IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL APPLICATION (FOR DIRECTION) NO. 3 of 2019
In R/ADMIRALTY SUIT NO. 1 of 2019
With
R/ADMIRALTY SUIT NO. 1 of 2019

FOR APPROVAL AND SIGNATURE:

HONOURABLE MS. JUSTICE SONIA GOKANI

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

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GP GLOBAL APAC PTE. LTD
Versus
MV SILVIA GLORY(IMO 9622942)

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Appearance:
Mr. ZARIR BHARUCHA with MR DHAVAL M BAROT(2723) Learned Advocates for the Defendant(s) No. 1
Mr. Saurabh Soparkar,Senior Advocate with learned Advocate MS PAURAMI SHETH(841) for the Plaintiff(s) No. 1

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CORAM:**HONOURABLE MS. JUSTICE SONIA GOKANI**

Date : 31/08/2020

ORAL JUDGMENT

1.This application is preferred by the applicant original defendant, Best Excellence Corporation Limited

("Best Excellence") seeking to vacate the order of arrest dated 01.01.2019 and the security furnished by the applicant to be returned.

2. Following are the prayers sought for, which are as under: -

""45. In view of what is stated herein above, the Applicant prays that the Hon'ble Court may be pleased to: -
Order and direct the order of arrest dated 2 January 2019 be vacated and the security, furnished by the Applicant be returned, along with accrued interest.

Order and direct that the Respondent's suit be dismissed.

Order and direct that the Respondent/Plaintiff compensate the Applicant/Defendant for its legal costs of UDS 150,000 and that pending the hearing of the Applicant/Defendant's said legal costs under Order 25, Rule 1 of the Code of Civil Procedure;

Order and direct that the Respondent/Plaintiff compensate the Applicant/Defendant towards losses suffered by the Applicant/Defendant towards losses suffered by the Applicant/Defendant on account of the wrongful/unjustified arrest of the Vessel, in pursuance of the undertaking given by the Respondent/Plaintiff.

Pending the hearing of the application, the Respondent/Plaintiff be directed to furnish security of USD100,000 towards losses suffered by the Applicant on account of the wrongful unjustified arrest of the Vessel.

For ad-interim reliefs in terms of the relevant prayer clauses above;

For any other order, as this Hon'ble Court may deem fit."

3. The Best Excellence is the owner of the defendant vessel M.V. Silvia Glory ("the Vessel" for short). The arrest order was obtained by the respondent plaintiff on the ground that it has a legitimate maritime claim/lien on the vessel arising out of the unpaid bunkers supplied to the vessel in October, 2018. The case of the respondent plaintiff is that one Bulk Marine Pvt. Limited ("Bulk Marine" for short) placed an order for supply of bunkers on behalf of the applicant for the vessel and this debt has remained unpaid and therefore, the applicant being the owner of the vessel is liable for the said outstanding dues. It is the say of the applicant defendant that the case of the plaintiff is misconceived and mysterious. It is a trite law that in order for a vessel to be arrested *in rem for unpaid bunkers,* the person liable for debt could not be the owner of the vessel, unless there is a contractual lien with the owner. The plaintiff respondent failed to make out even arguable *prima facie* case that the person liable for its alleged debt is the applicant. Moreover, the respondent actively

suppressed the material facts and documents, which showed that it was fully aware that the applicant was not liable for the debt. The arrest was obtained by misleading the Court and, therefore, it is urged that the order of arrest has to be set aside.

4. It is the say of the applicant that Bulk Marine was the charterer of the vessel and was not acting on behalf of the defendant vessel or its owners as has been wrongly alleged by the respondent. The plaintiff respondent would never have been under the impression that Bulk Marine was acting on behalf of the defendant vessel or its owner. The respondent suppressed the non-lien notice dated 28.10.2018 issued by the applicant at the time of delivery of bunkers specifically putting the plaintiff to the notice that Bulk Marine was the charterer of the ship and non-lien or claim would arise against the ship and that the applicant was not responsible for any payment towards it. It is the grievance of the applicant that all along the respondent knew that its customer or contractual counter-part was Bulk Marine and

not the applicant and no correspondence was sent to the applicant by the respondent.

5. Even the letter of demand for outstanding sum was issued by the respondent to Bulk Marine and not upon the present applicant. It is emphatically urged that the Bulk Marine is sub sub charterer of the vessel and the applicant has chartered the vessel to Lianyi Shipping Corporation ("Lianyi" for short). Lianyi in turn sub-chartered the vessel to Admiral Shipping and Admiral Shipping sub-sub-chartered the said vessel to Bulk Marine. It is thus clear, according to the applicant, that Bulk Marine is not the agent of the applicant, but having hired the vessel for its own commercial purpose and there being several degrees of contractual separation between the applicant and Bulk Marine as well as specifically contemporaneous messages from Bulk Marine specifically referring that supply of bunkers is not the responsibility of the applicant, the arrest order obtained is not tenable. No material has been produced by the plaintiff respondent to support its repeated assertion that Bulk Marine was acting on

behalf of the defendant vessel and/or its Master or its owner. It is urged that Bulk Marine had placed an order for supply of bunkers. It is in the capacity as charterer of the ship to the Master/Chief Engineer of the ship expressly put the respondent on notice on 28.10.2018 that supply was exclusively to the account of the Bulk Marine and neither the ship owner nor the applicant would be liable. Moreover, it is the say of the applicant that the respondent is an experienced bunker supplier and was aware that the order was placed by Bulk Marine on its own accord. There was nothing to indicate that Bulk Marine was acting on behalf of the vessel and, therefore, it could not have been so assumed by anyone, much less by the plaintiff which was fully aware that Bulk Marine was not acting on behalf of the owner of the vessel. It has lamented that the arrest of the ship was made on the basis of incorrect details. It is a trite law that in India, bunker supplier cannot claim a maritime lien for bunkers supplied to the vessel. Any alleged contractual lien cannot overcome the bar under the India Law on such

lien. Arrest in India is a procedural matter governed by India law. The order of arrest has been obtained by the respondent by misleading the Court and concealing the material facts. It has resulted into gross abuse of process of law and the respondent, therefore, is liable to be compensated.

6. Further affidavit came to be filed by the applicant Best Excellence to bring on record time charterer of the Vessel, time charterer Lianyi. The terms of the said time charterer were expressly incorporated. Clause 18 and Clause 46 of the said time charterer demonstrated that charterers were contractually obliged to pay for the bunkers stemmed on board the Vessel. The extract of clauses 18 and 46 are reproduced as under:

"Clause 18 of the Time Charter:-

"28. That the Owners shall have a lien upon all cargoes, and all sub-freights for any amounts due under this Charter, including General Aver-age contributions, and the Charterers to have a lien on the Ship for all monies paid in advance and not earned, and any overpaid hire or excess deposit to be returned at once. Charterers will not suffer, nor permit to be continued, any lien or encumbrance incurred by them or their agents, which might have priority over the title and interest of the owners in the vessel'.

Clause 46 Bunker Clause

Charterers undertake to supply vessel only with marine fuel oil and marine diesel or gasoil complying with the current ISO specifications, same to be free from any/all waste automotive lubricants or other waste chemicals. All testing results to be conducted in mutually acceptable laboratory. Replenishment of bunkers is arranged and paid for by the Charterers, but always under the supervision of the Master. The Master shall pay due diligence for replenishment of bunkers so as not to cause oil spillage while bunkering.

ISO f-8217-2005(e) RMG 380 for IFO

IFOd-8217-2005(e) DMB for IDO

From 1/1/2010 as per EU directive 2005/33/EE AT "BERTH REQUIREMENT' AND THE California air resources board(crab), vessels are calling such ports must use marine fuels with a sulfur content not exceeding 0.1% by mass. Therefore, vessel has to consume such fuel for d/g and boiler whilst at berth and Charterers' bunkering arrangements must comply with above regulations.

All bunkering at Singapore to take place within port limits only and in accordance with regulations on the Singapore port authority.

Owners have the right to appoint DNV Lloyds register, Fobas(or another recognized independent surveyor) to attend/monitor all bunker deliveries for quality and quantity. Charterers must give minimum one working day notice of intention to supply bunkers with details of suppliers/quantities/specifications.

Owners have the right to supply bunkers to the vessel for their own account without interference to vessel's operation/vessel's intake."

7. The plaintiff's authorized signatory filed affidavit-in-reply on behalf of the plaintiff denying all the

averments and allegations. The plaintiff insisted that it has very strong case on merits and the applicant had not deposited any security with the Court to secure the release of the defendant vessel and, therefore, the application is misconceived.

8. According to the plaintiff, all issues raised by the applicant referring the alleged existence of charter party would require findings of the facts and law and it would necessitate full-fledged trial upon the evidence being led in that regard. Therefore, it would be inappropriate to set aside the order of arrest at an interlocutory stage. According to the plaintiff, the defendant vessel was standing off Deendayal port since 07.11.2018, due to dispute relating to cargo on board the vessel and the said delay of two months was on account of dispute between Nava Investment and Torq Commodities LLC (" Torq Commodities" for short) regarding the cargo laden on the vessel and nothing can be said to be attributed to the plaintiff. Even when the applicant is actually involved and has good knowledge of those

proceedings, it has suppressed the said information from the Court. It is guilty of suppresio veri and suggestio falsi. According to the plaintiff, the applicant has not produced any document to establish anything and its application is based on no support documents. The applicant is aware that the Court has called for USD Bank account details for receiving cash security and the standard practice is to submit bank guarantee from a nationalized bank. However, it is still offering the security, which is not a usual practice. The plaintiff emphasized that to wriggle out of its liability to make payment, the applicant has concocted the story, inconsistent with the documents. It is urged that on the bunker delivery note on 28.10.2018, the Master/Chief Engineer of defendant vessel has specifically marked that no note of protest was issued by the defendant vessel and bunkers were received to the satisfaction of the vessel. An attempt is made to mislead the Court by producing the documents inconsistent with their own acknowledgment on the bunker

delivery note. It is urged that bunker confirmation is addressed to the defendant vessel and the owner and the Bulk Marine had directed the authority from the applicant for supply of bunkers. It is denied that the plaintiff had knowledge that Bulk Marine was solely responsible for the supply. It is denied that non-lien notice was either served upon the plaintiff or it accepted the liability of the charterer. It is denied that the applicant is not liable for supply of bunkers. The plaintiff also denied existence of charter party of February, 2012. The plaintiff submits that charter party has been fabricated and created after filing of the application. It is further urged that the plaintiff is not party to the email exchanges and the same cannot be relied upon by the applicant. It is denied that the applicant suffered any loss of USD 3,24,000 and it is urged that it be put to the strict proof of the same. It is further the say of the plaintiff that The suit has been filed only against the defendant vessel and the ownership of the vessel has not been

changed. Equaisis report indicates that the applicant is the registered owner of the vessel and is not the head owner. The plaintiff is not aware of the chain of charterers nor would it admit anything. It is further the say of the plaintiff that the present suit is for recovery of unpaid amount for bunker supply made to the defendant vessel and therefore the action *in rem* can lie against the vessel. The plaintiff has maritime claims as the order was placed by the Bulk marine on behalf of the owner and the bunkers were supplied to the defendant vessel on account of the faith and credit of the Vessel. Bunker delivery note is dated 28 October 2018 and is signed by the chief engineer of the defendant vessel which is without protest. Again in Tax invoice dated 26 October 2018 issued by the plaintiff, it is made clear that supply and delivery of marine fuel is subject to the general terms and conditions of marine fuel contract entered into by the plaintiff. The general terms and conditions of the plaintiff would create contractual Indian with the vessel.

9. The affidavit-in-rejoinder and affidavit in-sur-rejoinder and affidavit-in-sur-sur-rejoinder all have come on record.

10. This Court has extensively heard learned advocates on both the sides and also have perused the material on record. So far as O.J. Civil Application No.3 of 2019 is concerned, it is seeking to vacate the order of this Court dt.26.02.2019 which modified the first order of 02.01.2019 permitting the vessel to travel with certain amount of security as detailed in the order. The request for modification of the order is required to be allowed for the reasons stated hereinafter. Apt would be to reproduce profitably the modified order of this Court.

> "*[1.0] Mr. Dhaval Barot, learned advocate for the Defendant mentioned this matter for urgent circulation today. Permission is granted for urgent circulation and suit is taken up for hearing for the release of the Defendant Vessel.*
> *[2.0] Mr. Dhaval Barot, learned advocate appearing for the Defendant has submitted a purshish stating that the Registered Owners of the Defendant Vessel has furnished cash security to this Court, without prejudice to their rights and contentions in the suit and has prayed that the order of arrest be vacated*

and the Defendant Vessel be released from arrest. The purshish is taken on record.

[3.0] Mr. Dhaval Barot, learned advocate for the Defendant states that the Registered Owners have, on a without prejudice basis and without admitting to any liability, paid into the account of the Registrar General, High Court of Gujarat, a cash security USD 390790/which comprises of the Principal Amount, interest and Cost of Litigation as claimed by the Plaintiff.

[4.0] Ms. Paurami Sheth, learned advocate for the Plaintiff states that only on receipt of proof of actual deposit by the Registry, this Court may pass order of release of the Defendant Vessel.

[5.0] Having heard the learned advocates for the respective parties and in light of the fact that Defendant stated that it has deposited security of USD 390790 towards the Plaintiff's claim in the Suit, on a without prejudice basis, the following order is passed:

a. Registry shall verify that the Registered Owners of the Defendant Vessel has deposited an amount of USD 390790 in Punjab National Bank, NRI Branch, Pelican Building, Ashram Road, Ahmedabad in Account No.740600VQ00000013, Swift Code No.PUNBINBBAIB and AD Code No.0303969.

b. On confirmation of the receipt of the remittance as above, the concerned branch of Punjab National Bank is further directed to invest the same in a Fixed Deposit with cumulative effect in the name of Registrar, High Court of Gujarat.

c. On receipt of the intimation that such remit tance has been made and received by Punjab National Bank, NRI Branch, the Defendant Vessel shall be permitted to said out of the Deendayal Port. On remittance being received by the Bank, the Bank shall intimate the same to the Registry forthwith.

d. On such intimation being received by the Registry, the order of arrest dated 02.01.2019 shall stand vacated, and the Defendant Vessel shall be permitted to sail out.

e. Registry shall inform the Learned Advocates for the Defendant and the Plaintiff about such remittance having been received by the Bank.

f. Upon the Registry informing the Learned Advocate for the parties about such remittance having been received by the Bank, the Port Officer and Customs Authority at the Deendayal Port are directed to permit the Defendant Vessel to sail out of the Deendayal Port and render all necessary assistance to the Defendant and its representatives on production of simple copy of such communication addressed by the Registry to the Learned Advocate for the Defendant;

g. Upon the Registry informing the Advocate for the Defendant that the remittance has been received, it will also be open for the Defendant and/or its Advocate to communicate the above order by fax message /Email at the own cost and the Port and Customs Authority at the Deendayal Port are directed to act on fax / email message with an ordinary copy of the order;

[6.0] It is made clear that the security furnished shall be without prejudice to the rights and contentions of the parties.

Stand over to 06.03.2019.

Direct service is permitted TODAY."

11. At the outset, it is needed to be mentioned that this Court has recently in the case of Admiralty Suit NO.8 of 2019, decided the very issue with regard to the outstanding amount of unpaid bunkers and, whether the same can be charged by the party as maritime lien. Therefore, it will not be necessary to discuss the law on the subject separately and independently. It would be worthwhile to reproduce the relevant findings and observations reflecting upon the legal issue on the subject. Relevant paragraphs

from Civil Application No.1 in Admiralty Suit No.8 of 2020 on the issue of outstanding amount for bunker supply and whether the same can be claimed as maritime lien without any privity of contract with the owner of the vessel, are profitably reproduced as under:

12. *"13. Having thus heard both the sides and also having perused the law on the subject, at the outset, it is necessary to consider some of the vital provisions of the Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017 (hereinafter referred to as 'Admiralty Act').*

13. *The Admiralty jurisdiction is defined under Section 2(A) under the definition clause which is to be exercised by the High Court under Section 3, in respect of maritime claims specified under this act.*

13.1. *Section 2(1)(C) speaks of "arrest" which means 'the detention or restriction for removal of a vessel by order of the High Court to secure a maritime claim including seizure of a vessel in execution or satisfaction of judgment or order.'*

13.2. Section 2(1)(e) defines the High Court in relation to the Admiralty proceedings which includes also the High Court of Gujarat.

13.3. Apt would be to reproduce Section 4 (1)(g) of the Act:

> *"4. Maritime claim.—(1) … (g) agreement relating to the carriage of goods or passengers on board a vessel, whether contained in a charter party or otherwise; " It relates to an agreement relating to the carriage of goods and passengers on board a vessel, whether contained in a Charter Party or otherwise.*

13.4. Section 4(1) (h) reads thus:

> *"4. Maritime claim.—(1) … (h) agreement relating to the use or hire of the vessel, whether contained in a charter party or otherwise; (i) salvage services, including," This provision relates to an agreement relating to the use or hire of the vessel, whether contained in the Charter Party or otherwise.*

13.5. 'Maritime claim' would mean claim referred to in Section 4, which provides *thus:*

> *"4. Maritime claim.—*
>
> *(1) The High Court may exercise jurisdiction to hear and determine any question on a maritime claim, against any vessel, arising out of any—*
>
> *(a) dispute regarding the possession or ownership of a vessel or the ownership of any share therein;*

(b) dispute between the co-owners of a vessel as to the employment or earnings of the vessel;

(c) mortgage or a charge of the same nature on a vessel;

(d) loss or damage caused by the operation of a vessel;

(e) loss of life or personal injury occurring whether on land or on water, in direct connection with the operation of a vessel;

(f) loss or damage to or in connection with any goods;

(g) agreement relating to the carriage of goods or passengers on board a vessel, whether contained in a charter party or otherwise;

(h) agreement relating to the use or hire of the vessel, whether contained in a charter party or otherwise;

(i) salvage services, including, if applicable, special compensation relating to salvage services in respect of a vessel which by itself or its cargo threatens damage to the environment;

(j) towage;

(k) pilotage;

(l) goods, materials, perishable or non-perishable provisions, bunker fuel, equipment (including containers), supplied or services rendered to the vessel for its operation, management, preservation or maintenance including any fee payable or leviable;

(m) construction, reconstruction, repair, converting or equipping of the vessel;

(n) dues in connection with any port, harbour, canal, dock or light tolls, other tolls, waterway or any charges of similar kind chargeable under any law for the time being in force;

(o) claim by a master or member of the crew of a vessel or their heirs and dependents for wages or

any sum due out of wages or adjudged to be due which may be recoverable as wages or cost of repatriation or social insurance contribution payable on their behalf or any amount an employer is under an obligation to pay to a person as an employee, whether the obligation arose out of a contract of employment or by operation of a law (including operation of a law of any country) for the time being in force, and includes any claim arising under a manning and crew agreement relating to a vessel, notwithstanding anything contained in the provisions of sections 150 and 151 of the Merchant Shipping Act, 1958 (44 of 1958);

(p) disbursements incurred on behalf of the vessel or its owners;

(q) particular average or general average; 4

(r) dispute arising out of a contract for the sale of the vessel;

(s) insurance premium (including mutual insurance calls) in respect of the vessel, payable by or on behalf of the vessel owners or demise charterers;

(t) commission, brokerage or agency fees payable in respect of the vessel by or on behalf of the vessel owner or demise charterer;

(u) damage or threat of damage caused by the vessel to the environment, coastline or related interests; measures taken to prevent, minimise, or remove such damage; compensation for such damage; costs of reasonable measures for the restoration of the environment actually undertaken or to be undertaken; loss incurred or likely to be incurred by third parties in connection with such damage; or any other damage, costs, or loss of a similar nature to those identified in this clause;

(v) costs or expenses relating to raising, removal, recovery, destruction or the rendering harmless of a vessel which is sunk, wrecked, stranded or abandoned, including anything that is or has been on board such vessel, and costs or expenses relat-

ing to the preservation of an abandoned vessel and maintenance of its crew; and

(w) maritime lien."

13.6. Section 2(g) defines 'Maritime lien' which means Maritime claim against the owner, demise Charters, manager or operator of the vessel referred to in clauses (a) to (e) of subsection (1) of section 9 which will continue to exist under subsection (2) of that section. It would be apt to reproduce the entire provision at this stage:

"9. Inter se priority on maritime lien.—

(1) Every maritime lien shall have the following order of inter se priority, namely

(a) claims for wages and other sums due to the master, officers and other members of the vessel's complement in respect of their employment on the vessel, including costs of repatriation and social insurance contributions payable on their behalf;

(b) claims in respect of loss of life or personal injury occurring, whether on land or on water, in direct connection with the operation of the vessel;

(c) claims for reward for salvage services including special compensation relating thereto;

(d) claims for port, canal, and other waterway dues and pilotage dues and any other statutory dues related to the vessel;

(e) claims based on tort arising out of loss or damage caused by the operation of the vessel other

than loss or damage to cargo and containers carried on the vessel.

(2) The maritime lien specified in sub-section (1) shall continue to exist on the vessel notwithstanding any change of ownership or of registration or of flag and shall be extinguished after expiry of a period of one year unless, prior to the expiry of such period, the vessel has been arrested or seized and such arrest or seizure has led to a forced sale by the High Court:

Provided that for a claim under clause (a) of sub-section (1), the period shall be two years from the date on which the wage, sum, cost of repatriation or social insurance contribution, falls due or becomes payable.

(3) The maritime lien referred to in this section shall commence—

(a) in relation to the maritime lien under clause (a) of sub-section (1), upon the claimant's discharge from the vessel;

(b) in relation to the maritime liens under clauses (b) to (e) of subsection (1), when the claim arises, and shall run continuously without any suspension or interruption:

Provided that the period during which the vessel was under arrest or seizure shall be excluded.

(4) No maritime lien shall attach to a vessel to secure a claim which arises out of or results from—

(a) damage in connection with the carriage of oil or other hazardous or noxious substances by sea for which compensation is payable to the claimants pursuant to any law for the time being in force;

(b) the radioactive properties or a combination of radioactive properties with toxic, explosive or other hazardous properties of nuclear fuel or of radioactive products or waste."

The term 'Territorial water" shall have the same meaning as assigned to it in the territorial waters, continental shelf, exclusive economic zone and other Maritime zones act 1976 , as defined under section 2 (k)of the Act.

13.7. Section 3 provides for Admiralty jurisdiction and maritime claims.

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

13.8. It is apparent from section 3 that jurisdiction in respect of all maritime claims under this act, subject to section 4 and 5 of the said act, vests in the respective High courts and be exercisable over the waters up to and including the territorial waters of their respective jurisdictions in accordance with the provisions contained in this act. The central government of course, has power by notification to extend the juris-

diction of the High Court up to the limit as defined in section 2 of the territorial waters, Continental shelf, Exclusive Economic zone and other Maritime zones act, 1976.

13.9. Under section 4, the High Court is given the discretion to exercise jurisdiction to hear and determine any questions on a maritime claim against any vessel. It defines maritime claims from clauses (a) to (w). Section 4(1)(w) under the Maritime claim provides maritime lien, which are of five kinds and defined under Section 9 of the Act.

13.10. Section 5 permits the High Court to order arrest of any vessel in rem which is within its jurisdiction for the purpose of providing security against a maritime claim which is the subject of Admiralty proceeding where the court has reason to believe that the person who owned the vessel at the time when the maritime claim arose is liable for the maritime claim and is the owner of the vessel when the arrest is effected.

13.11. Section 5(1)(a) of the Admiralty Act, 2017 thus clearly provides that the Court having the jurisdiction to arrest the ship should have reason to believe "that the owner is liable to pay to the plaintiff."

14. It would be necessary at this stage to refer to the decision of the Apex Court sought to be relied upon by the plaintiff rendered in case of **Videsh Sanchar Nigam Ltd vs. M.V. Kapitan Kud & Ors [1996 SCC (7) 127],** where *the Apex Court has held that the arrest should be maintained if the case of the plaintiff is not hopeless and whether the owner is liable to the plaintiff, should be determined at the time of trial. As rightly pointed out by the learned Counsel of the applicant, the decision of Videsh Sanchar Nigam Ltd (supra) followed the judgment of Schwarz & Co. [Grain] Ltd. vs. St. Elefterio EX Arion [Owners]. [(1957) LLR Volume 1, 283] based on the English Administration of Justice Act, 1956 and particularly Section 3(4) of the said Act, which provides that what is required to be considered is whether "the owner*

would be liable in personam", there is no reference or expression as is found in Section 5(1)(a) of the Admiralty Act. Thus, what emerges is that the arrest of the ship, as per the Admiralty Act, 2017 should be permitted when the Court has 'reason to believe' that the owner is liable to the plaintiff. Undoubtedly, this remedy of arrest of a vessel concerns international trade and commerce and it is a very radical remedy having dire consequence of far reaching effects on various agencies and therefore, the Court satisfaction that the owner is liable, is quite necessary and a must, before the arrest is made and is maintained. However, if the Court has reason to believe that the vessel owner is liable, then the further investigation at the time of trial shall be required. It is quite obvious that unless, prima facie, the Court has such reason to believe, no point would be sub-served continuing the arrest. The Court has also, in agreement with the submissions of learned advocate Mr. Bharucha that when the prima facie finding that the Court has reason to believe that the owner would be liable to the plaintiff for the out-

standing amount, continuation of the arrest of the ship will not amount to striking a balance. Territorial jurisdiction for the arrest of the vessel cannot be permitted to be misused by anyone since under the local laws of the concerned countries, the suits are even otherwise maintainable. Therefore, it is not a case that the party would become remediless in the event of non entertainment of the suit. At the same time, there could be very serious triable issues which would not make it possible for the Court to conclude anything at the stage of interim protection and the matter would necessarily warrant trial. In such eventuality, it would not be possible for the Court to vacate the order of stay and terminate the litigation without availing any full-fledged opportunities to the parties. No party should be permitted to misuse the process of law but, at the same time, if it can show the substance and if there is a prima facie material having come on the record, the Court surely can exercise the jurisdiction of directing the arrest of the ship for the amount claimed by the plaintiff.

15. What would amount to 'reason to believe' shall need to be considered from some of the decisions sought to be relied upon.

15.1. The Apex Court in case of ***Aslam Mohammad Marchant vs. Competent Authority and Another [(2008) 14 SCC 186],*** *as to what amounts to 'reason to believe' that the statute provides such expression, it held that it is a trite law that either the reasons should appear on the face of the notice or they must be available on the material which is placed before the Court/Authority. The findings and observations of the Apex Court on the subject are as follows: -*

"REASON TO BELIEVE

50. This brings us to the next question as to what does the term "reason to believe" mean. We may in this behalf notice some precedents operating in the field.

51. In the context of the provisions of Section 147 of the Income Tax Act, this Court in Phool Chand Bajrang Lal Vs. ITO : [1993] 203 ITR 456] held:-

"25. From a combined review of the judgments of this court, it follows that an Income-tax Officer acquires jurisdiction to reopen an assessment under section 147(a) read with section 148 of the Income-tax Act, 1961, only if on the basis of specific, reliable and relevant information coming to his possession subsequently, he has reasons, which he must record, to believe that, by reason of omission or failure on the part of the assesses to make a true and full disclosure of all material facts necessary for his assessment during the concluded assessment proceedings, any part of his income, profits or gains chargeable to income-tax has escaped assessment. He may start reassessment proceedings either because some fresh facts had come to light which were not previously disclosed or some information with regard to the facts previously disclosed comes into his possession which tends to expose the untruthfulness of those facts. In such situations, it is not a case of mere change of opinion or the drawing of a different inference from the same facts as were earlier available but acting on fresh information. Since the belief is that of the Income- tax Officer, the sufficiency of reasons for forming this belief is not for the court to judge but it is open to an assesses to establish that there in fact existed no belief or that the belief was not at all a bona fide one or was based on vague, irrelevant and non- specific information. To that limited extent, the court may look into the conclusion arrived at by the Income-tax Officer and examine whether there was any material available on the record from which the requisite belief could be formed by the Income-tax Officer and further whether that material had any rational connection or a live link for the formation of the requisite belief."

(See also Income Tax Officer Vs. Lakshmani Mewal Das [(1976) 103 ITR 437].

In Assistant Commissioner of Income Tax v. Rajesh Jhaveri Stock Brokers Pvt. Ltd. [2007 (8) SCALE 396], interpreting the term `reason to believe' as used under Section 247 (a) of the Income Tax Act, 1961, it was opined :

"To confer jurisdiction under Section 247(a) two conditions were required to be satisfied firstly the AO must have reason to believe that income profits or gains chargeable to income tax have escaped assessment, and secondly he must also have reason to believe that such escapement has occurred by reason of either (i) omission or failure on the part of the assesses to disclose fully or truly all material facts necessary for his assessment of that year. Both these conditions were conditions precedent to be satisfied before the AO could have jurisdiction to issue notice under Section 148 read with Section 147(a). But under the substituted Section 147 existence of only the first condition suffices. In other words, if the assessing officer for whatever reason has reason to believe that income has escaped assessment, it confers jurisdiction to reopen the assessment."

15.2. The Sikkim High Court, in case of **Sikkim Subba Associates vs. Union of India (UOI) and Others**, in Civil Writ Petition No. 10 of 2004, Dated: 31.05.2005 explaining the term 'reason to believe', which according to it, the genuine satisfaction arrived at upon honest and reasonable evaluation of information coming to authority and there has to be a reasonable nexus between and satisfaction and

the situation contemplating in any of the clauses, as the matter before the Sikkim High Court was under the Income Tax Act, 1961. This, according to the Court, must be based on the 'information' which is 'in possession of' the officer and 'reason to believe' is opined to be stronger than satisfaction, thus, there is a live link between information and formation of belief. Relevant findings and observations of the Sikkim High Court reads thus:

> *"'29. It is further well-settled that the expression "reason to believe" as decided by the apex Court means a genuine satisfaction arrived at upon a honest and reasonable evaluation of information coming to authority. Furthermore, there must be a reasonable nexus between the satisfaction and the situation contemplated in any of the Clauses (a), (b) and (c). Meaning of the expression "reasons to believe" is stronger than satisfaction. There should be reasons to believe and such reasons to believe must be on the basis of the "information" which is "in the possession of" the concerned officer. It is further well-settled that there must be live link between the information and the formation of belief. In Sheo Nath Singh v. AAC and Ors. (1971) 82 ITR 147 (SC) at p. 153, it was held in para 10 that the words "reason to believe" suggest that the belief must be that of an honest and reasonable person based upon reasonable grounds and that the ITO would be acting without jurisdiction if the reason for his belief that the conditions are satisfied does not exist or is not material or relevant to the belief required by the section. In ITO and Ors. v. Lakh-*

mani Mewal Das (1976) 103 ITR 437 (SC) at pp. 437-438, it was held that the reasons for the formation of the belief must have a rational connection with or relevant bearing on the formation of the belief and rational connection postulates that there must be a direct nexus or live link between the material coming to the notice of the ITO and the formation of his belief and the live link or close nexus which should be there between the material before the ITO in the present case and the belief which he was to form. Further, in Ganga Saran & Sons (P) Ltd. v. ITO and Ors. (1981) 130 ITR 1 (SC), it was held that the AO must have reasons to believe which is stronger than the word "satisfied" and that the belief must not be arbitrary and irrational. In Calcutta Discount Co. Ltd. v. ITO and Anr. (1961) 41 ITR 191 (SC) it was held that the belief must not be based on mere suspicion but should be based on information.

30. It is further well-settled that the Courts can interfere if information is non-existent or irrelevant or the belief is dishonest. In ITO v. Seth Bios, (supra), it was held that if the action is maliciously taken or power under the section is exercised for a collateral purpose, it is liable to be struck down by the Court. In Vindhya Metal Corporation and Ors. v. CIT (supra) at p. 239 approved by apex Court in (1997) 224 ITR 614 (SC) (supra), it was held that the existence or otherwise of condition precedent to exercise of power under these provisions is open to judicial scrutiny and the absence of the condition precedent would naturally have the effect of vitiating the authorization made by the CIT and the proceedings consequent thereto. It was further held that the existence of information and its relevance to the formation of the belief can undoubtedly be gone into by the Court. Further, in Ganga Prasad Maheshwari and Ors. v. CIT (supra) at pp. 1053-4 it was held that if action has been taken by the public authorities without there being actual rea-

sons to believe about the existence of relevant facts, such action is without jurisdiction and it is open to the person impugning the action to question the very existence of the belief and to contend that the authority actually did not entertain any such belief.1

31. It is thus well-settled that under Article 226 of the Constitution, the High Court while exercising its jurisdiction examines the existence of the information on which belief is said to be formed and as to whether the information was of such a nature that there was a live link or a rational connection between the "information" and the formation of the belief. In this jurisdiction, the Court examines the satisfaction of the concerned authority on the information in his possession and does not substitute its own satisfaction by evaluating the information and/or material before it."

15.3. Thus, on the basis of the information and the details furnished to the Court, it must have a reason to believe that the owner is liable to the plaintiff and for arriving at such satisfaction, evaluation of information and the material is a must and as pointed out that the information would be such that would provide a live link or a rational connection between the information and the formation of belief. Thus, unless the Court satisfies that the

owner is liable, the arrest of the ship will not be permissible.

16. What is vital at this stage is to refer as to what amounts to maritime claim and maritime lien as mentioned herein above in the definition clause, which has been made abundantly clear as to what under the new regime of Admiralty Act, 2017 would amount to maritime claim. The arrest of the ship is permissible if there exists a contractual lien. It is a trite law that no action *in rem* is maintainable on the basis of contractual lien. The contractual lien is only actionable in personam. The Apex Court also in case of **Epoch Entrepots vs M.V. Won Fu [(2003) 1 SCC 305]** has made it extremely clear. It would be worthwhile to reproduce relevant paragraph of the said judgment: -

"19. We have in this judgment hereinbefore dealt with the attributes of maritime lien. But simply stated, maritime lien can be said to exist or restricted to in the event of (a) damage done by a ship; (b) salvage; (c) seamen's and master's wages;
(d) master's disbursement; and (e) bottomry; and in the event a maritime lien exists in the aforesaid five circumstances, a right in rem is said to exist. Otherwise, a right in personam exists for any claim that may arise

out of a contract."

16.1. The power to arrest the ship *in rem* is provided under Section 5 of the Admiralty Act, 2017, which authorizes the Court to arrest the ship for maritime lien as provided under Section 9 of the said Act. What is not contemplated under Section 9 is the contractual lien.

16.2. In case of ECO Maritime Ventures Ltd vs. ING Bank NV., in SLP No. 33865 of 2016, this decision of M.V. Won Fu (supra) was not placed before the Court, where the Court held that contractual lien is a maritime lien, which proposition cannot be sustained, in wake of the change in the law, particularly, Section 5(1)(e) when read with Section 9 of the Admiralty Act. It is true that the said decision has travelled up to the Apex Court and the Apex Court did not in any manner favoured the owner of the ship, however, as can be noticed that the Court dealt with the form of security and directed the release of the ship.

17. This Court cannot be oblivious of the fact that the very act of 2017 is subsequent and the decision in case of **Chrisomar Corporation vs Mjr Steels Private Limited [2017 (16) SCC 117]** has been rendered on 14.09.2017 and the same would bind this Court not only being a later decision but also being a decision directly on the subject and interpreting the very provisions which this Court also needs to take into account. The fact that earlier decisions of this Court which are relied upon by the plaintiff have essentially based on the Admiralty Court Act, 1861 and Article 3 of the Brussels Arrest Convention, 1952. It is also pointed out to this Court that the Arrest Convention of 1999 was not taken into consideration by the Court, which requires in personam liability of the owner for the arrest of the vessel.

18. Section 17(1)(b) of the Admiralty Act, 2017 repeals the Admiralty Court's Act, 1861 and Section 5(1)(a) of the Admiralty Act, 2017 is taking care of Article 3(1) of Geneva Arrest Convention, 1999. Apt

would be refer to Article 3(1)(a) of the International Convention on the Arrest of Ships, 1999:

"Article 3: - Exercise of right of arrest

1. Arrest is permissible of any ship in respect of which a maritime claim is asserted if:

(a) the person who owned the ship at the time when the maritime claim arose is liable for the claim and is owner of the ship when the arrest is effected; or

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

(c) the claim is based upon a mortgage or a "hypothèque" or a charge of the same nature on the ship; or

(d) the claim relates to the ownership or possession of the ship; or

(e) the claim is against the owner, demise charterer, manager or operator of the ship and is secured by a maritime lien which is granted or arises under the law of the State where the arrest is applied for."

19. Apt would be to refer to the decision of **Chrisomar Corporation** (supra) as the relevant findings and observations of the Apex Court since

clinches the issue so far as the maritime claim and maritime lien are concerned. It also refers to Article 3(1)(a) of the 1999 convention. Profitably the relevant paragraphs are reproduced as under:

""13. The Republic of India has finally woken up to the need for updating its admiralty law. The Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017 has been made by Parliament and has received the assent of the President on 9.8.2017, though it has not yet been brought into force. In this Act, "maritime claim" is defined in Section 2(1)(f) as being a claim referred to in Section 4 and a "maritime lien" is defined in subsection (g) of 2(1) as follows:

"2. Definitions (1) In this Act,—

(g) "maritime lien" means a maritime claim against the owner, demise charterer, manager or operator of the vessel referred to in clauses (a) to (e) of sub- section (1) of section 9, which shall continue to exist under subsection (2) of that section;" Section 4 reads as follows:

"4. Maritime Claim (1) The High Court may exercise jurisdiction to hear and determine any question on a maritime claim, against any vessel, arising out of any—

(a) dispute regarding the possession or ownership of a vessel or the ownership of any share therein;

(b) dispute between the co-owners of a vessel as to the employment or earnings of the vessel;

(c) mortgage or a charge of the same nature on a vessel;

(d) loss or damage caused by the operation of a vessel;

(e) loss of life or personal injury occurring whether on land or on water, in direct connection with the operation of a vessel;

(f) loss or damage to or in connection with any goods;

(g) agreement relating to the carriage of goods or passengers on board a vessel, whether contained in a charter party or otherwise;

(h) agreement relating to the use or hire of the vessel, whether contained in a charter party or otherwise;

(i) salvage services, including, if applicable, special compensation relating to salvage services in respect of a vessel which by itself or its cargo threatens damage to the environment;

(j) towage;

(k) pilotage;

(l) goods, materials, perishable or non-perishable provisions, bunker fuel, equipment (including containers), supplied or services rendered to the vessel for its operation, management, preservation or maintenance including any fee payable or leviable;

(m) construction, reconstruction, repair, converting or equipping of the vessel;

(n) dues in connection with any port, harbour, canal, dock or light tolls, other tolls, waterway or any charges of similar kind chargeable under any law for the time being in force;

(o) claim by a master or member of the crew of a vessel or their heirs and dependents for wages or any sum due out of wages or adjudged to be due which may be recoverable as wages or cost of repatriation or social insurance contribution payable on their behalf or any amount an employer is under an obligation to pay to a person as an employee, whether the obligation arose out of a contract of employment or by operation of a law (including operation of a law of any country) for the time being in force, and includes any claim arising under a manning and crew agreement relating to a vessel, not-

withstanding anything contained in the provisions of sections 150 and 151 of the Merchant Shipping Act, 1958;

(p) disbursements incurred on behalf of the vessel or its owners;

(q) particular average or general average;

(r) dispute arising out of a contract for the sale of the vessel;

(s) insurance premium (including mutual insurance calls) in respect of the vessel, payable by or on behalf of the vessel owners or demise charterers;

(t) commission, brokerage or agency fees payable in respect of the vessel by or on behalf of the vessel owner or demise charterer;

(u) damage or threat of damage caused by the vessel to the environment, coastline or related interests; measures taken to prevent, minimise, or remove such damage; compensation for such damage; costs of reasonable measures for the restoration of the environment actually undertaken or to be undertaken; loss incurred or likely to be incurred by third parties in connection with such damage; or any other damage, costs, or loss of a similar nature to those identified in this clause;

(v) costs or expenses relating to raising, removal, recovery, destruction or the rendering harmless of a vessel which is sunk, wrecked, stranded or abandoned, including anything that is or has been on board such vessel, and costs or expenses relating to the preservation of an abandoned vessel and maintenance of its crew; and

(w) maritime lien.

Explanation.—For the purposes of clause (q), the expressions "particular average" and "general average" shall have the same meanings as assigned to them in sub-section (1) of section 64 and sub-section (2) of section 66 respectively of the Marine Insurance Act, 1963.

(2) While exercising jurisdiction under sub-section (1), the High Court may settle any account outstanding and unsettled between the parties in relation to a vessel, and direct that the vessel, or any share thereof, shall be sold, or make such other order as it may think fit.

(3) Where the High Court orders any vessel to be sold, it may hear and determine any question arising as to the title to the proceeds of the sale.

(4) Any vessel ordered to be arrested or any proceeds of a vessel on sale under this Act shall be held as security against any claim pending final outcome of the admiralty proceeding." Under Section 5 of the Act, the High Court may order for the arrest of a vessel which is within its jurisdiction for the purpose of providing security against a maritime claim. Under Section 6 of the said Act, the High Court may also exercise admiralty jurisdiction by an order in personam in respect of the maritime claims referred to in Section 4.

Section 9 of the Act sets out the inter se priority of maritime liens, but in so doing also informs us that they are restricted to five subject matters only. Section 9 reads as follows:

"Sec. 9 Inter se priority on maritime lien (1) Every maritime lien shall have the following order of inter se priority, namely:—

(a) claims for wages and other sums due to the master, officers and other members of the vessel's complement in respect of their employment on the vessel, including costs of repatriation and social insurance contributions payable on their behalf;

(b) claims in respect of loss of life or personal injury occurring, whether on land or on water, in direct connection with the operation of the vessel;

(c) claims for reward for salvage services including special compensation relating thereto; (d) claims for port,

canal, and other waterway dues and pilotage dues and any other statutory dues related to the vessel;

(e) claims based on tort arising out of loss or damage caused by the operation of the vessel other than loss or damage to cargo and containers carried on the vessel.

(2) The maritime lien specified in sub-section (1) shall continue to exist on the vessel notwithstanding any change of ownership or of registration or of flag and shall be extinguished after expiry of a period of one year unless, prior to the expiry of such period, the vessel has been arrested or seized and such arrest or seizure has led to a forced sale by the High Court: Provided that for a claim under clause (a) of sub- section (1), the period shall be two years from the date on which the wage, sum, cost of repatriation or social insurance contribution, falls due or becomes payable.

(3) The maritime lien referred to in this section shall commence—

(a) in relation to the maritime lien under clause (a) of sub-section (1), upon the claimant's discharge from the vessel;

(b) in relation to the maritime liens under clauses (b) to (e) of sub-section (1), when the claim arises, and shall run continuously without any suspension or interruption: Provided that the period during which the vessel was under arrest or seizure shall be excluded.

(4) No maritime lien shall attach to a vessel to secure a claim which arises out of or results from—

(a) damage in connection with the carriage of oil or other hazardous or noxious substances by sea for which compensation is payable to the claimants pursuant to any law for the time being in force;

(b) the radioactive properties or a combination of radioactive properties with toxic, explosive or other hazard-

ous properties of nuclear fuel or of radioactive products or waste."

15. Section 12 states that the Code of Civil Procedure is to apply in all proceedings before the High Court insofar as it is not inconsistent or contrary to the provisions of the Act. By Section 17, the Admiralty Court Acts of 1840 and 1861 and the Colonial Courts of Admiralty Acts of 1890 and 1891 stand repealed. Also, the Letters Patent of 1865, insofar as it applies to the admiralty jurisdiction of the Bombay, Calcutta and Madras High Courts, also stands repealed.

16. An admiralty action in the courts of India commences against a vessel to enforce what is called a "maritime claim". Though India is not a signatory to the Brussels Convention of 1952, a long list of maritime claims is given in Article 1 thereof. Suffice it to say that sub-clause (k) of Article 1 states that important materials wherever supplied to a ship for her operation or maintenance would fall within the definition of a maritime claim. A maritime lien, on the other hand, attaches to the property of the vessel whenever the cause of action arises, and travels with the vessel and subsists whenever and wherever the action may be commenced. In The Bold Buccleugh, (1852) 7 Moo PCC 267, Sir John Jervis defined maritime lien as follows:- "[A] maritime lien is well defined … to mean a claim or privilege upon a thing to be carried into effect by legal process … that process to be a proceeding in rem.… This claim or privilege travels with the thing into whosesoever possession it may come. It is inchoate from the moment the claim or privilege attaches, and, when carried into effect by legal process by a proceeding in rem, relates back to the period when it first attached."

17. This judgment was referred to in M.V. Elisabeth and others v. Harwan Investment and Trading Private Limited, 1993 Supp. (2) SCC 433 at 462, paragraph 56 and

Epoch Enterrepots v. M.V. Won Fu (2003) 1 SCC 305 at 311, paragraph 13. In M.V. Al Quamar v. Tsavliris Salvage (International) Ltd. and others, (2000) 8 SCC 278 at 301, the Supreme Court observed as follows:-

"33. Be it noted that there are two attributes to maritime lien: (a) a right to a part of the property in the res; and (b) a privileged claim upon a ship, aircraft or other maritime property in respect of services rendered to, or injury caused by that property. Maritime lien thus attaches to the property in the event the cause of action arises and remains attached. It is, however, inchoate and very little positive in value unless it is enforced by an action. It is a right which springs from general maritime law and is based on the concept as if the ship itself has caused the harm, loss or damage to others or to their property and thus must itself make good that loss. (See in this context Maritime Law by Christopher Hill, 2nd Edn.)."

18. Only a small number of claims give rise to maritime liens as was noted in M.V. Won Fu (supra). Paragraph 19 of the said judgment states as follows:-

"19. We have in this judgment hereinbefore dealt with the attributes of maritime lien. But simply stated, maritime lien can be said to exist or restricted to in the event of (a) damage done by a ship; (b) salvage; (c) seamen's and master's wages; (d) master's disbursement; and (e) bottomry; and in the event a maritime lien exists in the aforesaid five circumstances, a right in rem is said to exist. Otherwise, a right in personam exists for any claim that may arise out of a contract." (at pages 314-315)

19. In an illuminating judgment of the Calcutta High Court Justice Mrs. Ruma Pal, as she then was, dealt with an action in rem filed in the admiralty court jurisdiction in Calcutta. With respect to the plaintiffs claim of the price of bunkers supplied to the shipowners, the Court held that the supply of necessaries to a vessel does not create a maritime lien. In Bailey Petroleum Company v. Owners and parties interested in the vessel

M.V. Dignity, (1993) 2 CHN 208 at 213-214, the learned Judge held:"16. It has been established by a wealth of decisions that the supply of necessaries does not create a maritime lien. Indeed the point was conceded by the counsel for the plaintiff at the hearing. It is only necessary to refer to two authorities on the point to emphasize the fact that this Court does not base its conclusion on the concession of the plaintiff's counsel but on the authorities cited.

17. It is not disputed that the jurisdiction of this court is governed by the Admiralty Court Act 1861 (Imp). Section 5 of the 1861 Act provides:

"5. The High Court of Admiralty shall have jurisdiction over any claim for necessaries supplied to any ship elsewhere than in the port to which the ship belongs, unless it is shown to the satisfaction of the court that at the time of the institution of the cause any owner or part owner of the ship is domiciled in England or Wales: Provided always, that if in any such cause the plaintiff do not recover twenty pounds, he shall not be entitled to any costs, charges, or expenses incurred by him therein, unless the judge shall certify that the cause was a fit one to be tried in the said Court."

18. In the case of Laws and others and Smith: the "Rio Tinto": 9 PD 356, the plaintiff had supplied necessaries to the vessel. The Trial Court held that the necessaries were supplied on the credit of the vessel and that the plaintiff had a right to a maritime lien and that, therefore, in spite of the fact that the vessel had been transferred subsequent to the supply of necessaries, the ship was liable. Sir James Hannen who delivered the opinion of the Privy Council held that the phrase "the court shall have jurisdiction" simply gave the Court jurisdiction but did not create any lien. A distinction was drawn between a provision for proceedings by arrest of the ship and the express creation of a lien. The Court held: "The Admiralty Court Act, 1861 (24 Vict. c. 10) and the decisions upon it must next be considered. By the 5th section it is enacted that the High Court shall have jurisdiction over a claim for necessaries supplied to any ship elsewhere than in the port to which the ship belongs,

unless it is shown to the satisfaction of the court that, at the time of the institution of the cause, any owner or part owner of the ship is domiciled in England or Wales. The words 'the High Court of Admiralty shall have jurisdiction', mean only what they purport to say, neither more nor less, that is, that the court shall take judicial cognizance of the cases provided for. The conclusion [is] that there is nothing from which it can be inferred that by the use of the words "the court shall have jurisdiction" the Legislature intended to create a maritime lien with respect to necessaries supplied within the possession."

19. In Shell Oil Co. v. The Ship "Lastrigoni" 3 ALR 399 the plaintiff had filed a suit for enforcement of the claim on the ground of bunkers provided by the plaintiff under a contract between the plaintiff and the agents of the time charterer. The contract provided that the sale and delivery of inter alia necessaries would be made on the faith and credit of the vessel. The arguments before the Court were that the supply of fuel itself created maritime lien to which the ship was subject and which could be enforced by an action in rem in admiralty. The second was that, in the circumstances, an action in rem lay notwithstanding the absence of any contractual liability on the part of the owners to pay for the bunkers supplied and that this was so by virtue of section 6 of the Admiralty Court Act 1840 (Imp), and section 5 of the Admiralty Court Act 1861 (Imp), either with or without the aid of cl. 6.4 of the Bunker Fuel Oil Contract. Menzies, J. held: "The matter was, I think, put at rest by the decision of the Privy Council in the Rio Tinto (1884) 9 APP Cas 356, by which it was decided that no maritime lien attaches to a ship in respect of coals or other necessaries supplied to it." In Saba International Shipping and Project Investment Private Limited v. Owners and parties interested in the Vessel M.V. Brave Eagle, previously known as M.V. Lima-I and others, (2002) 2 CHN 280 at 287-288 and 289-290, another single Judge of the same High Court differentiated between a maritime claim and a maritime lien and held as follows:

"20. Now the issue is what is a maritime claim and what is a maritime lien. These questions are to be answered in this proceeding before continuation of the interim order or passing any further interim order.

21. All cases of maritime lien are based on maritime claims but all maritime claims do not give rise to a maritime lien on the ship. Normally a lien in the general law is a rather limited right over some one else's property. It is a right to retain possession of that property usually to receive a claim. But a maritime lien differs from other liens in one very important respect. Liens generally require possession of the 'res' before they can come into effect. As an example an innkeeper has a lien over his guest's luggage against the payment of the bill, but if the guest is smart enough to remove his luggage, the innkeeper is left without a lien. But a maritime lien does not require prior possession for its creation. In a fit and proper case a claimant on the strength of his maritime lien can secure the arrest of a ship which then comes under the possession of the court and she cannot be moved without the court's order.

22. 'No Indian Statute defines a maritime claim' is the clear finding of Supreme Court in M.V. Elisabeth (AIR 1993 SC 1014, para 85, page 1040). But our Supreme Court followed the provisions of the Supreme Court Act 1981 of England where maritime claims have been listed on the basis of Brussels Convention of 1952 on the Arrest of Sea Going Ships. Under Article 1 of the said Convention various maritime claims have been catalogued. Out of which 1(k) answers the description of the claims of the plaintiff in this proceeding. Article 1(k) reads "goods or materials whether supplied to a ship for her operation or maintenance". Even though India is not a signatory to the Brussels Convention, but the Supreme Court held that the provisions of these Conventions should be regarded as part of International Common Law and these provisions 'supplement' and 'comple-

ment' our maritime laws and fill up the lacunae in The Merchant Shipping Act.

23. But in Elisabeth, the Hon'ble Supreme Court did not notice any convention on maritime lien. However the Hon'ble Supreme Court accepted in para 57 of Elisabeth the judicial determination of the concept of 'maritime lien' by English courts and which I quote as follows:

"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 The Bold Buccleugh, (1852) 7 Moo PCC 267)."

24. A definition of maritime lien has also been given in Stroud's Judicial Dictionary, 5th Edition page 1466 to the following effect:

"A maritime lien may be defined as a right specifically binding a ship, her furniture, tackle, cargo, and freight, or any of them, for payment of a claim founded upon the maritime law and entitling the claimant to take judicial proceedings against the property bound to enforce, or to ascertain and enforce, satisfaction of his demand; thus, a salvor has a maritime lien on the property saved for such an amount as a court exercising admiralty jurisdiction shall award. Maritime lien are distinguished from all other liens in these two chief particulars: (i) they are in no way founded on possession or property in the claimant, (ii) they are exercised by taking proceedings against the property itself in a form of action styled an action in rem (The Glasgow Packet, 2 Rob. W. 312; The Repulse, 4 Notes of Cas. 170), and, from this and their secret nature, they closely resemble the species of security known to Roman law under the name of hypotheca (Dig. xiii). Interest, if any allowed, and the costs of enforcing a claim for which a maritime lien exists, will be included in such lien (The Margaret, 3 Hagg. Adm. 240)."

25. According to the well known treatise of Thomas on maritime lien, the following claims may give rise to maritime lien namely:

"(a) Damage done by a ship

(b) Salvage

(c) Seamen's wages

(d) Master's wages and disbursements

(e) Bottomry and respondentia".

26. The aforesaid passage from Thomas has been approved by the Division Bench of Calcutta High Court in Mohammed Saleh Behbehani & Company v. Bhoja Trader, reported in (1983) 2 Calcutta Law Journal 334. At 344 of the report, the learned Judges of the Division Bench referred to maritime liens as representing 'a small cluster of claims' and referred to the aforementioned passage from Thomas.

(27) and

(28) xxx xxx xxx

29. Counsel for the respondent also relies on a passage from Roscoe on The Admiralty Jurisdiction and Practice, 5th Edition. While dealing with necessaries, the learned author has stated as follows:

"Persons who have supplied a ship, whether British or foreign, with necessaries have not a maritime lien upon her, and the vessel does not become chargeable with the debt till the suit is actually instituted; consequently there can be no claim against a ship which has been sold, even with notice of such a claim in respect of which an action has not been commenced, and a want of caution in supplying the necessaries may, it would

seem, cause a postponement of claims to others more carefully begun. The necessaries claimant is not a secured creditor until the moment of arrest."

30. There is a direct judgment on this point by a learned Judge of this court in Bailey Petroleum, referred to above.

31. Relying on the judgment of the Privy Council in Rio Tinto, reported in 1884 (9) Appeal Cases 356 and the judgment in Shell Oil Co. v. The Ship Lastrigoni, reported in 1974 (3) All England Reports 399, the learned single Judge held in Bailey Petroleum that a claim arising out of the supply of necessaries may give rise to a statutory right of action 'in rem' under section 5 of Admiralty Court Act, 1861 but it does not give a rise to maritime lien. Paragraphs 23 and 24 of the judgment in Bailey Petroleum make it clear and I quote them in extenso:

"23. Whereas a maritime lien attaches to the res and travels with it and may be enforced against a subsequent purchaser of the res, a statutory right of action in rem is defeated by a change of ownership. This later principle follows from the nature of the right described in the preceding paragraph.

24. This view of the law is supported by a catena of decisions."

21. In fact, the International Convention on Maritime Lien and Mortgages, 1993 defines maritime liens in Article 4 as follows:-

"Article 4: Maritime liens I. Each of the following claims against the owner, demise charterer, manager or operator of the vessel shall be secured by a maritime lien on the vessel:

(a) claims for wages and other sums due to the master, officers and other members of the vessel's complement in respect of their employment on the vessel, including

costs of repatriation and social insurance contributions payable on their behalf;

(b) claims in respect of loss of life or personal injury occurring, whether on land or on water, in direct connection with the operation of the vessel;

(c) claims for reward for the salvage of the vessel;

(d) claims for port, canal, and other waterway dues and pilotage dues;

(e) claims based on tort arising out of physical loss or damage caused by the operation of the vessel other than loss of or damage to cargo, containers and passengers' effects carried on the vessel.

2. No maritime lien shall attach to a vessel to secure claims as set out in subparagraphs (b) and (e) of paragraph 1 which arise out of or result from:

(a) damage in connection with the carriage of oil or other hazardous or noxious substances by sea for which compensation is payable to the claimants pursuant to international conventions or national law providing for strict liability and compulsory insurance or other means of securing the claims; or

(b) the radioactive properties or a combination of radioactive properties with toxic, explosive or other hazardous properties of nuclear fuel or of radioactive products or waste."

22. Article 8 then states that the characteristics of such liens are as follows:- "Article 8: Characteristics of maritime liens Subject to the provisions of article 12, the maritime liens follow the vessel, notwithstanding any change of ownership or of registration or of flag." It is, thus, clear that a claim for necessaries supplied to a vessel does not become a maritime lien which attaches to the vessel.

23. Shri Divan, however, cited U.S. case law in support of his submission that a claim for necessaries raises a

maritime lien. We are afraid that given the Indian case law on the subject read with the various international Conventions referred to above, the U.S. seems to stand alone in considering that claims for necessaries would amount to maritime lien enforceable against the vessel as such wherever it goes. It is clear that in our country at least claims for necessaries, though maritime claims, do not raise a maritime lien.

24. What arises next, therefore, is the manner of enforcement of maritime claims in our Courts. In M.V. Elisabeth (supra) at 459- 462, this Court laid down, in some detail, the basic features of the admiralty jurisdiction in this country, and how maritime claims are to be enforced. The Court held:

"Admiralty Law confers upon the claimant a right in rem to proceed against the ship or cargo as distinguished from a right in personam to proceed against the owner. The arrest of the ship is regarded as a mere procedure to obtained security to satisfy judgment. A successful plaintiff in an action in rem has a right to recover damages against the property of the defendant. "The liability of the shipowner is not limited to the value of the res primarily proceeded against …. An action … though originally commenced in rem, becomes a personal action against a defendant upon appearance, and he becomes liable for the full amount of a judgment unless protected by the statutory provisions for the limitation of liability".' (Roscoe's Admiralty Practice, 5th ed. p. 29) The foundation of an action in rem, which is a peculiarity of the Anglo-American law, arises from a maritime lien or claim imposing a personal liability upon the owner of the vessel. A defendant in an admiralty action in personam is liable for the full amount of the plaintiff's established claim. Likewise, a defendant acknowledging service in an action in rem is liable to be saddled with full liability even when the amount of the judgment exceeds the value of the res or of the bail provided. An action in rem lies in the English High Court in respect of matters regulated by the Supreme Court Act 1981, and in relation to a number of claims the jurisdiction can be invoked not on-

ly against the offending ship in question but also against a 'sistership' i.e., a ship in the same beneficial ownership as the ship in regard to which the claim arose.

"The vessel which commits the aggression is treated as the offender, as the guilty instrument or thing to which the forfeiture attaches, without any reference whatsoever to the character or conduct of the owner …." (Per Justice Story, The United States v. The Big Malek Adhel [43 US (2 How) 210, 233 (1844)])." xxx xxx xxx A ship may be arrested (i) to acquire jurisdiction; or

(ii) to obtain security for satisfaction of the claim when decreed; or (iii) in execution of a decree. In the first two cases, the court has the discretion to insist upon security being furnished by the plaintiff to compensate the defendant in the event of it being found that the arrest was wrongful and was sought and obtained maliciously or in bad faith. The claimant is liable in damages for wrongful arrest. This practice of insisting upon security being furnished by the party seeking arrest of the ship is followed in the United States, Japan and other countries. The reason for the rule is that a wrongful arrest can cause irreparable loss and damages to the shipowner; and he should in that event be compensated by the arresting party. (See Arrest of Ships by Hill, Soehring, Hosoi and Helmer, 1985).

The attachment by arrest is only provisional and its purpose is merely to detain the ship until the matter has been finally settled by a competent court. The attachment of the vessel brings it under the custody of the Marshal or any other authorized officer. Any interference with his custody is treated as a contempt of the court which has ordered the arrest. But the Marshal's right under the attachment order is not one of possession, but only of custody. Although the custody of the vessel has passed from the defendant to the Marshal, all the possessory rights which previously existed continue to exist, including all the remedies which are based on possession. The warrant usually contains a monition to all persons interested to appear before the court on a particular day and show cause why the

property should not be condemned and sold to satisfy the claim of the plaintiff.

The attachment being only a method of safeguarding the interest of the plaintiff by providing him with a security, it is not likely to be ordered if the defendant or his lawyer agrees to "accept service and to put in bail or to pay money into court in lieu of bail". (See Halsbury's Laws of England, 4th edn., Vol. 1, p. 375 etc.).

xxx xxx xxx A personal action may be brought against the defendant if he is either present in the country or submits to jurisdiction. If the foreign owner of an arrested ship appears before the court and deposits security as bail for the release of his ship against which proceedings in rem have been instituted, he submits himself to jurisdiction.

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.

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."

25. The Court went on to hold that though Indian statutes lag behind international law in this context, the principles in these Conventions derived from the common law of nations, will be treated as a part of the common law of India. Paragraph 76 in this behalf reads as under:-

"76. It is true that Indian statutes lag behind the development of international law in comparison to contemporaneous statutes in England and other maritime countries. Although the Hague Rules are embodied in the Carriage of Goods by Sea Act, 1925, India never became a party to the International Convention laying down those rules (International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, Brussels, 1924). The Carriage of Goods by Sea Act, 1925 merely followed the (United Kingdom) Carriage of Goods by Sea Act, 1924. The United Kingdom repealed the Carriage of Goods by Sea Act, 1924 with a view of incorporating the Visby Rules adopted by the Brussels Protocol of 1968. The Hague-Visby Rules were accordingly adopted by the Carriage of Goods by Sea Act 1971 (United Kingdom). Indian legislation has not, however, progressed, notwithstanding the Brussels Protocol of

1968 adopting the Visby Rules or the United Nations Convention on the Carriage of Goods by Sea, 1978 adopting the Hamburg Rules. The Hamburg Rules prescribe the minimum liabilities of the carrier far more justly and equitably than the Hague Rules so as to correct the tilt in the latter in favour of the carriers. The Hamburg Rules are acclaimed to be a great improvement on the Hague Rules and far more beneficial from the point of view of the cargo owners. India has also not adopted the International Convention relating to the Arrest of Seagoing Ships, Brussels, 1952. Nor has India adopted the Brussels Conventions of 1952 on civil and penal jurisdiction in matters of collision; nor the Brussels Conventions of 1926 and 1967 relating to maritime liens and mortgages [(a) International Convention relating to the Arrest of Seagoing Ships, Brussels, May 10, 1952 (IMC); (b) International Convention on Certain Rules concerning Civil Jurisdiction in Matters of Collision, Brussels, May 10, 1952 (IMC); (c) International Convention for the Unification of Certain Rules relating to Penal Jurisdiction in Matters of Collision, Brussels, May 10, 1952 (IMC); and (d) International Conventions for the Unification of Certain Rules of Law relating to Maritime Liens and Mortgages, Brussels, April 10, 1926, and the Revised Convention on Maritime Lines and Mortgages, Brussels, May 29, 1967 (IMC).] India seems to be lagging behind many other countries in ratifying and adopting the beneficial provisions of various conventions intended to facilitate international trade. Although these conventions have not been adopted by legislation, the principles incorporated in the conventions are themselves derived from the common law of nations as embodying the felt necessities of international trade and are as such part of the common law of India and applicable for the enforcement of maritime claims against foreign ships." (at pages 469-470) A list of maritime claims was then referred to in paragraph 84 and the Brussels Convention relating to the Arrest of SeaGoing Ships, 1992 was referred to and followed.

26. The next important aspect that was argued was that the ownership of the vessel to enforce a maritime claim

has to be seen at the stage of institution of the suit and not at the stage of arrest. The general rule that is contained in our country as to what crystallises on the date of a suit is reflected in Rameshwar and others v. Jot Ram and others, 1976 1 SCR 847 at 851-52. This Court held:-

"In P. Venkateswarlu v. Motor & General Traders [(1975) 1 SCC 770, 772 : AIR 1975 SC 1409, 1410] this Court dealt with the adjectival activism relating to post-institution circumstances. Two propositions were laid down. Firstly, it was held that [SCC p. 772, para 4] 'it is basic to our processual jurisprudence that the right to relief must be judged to exist as on the date a suitor institutes the legal proceeding.' This is an emphatic statement that the right of a party is determined by the facts as they exist on the date the action is instituted. Granting the presence of such facts, then he is entitled to its enforcement. Later developments cannot defeat his right because, as explained earlier, had the court found his facts to be true the day he sued he would have got his decree. The Court's procedural delays cannot deprive him of legal justice or rights crystallised in the initial cause of action. This position finds support in Bhajan Lal v. State of Punjab [(1971) 1 SCC 34].

The impact of subsequent happenings may now be spelt out.

First, its bearing on the right of action, second, on the nature of the relief and third, on its impotence to create or destroy substantive rights.

Where the nature of the relief, as originally sought, has become obsolete or unserviceable or a new form of relief will be more efficacious on account of developments subsequent to the suit or even during the appellate stage, it is but fair that the relief is moulded, varied or reshaped in the light of updated facts. Patterson [Patterson v. State of Alabama, (1934) 294 US 600, 607] illustrates this position. It is important that the party claiming the relief or change of relief must have the same

right from which either the first or the modified remedy may flow.

Subsequent events in the course of the case cannot be constitutive of substantive rights enforceable in that very litigation except in a narrow category (later spelt out) but may influence the equitable jurisdiction to mould reliefs. Conversely, where rights have already vested in a party, they cannot be nullified or negated by subsequent events save where awthere is a change in the law and it is made applicable at any stage. Lachmeshwar Prasad Shukul v. Keshwar Lal Chaudhuri [1940 FCR 84 : AIR 1941 FC 5] falls in this category. Courts of justice may, when the compelling equities of a case oblige them, shape reliefs — cannot deny rights — to make them justly relevant in the updated circumstances. Where the relief is discretionary, courts may exercise this jurisdiction to avoid injustice. Likewise, where the right to the remedy depends, under the statute itself, on the presence or absence of certain basic facts at the time the relief is to be ultimately granted, the Court, even in appeal, can take note of such supervening facts with fundamental impact. Venkateswarlu, read in its statutory setting, falls in this category."

27. However, the International Convention on the Arrest of Ships, 1999, in which India participated, states as follows:-

"Article 3: Exercise of right of arrest

. Arrest is permissible of any ship in respect of which a maritime claim is asserted if: (a) the person who owned the ship at the time when the maritime claim arose is liable for the claim and is owner of the ship when the arrest is effected; or (b) – (e) xxx xxx xxx

(2) xxx xxx xxx

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

enforced against that ship by judicial or forced sale of that ship."

28. India is not a signatory to the aforesaid Convention, yet following M.V. Elisabeth (supra), this Convention becomes part of our national law and must, therefore, be followed by this Court. Article 3(1)(a) is in two parts. First, arrest is only permissible of any ship if a maritime claim is asserted against the person who owned the ship at a time when the maritime claim arose for which the owner is liable, and second, that the same ship owner should be the owner of the ship when the arrest is effected. Thus, article 3(1)(a) sets the controversy at rest because a maritime claim can be asserted only at the time the arrest is effected and not at the time of the institution of the suit. This being so, Shri Divan's reliance on English judgments to the contrary, namely Monica S. (1967) 2 Lloyd's Rep. 113 as followed in Re, Aro Co Limited 1980 1 All ER 1067, cannot be followed. Both judgments were prior to the 1999 Convention and it is this Convention that must be followed. It is, therefore, clear that the relevant date on which ownership of the vessel is to be determined is the date of arrest and not the date of institution of the suit""

29. It is thus quite clear that at the time of exercise of admiralty jurisdiction and directing the arrest of the ship, there has to be an action in personam. When the question arises of as to whether there should be action *in rem* against the ship for the unpaid amount of bunkers supplied to the ship at the instance of the charterer or the third party, it is only if there exists a contractual lien with the owner of the ship, the same can be arrested, as otherwise, in personam liability of the owner is a must for requirement of arrest of ship for claims for necessaries.. The Apex Court clearly has held that "——*given the Indian case law on the subject read with the various international Conventions referred*

to above, the U.S. seems to stand alone in considering that claims for necessaries would amount to maritime lien enforceable against the vessel as such wherever it goes. It is clear that in our country at least claims for necessaries, though maritime claims, do not raise a maritime lien."

20. Thus now, as the law on the subject is already discussed above, the same shall have to be applied to the facts of the instant case. The question that would beg the answer is whether the applicant defendant Best Excellence is, in any manner, responsible for the payment of unpaid bunkers ordered by the charter party. What is further to be regarded is whether is it a case where Master of the ship had given any notice of non-lien clause or had accepted the bunkers for and on behalf of the vessel without a murmur keeping the seller in dark and, thereby, causing confusion and ambiguity, which can be only resolved after the full-fledged trial.

21. On behalf of the applicant defendant, it is urged that the Bulk Marine, which was the charterer of the vessel, never acted on behalf of the Vessel or its owner, and the plaintiff respondent could never have been

under the impression that Bulk Marine was acting on behalf of the Vessel or its owner. The respondent, according to the applicant, suppressed the non-lien notice dated 28.10.2018 issued at the time of delivery of bunkers putting the plaintiff to the notice that it was the charterer, which was ordering the bunkers and not the ship owner. It is emphasized all along that the litigant which attempts to obtain the order suppressing vital aspects must not be entertained and such order cannot be continued in as much as that would amount to encouraging those who have no regard for the truth and the sanctity of the process and system also is compromised thereby.

22. Whereas, it is a clear case of the plaintiff G.P.Global Apac Pte.Ltd.,("G.P. Global" for short), which is in the business of supplying bunkers of the sea going vessel that it was the Vessel, which purchased the bunkers from the plaintiff and did not pay the amount, as per the invoices raised. It has also alleged that existence of charter party would require finding of facts and law and would necessitate full-

fledged trial upon the evidence being led in that regard. It has further alleged that the applicant has concocted the story inconsistent with the documents and at the time of bunker delivery on 28.10.2018, the Master/Chief Engineer of the Vessel had not marked any note of protest and, in fact, it had expressed its satisfaction over the bunkers supplied. It is also alleged that the documents are concocted by the owner with regard to non lien notice and it is denied that the plaintiff had any knowledge that the Bulk Marine was solely responsible for the payment of unpaid bunkers.

23. According to the plaintiff, defendant vessel was sub-chartered to Admiral Shipping from Lianyi and then to the Bulk Marine. The charterer with the Bulk Marine was for maximum 30 days as can be seen from email of 14.09.2018. Therefore, any supply made after expiry of the said period would be on account of the applicant. The supply since was made on 28.10.2018 after the expiry of the time charter period, the liability will be of the defendant vessel from 24.10.2018. The

hire period of Bulk Marine is reflected and, therefore, the defendant vessel since was not hired on the date of the supply of bunkers, the applicant cannot wriggle out of its liability to make the payment. It is also urged that the bunker delivery note Master/Chief Engineer of the Vessel has marked that there is no note of protest issued by the Vessel and the bunkers were received to the satisfaction of the Vessel. The notice, which is produced, according to the plaintiff, is a purported notice by producing the document, which is inconsistent with its own acknowledgement on the bunker delivery note. These being two contradictory documents, they are needed to be decided at the time of trial and cannot be appreciated at an interlocutory stage. It has denied specifically that any notice of non-lien on 28.10.2018 had been issued. The BDN also mentioned that no such note was issued and the bunkers received were to the satisfaction of the Master. It further added that even if non-lien notice was issued, the same is contrary to the plaintiff's terms and conditions and, therefore, it would become null

and void. Non-lien notice was not on the physical supplier as urged. It was clause 2.1(g) of the charter party agreement, as mentioned hereinabove, which has been relied upon to urge that general terms and conditions would also mean the Vessel of the owner . It has been denied that the plaintiff had knowledge that the Bulk Marine was solely responsible for the supply. It insisted on the contractual maritime lien on the defendant vessel, which can prove at the time of trial.

24. According to the plaintiff, the Vessel was standing at Deendayal port for around 02 months before the plaintiff applied for arrest of the vessel, as there were disputes with regard to the cargo. No loss on account of the arrest order passed in favour of the plaintiff can be urged, as the vessel was standing since 07.11.2008. It also denied that the vessel is incurring 200 USD expense every day and to mitigate the loss, the applicant has incurred USD 1,50,000/- as cost. It has also denied that 1,00,000 USD should be directed by way of security.

25. In wake of these rival contentions, the Court shall

need to examine as to whether there is, in fact, any such aspect, which would require adducing of the evidence and the matter to go on the trial or is it a open and shut case where the plaintiff could obtain the order of arrest by not revealing the correct details to the Court at the time of *ex parte* order of arrest. Is it also the case where the plaintiff was also in know of the fact that the applicant being the owner, was, in no manner, liable because of the charter party agreement, for any supply of bunkers to the third-party by the seller, which in the instant case, happens to be the plaintiff.

26. At the outset, it is to be noted that Equasis report makes it abundantly clear that Best Excellence is the registered owner of the defendant vessel flying the flag of Hong Kong, China and is of bulk carrier from 01.04.2012. This report is easily available for the parties to view and is also in know as to who is the owner of the vessel. Therefore, there is no ambiguity nor any spec of doubt in relation to the outsider to know the aspect of ownership of this ship.

27. In this background, the plaintiff G.P. Global, which is incorporated under the laws of Singapore and is engaged in the business of supplying bunkers to the sea going vessel, supplied the bunkers for consumption of the Vessel. From the documents which have been produced, it appears that sales confirmation at Ex.B shows the seller as G.P. Global (plaintiff) and buyer as Bulk Marine and/or Master/Charterer/Managers/Operators at the port at Singapore on 08.10.2018. The location of the port is Encourage, Singapore. The payment terms are 30 days from the delivery date. The email dated 26.10.2018 is sent to the Bulk Marine by G.P. Global thanking for sale confirmation for the Vessel. The bunker delivery note provides the Port as Singapore and tanker's name (agent), who is the agent of G.P. Global, refers to the name of Zafer. The date is 28.10.2018 and the Vessel's name is M.V.Silvia Glory, the next port of shown is India. At the time of this bunker delivery note, the question was whether the protest note has been issued. The rounded mark made on this very

document is on "No". The tax invoice reflects the buyer as Bulk Marine. It also provides that the supply and delivery of marine fuel is subject to the General terms and conditions of bunker fuel by G.P. Global APAC PTE Ltd. The definition of buyer is provided at clause 2.1(g) of the time charter agreement and clauses 9.2, 9.4 and 9.9 which speak of the liability of the Vessel as well being the Owner of the Vessel.

28. Relevant paragraphs are reproduced hereunder: -

"2.1(g) "Buyer" means jointly and severally the party taking delivery and paying for the Bunker Fuel and the owners, managers, operators, time charterers, bareboat charterers and charterers of the Vessel or any party requesting offers or quotations for or ordering Bunker Fuel and any party on whose behalf the said offers, quotations, orders and subsequent agreements or contracts have been made.

xxx xxx xxx

9.2 Payment shall be in accordance with the Seller's invoice which may be sent by facsimile transmission, email, mail or courier. A copy of BDN shall be provided to Buyer along with the Seller's invoice but payment shall not be conditioned upon Buyer's receipt of the original BDN. The Seller's Invoice shall be based on the quantity of Buner Fuel delivered, as determined in accordance with Clause 6, and shall contain other applicable charges associated with the delivery. The volume stated in BDN is to be considered final in respect of the quantity to be invoiced.

Xxx xxx xxx

9.4. Credit granted to the Seller shall at all times be subject to the following terms:

(i) Credit (including for the 30 days payment period or any period otherwise agreed referred to in Clauses 9.3) will only be granted on the basis that it is secured by a maritime lien on the Vessel in accordance with Clause 9.9.

(ii) Any notice by the Buyer that a maritime lien on the Vessel may not be created for any reason must be given to Seller in the initial order for Bunker Fuel, in which case no credit can be granted to Buyer and the Buyer shall, at the option of the Seller, make payment in accordance with Clause 9.5 or any other payment terms determined by the Seller. Any notice of such restriction given by Buyer, its agents, ship's personnel or other person later than in the initial order shall not effect a modification of the terms of sale of Bunker Fuel, except that any granting of credit by the Seller shall be rescinded on receipt of the notice, with full payment due forthwith. Any cancellation thereafter shall make the Buyer liable for cancellation charge hereunder. For avoidance of doubt, it is stated that any notice or any stamp in the BDN or similar document cannot adversely affect the Seller's maritime lien on the Vessel.

(iii) If credit is granted to the Buyer, the Seller may withdraw such credit at any time, for any reason, and require full payment upon delivery or at any time after delivery. If credit is withdrawn and payment is not made upon demand, interest shall be payable from date of delivery at the rate set forth in Clause 9.7.

(iv) If payment is not made within thirty (30) days or any number of days otherwise agreed, or if credit is withdrawn and payment not made upon demand, the Buyer shall be liable for all closts (whether or not suit is filed) incurred by the Seller to recover such amounts including but not limited to attorney's fees , court costs and collection expenses. If suit is filed, the Buyer shall be liable for all court costs in addition to attorneys' fees and expenses. All such charges, together with interest, shall be secured under the

Seller's maritime lien on the Clause under Clause.9.9.

(v) If the party requesting Bunker Fuel is not the owner of the Vessel, the Seller shall have the right to insist as a precondition of sale that a payment guarantee is provided by the owner of the Vessel. The Seller shall have the right to cancel the Bunker Contract with the Buyer at any time, if the owner's payment guarantee is not received upon request thereof from the Seller to the Buyer and/or Owner. The Seller's decision to forego obtaining a payment guarantee shall have no effect on the Seller's right to a lien on the Vessel for any Bunker Fuel sold and delivered under the Bunker Contract."

xxx xxx xxx

9.5 Notwithstanding Clause [9.3] the Seller is entitled to require the Buyer to make payment in advance of the delivery and where the Buyer has made payment in advance of the delivery, such payment be adjusted on the basis of actual quantities of Bunker Fuel delivered and confirmed in the BDN and additional payment, if any, shall be made by the Buyer within seven (7) after completion of delivery.

xxx xxx xxx

9.9 The Buyer accept that Bunker Fuel are delivered under this Bunker Contract are on credit of the Buyer a swell as the credit of the Vessel, and it is agreed and Buyer warrants that, in addition to any rights against the Buyer, the Seller will have and may assert a maritime lien against the Vessel for the amount of the purchase price of such Bunker Fuel together with all other applicable charges payable under this Bunker Contract."

29. As can be seen from the General terms and conditions of the Plaintiff/ Respondent that they speak

of liability of the vessel and the owner due to maritime lien. However, admittedly, every correspondence is addressed to the plaintiff and not to the applicant. Unilateral incorporation of terms cannot bind the third party unless it is a party to such a contract. Under the heading of Order Confirmation in communication through email it is stated that "payment is delayed by 06 days and we are yet to sight the funds in our account." The email addressed to the Bulk Marine is of 05.12.2018, which says that the payment is delayed by 08 days and there should be a swift advice on the same. The third reminder also was on 06.12.2018, which says that there was no claim nor consideration or any issue on fuel supplied and payment is overdue by 09 days without any fault. The fourth reminder is of 10.12.2018, again addressed to the Bulk marine that the delay is too long as the funds had not gone to the account of the plaintiff.

30. The communication of 14.09.2018 from Bulk Marine to the Master of the Vessel states that the Bulk Marine is the next time charter for the trip, of about 25

to 30 days without guarantee for Indonesia towards the west coast India. It further says that it welcomes the Master, its officers and crew on charter and look forward to work closely in order to make this charter successful and mutually beneficial. The business was to load 55,000 MT of molo coal in bulk from Indonesia for discharge to port at Kandla, India. It also stated to confirm that the Vessel should have sufficient tanker capacity to receive bunkers at Singapore. It is further needed to be noted that the email says that the Vessel has been arrested at Kandla at the instance of G.P. Global. It also says that G.P. Global is the bunker supplier from whom Bulk Marine ordered the bunkers for which the Bulk Marine failed to make payment. It had been emphasized that the vessel owner is not responsible for procuring the bunkers given the chartering arrangements, which were in place. The arrest of the Vessel, since had happened on account of the failure to meet the obligation by the Bulk Marine, for all losses, expenses, damage etc. flowing from such arrest, the applicant-owner of the ship had demanded

the obligations to be fulfilled by the Bulk Marine.

31. Annexure-F is the notice for the bunkers to be delivered on board at Singapore on 28.10.2018. This is by the Master of the Vessel, which states that bunkers to be delivered at port is solely for account of charterers of Bulk Marine and not for the account of said vessel or her owner. Notice which runs as follows:-

"NOTICE

Vessel Name: SLIVIA GLORY
Bunker Supplier: BOMIN BUNKER OIL PTE LTD
Bunkering Port: SINGAPORE
Date: 28.10.2018
Dear Sir,

This is to certify that the bunker to be delivered on board our vessel M.V.Silvia Glory which is solely for the account of charterers of BULK MARINE PTE.LTD., SINGAPORE and not for the account of said vessel or her owners and accordingly, non-lien or other claim against vessel or her owners can arise therefore. Furthermore, regarding the content in blank column of owner/operator on the BDN, you should write down the charterer's name who arrange the bunkering on the BDN, not for the owner or master of SILIVA GLORY. Please kindly note that the oil sample is taken at our vessel's manifold during the whole bunkering operation. And supplier is properly informed before pumping. Thanks our cooperation!"

32. This notice, thus, makes it clear that there is non-lien or other claim against the Vessel, as has been made very clear by the owners. In the content of the BDN, it also insisted that the charterer's name should be written and not of the owner or the Master of the Vessel. According to the applicant defendant, it is a clear notice of there being non-lien over the ship. This, contains signature of the Master and stamp on the same is of Zafer, who is the agent of plaintiff, G.P. Global.

33. It is to be noted that the date in the bunker delivery note is 28.10.2018, where the name of the Vessel has been referred to, there is no reference of Bulk Marine in the said bunker delivery note. It also bears tanker's stamp, who is Zafer, the agent of G.P. Global.

34. As mentioned above, insistence on the part of the plaintiff of absence of non-lien notice does not have substance in as much as the notice referred to hereinabove bears the stamp of Zafer, the official agent of the plaintiff. It also bears the signature of

Master/Cargo officer of the bunker. It is also intriguing as to why the BDN should not contain the name of the Charterer when a specific intimation and request has gone to the supplier. The notice itself has a stamp of the agent whose name in BDN is also clear. without concluding on this absence of name of Charterer, this also possibly could be a strategic omission so as to invoke the General Terms and Conditions of the Plaintiff against the Vessel/the owner at a future date in the event of any default in making of payment, as incidentally happened in the present case. Be that as it may, for present, it is quite apparent that the plaintiff had sufficient notice as to with whom it was contracting as also in respect of non availability of maritime lien against the applicant Owner. This prima facie completely negates the stand of plaintiff of its being unaware of the charter party agreement and position of the party with whom it was contracting to be the Charterer and solely responsible for the payment of bunkers meant for the voyage.

35. In this backdrop, there is also a requirement to

refer to the communication dt. 04.01.2019, which expressed the need of the registered owner of the Vessel, the Best Excellence to contact the plaintiff in respect of the wrongful arrest by misleading the Court or suppressing the vital documents. It also communicated that the Bulk Marine is the sub-sub-charterer of the vessel. Non-lien notice was already issued by the owner i.e. the Master on 28.10.2018 to the physical supplier, when fuel was supplied, wherein it made very clear that fuel had been ordered at the behest of Bulk Marine and owners were not liable for the same and yet, arrest was made by not disclosing truly this aspect.

36. It is also further needed to be noted that for the limited purpose of bringing on record the time charterer between the owner of vessel and Lianyi Shipping Corporation ("Lianyi" for short), the Best Excellence had given the details in the further affidavit. Clauses 2 and 46 of the Time Charterer provides that while on hire, the charterer shall provide and pay for all the fuel, except as otherwise agreed for charges

customary and compulsory, pilotage, boat age etc. Clause 46 specifically provides that it is the charterer, who shall be providing the fuel to the vessel and such fuel shall be oil and marine diesel and gas oil complying with the current ISO specifications. It also provides that the Master also shall pay due diligence for replenishments of bunkers so as not to cause oil spillage while bunkering.

37. Clause 18 of the time charter also makes it clear that charterers have no authority to create lien on the vessel. It specifically prohibits any lien or encumbrance, which might have a priority over the title and interest of the owner in the vessel in relation to the overpaid hire or excess deposit or any amount due at the end of charterer. The charter party agreement is also brought on the record. The reference is also needed to be made of communication dt.11.10.2018 made by Forrunner, who were managing agent of owner, which has been addressed to Bromar (broker) directing to notify Bulk Marine that the bunker supply to be made to the vessel at Singapore

was on account of the Bulk Marine and the owner/Master of the vessel would not be liable for the same. The email also instructed the Bulk Marine to inform the bunker supplier about the non-lien clause prior to ordering the bunkers for the vessel. Yet another email was addressed to Bromar on 24.10.2018 by Forrunner as the reminder of non-lien email. On 26.10.2018 Bromar addressed an email to Forrunner acknowledging the non-lien notice and confirming that the bunkers were being supplied to the vessel by the plaintiff on account of Bulk Marine. It also had agreed to timely payment to the plaintiff and to provide the owners with proof of such payment.

38. These emails further vindicates the stand of the applicant and are prima facie very clear pointers that the Bulk Marine could not have bound the vessel for any expenditure to be incurred for fuel and all dues to be incurred during the voyage would be the onus of Bulk Marine and surely not of the Owner of the vessel in absence of Non-lien clause. In other words, particularly with reference to the bunkers supplied for

the vessel at the instance of the Charterer during its contractual period, it was not authorised for creating maritime lien on the vessel. Not only the applicant made it very clear from the very beginning to the broker through whom the deal was struck, it has been also confirmed by the Bulk Marine that the very aspect has gone to the plaintiff and the supply of bunkers to the vessel, at the behest of charterer, is recognised to be the obligation of the Charterer.

39. It can be also culled out from the clarity reflected in the terms incorporated in the time charter party between the owner and the sub-charter party and the sub-charterer or sub-sub-charterer making it abundantly clear that no liability of unpaid bunkers could be created either of the owners or of the ship.

40. In wake of foregoing discussion, emphatic and reiterative contention, made by the plaintiff that at the time of delivery of bunkers to the Bulk Marine, non-lien clause was never made known to the plaintiff or its agent, whose stamp is also in fact found on the communication addressed by the Master of the ship,

does not find favour with this court. The stand of the plaintiff that the defendant vessel was sub chartered to Bulk Marine, was not known to it is self defeating from its own correspondence. It is also an unacceptable argument that the fixture note is merely an email and a fabricated document created to aid mischievous application and that the applicant be put to strict proof thereafter.

41. The reiterative emphasis on the part of the plaintiff that the Bulk Marine placed an order for bunkers on behalf of the owner of the vessel would have no basis and even if it did, scrutiny required at the end of the plaintiff cannot be passed on to anyone. There cannot also be a dispute or question about ownership of the vessel also. Equasis report produced, is in the public domain, also clearly reflects that the applicant defendant is the owner of the Vessel for a long time. Moreover, the fact that the Vessel standing at Deendayal port since 07.11.2018 and its arrest in other matter, also cannot furnish the ground to any party to approach this court as every litigant needs to

establish its case on its own strength and merit and not to build the same on the weakness of other side. What is far more important is as to whether the plaintiff has any right to get the Vessel arrested by claiming maritime lien and from what culls out from the documentary evidence, plaintiff all along knew that it dealt with the charterer and not the owner. Notice to its agent by the Master of the ship through whom it dealt with the Charterer also, would not permit the plaintiff to deny any fact situation. Knowing fully well the legal status of the party it dealt with, It had raised the demand from time to time from the Bulk Marine and not the owner of the Vessel. what is magnified by the applicant is the wrongful arrest of the Vessel by serious suppression of facts and his seeking compensation for the loss due to wrongful arrest, and what has been claimed by the applicant is a loss incurred from 02.01.2019 and not from 07.11.2018.

42. The plaintiff has alleged forgery against the applicant of documents of charter party and sub-sub-charterer party. The Court cannot be oblivious of the

fact that the applicant has placed on record the fixture note entered into between the applicant and Lianyi on 07.02.2018 and the charter party in further affidavits presented as rightly pointed out by the applicant is the underling document of the fixture note. The terms of charter party are incorporated in the fixture note. Serious allegations are leveled by the plaintiff of the forgery of the email of 17/24/26.10.2018 which the plaintiff is required to prove before this Court at the time of trial.

43. What is vital for this Court to acknowledge is the non-lien notice, which appears to have been acknowledged by the tanker agent Zafer, who is from Bomin Bunker Oil Pte. Ltd. The physical supply of the bunker has been made through this agent. The bunker delivery note also makes a reference of tanker agent Zafer and his stamp is already noticed on the communication dated 28.10.2018, which is a non-lien notice. There is a serious attempt to challenge the veracity of this document and emails both. There appears prima facie clearly a non-lien notice already

provided and it has been stamped by the agent, who delivered the bunkers as the representative of the plaintiff.

44. In that view of the matter, when on one hand these documents are emerging on the record, which of course appears to have been stamped by the agent of the plaintiff prima facie, the bunker delivery standard note questions this wise “was a note of protest issued? “ and there is a round made on the answer “No”. This has come from the possession of the plaintiff. Thus, here is a case of simultaneous issuance of non-lien notice when the bunkers had been supplied, whereas BDN marks absence of notice of protest without signature of any person and it has rounded NO as if there being none. This rounding off also needs to be seen in the background where the BDN itself names Zafer as tanker and agent of G.P. Global as is clearly emerging. Therefore, his very stamp on non-lien notice, signed for and on behalf of the owner by the Master/Cargo Officer of the bunker, would surely and seriously weaken the very edifice of the case of the

plaintiff.

45. In the instant case, the correspondence of the plaintiff is all through out with the Bulk Marine. It is in knowledge of the plaintiff that the owner is the Best Excellence. It also cannot depend on its own terms and conditions of supply of bunkers when there is no privity of contract with the owner, as the maritime lien will not be available unless the contract with the owner binds them for any unpaid sum of bunkers. The law being clear that the owner cannot be bound by any contractual terms, which the charterer may have for the supply of bunkers with the seller, the plea of maritime lien may not be available to the plaintiff and only on account of serious disputes raised with regard to the emails so also non-lien notice on affidavit by the plaintiff applicants, while permitting it to prove it before this Court, in the opinion of this Court with a specific pleadings and the documents in question with the charter party and explicit clauses No.18 and 46 of the Charter party, it would be unsafe to allow the plaintiff to continue with the arrest without putting it

to strict mandatory terms. It would be also desirable to direct the expeditious proceedings of the suit in this case. The case is essentially in the realm of facts, based on documentary evidence and for various questions raised by the plaintiff, even while allowing fair and reasonable opportunities to it, it should also deserves to be visited with some monetary sanction.

46. Resultantly, while not setting aside the order of arrest, granted in favour of the plaintiff, in wake of the robust material, which has been produced by the applicant and as discussed above, undertaking given by it in the event of any failure and to safeguard the interest of other side would not suffice, and the plaintiff is directed to deposit the amount of USD150,000 (One lakh fifty thousand US dollars). Accordingly, this application is disposed of. Let the amount be deposited by the plaintiff within 08 weeks from the date of receipt of copy of this order. Amount deposited shall be fixed deposited for the period of 01 year initially by the Registry which shall also if need so arises, periodically renew the same thereafter till the

final disposal of the suit. In the event of failure to obey the directions of deposit by the plaintiff, the amount deposited by the applicant/defendant by virtue of the directions of this court shall be refunded to it and it would be open for the defendant to

47. In the meantime, registry shall also place it before appropriate Bench for recordance of evidence on urgent basis after eight weeks. None of the findings and observations shall prejudice either side in the trial of the suit for they being of prima facie nature.

48. Application stands disposed of accordingly.

(MS. SONIA GOKANI, J.)

MISHRA AMIT V./sudhir