clear that the judgment creditor (applicant), in the first instance, bears the expenses of maintaining possession of the property to be attached. This rule, which applies to attachment in execution of a decree applies also to attachment before judgment, as required by Rule 483 of the High Court Rules. In all cases of arrest, poundage is recovered on this basis, that is to say, on the ground that there is actual attachment or seizure and the plaintiff who applies for such attachment or seizure must bear the expenses of the Sheriff in maintaining possession or custody of the vessel.

25. Seizure of movable property generally and arrest of a ship in particular are clearly different from an injunction in respect of the property. An injunction is typically an order in personam. It operates against a named person, who is usually the defendant to the action. Any breach of an injunction order by the person injuncted invites an action in contempt against him. Seizure under a court process, on the other hand, as in the case of arrest of a ship in admiralty, operates in rem, since it transfers the custody of the property to the court or its officer and holds good against the world at large. Any interference with the custody of the court or its officer, even if it be by any third party unconnected with the suit, is actionable as contempt of court. Custody of the court is usually indicated conspicuously on or about the thing seized, just as an arrest is notified to the world at large by serving a warrant of arrest on the ship, with communication to all concerned authorities such as the port administration and customs signifying the custody of the court. The current procedure in England for arrest of a ship indicated in **The "Johny Two"**[31] requires the Admiralty Marshal, upon issue of the warrant of arrest, to telephone

31 (1992) 2 Lloyd's Rep 257

the relevant officer of HM Customs & Exercise and instruct him to arrest the ship. That is followed up by sending a 'Note of Action' by fax confirming his instructions. An officer of HM Customs then arrests the ship by attaching the Note of Action to the ship. He then carries out the Marshal's instructions for keeping the ship safely under arrest. So far as this Court is concerned, the procedure is broadly similar. Upon issue of a warrant of arrest, the bailiff appointed by the Sheriff serves copies upon the Conservator or Deputy Conservator of the Port as also on the Customs Office within whose water territorial jurisdiction the ship is located, who, in turn, make entries in their records. The bailiff, then, carries the original warrant to the ship and executes the same personally on the Master or other officer appointed to man the ship and, in case of an unmanned ship, pastes the original to the wheel of the vessel. The custody of the court is thus indicated conspicuously so as to avoid any interference by anyone with such custody.

26. Learned Counsel for the Plaintiffs submit that if 'arrest' is treated as a seizure and Article 80 is applied to it, that would lead to absurd results. Learned Counsel submit that the starting point of the period of limitation in Article 80 is the date of the seizure and that would imply that even if an application to set aside the arrest is pending and not decided within one year, the defendant or any party sustaining prejudice would have to file a suit claiming compensation for wrongful arrest before expiry of one year from the date of the arrest; if the application to vacate the arrest is not decided for several years, such party would have to continuously amend his claim in the suit or file multiple suits, each at the end of the succeeding 12 month period. There is nothing new or extraordinary about this predicament.

That is a difficulty intrinsic to Article 80 about any seizure of property, not just arrest of a ship. This difficulty was highlighted in the 89th Report of Law Commission of India on the Limitation Act, 1963. The Report notes that even when the draft Limitation Bill of 1908 was circulated, suggestions were received for computation of the limitation period, where the seizure continues, from the date of its termination, for if the property remained under wrongful distress it was difficult for the plaintiff to assess his compensation until the property was released. The Law Commission in its 89th Report was not clear as to why this suggestion was not accepted back then. The Commission, however, recommended that considering the long duration of pendency of cases in courts and the time taken for their disposal, it was likely that the attaching authority might take a long time before the objections to the attachment were decided and since the provision in the statute providing for the starting point of limitation at the date of the attachment might cause serious hardship, the Article (Article 80) needed to be revised so as to make the date of release from the seizure as the starting date. The Commission was of the view that it would rather be harsh to drive an aggrieved person to a civil court even before a cause of action accrued in his favour, or at least before his claim could be effectively decided. The suggestion, however, was not carried into any amendment of the Article. Article 80 still remains the same. No doubt the difficulty voiced by the Law Commission, and which is presently canvassed by learned Counsel for refraining from applying Article 80 to the case before the court, is a valid concern, but that is for the legislature to decide in its wisdom, and not for this court to take into account. That is no reason to not apply Article 80 to any particular case of seizure which would

otherwise fall under that Article.

27. Alternatively, it is submitted that assuming, whilst denying, that Article 80 applies, the cause of action in the case of an arrest is a continuous cause of action so long as the arrest lasts, each successive day giving rise to a fresh cause of action. There is no substance in this submission either. In an old case, decided by the Full Bench of Lahore High Court, **Khair Mohd. Khan vs. Mt. Jannat**[32], the injury of a 'continuing wrong' and the test of its determination have been succinctly explained in the following words :

> " In considering whether the particular Act complained of constitutes a "continuing wrong" within the meaning of S. 23 for which the cause of action arises *de die in diem* it is necessary to keep in mind the distinction between an "injury" and the "effects of that injury." Where the injury complained of is complete on a certain date, there is no "continuing wrong" even though the damage caused by that injury might continue. In such a case the cause of action to the person injured arises, once and for all, at the time when the injury is inflicted, and the fact that the effects of the injury are felt by the aggrieved person on subsequent occasions, intermittently or even continuously, does not make the injury a "continuing wrong" so as to give him a fresh cause of action on each such occasion. If however the act is such that the injury itself is continuous then there is a "continuing wrong" and the case is governed by S.23. As observed by Mookerjee J., in 31 IC 242, the essence of a continuing wrong is that
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> > the act complained of creates a continuing source of injury and is of such a nature as to render the doer of it responsible for the continuance; in such cases a fresh cause of action arises *de die in diem*. To put the matter in another way, where the wrongful act produces a state of affairs every moment's continuance of which is a new tort, a fresh cause of action for the continuance lies.
>
> The question in each case therefore is whether the "injury", which is the basis of the grievance of the aggrieved party is itself

32AIR 1940 Lahore 359

> "continuing", or whether the injury was complete when it was committed but the damage flowing from it has continued or is continuing. If the former, the case falls within the purview of S.23, Limitation Act, and the cause of action arises *de die in diem*; if the latter, the terminus a quo is the date on which the wrongful act was done."

This judgment has been cited with approval by the Supreme Court in **Balakrishna Savlaram Pujari Waghmare vs. Shree Dhyaneshwar Maharaj Sansthan**[33]. The Court has held in that case that it is the very essence of a continuing wrong that it is an act which creates a continuing source of injury and renders the doer of the act responsible and liable for the continuance of that injury. If, on the other hand, the wrongful act causes an injury which is complete, there is no continuing wrong even though the damage resulting from the act may continue. What is necessary is to draw a distinction between the injury caused by a wrongful act and what may be described as the effect of that injury. It is difficult to say that continued arrest causes continued injury; what is continued is its effect. The injury is complete when the arrest is effected.

28. Arrest, thus, being seizure of the property particularly from the point of view of the injury caused by it, attracts Article 80 for any grievance alleging it to be wrongful. The Limitation period is of one year and it begins to run from the date of the arrest. Any suit, including a counter claim filed after one year of arrest, would, thus, be barred by limitation.

29. It is, however, contended by the Plaintiff to the counter-claim (Counter Claim No.19 of 2012) that the counter-claim is filed

33 AIR 1959 Supreme Court 798 (V 46 C 107)

not merely to claim compensation for wrongful seizure, but also to enforce the undertaking given by the original Plaintiff (i.e. Defendant to the counter claim) to compensate any party which may have sustained prejudice by the order of arrest. It is submitted that the prejudice sustained by the original Defendant, acting through her owners, is complete and becomes finally crystallized only when the arrest is vacated and the ship is released. Mr. Narichania, learned Counsel for the Plaintiff to the counter claim, relies on Rules 940 and 941 of the Bombay High Court (Original Side) Rules, which *inter alia* deal with a remedy where the property is arrested without good and sufficient cause and any party suffers prejudice by such arrest. It is submitted that in the present case, when the order of arrest was vacated by the court, there was already a pending motion by the Plaintiff to the counter claim (original Defendant) claiming relief of compensation simultaneously with the release of the vessel. It is submitted that whilst allowing that motion, by unconditionally vacating the order of arrest, this court gave liberty to the original Defendant to adopt independent proceedings for damages for wrongful arrest. Learned Counsel submits that the right to seek such compensation arises upon the order of arrest being unconditionally vacated by the court, which usually happens when the plaintiff to the admiralty suit, after obtaining the order of arrest, is unable to establish his case. Learned Counsel relies in this behalf on the cases of **Acquaroots Shipping Co. Ltd. Vs. M.V. Guang Hua Men**[34] and **Navios Corporation Vs. m.v. "FU JIN"**[35], both decided by our court, and the Supreme Court decision in **M.V. Elisabeth** (supra).

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34 Notice of Motion No.1369/2012 in Adm. Suit No.27/2009, Order dtd. 23 August 2012.
35 Admiralty Suit No.8 of 2010, Order dated 27 August 2010.

30. Apropos of the Plaintiff's plea that its counter-claim is an action to enforce the undertaking, it is important to bear in mind the object and purpose of the undertaking. The undertaking furnished by the original Plaintiff in the present case is in pursuance of Rule 941 of the Bombay High Court (Original Side) Rules, which is a statutory embodiment of a time-honoured practice of courts to require the applicant for injunction or any other interlocutory relief such as arrest of a ship pending trial to give an undertaking to abide by any order for damages that may be made if the respondent to the application suffers loss as a result of the order, and the court is of the opinion that the applicant should compensate him for such loss. According to Sir George Jessel MR in **Smith vs. Day**[36]**,** this undertaking, which is generally referred to as 'undertaking in damages', was invented by Knight-Brace LJ when he was Vice-Chancellor. It had been originally inserted only in ex parte orders for injunctions. Soon it came to be recognized as an important procedural device in any inter-partes application on motion, where the court did not know who would eventually prevail. The undertaking fulfilled two objectives. The first, as explained in his treatise '**Commercial Injunctions**'[37] by Steven Gee QC, was to enable the court to abstain from expressing premature views on the merits of the action and the second to enable the court to grant an injunction knowing that if the defendant prevailed he would usually obtain some compensation for having been subjected to an injunction. For our purposes, it is important to note that the undertaking is a means to the respondent to the original motion for interim relief to obtain compensation for loss caused by any order passed on the motion. It is secondly important to note that this

36 (1882) 21 Ch. D. 421 at P. 424

37 6th Edition, Para 11-003 at P.318

compensation is separate from damages claimed in an individual cause of action, where the order was obtained either maliciously or without reasonable cause, or in abuse of the process of the court or in breach of contract. In each of these latter cases, the respondent can obtain compensation on a cause of action founded on a specific actionable wrong committed by the applicant. For an action based on such cause of action there is no need for there to be any undertaking on the part of the applicant. The idea behind the undertaking is that it enables the court to grant compensation simply on the grounds (a) that loss is caused to the respondent by a court order and (b) that the court is of the opinion that the applicant must compensate him for such loss. It may be sufficient for the court to grant such compensation when it finds that the interlocutory relief causing loss was simply unjustified without anything more. It need not, in other words, look for any actionable wrong committed by the applicant for such relief.

31. The English Court of Appeal, in **Cheltenham & Gloucester Building Society vs. Ricketts**[38], culled out the following guidance from the various authorities on the point:

> "(1) Save in special cases an undertaking as to damages is the price which the person asking for an interlocutory injunction has to pay for its grant. The court cannot compel an applicant to give an undertaking but it can refuse to grant an injunction unless he does. (2) The undertaking, though described as an undertaking as to damages, does not found any cause of action. It does, however, enable the party enjoined to apply to the court for compensation if it is subsequently established that the interlocutory injunction should not have been granted. (3) The undertaking is not given to the enjoined but to the court. (4) In a case where it is determined that the injunction should not have been granted the undertaking is likely to be enforced, though the court retains a discretion not to do

38 1 W.L.R. 1545

so. (5) The time at which the court should determine whether or not the interlocutory injunction should have been granted will vary from case to case. It is important to underline the fact that the question whether the undertaking should be enforced is a separate question from the question whether the injunction should be discharged or continued. (6) In many cases injunctions will remain in being until the trial and in such cases the propriety of its original grant and the question of the enforcement of the undertaking will not be considered before the conclusion of the trial. Even then, as Lloyd L.J. pointed out in Financiera Avenida v. Shiblaq, The Times, 14 January 1991; Court of Appeal(Civil Division) Transcript No.973 of 1990 the court may occasionally wish to postpone the question of enforcement to a later date. (7) Where an interlocutory injunction is discharged before the trial the court at the time of discharge is faced with a number of possibilities. (a) The court can determine forthwith that the undertaking as to damages should be enforced and can proceed at once to make an assessment of the damages. It seems probable that it will only be in rare causes that the court can take this course because the relevant evidence of damages is unlikely to be available. It is to be noted, however, that in Columbia Pictures Inc. v. Robinson [1987] Ch. 38, Scott J. was able, following the trial of an action, to make an immediate assessment of damages arising from the wrongful grant of an Anton Piller order. He pointed out that the evidence at the trial could not be relied on to justify ex post facto the making of an ex parte order if, at the time the order was made, it ought not to have been made: see p. 85H. (b) The court may determine that the undertaking should be enforced but then direct an inquiry as to damages in which issues of causation and quantum will have to be considered. It is likely that the order will include direction as to pleadings and discovery in the inquiry. In the light of the decision of the Court of Appeal in Norwest Holst Civil Engineering Ltd. v. Polysius Ltd., The Times; 23 July 1987; Court of Appeal (Civil Division) Transcript No.644 of 1987 the court should not order an inquiry as to damages and at the same time leave open for the tribunal at the inquiry to determine whether or not the undertaking should be enforced. A decision that the undertaking should be enforced is a precondition for the making of an order of an inquiry as to damages. (c) The court can adjourn the application for the enforcement of the undertaking to the trial or further order. (d) The court can determine forthwith that the undertaking is not to be enforced. (8) It seems that damages are awarded on a similar basis to that on which damages are awarded for breach of contract. This matter has not been fully explored in the English cases though it is to be noted that in Air Express Ltd. v. Ansett Transport Industries (Operations) Pty. Ltd. (1979) 146 C.L.R. 249, 267 Aickin J. in the High Court of Australia expressed the view

> that it would be seldom that it would be just and equitable that the unsuccessful plaintiff "should bear the burden of damages which were not foreseeable from circumstances known to him at the time." This passage suggests that the court in exercising its equitable jurisdiction would adopt similar principles to those relevant in a claim for breach of contract."

32. It is a part of the law of interlocutory relief generally, and of arrest pending an admiralty action in particular, that a party aggrieved by any interlocutory relief, or arrest, can apply in the same suit for compensation for a wrongful or unjustified relief, or arrest. In particular, Arrest Convention of 1999, which, as we have noted above, is very much a part of the admiralty law to be applied by the High Court in India, recognizes (Clause 2 of Article 6) the jurisdiction of the courts of the place of arrest to determine the extent of the liability, if any, of the claimant for arrest for any loss or damage caused by the arrest of a ship, including but not restricted to such loss or damages as may be caused in consequence of the arrest having been wrongful or unjustified. The same Article (Clause 1 of Article 6) recognizes the power or authority of the court to impose upon a claimant for arrest of a ship, as a condition of the arrest, an obligation to provide security of a kind, and for an amount and upon such terms, as may be determined by that court, for any loss which may be incurred by the defendant as a result of the arrest, and for which the claimant may be found liable. Relying on these provisions and reading them with Rule 941 of the High Court Rules, our court in **Acquaroots Shipping Co. Ltd.** (supra) has held that "...when a vessel is arrested without proper cause and the order of arrest is vacated unconditionally or if the plaintiff after obtaining the order of arrest is unable to establish his case, the party suffering prejudice by such order can invoke the undertaking furnished by the party arresting the vessel and seek damages/compensation..."

In the case of **Navios Corporation** (supra), another learned Single Judge of our court has held that where an undertaking is given under Rule 941, it can be enforced by any person entitled to enforce the same by filing an application in the same proceeding before the same court.

33. It is thus clear that as a court ordering arrest of the Defendant vessel pending the Plaintiff's admiralty action, this court is fully within its powers, after vacating the arrest unconditionally, to consider (a) whether the Defendant acting through its owner has suffered any loss or damage, (b) whether such loss or damage is caused as a result of the arrest being wrongful or unjustified, and (c) whether the Plaintiff is liable to compensate the Defendant for the same. As part of this exercise, this court can certainly hold the Plaintiff to its undertaking furnished to the court under Rule 941 of the High Court Rules, and use the undertaking as a means to recover such loss or damage. It does not matter one bit whether the Defendant has applied for such recovery by a motion in the suit or simply by a plea in his written statement or by way of a counter claim filed in the suit. What is important to note is that the Defendant has raised the issue and made the application in the same suit. If made in the same suit, such plea or application is part of the Defendant's case in the suit. The court, in other words, adjudicates the liability of the plaintiff for a wrongful or unjustified arrest as an adjunct of its power to order arrest pending an action.

34. The result of the foregoing discussion on the Court's power or authority to determine the loss or damage caused to the defendant by a wrongful or unjustified arrest and to enforce the

plaintiff's undertaking in damages, may be summarized as follows : the defendant's right to claim and the court's corresponding power to grant such damages are not incidences of a remedy for a separate cause of action against the plaintiff. It is part of the court's power to do complete justice between the parties before it. When the defendant applies for such damages, he requires the court to do such justice. It is, in that sense, neither an action for recovery of damages for wrongful seizure nor injury caused by an injunction, but to compensate the defendant for loss caused by a court order, which, the court is of the opinion, the plaintiff ought to do, and this the court orders by requiring the plaintiff to fulfill his undertaking given to the court.

35. In the present case, the Plaintiff to the counter claim, who is a defendant to the suit, has taken steps in this very suit for claiming compensation for loss caused to it by the order of arrest. The Plaintiff to the counter claim first applied for security on the part of the Plaintiff herein (i.e. the defendant to the counter claim) by way of cash deposit or bank guarantee with a view to secure the former's claim for loss and damage suffered by it by reason of wrongful arrest of the Defendant vessel and directions to pay such sum as may be deemed fit towards such loss and damage. This application was made as part of the application for vacating the order of arrest. Pursuant to an order dated 12 July 2011, this court, whilst vacating the arrest, granted liberty to the Plaintiff to the counter claim to file separate proceeding for damages for wrongful arrest. The Plaintiff to the counter claim thereafter filed a further notice of motion, being Notice of Motion No.1439/2012, for claiming such damages. That motion was followed by the present counter claim, which, according to the

Plaintiff, was filed by way of abundant caution to obviate any technical objection concerning its claim for damages for wrongful arrest. The Defendant to the counter claim (original Plaintiff), on the other hand, in its reply to Notice of Motion No.1439/2012, admitted that the question of payment of damages would arise "in the event of the order of arrest being found to be wrongful". The Defendant took up a position that admittedly the order of arrest had not been found to be wrongful and thus, the application in Notice of Motion No.1439/2012 was not maintainable. In other words, the Defendant took up a position that the question of invocation of undertaking would arise only after the arrest was declared to be wrongful. At the hearing of the notice of motion, finally, the Plaintiff to the counter claim sought liberty from the court to withdraw the notice of motion and instead pursue its counter claim. The motion was allowed to be withdrawn with liberty as prayed. The present counter claim has accordingly been continued as a counter claim in the suit.

36 It is thus clear that that the Plaintiff to the counter-claim has a remedy within the suit of the claimant for arrest for damages caused to the former by a wrongful or unjustified arrest and can apply for such remedy at any time after the arrest has been vacated on the ground either that it is wrongful or unjustified. The Plaintiff to the counter-claim can enforce the undertaking in the very suit in which it was given as part of that remedy. The right to seek such remedy arises upon the order of arrest being unconditionally vacated by the court. The Plaintiff to the counter-claim first applied for this remedy as part of its application for vacating the arrest, followed by another independent Notice of Motion for claiming the remedy and thereafter,

by the present counter-claim, after seeking liberty from the court. It is not in dispute that if the Plaintiff's right to claim compensation from the Defendant to the counter-claim were to accrue at the date of vacating of the arrest, the present counter-claim would be within time.

37. The question that now arises for our consideration is whether the Plaintiffs in the companion suit, i.e. Admiralty Suit No.66 of 2015, can also seek to enforce the undertaking and claim their suit to be within time on that account. Mr. Pratap, for the Plaintiffs, submits that the wordings of the undertaking are very wide and cover not just persons who are parties to the suit or, for that matter, persons whose property is arrested. Learned Counsel submits that there could be several categories of persons who may suffer from a wrongful arrest, e.g. cargo interests, demise charterers, etc; these latter can also claim compensation for loss or damage caused to them by reason of a wrongful arrest. Learned Counsel submits that just as a right to damages accrues to the defendant in an action for arrest upon the arrest being vacated, the right of all these others, who are not parties to the suit but who have suffered damages as a result of the arrest, which they claim to be wrongful, arises upon the arrest being vacated and they can very well apply for enforcement of the undertaking.

38. There is a fundamental fallacy in this submission. The defendant's right in a suit filed by the plaintiff claiming any interlocutory relief, including an arrest pending the suit, as we have noted above, is not a right to claim against the plaintiff for a wrong committed by the latter either in contract or tort, but is a right to require the court to do complete justice between the parties before it,

to require the court to compensate the defendant for loss caused by a court order, which the Plaintiff was not, in the first place, justified in seeking. The undertaking given to the court by the plaintiff in such a case, and which the defendant seeks to enforce as part of this right, is a mere means for enabling the court to do such justice between the parties. The undertaking is given to the court and not directly to the party or parties either identified in it or indicated in it. No party, including the defendant to the suit, is entitled to sue on it as if it were a contract between it and the plaintiff who furnished the undertaking. Even the defendant cannot maintain a claim, as if in contract, before any other forum for enforcement of the undertaking. A third party to the action naturally has no cause of action based on such undertaking. The form of the undertaking, no doubt, as submitted by Mr. Pratap, is a general commitment for compensating any aggrieved party for an arrest which is either wrongful or unjustified, but that is because of the very nature of an admiralty action. It is an action commenced against the res. There are no identified individual interests in the res when the admiralty action is commenced. The individual interests who are concerned in the action, and who may be affected by it, have to approach the court for being joined as party defendants to the action, be it the owners, the despondent-owners, the demise charterers or even the cargo-owners. That is why Rule 949 of the Bombay High Court (Original Side) Rules permits intervention in the admiralty suit by any person who has interest in the property against which the suit in rem is brought and which is under arrest, or any money representing its sale proceeds brought in court, but who is not a defendant to the suit. If it is the case of a party that it is aggrieved by any arrest of property or sale of property in pursuance of such arrest,

and it has a claim against the property or the sale proceeds, it must intervene in the very suit. Only then it is entitled to seek justice as between itself and the plaintiff in respect of the arrest or the sale, as the case may be. This right of the party, as explained above, is different from its right to sue in contract or tort, i.e. for wrongful seizure in breach of contract or tort, as the case may be. In any such independent action it sues on an actionable wrong committed by the plaintiff in the arrest action and not on the undertaking furnished by the latter in his own action.

39. The Plaintiffs in the companion admiralty suit (Admiralty Suit No.66 of 2015), thus, have no cause of action to sue the Defendant (Plaintiff in Admiralty Suit No.3 of 2011) on the latter's undertaking furnished in Admiralty Suit No.3 of 2011. The Plaintiffs' cause of action, if any, is only on the tort committed by the Defendant by wrongful arrest, that is to say, wrongful seizure of the property under legal process. Their suit is, thus, covered by Article 80. The limitation period for their suit is one year from the date of the arrest, i.e. one year from 9/10 December 2010. The suit, filed on 22 June 2015, is clearly beyond time and barred by the law of limitation.

40. The result of the foregoing discussion is that Counter-claim No.19 of 2012 is within time, but Admiralty Suit No.66 of 2015 is barred by the law of limitation. The preliminary issue framed as above in Counter-claim No.19 of 2012 is accordingly answered in the negative, i.e. in favour of the Plaintiff to the Counter-claim. The preliminary issue framed in Admiralty Suit No.66 of 2015 is answered in the affirmative, i.e. in favour of the Defendant to the suit. Admiralty Suit No.66 of 2015 is accordingly dismissed. Counter-claim

No.19 of 2012 shall now be placed before the regular court hearing admiralty matters for directions in the trial. Notice of Motion No.2202 of 2015 is disposed of accordingly. Notice of Motion No.1770 of 2015 in Admiralty Suit No.66 of 2015 does not survive, as the suit is dismissed on the basis of the preliminary issue as above.

**(S.C. GUPTE, J.)**