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

COMMERCIAL APPEAL (L) NO. 465 OF 2018
IN
NOTICE OF MOTION (L) NO. 1392 OF 2018
IN
JUDGE'S ORDER NO,. 107 OF 2018
IN
ADMIRALTY SUIT (L) NO. 20 OF 2018

ALTUS UBER, offshore vessel having IMO No.9385300 a motor, flying the flat of Liberia Monrovia together with her engine, machinery, boats, tackle, outfit, fuels, spares, appurtenances and stores, presently at Mumbai, within Indian territorial waters, And all parties interested in her. ... Appellant [Ori. Defendant]

Versus

Siem Offshore Rederi AS, a company incorporated under the Laws of Norway having its registered office at Nodeviga, 14, N-4610, kristiansand S, Norway ... Respondent [Ori. Plaintiff]

WITH
NOTICE OF MOTION (L) NO. 1089 OF 2018
IN
COMMERCIAL APPEAL (L) NO. 465 OF 2018
IN
JUDGE'S ORDER NO,. 107 OF 2018
IN
ADMIRALTY SUIT (L) NO. 20 OF 2018

ALTUS UBER, offshore vessel having IMO No.9385300 a motor, flying the flat of Liberia Monrovia together with her engine, machinery, boats, tackle, outfit, fuels, spares, appurtenances and stores, presently at

Mumbai, within Indian territorial waters,] ... Applicant
And all parties interested in her.][Ori. Defendant]

IN THE MATTER BETWEEN :

ALTUS UBER, offshore vessel having IMO]
No.9385300 a motor, flying the flat of Liberia]
Monrovia together with her engine,]
machinery, boats, tackle, outfit, fuels, spares,]
appurtenances and stores, presently at]
Mumbai, within Indian territorial waters,] ... Appellant
And all parties interested in her.][Ori. Defendant]

Versus

Siem Offshore Rederi AS, a company]
incorporated under the Laws of Norway]
having its registered office at Nodeviga,] ... Respondent
14, N-4610, kristiansand S, Norway][Ori. Plaintiff]

WITH
NOTICE OF MOTION (L) NO. 1137 OF 2018
IN
COMMERCIAL APPEAL (L) NO. 465 OF 2018
IN
JUDGE'S ORDER NO,. 107 OF 2018
IN
ADMIRALTY SUIT (L) NO. 20 OF 2018

SWORDFISH SHIPCO LIMITED, a company]
incorporated and existing under the laws of]
the United Kingdom and having its registered]
address at 210 Pentronville Road,]
London N1 9JY] ... Applicant

IN THE MATTER BETWEEN :

ALTUS UBER, offshore vessel having IMO]
No.9385300 a motor, flying the flat of Liberia]
Monrovia together with her engine,]
machinery, boats, tackle, outfit, fuels, spares,]

appurtenances and stores, presently at]
Mumbai, within Indian territorial waters,]
And all parties interested in her.] ... Appellant

Versus

Siem Offshore Rederi AS, a company]
incorporated under the Laws of Norway]
having its registered office at Nodeviga,]
14, N-4610, kristiansand S, Norway] ... Respondent

WITH
COMMERCIAL APPEAL NO. 86 OF 2019

SWORDFISH SHIPCO LIMITED, a company]
incorporated and existing under the laws of]
the United Kingdom and having its registered]
address at 210 Pentronville Road,] ... Appellant
London N1 9JY] [Ori. Def No.2.]

Versus

1 Siem Offshore Redri AS, a company]
incorporated under the Laws of Norway]
having its registered office at Nodeviga,] ... Respondent
14, N-4610, kristiansand S, Norway] No.1(Ori.Pltff).

1 ALTUS UBER, offshore vessel having IMO]
No.9385300 a motor, flying the flat of Liberia]
Monrovia together with her engine,]
machinery, boats, tackle, outfit, fuels, spares,]
appurtenances and stores, presently at]
Mumbai, within Indian territorial waters,] ... Respondent
And all parties interested in her.] No.2 (Ori.Def.No.1)

Mr. Sunip Sen with Ms. Priyanka Pol i/b Pol Legal Juris for the Appellant in COMAPL No.465 OF 2018 and for the Applicant in NMCAST No.1089 of 2018.

Mr. Prashant Pratap, senior advocate with Mr. Vishal Muglikar

and Mr. Nishaan Shetty i/b Mr. Kaushik S. Krishnaswamy for the Respondent / Original Plaintiff.

Mr. Aspi Chinoy, senior advocate with Mr. Akshay Kolse Patil, Mr. Amitava Majumdar, Ms. Damayanti Sen & Mr. Ruchir Goenka i/b Bose & Mitra & Co. for the Appellant in COMAP No.86 of 2019 and for the Applicant in NMCAST No.1137 of 2018.

CORAM : S.C. DHARMADHIKARI &
B.P. COLABAWALLA, JJ.

Date of Reserving : 24TH APRIL, 2019

Date of Pronouncement : 23RD JULY, 2019

JUDGMENT : *[Per S.C. Dharmadhikari, J.]*

1 This Appeal [Appeal (L) No. 465 of 2018] challenges the judgment and order of a learned single Judge (K.R. Shriram, J.) delivered in a Notice of Motion being Commercial Notice of Motion (L) No. 1392 of 2018 in Commercial Admiralty Suit (L) No. 20 of 2018.

2 By the order under challenge, pronounced on 25th September, 2018, the learned single Judge has proceeded to dismiss the Notice of Motion with costs quantified at rupees five lakhs. The appellant before us is the original defendant in the Suit whereas the respondent is the original plaintiff. They shall

be referred to hereafter as plaintiff and defendant.

3 The plaintiff instituted the Suit in the Admiralty and Vice Admiralty Jurisdiction of this Court. Now, this Suit is numbered as Commercial Admiralty Suit No. 62 of 2018.

4 At the outset, and before we proceed to refer to the allegations in the Plaint, we at once clarify that this Appeal is under section 14 of The Admiralty (Jurisdiction & Settlement of Maritime Claims) Act, 2017 [for short "The Admiralty Act"]. The parties before us have proceeded on the footing that the instant appeal is maintainable. Hence we are not called upon to decide the issue of maintainability or consider any objection of that nature. We have, for the purposes of the present Appeal, proceeded on the basis that the impugned order is capable of being challenged in an appeal under section 14 of the Admiralty Act.

5 Now, we come to the allegations in the Plaint. The plaintiff is a company, incorporated under the laws of Monrovia. It gives its vessels on various kinds of Charterparty, namely,

Bareboat, Time and Voyage charters. The defendant is an offshore supply vessel / platform vessel flying the flag of Liberia and presently lying and being at Mumbai i.e. within the territorial waters of India and within the Admiralty jurisdiction of this Court. The defendant is owned by Marine Engineering Diving Services FZC, [for short "MEDS"], a company incorporated under the foreign laws, having its registered office at United Arab Emirates.

6 The Suit is filed, *inter alia*, for recovery of an amount of US$ 28,889,304/-, which includes charter hire in the sum of US$ 6,797,554/- and claim for capital value of the vessel in the sum of US$ 20,061,750/- together with further interest and costs due to breach of the conditions stipulated in the Bareboat Charterparty dated 13th May, 2015, copy of which is annexed as Annexure A to the Plaint. It is claimed that as owners of a motor vessel Siem Marlin, the plaintiff offered the same on Bareboat Charterparty to Marine Engineering Diving Services FZC for a period of five years with a purchase obligation at the end of five years or a purchase option at the end of the first / second / third / fourth year from the date of delivery. The plaintiff states that the

process of chartering Siem Marlin had taken place through a common chartering broker – Fathom Offshore Services Limited. The brokers were also involved in correspondence relating to compliance of the Bareboat Chaterparty terms.

7 In paragraph 8, the plaintiff reproduces the relevant clauses of the Charterparty.

8 In paragraph 9, it is alleged that as per the terms of the Bareboat Charterparty, the charterers / the owners of the defendant vessel were required to take delivery of Siem Marlin between 15th and 25th October, 2013. As per the terms and conditions stipulated in the Bareboat Charterparty, fifteen days prior to the delivery of the vessel to the charterers, they were required to furnish bank guarantee for US$ 40,00,000/-. This is to guarantee full performance of the obligations under the charterparty. The bank guarantee was to be furnished between 10th to 15th September, 2015. The charterers / owners of the defendant, in unequivocal terms, represented to the plaintiff that they would be furnishing the requisite performance bank guarantee to the plaintiff in due compliance with the terms of the

Bareboat Charterparty. Following the execution of the Bareboat Charterparty, the bank guarantee was not provided by the charterers. In the month of August, 2015, through the brokers, the plaintiff was informed that the charterers were having difficulty in arranging the bank guarantee. The plaintiff and the charterers discussed various proposals to amicably resolve the issue, but no agreements were reached. One such proposal was to enter into a Time Charterparty, but no agreement was ever reached. Annexure B are copies of the letters exchanged between the parties. Once again in the month of September / October, 2015, the plaintiff called upon the charterers to furnish the bank guarantee. As the charterers were unable to furnish the bank guarantee for the subsisting employment of the vessel Siem Marlin, the parties agreed to a new delivery window for Siem Marlin. Further correspondence was exchanged. It appears that the bank guarantee was not provided despite the above development and on 11th October, 2015, the plaintiff and the charterers amended the Bareboat Charterparty by Addendum No.l. That Addendum amended the time for delivery clause and cancellation date.

9 On 4th November, 2015, the plaintiff sent an email to the charterers calling upon them to present the bank guarantee before 8th November, 2015. Annexure-E is a copy of this email dated 4th November, 2015. Thereafter, the defendant to the Suit made a request and in that regard, paragraph Nos.14 to 16 of the Plaint read as under :

> *"14 Thereafter, the Defendant herein, due to financial difficulties faced by them, made a request, whilst agreeing to keep the all the terms and conditions, rights and liabilities under the Bareboat Charterparty alive and subsisting, to enter into a fresh time charter party in respect of vessel Siem Marlin in place of the bareboat charterparty. The Plaintiff craves leave to refer to and rely upon the correspondence exchanged between the Plaintiff and the Defendant in respect of entering into Time Charterparty in place of Bareboat Charterparty, as and when produced.*
>
> *15 On 7 November 2015, without prejudice to and whilst keeping all its the rights and remedies under the Bareboat Charter alive, the Plaintiff and Charterers / owners of the Defendant vessel entered into a BIMCO Supply time charterparty (Hereinafter referred to as "Time Charterparty"). As per clause 43 of the Time-charterparty, the Time Charterparty was to come into effect only upon Charterers/owners of the Defendant vessel furnishing the agreed Bank Guarantee. Clause 43 of the Time Charterparty set out below:*
>
> *"The Charter-party will not come into effect before Charterers have presented the agreed Bank Guarantee to owners".*
>
> *Under the Time charterparty Charterers/owners of the Defendant vessel was required to present a bank guarantee for USD 2,000,000/- (US Dollar Two Million).*
>
> *16. The relevant terms of the Time Charterparty are as follows :*

Box 5
Date of delivery 15.12.2016

Box 6
Cancelling date : 15.01.2016

Box 7
Port or place of delivery :
Arriving pilot station, Dubai

Hereto annexed and marked as Exhibit F is copy of the Time Charterparty dated 7 November 2015"

10 On 12th November, 2015, the plaintiff sent an email to the charterers / owners of the defendant informing them that the time Charterparty will come into effect and replace the Bareboat Charterparty only on the charterers furnishing the bank guarantee under the time Charterparty. The plaintiff informed the charterers that they were yet to receive the bank guarantee under the Time Charterparty. They reserved their right to claim damages under the Bareboat Charterparty. Annexure G to the Plaint is a copy of the email dated 12th November, 2015. On 16th November, 2015, the charterers / owners of the defendant vessel sent an email replying to the plaintiff's email and they said that they were relentlessly chasing their bankers on the subject of the bank guarantee but confirmed that once the Time Charterparty comes into effect the Bareboat Charterparty will stand cancelled.

Then on 19th November, 2015, the Charterers / owners of the defendant vessel sent an email to the plaintiff informing them that the bank guarantee was being vetted by the bankers and requested the plaintiff to advise if the format attached by them of the bank guarantee was acceptable to the plaintiff or otherwise.

11 In paragraph 20 of the Plaint the plaintiffs state that despite the above noted assurances and representations the Charterers / owners of the defendant vessel failed and/or neglected to furnish the requisite bank guarantee as contemplated by the Charterparty and, therefore, a notice of termination was issued by the plaintiff on 24th November, 2015 informing the Charterers that the plaintiff will take the necessary steps to mitigate their loss but will hold the Charterers liable for all losses suffered due to the repudiatory breach of the Bareboat Charterparty. The plaintiff then recorded on 2nd November, 2015, that they were yet to receive the bank guarantee and, therefore, even the Time Charterparty is rendered ineffective. The plaintiff is, therefore, under no obligation to mobilise the vessel.

12 On 8th December, 2015, the Charterers / owners of the

defendant vessel responded to the plaintiff's e-mail dated 24th November, 2015 and raised certain defences. These defences are noted in paragraph 22 of the Plaint and the response thereto is set out in paragraph 23.

13 It is then claimed that a Time Charterparty was signed and sealed by the Charterers / owners of the defendant vessel on 7th January, 2016, but the plaintiff categorically informed them that this will not come into force until the agreed bank guarantee has been presented and the last date for presentation would be 21st January, 2016. Once again the repudiatory breach was noted and on 26th November, 2016, the letter was addressed by the plaintiff's attorney to which a reply was received on 31st January, 2016 by email.

14 It is claimed that the bank guarantee was not presented even by 1st February, 2016, after which there was correspondence through advocates to which there was no reply from the defendants, save and except an email of 1st March, 2016. Then, the plaintiff stated that the appointment of an Arbitrator was made and that was also informed. The plaintiff also informed

the Charterers of filing of their statement of claim before the Arbitral Tribunal. It is clear that once the Arbitrator was appointed / the Tribunal was constituted, the request was made by the Charterers / owners of the defendant vessel to extend time till mid-July, 2017 to submit their response/defence to the plaintiff's statement of claim. In the further paragraphs of the Plaint it is stated that the extension was not agreed. There were talks and discussions, but no settlement/agreement could be reached.

15 Paragraphs 35 to 37 of the Plaint are crucial for our purpose and read thus :

> *"35 The Plaintiff states that it learned that in or around November 2017, the Charterers / owners of the Defendant vessel purchased the Defendant vessel Altus Uber. The Seaweb Report dated May 2018, confirms that the Charterers / owners of the Defendant vessel are the registered owners of the Altus Uber. Annexed hereto and marked as* ***EXHIBIT - "Y"*** *is a copy of the Equasis Report dated 30 May 2018.*
>
> *36 The plaintiff further submits that correspondence exchanged between the parties clearly reveal the fact that the rights of the Plaintiff accruing under the*

bareboat charter party has been prejudiced for reasons more particularly set out herein below:

a. The Plaintiff gave its vessel Siem Marlin on bareboat Charter to the Charterers / owners of the Defendant vessel under the Bare Boat charterparty;

b. The Charterers / owners of the Defendant vessel in repudiatory breach of imperative condition and warranty of the Bareboat Charterparty failed to furnish the requisite performance guarantee in the sum of USD 4 Million;

c. With a view to arrive at a amicable solution keeping all the rights and remedies under the Bareboat charterparty and only with a view to mitigate the losses arising out of breach of Bareboat Charterparty by the Charterer / Owner of the Defendant vessel, the Plaintiff entered into short term Time Charterparty with Charterers / owners of the Defendant vessel which were to come into effect only when the Charterer furnishes the performance guarantee under the time charterparty in the sum of USD 2 Million;

d. The Charterer failed to furnish the abovementioned performance guarantee of USD 2 Million under the Time Charterparty;

e. Again with a view to arrive at a amicable solution, the Plaintiff was constrained to accede to the revision of the cancelling date under the Time Charterparty on two occasions with a view to afford the Charterer an opportunity

to furnish the bank guarantee;

f. At each occasion the Charterer / owners of the Defendant vessel only gave hollow assurances of securing the performance bank guarantee;

g. The Plaintiff at each and every step of the dispute has accommodated the requests made by the Charterer / owners of the Defendant vessel for extension of the cancellation date, reducing the quantum of performance guarantee under the Time Charterparty, accommodating their request for delivery location of the vessel;

h. The failure of the Charterer to furnish the performance guarantee has caused the Plaintiff significant financial loss and damage running into millions of dollars which the Plaintiff is entitled to recover from the Defendant vessel;

i. The running into millions of dollars on one hand is evading to discharge its liability to make payment of the damages to the Plaintiff by citing lame excuses and on the other hand it has expended to acquire the Defendant vessel;

j. The Plaintiff submits that in spite of repeated failure and wilful default in discharging its liability which it owes to the Plaintiff which runs into millions of dollars, the Plaintiff was always ready and willing to have the vessel Siem Marlin delivered Charterers / owners of the Defendant within the canceling date stipulated under the Time Charterparty;

37 In view of the above facts and circumstances, the Charterers / owners of the Defendant vessel are in repudiatory breach of the Bareboat Charterparty inter alia by breaching essential conditions and warranties of the Bareboat Charterparty. Therefore, the Plaintiff is entitled to claim damages from the Charterers / owners of the Defendant and are also entitled to be placed in the same position as if the Bareboat Charter Party had been performed.

a. The Plaintiff states that the amount of charter hire payable under the Bareboat Charterpaprty for the first year amounts to USD 8,395,000.00 (US Dollars Eight Million Three Hundred Ninety Five Thousand) (USD 23,00.00 x 365)

b. The Plaintiff states that at the date of the termination of the bareboat charterparty there was no market for a substitute bareboat charter for the minimum term of the charterparty, which was intended to continue for 5 years. Therefore, it was impossible for the Plaintiff to find a suitable charterer to take on bare boat charter at the same rate and terms. Therefore, in order to mitigate the loss the Plaintiff was constrained to employ the vessel under three short-term time charter parties in the spot market. During the first year of the charterparty i.e., from 22nd November 2015 to 22nd November 2016 the Plaintiff has made short terms time charterparty earnings in the sum of USD 6,215,696. A brief break up of the short term charter-parties are as follows :

CP date	Charterers	Rate	Period	Earnings
07.12.15	Maritime Platforms Ltd.	23,500	29.12.15 - 07.02.2016	962,847
10.03.16	Wagenborg Offshore Operations BV	24,035	17.03.16 - 20.04.16	824,951
26.04.2016	Siem Offshore Contractors Gmbh	20,361.42	26.04.16 - 22.11.16	4,427,898
			Total	6,215,696

The Plaintiff states that this amount would be adjusted in the amount of damages that the Plaintiff is entitled to recover from the Charterers / owners of the defendant. The Plaintiff craves leave to produce, refer to and rely upon the papers and documents in support of the earnings from the short-term charter parties. The Plaintiff reserves their right further to revise the claim and amend the Plaint for loss of charter hire based on further and continuing losses being suffered by the Plaintiff.

c. The Plaintiff further states that, since the Plaintiff was constrained to let out the vessel on short term Time Charter parties, the Plaintiff was forced to incur operating costs and expenses (management, crewing etc.) under these time charter parties which they would not have had to incur under the bareboat chaterparty, under which such expenses would have been to the account of the Charterers / owners of the defendant vessel. Therefore, these expenses ought to be deducted from the comparable charter hire earned from the Short term charter parties. The Plaintiffs total operating expenses during the aforementioned period are to the tune of

USD 4,618,250.00. Therefore, these expenses ought to be deducted from the comparable charter hire earned from the Short term time charter parties. The Plaintiffs total operating expenses during the aforementioned period are to the tune of USD 4,618,250.00. Therefore, the Plaintiffs claim for the loss of total charter hire under the Bareboat charterparty during the first year is USD 6,797,554.00 i.e., [(USD 8,395,000 (total amount that would have been earned by the Plaintiff under the bare boat charterparty) - (USD 6,215,696.00 (first year earnings from the short term time charter parties) – USD 4,615,250.00 (operating expenses incurred by the Plaintiff)]. Hereto annexed and marked as Exhibit "Z" is a brief summary of the operating expenses incurred by the Plaintiff under the three charter-parties. The Plaintiff craves leave to refer and reply upon further documents in support of the operating expenses.

d. The Plaintiff states that the Plaintiff is entitled to damages for loss of sale of the vessel Siem Marlin. The obligation of charterers / owners of the Defendant vessel to purchase the vessel Siem Marlin would have triggered at the end of fifth year from the date of delivery, as per Clause 32 (ii)(iv), but the Plaintiff's claim is based on the purchase price payable after the first year from the date of delivery of the vessel under the bareboat charterparty i.e., USD 47,061,750.00. This amount of capital cost of the vessel Siem Marlin is provided in Clause 32 of the 'Hire/Purchase Agreement' which is Part IV of the Bareboat Charterparty. The relevant portion of the Clause 32 reads as follows :

"32 (i) During the period of hire of this Charter and provided the Charterers have fulfilled their obligations according to Part I and II, it is agreed by the parties that the Charterers shall have the following options to purchase vessel:

Within twenty five (25) days after the end of the first/second/third/fourth year from the Delivery date"

(Delivery date means the date when the vessel is delivered to Charterers under this Charter)

a. The first year from the date of delivery, at a price of USD 50,000,000.00 (United States Dollars Fifty Million) minus 35% of the hire payments made during the first year of charter i.e. a total sum of USD 47,061,250.,00 (United States Dollars Forty Seven million and Sixty one Thousand and Two Hundred and Fifty): or"

The Plaintiff states that this would have been the first purchase option available to charterers. The purchase price for the subsequent optional years 2, 3, 4 and 5 does not fully take into account the hire paid. The Plaintiff states however that the market for offshore supply vessels has dropped since the date when the Bareboat charterparty was entered into between the Plaintiff and the charterers/Owners of the Defendant vessel. Therefore, the Plaintiff estimates that the market value of the vessel at the time when the first purchase option available to the charterers/Owners of the Defendant vessel was about USD 25,000,000.00 (US Dollar twenty five million), therefore the Plaintiff is entitled to the claim for the

loss of sale of the vessel Siem Marlin in the sum of USD 22,061,750.00 [USD 47,061,750.00 (US dollar forty seven million sixty one thousand and seven hundred and fifty)-USD 25,000,000.00 (twenty five million only)]. The market value of the Siem Marlin is evidenced by fleet valuation certificate dated 31 December 2016 issued by Pareto Brokers and vessel valuation report of Fearnely Offshore supply AS as of 31 December 2016. Hereto annexed and marked as Exhibit ***"A1"*** *is copy of the Fleet valuation certificate dated 31 December 2016 issued by Pareto Brokers and Fearnely Offshore Supply AS."*

16 Thus, the cause of action in the Suit is the claim on the defendant vessel for recovery of charter hire as well as capital value of the vessel which the plaintiff would have earned had the Charterers / owners of the defendant vessel not breached the essential condition and warranty of the Bareboat Charterparty. The assertion in the Plaint is that this is a maritime claim. It is valid, subsisting and enforceable against the defendant vessel. The Suit was, therefore, maintainable. The requisite paragraphs in that behalf are paragraphs 40 and 41 of the Plaint. The prayers in the Plaint are to the following effect :

"55. In the facts and circumstances above the Plaintiff herein most respectfully prays that this Hon'ble Court be pleased to :

a. Pass an order and decree directing the Defendant to pay to the Plaintiff sum of USD 28,889,304.00 (US Dollars Twenty Eight Million Eight Hundred Eighty Nine Thousand Three Hundred and Four Only), including costs (in the sum of USD 30,000.00) together with interest at the rate of 8% p.a. on the principal amount of USD 28,859,304.00 from the date of filing of the present suit till the payment and/or realisation as per the particulars of the claim at ***EXHIBIT A1***

b. That this Hon'ble Court be pleased to order and decree that Defendant vessel together with her hull, tackle, engines, machinery, boats and all appurtenant be arrested and condemned and be sold for the amounts and interest mentioned in prayer clause (a) and the cost of the suit and for further cost, charges, expenses, enforcement fees and expenses to be incurred and that out of the sale proceeds thereof the Plaintiff's claim herein together with further cost, charges and expenses, enforcement and the expenses to be incurred, be directed to be paid over to the Plaintiff in satisfaction of its claim.

`i. Without prejudice and only In the alternative to the prayer clause (a) above, this Hon'ble Court be pleased to order vessel together with her hull, tackle, engines, machinery, boats and all appurtenant be arrested and condemned and be sold and the vessel or upon her condemnation sale under the orders of this Hon'ble Court, the sale proceeds of the Defendant vessel be applied as a security to enure for the benefit of an Award that would be passed in favour of the Plaintiff herein in the LMAA arbitration proceedings pending in London between the Plaintiff and the

Charterer/Owners of the Defendant vessel.

ii. That pending the hearing and final disposal of the present suit the Defendant vessel be arrested, seized, appraised, condemned and sold together with her hull, engines, machines, boats, tackles, bunkers, paraphernalia and appurtenant by and under the orders and directions of this Hon'ble Court and the sale proceeds be ordered to be deposited in the Admiralty Registry of this Hon'ble Court towards security and/or satisfaction of the Plaintiff's claim in the suit;

c. For ad-interim reliefs in terms of prayer clauses (d) & (e) above.

d. For costs of the suit.

e. For such other and further reliefs as the nature and circumstances of the present case may require."

17 It is in such a Suit filed in this Court in its Admiralty jurisdiction on 1st June, 2018, that the defendant moved this Notice of Motion. The Notice of Motion was moved with the prayer to set aside and/or recall the ex-parte ad-interim judgment and order dated 1st June, 2018 and release the defendant vessel Altus Uber from the order of arrest.

18 This Notice of Motion was moved because on presentation of the Plaint, an order of arrest was sought and

which came to be passed on 1st June, 2018.

19 The appellant / defendant's Notice of Motion was supported by an affidavit of the authorised representative of the Charterers and in that it is stated that Marine Engineering Diving Services FZC are the Charterers of the defendant vessel. After setting out the circumstances in which the order of arrest was passed, in paragraph 4 of the affidavit it is stated that the plaintiff has mischievously and erroneously contended that Marine Engineering Diving Services FZC is the owner of the defendant vessel and got the defendant vessel arrested on the basis of incorrect assertion set out in paragraph 35 of the Plaint. It is stated that Marine Engineering Diving Services FZC is not the owner of the defendant vessel. It is stated that Swordfish Shipco Limited is the owner of the defendant vessel and annexed and marked as Exhibits A and B are copies of the certificate of registry of Bareboat indicating Marine Engineering Diving Services FZC as the Bareboat Charterers of the defendant vessel and the Continuous Synopsis Record of the Liberian Maritime Authority denotes the said Swordfish Shipco as the owner of the defendant vessel. The certificate of registry is relied upon.

Paragraph 5 of this affidavit, running page 73, reads as under :

> *'5. I say that the Plaintiff has annexed a Seaweb Report as Exhibit "Y" to the Plaint. I say that the plaintiff has relied upon a third party website which has shown incorrect information as to the Owner of the Defendant vessel. I further say that Plaintiff has annexed no other document showing/proving that the Marine Engineering Diving Services, (FZC) is the owner of the Defendant vessel. I say that the Seaweb Report is incorrect and has incorrectly shown Marine Engineering Diving Services, (FZC) as the owner of the Defendant vessel. I further say that the company operating the above webpage has not gained/asked any information from the Charterers before publishing this false information on the webpage and neither the Charterers of the Defendant vessel has provided such false information."*

20 On this Notice of Motion being served, a detailed reply was filed by the plaintiff denying all the allegations and reiterating the averments in the Plaint.

21 With the above material, this Notice of Motion was heard by the learned single Judge at great length. He came to the conclusion that the contentions of the defendant cannot be accepted. The Suit is maintainable. The order of arrest cannot be vacated as prayed. Consequently, the Notice of Motion deserves

to be dismissed with costs. That is how the Notice of Motion was dismissed with costs quantified at Rs.5,00,000/-.

22 It is this order which is challenged in the instant Appeal.

23 There is an Appeal also filed by Swordfish Shipco Limited and that seeks to appeal against the very order.

24 It is clear that an independent application was made by even Swordfish, but during the pendency of the same, it was noticed that the instant appeal has been filed and moved. Hence, Swordfish was advised to present its independent Appeal and challenge the impugned order. Accordingly, the two Appeals were taken up together and are being disposed of by this common order.

25 We admit both these Appeals. The respective respondents / plaintiff waive service of the Appeal. Since the necessary documents and records are produced for our perusal, we dispense with the filing of the paper-book. With the consent of

both sides, both the Appeals are disposed of by this common judgment.

26 In the first Appeal, Mr. Sunip Sen, learned counsel appearing on behalf of the appellant/defendant would submit that the impugned order is contrary to law and must be set aside. He would submit that the order of the learned single Judge is erroneous and illegal inasmuch as it fails to notice a salient feature of the whole controversy. The salient feature being that there is an arbitration which is pending. That arbitration is between the plaintiff and the Charterers/owners of the defendant vessel. The parties to the present lis have no nexus or connection with India. The arbitration proceedings are being held abroad. The seat of the arbitration and the applicable law to the claim may also not be the Indian law bearing in mind the clauses and covenants of the Bareboat Charterparty. In such circumstances, whether it is permissible to obtain security for an arbitration award through an action in rem/admiralty proceedings is the first broad issue. Secondly, whether a suit in rem or otherwise lies in view of the arbitration agreement and/or the ongoing arbitration makes no difference.

27 Mr. Sen then concluded the broad issues by urging that the learned single Judge failed to consider as to whether another bareboat chartered vessel can be arrested for claims against the bareboat charterer which did not arise in respect of that bareboat chartered vessel.

28 Mr. Sen would submit that the argument on the power to arrest is in the alternative and without prejudice to the primary argument on the maintainability of the Suit, as framed. In elaboration of the alternate argument, Mr. Sen would submit that there was a vessel in relation to which the Bareboat Charterparty was executed. Admittedly, that vessel is not the vessel before this Court, namely, the defendant. The defendant vessel is sought to be proceeded against in purported exercise of the power of arrest which also now is codified. In other words, no assistance can be derived from the uncodified admiralty law or principles laid down in relation thereto when we have an Act of the Parliament. Now, The Admiralty Act, 2017 would alone be looked into. So looked into, all the conventions, agreements and common law principles are inapplicable insofar as the present lis

is concerned. If the whole of this is inapplicable and the matter has to be decided on the touchstone of the Admiralty Act, 2017, then, the learned Judge should have assigned cogent and satisfactory reasons, which would stand the scrutiny in law, while proceeding to arrest the defendant.

29 Mr. Sen, therefore, submits that the issues as raised touches the competence of this Court and this Court cannot be oblivious of the fact that all earlier judgments of this Court as also of the Hon'ble Supreme Court would not be of any assistance. We would have to, as the learned single Judge was indeed required to, necessarily consider the ambit and scope of the powers conferred by the Admiralty Act 2017, particularly in relation to the power to arrest. He would, therefore, submit that this Court must not place such a wide and broad interpretation on the provisions and particularly sections 4(4) and 5(1) and sub-section (2) of section 5 which would confer wholly unguided, unbridled and unrestricted powers to arrest any vessel. The words "*also order arrest of any other vessel*" appearing in sub-section (2) of section 5 would, therefore, have to be given a meaning consistent with the aim and object of the enactment, the aim being to consolidate the

laws relating to admiralty jurisdiction, legal proceedings in connection with vessels, their arrest, detention, sale and other matters connected therewith or incidental thereto. If we still fall back on conventions and general principles of admiralty jurisdiction as culled out from the orders and judgment of English Courts and prior judgments of this Court, then, we would be doing a violence to the plain language of The Admiralty Act, 2017, is the contention.

30 Mr. Sen would submit that when a party seeks a security for an Arbitration Award to be made in pending or future proceedings, the issue is really one of the law governing arbitration. Admiralty law comes only as an ancillary measure because that process is resorted to so as to secure the Award. Hence, the law relating to securing an Arbitration Award (present or future) in present or future arbitrations and the scope for using the Admiralty process to obtain security for an Arbitration Award is the real issue.

31 Mr. Sen would submit that the purpose and consequence of an arbitration agreement are two-fold. Firstly,

there is a bar on the party from approaching the Courts. Thus, such an agreement is saved by the exception to section 28 of the Indian Contract Act, 1872. Secondly, by virtue of the various provisions contained in the Arbitration Act, the ordinary Courts are enjoined not to exercise jurisdiction and to stay or dismiss actions if the subject matter is the same. This is, of course, subject to such intervention as expressly permitted by the Arbitration Act.

32 Mr. Sen would submit that under the earlier statutory arbitration regime, stay of the Suit was discretionary. This was the position in domestic arbitrations and mandatory in foreign arbitrations, subject, of course, to the validity of the arbitration agreement. This was also the position prevailing in the United Kingdom. In general, the common law position was that there could be no arrest for providing security for arbitration awards. It was expressly held that this jurisdiction did not extend to using power of arrest to secure maritime claim. In that regard, our attention was invited by Mr. Sen to the observations and the conclusions reached by Mr. Justice Brandon in the famous decision in *The Rena K. (1978) 1 Lloyd Law Reports P. 545.*

33 Mr. Sen would submit that even in the Court of Appeal which disapproved the view of Justice Brandon and its theory as per Rena K., it was held that there was no such power. There was no power to even retain the security or conditional release thereof. In that regard, our attention was invited to the decision of the English Court reported in *The "Tuyutt" 1984 Vol.II Lloyd Law Reports 51*.

34 Mr. Sen would emphasize that the purpose of an action in rem as set out in the decision of the Court of Appeal has not changed, but is reinforced by the Admiralty Act, 2017.

35 Mr. Sen would submit that the United Kingdom enacted The Civil Judgments and Jurisdiction Act, 1982, to bring in the European Union Brussels Convention. He invites our attention to section 26 of that Act and would urge that this expressly provides for arrest as security. However, Mr. Sen submits that this was a statutory change in pursuance of the European Union Convention and not in Common Law nor International Convention affecting any non-member State. The

English Arbitration Act deleted section 26 and replaced it with section 11 in the Arbitration Act 1996. That again enacts a provision for retention of security where admiralty proceedings are stayed.

36 As far as the Indian legal position is concerned, Mr. Sen submits that the Indian Arbitration Act, 1996, broadly categorizes the arbitration as domestic arbitration and foreign awards in arbitrations. Mr. Sen took us through the relevant provisions of the Indian Arbitration Act 1996 to submit that they provided for interim measures, *inter alia*, to secure the amount in dispute, but limited to domestic arbitrations. There was no provision for security in pending foreign arbitration proceedings.

37 Mr. Sen invites our attention to the Arrest Convention, but which had not come into effect on 14th September, 2011,l to urge that absent any provision for security in arbitrations abroad, considering the hardship and need to do justice, a Division Bench of this Court in the case of *2002 (4) Mh. LJ., 584 Islamic Republic of Iran Shipping Lines vs. m.v. Mehrab & Ors.* held that an action in rem was available and that the Court's jurisdiction extended to

pending and future arbitrations.

38 There was a conflict with the earlier judgment in the case of *2007 (2) Arb. L.R. 104 (Bombay) (FB) J.S. Ocean Llc. Vs. m.v. Golden Progress & Anr*. and, therefore, the matter was referred to a Full Bench of this Court. Inviting our attention to the Full Bench judgment of this Court, Mr. Sen would submit that even if the legal position is that which is enunciated in this larger Bench / Full Bench judgment, still, a later Supreme Court judgment came to the conclusion that the Arbitration Act was a complete self-contained code. That something is not provided therein cannot be read into or inserted therein. It is in these circumstances that he would rely upon the judgment of the Hon'ble Supreme Court in the case of *Bharat Aluminium Company Limited vs. Kaiser Aluminium Technical Services Inc.* reported in *(2012) 9 SCC 552*. He urged that after *BALCO*, the legal position is that the Courts cannot fill in gaps or lacunae in law to relieve perceived hardship. That is for the Legislature to do. That is how the Legislature stepped in after *BALCO* and amended the Indian Arbitration Act, 1996. The 2015 amendment was highlighted.

39 According to Mr. Sen section 5 of the Indian Arbitration Act 1996 has enacted a bar where judicial intervention beyond that permitted by the said Statute would have to be construed to mean that it applies across the board to all judicial interventions in arbitrations, whether against or in aid of arbitrations or awards.

40 Mr. Sen submits that the Admiralty Act, 2017, came in as a consolidated statute after taking into account this state of law in India and elsewhere. However, it limits the right of arrest and the jurisdiction in that behalf to maritime claims and liens.

41 Mr. Sen would submit that arbitration Awards are independent causes of action, apart from being a future cause of action that has not arisen and is speculative. It is not one of the specified causes of action, namely, maritime claim or maritime lien on which an action in rem lies. On the contrary, the jurisdiction of the Court as well as right of action in rem under the Admiralty Act is limited.

42 Mr. Sen contends that the Arbitration Act is a self-contained, codifying and amending law. In all matters relating to arbitration it will be impermissible to look outside the Act. The argument is that even the Admiralty Act enjoys this position. Even in Admiralty Act, which is a consolidating statute and exhaustively defining maritime law, still, that does not change the common law position that arrest was not a means of obtaining security for arbitral awards. The Admiralty Act defines the stated / permitted causes of action for arrest. The Arbitration Act specifies the methods of obtaining interim measures, including securing the amount in dispute in the arbitration and read with section 5 bars any other judicial intervention. The belief of theory that it is upto the Courts to fill up lacuna in laws for the benefit of litigants is thus inaccurate and has no place in law.

43 Mr. Sen has taken us through the provisions of both the Arbitration Act and the Admiralty Act in great details. The emphasis is that we cannot lose sight of the distinction between an action in rem and action in personam. The arbitration is in personam whereas the suit in this case is in rem. He would submit that if an action is barred by an arbitration agreement or

an on-going arbitration, the test is not who the parties are, but what the subject matter is. If the subject matter is the same, the suit is barred. Thus this distinction between an action in rem being different from an action in personam obfuscates the true issue. Here, the adjudication will be on the liability of the person liable in personam and no other. Thus, once the attempt is to secure the claim in the arbitration through this process adopted by the plaintiff in this case, then, we must discourage it at all costs. Mr. Sen has, therefore, emphasized the issue that when a party seeks security for an arbitration Award to be made in pending or future proceedings, the issue is really one of the law governing admiralty. Admiralty law comes not only as an ancillary because that process is sought to be made one of the means of securing the Award. He has pointed out the consequences of the arbitration agreement, the first one being a bar on the party from approaching the Court. That is expressly saved by section 28 of the Contract Act. Second, by virtue of the provisions of the various Arbitration Acts, the Courts are enjoined not to exercise jurisdiction and to stay or dismiss actions if the subject matter is the same. This, of course, is always subject to such intervention as expressly permitted by the Arbitration

Act. Mr. Sen has thereafter emphasized the difference in the language of the common law relating to providing security for arbitration Awards. He also submits that under the earlier statutory arbitration regime, stay was discretionary in domestic arbitration and mandatory in foreign arbitration (subject to the validity of the arbitration agreement). The position in UK was brought to our notice and equally as far as admiralty is concerned, the Brussels Convention. It is, therefore, clear, according to Mr. Sen, that if one takes the Indian conspectus, then, there was no provision for security in pending foreign arbitration proceedings. Since there was no provision for security for arbitration abroad considering the hardship and need to do justice, a Division Bench of this Court held that action in rem was available, but also held that the Court's jurisdiction extended to pending and future arbitrations. However, there was a conflict between judgments of this Court rendered earlier and the matter was referred to a Full Bench. That was with a view to set the controversy at rest. However, even the judgments of the Supreme Court, post our Full Bench, should be noted according to Mr. Sen. He would submit that the amended Arbitration Act bars any judicial intervention otherwise than as permitted by Part I. This

applies across the bar to all judicial interventions in arbitrations, whether against or in aid of arbitration awards. Arrest to obtain security for an award for such judicial intervention and is barred by section 5 of the Arbitration Act. As far as the Admiralty Act is concerned, even there we must note that difference and which is significant. Earlier, the English regime was followed. Now, we have our own Admiralty Act which is a consolidating statute and exhaustively defines maritime claims, but does not change the common law position. It is in these circumstances that he would argue that even after initiation of the arbitration, the position would be as noted by us. Now, we must go by the language of the two laws and particularly the later consolidated statute on admiralty.

44 Mr. Sen then invited our attention to sections 4 and 5 of the Admiralty Act to submit that the vessel in this case is a bareboat charter to the appellant-defendant. It produced the certificates of registration, both of the registered owner and of the bareboat charterer. The learned Judge drew an adverse inference since the charter was not produced. That is insignificant. It is an inter-party document but the primary document of registration of

two countries was produced. In any event, an adverse inference could not have been drawn unless the party was first called upon to produce that document and had refused. Mr. Sen also criticizes the judgment of the learned single Judge for, according to him, it fails to read the difference between sub-sections (1) and (2) of section 5 of the Admiralty Act. He would submit that as far as sub-clause (1) is concerned, the vessels cannot be different because that sub-section deals with same-ship arrest. As far as sub-section (2) is concerned, according to Mr. Sen, any other vessel which can be arrested for the purpose of providing security against a maritime claim would have to be the one excluded by the proviso. Thus, clause (a) of sub-section (1) of section 5 enables the High Court to arrest any vessel which is within its jurisdiction for the purpose of providing security against a maritime claim which is the subject matter of an 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 claim and is the owner of the vessel when the arrest is effected. To summarize and conclude Mr. Sen would say that in this case there is a clear attempt to secure the claim in the pending foreign arbitration. That is, therefore, an attempt to

secure the benefits in an award which, according to the plaintiff, is likely to be made in its favour. For securing such a claim and in relation to an arbitration which has no nexus with India is not permitted and recourse to Admiralty Act of 2017 cannot be taken. Secondly, even when the Admiralty law is taken recourse to, the Court must be satisfied that the jurisdiction called upon to be exercised is clearly falling under Chapter II of the Admiralty Act, 2017. Section 3 thereof with sub-section (1) spells out that the admiralty jurisdiction vesting in the High Court is subject to the provisions of sections 4 and 5. The extent of its jurisdiction is specified in section 3. If section 4 guides and ought to guide us, then, we cannot lose sight of sub-section (4) of section 4. We must also note the difference in the language of sub-section (1) and sub-section (2) of section 5 and all this being considered we would but hold that this Court lacks jurisdiction to entertain and try the suit. The impugned order is thus beyond the jurisdiction of the Admiralty court. On that count alone, this Appeal must succeed.

45 Mr. Sen has also taken us through the Memo of Appeal and he would submit that the arrest was challenged in the backdrop of the facts set out in the Memo and also on the grounds

which have been summarized. Mr. Sen argued that the learned Judge failed to appreciate that the arrest of the vessel was permissible only if the vessel being arrested was owned by or on demise charter to MEDS at the time the cause of action arose as well as the demise charterer owner of the vessel at the time the cause of action arose and at the time the arrest was made were liable. The learned Judge failed to appreciate that MEDS had no connection with the arrested vessel at the time the cause of action arose whether as owner or as bareboat and/or demise charterer.

46 The vessel Siem Marlin was never delivered and it is no one's case that either vessel was on demise charter to MEDS. It is in these circumstances that the findings of the learned Judge indicate that this Court has assumed that the jurisdiction vests in it. It does not vest in it in law and on facts.

47 For these reasons, he would submit that the Appeal be allowed.

48 He has placed strong reliance upon the following decisions :

(1) 2007(2) Arb. LR. 104 (Bombay) (FB), J.S. Ocean LLc. vs. m.v. Golden Progress & Anr.

(2) AIR 2011 SC 2649 Fuerst Day Lawson Ltd. vs. Jindal Exports Ltd.

(3) (2012) 9 SCC 552 Bharat Aluminium Co. vs. Kaiser Aluminium Technical Service Inc.

(4) 2002(4) Mh.LJ., 584 Islamic Republic of Iran Shipping Lines vs. m.v. Mehrab & Ors.

(5) 1993 Supp (2) SCC 433 m.v. Elizabeth & Ors. vs. Harwan Investment and Trading Pvt. Ltd.

(6) 3 Weekly Law Report (1997) 818 Republic of India & Anr. vs. India Steamship Co. Ltd.

49 There is another appeal which is filed, being Commercial Appeal No. 86 of 2019, by M/s. Swordfish Shipco Limited and the same facts in relation thereto are highlighted. There, Mr. Aspi Chinoy, learned senior counsel would submit that the impugned order proceeds to arrest a vessel which in law could not have been arrested by the Court.

50 Mr. Chinoy has highlighted the fact of the impugned order is affecting the rights of the appellant in that appeal periodically. The thrust of his submission is that the arrested

vessel has absolutely no nexus with the underlying transaction sought to be projected before this Court. He would submit that the learned Judge, while giving an expansive meaning to the provisions, inadvertently included a vessel and brought it under arrest although, in law, it could not have been arrested.

51 Mr. Chinoy submits that the suit proceeds on an erroneous basis that M/s. Marine Engineering Diving Services, UAE, referred above as MEDS, is a party to a charterparty arrangement with the appellant. That was a bareboat charter. That has since been terminated by the appellant.

52 The learned Judge ought to have realised that the suit proceeds erroneously by terming MEDS as the owners of the second respondent-vessel. The arrest was challenged, *inter-alia*, on the ground that the vessel could not been arrested under the provisions of the Admiralty Courts Act. The learned Judge ought to have realised that the appellant is the registered owner of the vessel and it is not liable for the alleged claim of the original plaintiff. The learned single Judge should have realised that the original plaintiff cannot exercise a lien or any maritime claim on

the property which is in the ownership of a party not liable for its maritime claim. The learned single Judge also failed to note that the party liable for the alleged claim of the plaintiff is not the owner and/or beneficial owner of the vessel. The claim of the plaintiff is arising out of a dispute between the plaintiff and MEDS, but MEDS was not the charterer of the defendant vessel under a contract between them. The contract concerns a different vessel, not being the defendant vessel and the appellant M/s. Swordsfish is not a party to the said contract. Once the claim is unrelated to the second defendant vessel, then, the plaintiff has no cause of action against the vessel. The plaintiff cannot have a maritime claim or lien over the defendant vessel nor any reason to maintain action in rem against the defendant vessel.

53 Mr. Chinoy emphasized that the wordings of sections 4 and 5 of the Admiralty Courts Act must be understood in the backdrop of such a scenario. He submits that the learned single Judge has not appreciated that the alleged breach of an agreement relating to the use or hire of a ship whether by a charterparty or otherwise would give rise to a maritime claim only against the contractual counter party and in this case MEDS,

and any vessel owned by MEDS. No claim can arise against any other party or any vessel owned by any other party in any manner whatsoever. The learned Judge, therefore, should have appreciated that the plaintiff must have a right to proceed against the defendant vessel. It does not have any right. Further, the plaintiff does not have any maritime claim against the defendant vessel or against the appellant (in Commercial Appeal No. 86 of 2019) who is the registered owner of the vessel. Thus, the argument is that the impugned order has not been rendered bearing in mind the settled legal position and which does not undergo a drastic change. In fact, a recognition is given to a common law principle in the statutory scheme. Unfortunately, according to Mr. Chinoy, the learned Judge has misread and misinterpreted the legal provisions. He has not considered them in their proper perspective. Mr. Chinoy has taken us through the documents to show that the registration of the vessel is evidenced by these documents and certificates. They clearly indicate that the owner is the appellant. For these reasons, Mr.Chinoy has submitted that the appeal be allowed.

54 We must straight away indicate that Mr. Chinoy's arguments are based on the judgment of the Hon'ble Supreme Court in the case of *Sunil B. Naik vs. Geo Wave Commander* reported in *(2018) 5 SCC 505*. Mr. Chinoy submits that the learned Judge committed a grave error of law and in paragraph 47 onwards held that the appellant in the present appeal has failed to sight a single judgment of any Court in India or for that matter, a foreign court that would have any bearing on the submissions of the plaintiff or of the applicant. Far from it, according to Mr. Chinoy this judgment in *Sunil B. Naik vs. Geo Wave Commander* applies with full force to the issue raised before us. He would submit that this judgment was very much before the learned single Judge as it was expressly cited. The learned Judge erroneously records that a copy of this judgment was tendered but it was not pressed by the applicant. The learned Judge in one line says it is not relevant. In fact, it is very much relevant and, therefore, on failing to note a judgment of the Hon'ble Supreme Court and fully applicable to the issue at hand is enough for us to set aside the impugned judgment. Mr. Chinoy would invite our attention to paragraphs 47 and 48 of the judgment under appeal in that behalf.

55 Thus, it is alleged by him that we should allow the appeal and release the vessel from arrest.

56 Mr. Prashant Pratap learned senior advocate appearing on behalf of the plaintiff would submit that the two questions arising in this appeal are (i) whether an action in rem is maintainable for arrest of a ship in respect of a maritime claim where the disputes have been referred to arbitration, and (ii) whether section 5(2) read with section 5(1)(b) of the Admiralty Act would apply if the demise charterer of a vessel is liable for the maritime claim and is it open to the claimant to arrest any other vessel of which he is the demise charterer.

57 It is stated that on question No.1 the point is expressly covered by a Division Bench and Full Bench judgment of this Court. It is also elaborated by him that the Full Bench judgment of this Court was rendered precisely to deal with the controversy at hand. Therefore, it does not matter whether arbitration proceedings have been commenced before filing of the action in rem or are yet to commence. The Full Bench of this Court did not

draw any distinction which it would have if it was of the view that once an arbitration has commenced, an action in rem for recovery of the claim cannot be filed. He submits that this question was squarely raised before the Full Bench (see paragraph 2). It matters not whether arbitration proceedings have been commenced before filing of the action in rem or yet to be commenced (pending or future – see *Mehrab* and the *Jala Matsya 1987 Vol 2 Lloyds Law Reports 164* and *Golden Progress* paragraph 2). The Full Bench did not draw any such distinction which it would have if it was of the view that once an arbitration has been commenced, an action *in rem* for recovery of the claim cannot be filed, as the question was squarely raised in paragraph 2.

58 In fact the conclusions articulated in paragraph 78 (ii) *"where the parties have agreed to submit the dispute to arbitration"* contemplates merely an arbitration agreement and not future submission to arbitration as contended by the Applicant. As long as there is an agreement of arbitration, it could have already been invoked or yet to be invoked. The reference in paragraph 75 "*Section 45 as the language suggests,*

empowers the judicial authority to refer parties to arbitration at the request of one of the parties to such agreement where it is seized of an action in a manner in respect of which the parties have made the agreement as contemplated in Section 44. There is no inherent lack of jurisdiction in the court in entertaining an action in rem in respect of which the parties have an agreement referred to in Section 44 and none of the parties has invoked arbitration agreement" cannot be held to mean that if arbitration is invoked there is inherent lack of jurisdiction and a party loses its rights to file an action in rem. Neither does Section 45 of the Arbitration Act contemplate a bar to filing an action (suit) if arbitration has already been invoked. If fact a stay then becomes mandatory as there would be no question of disputing the validity of the arbitration agreement. In fact there is no provision in Chapter I Part II of the Arbitration Act which bars the jurisdiction of the Court to entertain an in *rem* action or a suit if parties have invoked arbitration and arbitral tribunal has been constituted. If that were to be the position then the question in paragraph 2 would have been answered differently.

59 The question that arose in *BALCO* (at paragraph 10.5) was whether a suit for preservation of assets pending an arbitration proceedings is maintainable. It is in this context that *BALCO* reiterates the settled legal position following the judgment in the case of *State of Orissa vs. Madan Gopal Rungta AIR 1952 SC 12* that interim relief can be granted only in aid of and as ancillary to the main relief which may be available to the party on final determination of his rights in a suit or proceeding. An Admiralty action *in rem* is not a suit for preservation of assets pending arbitration proceedings. It is a suit for enforcement of a maritime claim by arrest of a ship.

60 The full bench judgment does not advocate a suit for interim relief only. It holds that an action in rem is maintainable for recovery of a maritime claim and arrest of a vessel where parties have agreed to submit disputes to arbitration. This is not a suit only for interim relief but is a substantive action for recovery of a maritime claim. It is only when the ship is arrested and the owner enters appearance and submits to jurisdiction that the Court will not proceed with the suit *in personam* on merits but refer the parties to arbitration. Thus what in effect happens is

that the suit is stayed consistent with Section 45 of the Arbitration and Conciliation Act, 1996. Retention of security is then a matter of discretion for the Court in the event the suit is stayed.

61 It may be borne in mind that interim relief is not a matter of right, but is always discretionary. However, the Admiralty Act, 2017 provides for a right *in rem* to arrest a ship to obtain security for a maritime claim. This right is a substantive right and cannot be denied to the Plaintiff merely because the underlying disputes have been and/or are required to be submitted to arbitration unless there is an express bar and there is none.

62 Mr. Pratap sought to deal with the submission that the impugned judgment is erroneous and incorrect because it allows the Court to arrest a vessel to secure a claim in arbitration which is not permissible in law as the Court can only arrest a vessel to secure a decree that may be passed in the suit. He submits that the impugned judgment does not say that the Court will make an order to secure the claim in arbitration or that security must be

provided in the arbitration. The judgment makes it clear that security will be given in the suit and will be retained in the suit in the event the suit is stayed and parties are referred to arbitration. Retention of security in the suit is a matter of Court's discretion. The security is not transferred to the arbitral proceedings and neither is the security ordered to be in aid of arbitration proceedings. Once there is an arbitral Award, then, the plaintiff will apply to the Court to lift the stay and rely upon the Award as binding between the parties and request the Court to decree the suit in the sums awarded and permit execution of the decree against the security in the suit. This satisfies the requirement of section 4(4) of the Admiralty Courts Act, 2017.

63 Mr. Pratap, therefore, submits that the plaintiff has a right to apply for a warrant of arrest and the Admiralty Court has jurisdiction to issue the same. Once the warrant is executed and the ship is arrested, if there is a stay of the suit, the Court has a discretion as regards retention of security even if the suit is stayed.

64 It is in these circumstances that Mr. Pratap would rely

upon the judgment of the Kolkata High Court reported in *AIR 1988 Cal. 142*.

65 It is stated that the Full Bench judgment of this Court is still a good law and Mr. Pratap would submit that the enacting of the Admiralty Act 2017 has not altered the position in any manner.

66 The Admiralty Act, 2017, is a Special Act. However, it is not a self-contained code unlike the Arbitration and Conciliation Act, 1996. There are several other statutes which deal with arrest and detention of ships and maritime claims, notably the Merchant Shipping Act, 1956, Indian Ports Act, 1908, Major Port Trusts Act, 1963, etc. The observations in *BALCO* are with reference to the Arbitration and Conciliation Act, 1996 being a self-contained code as held in *Fuerst Dahy Lawson vs. Jindal Exports Ltd. AIR 2011 SC 2649.* Thus it is not permissible to look outside the Arbitration Act in order to fill any lacunae. These do not apply to the Admiralty Act, 2017, which is not a self-contained code.

67 The Admiralty Act only deals with what constitutes a maritime claim and arrest of ships to secure maritime claims. The Act does not provide for what is required to be done after a ship is arrested to secure a maritime claim and the owner enters appearance and submits to jurisdiction. The Act is silent on the procedure to be followed in the event the disputes are to be referred to arbitration. Consequently, it is open to the Court to look outside the Admiralty Act and adopt and apply general law principles and broadly accepted international procedure to evolve a procedure which involves interplay between actions in rem and arbitration so as to advance the cause of justice and which is not prohibited by domestic law, as was done in *Golden Progress*. This procedure can be applied without any difficulty or conflict once a ship is arrested in respect of a maritime claim under the Admiralty Act, 2017. If the Admiralty proceedings are stayed and security retained in the suit pending final outcome of the suit, the same is consistent with Section 4(4) of the Admiralty Act, 2017. Once there is an award which is not satisfied, then, an application is filed in the Court for filing the stay and to rely on the award as binding between the parties and that the conditions specified in Section 48 are satisfied. Section 46 of the Arbitration Act, 1996

permits the award to be relied upon in any legal proceedings in India and all references to enforcement of a foreign award shall be construed as including references to relying on an award. If the objections to the award under section 48 are rejected, the award would be considered as binding on the parties as per Section 46 of the Arbitration Act, 1996 which permits the award to be relied upon in any legal proceedings in India. The suit is then decreed on the basis of the award for the sums awarded. This is the final outcome of the suit. The security can then be made available to the Plaintiff in execution of the decree.

68 No statute caters to every fact situation. The submission that what is not provided of is impliedly excluded, is not correct. The Admiralty Act 2017 is not a self-contained code unlike the Arbitration and Conciliation Act, 1996. It sets out the extent of the jurisdiction of the court (territorial and over ships – section 3) , a list of maritime claims (section 4) and the powers of the court to arrest a ship for the purpose of providing security in respect of a maritime claim (section 5). The Admiralty Act, 2017 does not refer to stay of Admiralty proceedings once the ship is arrested and security provided. That comes in by virtue of

Section 45 of the Arbitration and Conciliation Act, 1996. This does not mean that the suit is not maintainable or that there is an implied bar. The presence of an arbitration agreement does not oust the jurisdiction of a Civil Court. Even if the suit is stayed there is no bar to retention of security in the suit.

69 The Apex Court has in several judgments supported such interpretative changes having regard to the ever changing global scenario (paragraph 56 of m.v. Sea Success (2004) 9 SCC 512). In the case of *Al Quamar (2000) 8 SCC 278* para 43 the Apex Court also observed that *"the Court has to approach modern problems with some amount of flexibility as is now being faced in the modern business trend. Flexibility is the virtue of the law courts as Roscoe Pound puts it. The pedantic approach of the law courts are no longer existing by reason of the global change of outlook in trade and commerce"*.

70 Courts promote alternate dispute resolution by arbitration and mediation. A party willing to arbitrate cannot be put at a disadvantage and be told that he has lost his right to obtain security by arrest of a ship. Every charterparty and every

other form of Standard Shipping Contract out of which most disputes arise contains a printed arbitration clause. It would be a retrograde step if in case of disputes a party has no right to obtain security by arrest of a ship if he has a maritime claim. This would not serve the cause of ADR in India which Courts are keen to promote to ease the burden on Courts of law suits clogging the system.

71 On Mr. Chinoy's submissions Mr. Pratap would submit that section 5 of the Arbitration Act bars intervention of the Court in matters governed by Part-I. The present case is not an application under Part-I and consequently the bar of section 25 of the Arbitration Act 1996 has no application. He would submit that the suit is not barred inasmuch as it is only on an application of the party that section 8 of the Arbitration Act 1996 applies. He would submit that we must refer to section 10 of the Code of Civil Procedure, 1908. The pendency of a suit in a foreign Court does not preclude the Courts in India from trying a suit founded on the same cause of action. If this be so, then, how can the pendency of foreign arbitration proceedings be a bar to a suit in India on the same cause of action. In such a case of a prior foreign suit, if

security by way of interim relief is obtained by the plaintiff in the suit in India the Court may, on the application of the defendant, either put the plaintiff to an election if it is found to be vexatious or stay the suit and retain security or make the stay conditional upon alternate security being provided. The suit in India on the same cause of action can be stayed and security retained. The same can be done in the case of a foreign arbitration.

72 The submission that once there is an arbitration agreement and arbitration has been invoked, the Court has no jurisdiction to arrest a ship in exercise of the Admiralty jurisdiction, has been specifically held to be incorrect by the English Court of Appeal in The Andria. Thus the purpose of the Plaintiff in invoking the Admiralty jurisdiction cannot affect the existence of the jurisdiction. Thus it cannot be said that the Court has no jurisdiction to arrest a ship or to maintain an arrest where the purpose of the Plaintiff is simply to obtain security for an award in arbitration proceedings. The jurisdiction is simply there. The Court has the power to arrest.

73 The elaboration of the submissions of Mr. Pratap made

orally and in writing revolves around the primary stand, namely, that the Admiralty Act was not enacted to give effect to the 1999 Arrest Convention and section 5(2) of the Act has to be considered independently without reference to the Convention. The argument that it was enacted to give effect to the Arrest Convention, according to Mr. Pratap is, therefore, inaccurate. Besides that, under Article 3(2) of the Arrest Convention, arrest is permissible of any other ship owned by the person who is liable for a maritime claim and who, when the claim arose, was the demise charterer, time charterer or voyage charterer of that ship/vessel. This means that if a claim is against the demise charterer, time charterer or voyage charterer, any other ship owned by these three types of charterers can be arrested. Mr. Pratap, outlining the difference between the Arrest Convention and the Act, contends that under the Admiralty Act, 2017, if the claim is against the time charterer or a voyage charterer, then, there appears to be no provision for arrest of any other ship owned by the time charterer or voyage charterer. The Act, therefore, does not appear to give the right to arrest any ship owned by the time charterer or voyage charterer if the claim is against such charterers. However, the Arrest Convention Article

3(2) expressly permits this.

74 From the above it can be seen that the powers of arrest of "*any other vessel*" under section 5(2) of the Act differ from those under the Convention. Thus recourse cannot be had to the Convention when interpreting the provisions of section 5(2) of the act which stands on a separate and independent footing.

75 When it comes to a maritime claim against a demise charterer, the Convention restricts the right of arrest to any other vessel owned by the demise charterer and does not permit arrest of any other vessel on demise charter to the demise charterer. However the Admiralty Act, 2017 permits the arrest of any other vessel which is on demise charter to the demise charterer when the arrest is affected or the demise charterer is the owner of that vessel.

76 Section 5(2) permits the arrest of any other vessel in lieu of the vessel against which a maritime claim is made subject to the provisions of Section 5(1). This means that in case of a maritime claim against a demise charterer (MEDS) in respect of a

demise chartered vessel (SIEM MARLIN) any other vessel that can be ordered to be arrested in lieu of the demise chartered vessel (SIEM MARLIN) would be any other vessel of which the demise charterer (MEDS) is the demise charterer or owner when the arrest is effected as provided in Section 5(1)(b) which deals with demise charterers. This other vessel is ALTUS UBER which was on demise charter to MEDS on the date of the arrest, namely, 1 June 2018.

77 This is the conclusion reached by the learned single Judge in paragraph 52 of the impugned order and is correct and does not call for interference.

78 According to Mr. Pratap, the judgment of the Apex Court in Geowave Commander is not applicable. This judgment was simply cited by the appellant before the learned single Judge but was not pressed by the appellant and for good reason (see paragraph 47 of the impugned judgment at page 54). In *Geowave Commander*, the Plaintiffs had given their ships on time charter to the charterer Reflect Geophysical Pvt. Ltd. This reflects that this was a time charterer and not a demise charterer. The

Plaintiffs had claims under the time charter against the time charterer Reflect Geophysical. For this purpose the Plaintiff could only arrest a ship owned by Reflect Geophysical as provided by Article 3(2) of the 1999 Arrest Convention. The Admiralty Act, 2017 was not then in force.

79 The Plaintiffs in Geowave Commander then contended that even though Reflect was the demise charterer of Geowave Commander, the demise charterer should be considered as the de-facto owner of the ship and consequently the owner. This was negatived by the Supreme Court who held that the word *"owner"* denotes legal (de jure) ownership and not merely a de-facto owner. If in law Reflect was not the legal owner of the vessel then Reflect cannot be considered as the owner under Article 3(2) of the Convention.

80 According to Mr. Pratap, the case of Geowave Commander is completely different from the facts of the present case. The law is also different. The Plaintiffs claim is against a demise charterer. In Geowave Commander it was against a time charterer. Section 5(2) read with Section 5(1)(b) of the

Admiralty Act 2017 permits arrest of any other vessel either owned or on demise charter to the demise charterer. This question never arose in Geowave Commander because the Plaintiffs in that case had a claim against a time charterer and not a demise charterer and therefore could arrest any other ship owned by the time charterer and not a ship on demise charter. This is explained by the learned single Judge in paragraph 47 and the Geowave Commander has been correctly distinguished.

81 It may be seen that the Admiralty Act, 2017 was not in force when this case came up before the Bombay High Court and even when the appeal was heard by the Supreme Court. Section 5(2) of the Admiralty Act is not referred to in the judgment in *Geowave Commander*. It only refers to Section 5(1) which contains provisions similar to Article 3(1). This case concerns Section 5(2) for which there is no equivalent in the Convention.

82 The submission that construction of Section 5(2) as adopted by the learned Single Judge leads to an absurd or inequitable result by which a ship owned by a person who is not liable in respect of a claim is arrested is misconceived. This is not

an absurd result. The Convention itself permits arrest of a vessel on demise charter [Article 3(1)(b)] where there is no personal liability of the owner. For example, if the demise charterer were to sub-charter the vessel on time charter and thereafter wrongfully repudiate the sub-charterparty, it would be open to the time charterer to arrest the vessel to secure its claim in damages even though there is no personal liability on the owner of the vessel who has done no wrong. What the Admiralty Act, 2017 has done is to simply extend this to any other vessel on demise charter to the demise charterer. Thus, if there is any such principle that a vessel can be arrested only if there is personal liability of the owner, an exception has been carved out by the Arrest Convention itself to provide for arrest of a vessel on demise charter even though the owner is not personally liable and this exception has been extended by the Admiralty Act, 2017 to cover any other vessel on demise charter to the demise charterer even though there is no personal liability of the owner. Hence there is nothing inherently wrong in permitting such an arrest as sought to be argued by the Appellant who admits that Section 5(2) is unambiguous.

83 Mr. Pratap has placed heavy reliance on the following judgments :

(1) (2009) 2 SCC 134 Shakti Bhog Foods Limited vs. Kola Shipping Limited.

(2) Lloyd's Law Reports (1987) Vol.2 – Queen's Bench Division (Admiralty Court) – judgment dated 4th July, 1986.

(3) 1 Queen's Bench 377 (1979) – The Rena K.

84 For properly appreciating the rival contentions, it is necessary to refer to the allegations in the plaint.

85 The suit is filed by the plaintiff for seeking to assert the claim and the cause of action as set out in the plaint and summarized in paragraph 38 onwards indicates that this is an in rem action for enforcement of the plaintiff's maritime claim on the defendant vessel for recover of charterhire as well as capital value of the vessel (as provided in the bareboat charterparty) which the plaintiff would have earned, had the charterers / owners of the defendant vessel not breached the essential condition and warranty of the bareboat charterparty. It is stated that the maritime claim is valid, subsisting and enforceable

against the defendant vessel. In view of the failure on the part of the charterers / owners of the defendant vessel to comply with the essential conditions under the bareboat charterparty, the plaintiff says that it is entitled to file the present suit for recovery of charterhire as well as the capital value of the vessel which the plaintiff would have earned had that essential condition and warranty not been breached.

86 It is clearly stated in paragraph 4 that this constitutes a maritime claim under section 4(1)(h) of the Admiralty Act, 2017 and the Arrest Convention 1999. It is claimed that an action in *rem* under the provisions of the Admiralty Act, 2017 and Arrest Convention is a special and effective right and procedure prescribed in Admiralty jurisdiction for recovery of a lien and a claim by an action in rem against a vessel which are within the jurisdiction of this Court. The plaintiff claims to be entitled to proceed against the defendant vessel in an in rem action for recovery of charter hire and the capital value of the vessel Siem Marlin. It is, therefore, said that this Court has jurisdiction to entertain, try and dispose of this suit.

87 Insofar as the arrest is concerned, that is claimed, based on section 5 of the Admiralty Act, 2017 and the International Convention on the Arrest of Ships, 1999. It is stated that the plaintiff is entitled to arrest the defendant vessel in the present admiralty proceedings since the owner of the defendant vessel is liable for the maritime claim and the owner of the defendant vessel was the demise charterer of the vessel Siem Marlin under the bareboat charterparty.

88 Before proceeding further, we must indicate that the issue of jurisdiction of this Court is raised qua the subject matter. This Court's territorial jurisdiction is not the issue at hand. The competence of this Court to entertain and try the suit particularly because of its subject matter is highlighted before the learned single Judge as also before us. Like any other facet of jurisdiction, even when one is dealing with the subject matter of the suit one must proceed on the allegations in the plaint. They would have to be presumed as true until the contrary is proved. Once we look at the allegations in this plaint, then, we do not think that the learned single Judge was in error in rejecting the objection to this Court's competence and jurisdiction to entertain and try the suit.

89 The plaint itself has highlighted that notwithstanding the pendency of the arbitration proceedings and award that may be passed in arbitration proceedings in London, they are entitled to file the present Admiralty Suit seeking arrest of the defendant vessel as security for their claim in the suit. The plaintiff is entitled to seek a decree against the defendant vessel as claimed in the suit and obtain security for its present claim. In the alternative, the defendant vessel can be retained as security for the arbitration proceedings commenced in London.

90 The fallacy in the argument of Mr. Sen and Mr. Chinoy is in presuming that this Court has been approached by the plaintiff only to obtain security for the arbitration proceedings commenced in London. Far from it, the present suit is filed to enforce a maritime claim and that is clear from a reading of the plaint as a whole. It is well settled that the allegations will have to be read as a whole and in their entirety. None of the allegations in the plaint can be picked out of context and read in isolation. After setting out the background, the plaint proceeds to say that this is an in-rem action for enforcement of the plaintiff's maritime claim.

Once this is how the plaint allegations are premised and the ultimate relief, then, we are of the opinion that we cannot agree with Mr. Sen as also Mr. Chinoy.

91 Mr. Sen's argument presumes that because there is a pending arbitration and abroad, by its sheer pendency the present suit is barred. For that purpose, he says that this suit is filed to obtain security for the claim in the arbitration which is going on abroad. In the foregoing paragraphs, we have already said that this is not how the claim is founded. Secondly, Mr. Sen's arguments proceed on an erroneous basis and namely that pendency of the arbitration proceedings abroad by itself and without anything more bars the filing of the suit. To our mind, that is not the accurate position.

92 Section 5 of the Arbitration & Conciliation Act, 1996, bars judicial intervention. That says that notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene, except where so provided in this Part. The word "Part" may not be defined, but that is to be understood by the index and

contents of the Arbitration & Conciliation Act, 1996. Part-I thereof is titled as Arbitration and has as many as ten Chapters. The ten chapters contain general provisions, arbitration agreement, composition of arbitral tribunals, jurisdiction of arbitral tribunals, conduct of arbitration proceedings, making of arbitral award and termination of proceedings, records against arbitral award and finality and enforcement of arbitral awards. Chapters IX and X are titled as 'Appeals' and 'Miscellaneous'. Part-II of the Act deals with enforcement of certain foreign awards. Therefore, judicial intervention is permissible to the extent indicated in section 5. Mr. Sen's argument overlooks the fact that filing or presenting of the suit in this Court cannot be said to be attracting the bar. Something more than that would attract the bar. If presence of an arbitration agreement between the parties itself attracts a bar, then, section 8 of the Arbitration & Conciliation Act 1996 would become otiose and redundant. That enacts a power to refer parties to arbitration where there is an arbitration agreement. Therefore, a judicial authority before which an action is brought in a matter which is subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him so

applies, then, dependent upon other conditions in sub-section (1) of that section being satisfied, the parties have to be referred to arbitration. For that, the Court will have to conclude that there is a valid arbitration agreement. This sub-section has been amended retrospectively with effect from 23rd October, 2015. Prior thereto, it was reading as under :

> *"**8 Power to refer parties to arbitration where there is an arbitration agreement**.- (1) A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.*
>
> *(2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.*
>
> *(3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced and an arbitral award made."*

93 Now, sub-section (2) and which is retained contains a proviso with retrospective effect. By that proviso an original arbitration agreement or a duly certified copy thereof has to be

presented for an application under sub-section (1) of section 8 to be entertained. The proviso enables the Court to exercise its powers under sub-section (1) in the absence of the original agreement. Sub-section (3) says notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.

94 Therefore, the judicial authority has to be approached by making an application within the meaning of sub-section (1) so as to enable it to exercise its power to refer parties to arbitration where there is an arbitration agreement.

95 In the instant case, it is said that the arbitration is pending abroad. Section 45 of the Arbitration & Conciliation Act, 1996, reads as under :

> "***45. Power of judicial authority to refer parties to arbitration***.- *Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless*

it finds that the said agreement is null and void, inoperative or incapable of being performed."

96 A bare perusal of this provision says that notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

97 Once the institution or filing of the present suit is not barred and the parties have to move and prevent the Court from proceeding with the suit, then, we do not see how Mr. Sen's argument can be accepted. Apart from the above, the learned Single Judge's order can be sustained on facts.

98 We are not deciding any larger issue or wider controversy simply because Mr. Sen's argument have not rested on the above provision of the Arbitration Act alone. He has gone

ahead and criticised the approach of the learned single Judge by contending that the instant suit only seeks to protect or secure the claim in the on-going foreign arbitration. Thus, his contention is that this suit is filed to obtain a security for the ultimate award that would be made in favour of the plaintiff.

99 Far from it, this suit is filed to recover the amounts, more particularly set out in the prayer clause by urging that there is a maritime claim. Mr. Sen pertinently does not dispute that the underlying claim in this case is otherwise a maritime claim. However, his argument is that such a claim, which is referred to in section 4 of the Admiralty Act, 2017, is pressed by the plaintiff in the on-going arbitration proceedings. Therefore, the present suit is filed only to secure the claim and the fruits of the arbitral proceedings abroad. Thus, in the event the Award passed in favour of the plaintiff in the foreign arbitration has to be enforced, then, there has to be a security for it and for that reason, this suit is filed.

100 We do not think so. Ultimately, this aspect has to be decided on the facts and circumstances of each case. No general

rule can be laid down. One would have to read every plaint and the allegations therein carefully. One would have to take the plaint allegations as a whole and read them harmoniously. One would have definitely and to arrive at a proper conclusion, read the allegations in this manner. They would have to be assumed to be true. Therefore, we are not saying that a suit to secure the claim in the arbitral proceedings can be filed irrespective of the requirements stipulated in the Admiralty Act, 2017. They have to be fulfilled and all preconditions satisfied. We are not laying down such a principle as is apprehended by Mr. Sen. All that we are saying is that in the backdrop of the facts and circumstances of this particular case, we do not think that the suit has been filed to secure the claim in the pending foreign arbitral proceedings. By this finding and conclusion and which is based entirely on the facts and circumstances of each case, we are not laying down any general rule, much less a principle of law that a suit simplicitor to secure a claim in the arbitration abroad would be always maintainable in the Admiralty jurisdiction of this Court. We think that our clarification is enough to understand the ultimate conclusion that we have reached. It is only to negate the argument of Mr. Sen that the instant suit is filed to claim arrest of

a vessel as a security for the pending foreign arbitration that we have made these detailed observations.

101 Once we clear this ground, then, the remaining issue is whether this Court's order of arrest, as made by the learned single Judge, requires interference. In that regard, we must refer to the Admiralty Act in some details. The Admiralty Act, 2017, is an Act to consolidate the laws relating to Admiralty jurisdiction, legal proceedings in connection with vessels, their arrest, detention, sale and other matters connected therewith or incidental thereto. The Statement of Objects and Reasons leading to this enactment reads as under :

> "***STATEMENT OF OBJECTS AND REASONS***
>
> *The present legal framework for admiralty jurisdiction in India flows from laws enacted by the British which confer admiralty jurisdiction only to those High Courts which were established under the Letters Patent, 1865. Subsequent to the judgment of the Supreme Court in its judgement in M.V. Elisabeth And Others Vs. Harwan Investment and Trading Pvt. Ltd. to codify and clarify the admiralty laws in the country, the Law Commission of India also in its 151st Report recommended for enacting a new admiralty Act for India.*

2. The Admiralty (Jurisdiction and Settlement of Maritime Claims) Bill, 2016 consolidates the existing British era laws on civil matters of admiralty jurisdiction of courts, admiralty proceedings on maritime claims, arrest of vessels and related issues in line with modern trends in the maritime sector and in uniformity with prevalent international practices.

3. The Bill also proposes to confer admiralty jurisdiction on High Courts of coastal States. This jurisdiction extends up to Indian territorial waters. The Central Government is empowered to further extend, by a notification, upto exclusive economic zone or any other maritime zone of India or islands constituting part of the territory of India. The Bill covers every vessel irrespective of place of residence or domicile of owner. However, warships and naval auxiliary or other vessels used for non-commercial purposes are beyond its purview. Though inland vessels and vessels under construction are excluded from its application, the Central Government is empowered to make it applicable to these vessels also, by a notification, if necessary. The Bill provides for adjudication of identified maritime claims and, to ensure security against maritime claims, arrest of vessels in certain circumstances. The Bill also provides for inter se priority on maritime lien. The liability in respect of selected maritime claims on a vessel passes on to its new owners by way of maritime liens subject to a stipulated time limit. The Civil Procedure Code, 1908 shall be applicable in respect of aspects on which provisions are not laid down in the Bill. The Bill also

deals with admiralty jurisdiction in personam and the order of priority of maritime claims.

4. It is proposed to repeal four archaic admiralty laws on civil matters, namely, (a) the Admiralty Court Act, 1861, (b) the Colonial Courts of Admiralty Act, 1890, (c) the Colonial Courts of Admiralty (India) Act, 1891, and (d) the provisions of the Letters Patent, 1865 in so far as it applies to the admiralty jurisdiction of the Bombay, Clacutta and Madras High Courts, as those provisions would become redundant with the enactment of this Legislation.

5. The Bill seeks to achieve the above objectives."

102 Now, a reference will have to be made to the provisions of the Act so as to properly understand the intent of the Parliament. In Chapter I titled "Preliminary", section 1 says that this Act may be called the Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017 and sub-section (2) of section 1 says that it shall apply to every vessel, irrespective of the place of residence or domicile of the owner. The proviso thereto excludes an inland vessel and a warship, naval auxiliary or other vessel owned or operated by the Central or a State Government and used for any non-commercial purpose. It shall also not apply to a foreign vessel which is used for any non-commercial purpose as

may be notified by the Central Government. The definitions are contained in section 2. Clause (a) defines "admiralty jurisdiction" to mean the jurisdiction exercisable by a High Court under section 3, in respect of maritime claims specified under this Act. "Admiralty proceeding" means any proceeding before a High Court exercising admiralty jurisdiction. The word "arrest" is defined in section 2 clause (c) as under :

> *"**2. Definitions**.- (1) In this Act,-*
> *(a) ... ...*
> *(c) "arrest" means detention or restriction for removal of a vessel by order of a High Court to secure a maritime claim including seizure of a vessel in execution or satisfaction of a judgment or order;"*

103 A perusal of this definition would mean detention or restriction for removal of a vessel by order of a High Court to secure a maritime claim including seizure of a vessel in execution or satisfaction of a judgment or order for arrest. The definition, therefore, itself is so clear as requiring no elaboration. The term "High Court" is defined in section 2 clause (e) and the term "maritime claim is defined in clause (f) of section 2 to mean a claim referred to in section 4. The term "maritime lien" is defined

in section 2 clause (g) as under :

> *"**2. Definitions**.- (1) In this Act,-*
>
> *(a) ... ...*
>
> *(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 sub-section (2) of that section;"*

104 The other definitions need not be referred to, save and except the definition of the term "vessel" and that also is an inclusive one. The controversy as to whether the defendant is a vessel or not has not arisen in this case and, therefore, this definition need not be elaborated in any details.

105 Chapter II contains very important provisions, namely, sections 3, 4 and 5 and they read as under :

> *"**3 Admiralty Jurisdiction.**- (1) 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.

***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 maybe 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;

(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.

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

(a) the person who owned the vessel at the time when the maritime claim arose is liable for the claim and is the owner of the vessel when the arrest is effected; or
(b) the demise charterer of the vessel at the time when the maritime claim arose is liable for the claim and is the demise charterer or the owner of the vessel when the arrest is effected; or
(c) the claim is based on a mortgage or a charge of the similar nature on the vessel; or
(d) the claim relates to the ownership or possession of the vessel; or
(e) the claim is against the owner, demise charterer, manager or operator of the vessel and is secured by a maritime lien as provided in section 9.

(2) The High Court may also order arrest of any other

vessel for the purpose of providing security against a maritime claim, in lieu of the vessel against which a maritime claim has been made under this Act, subject to the provisions of sub-section (1):

Provided that no vessel shall be arrested under this sub-section in respect of a maritime claim under clause (a) of sub-section (1) of section 4."

106 A perusal of section 3 would reveal that it is subject to the provisions of sections 4 and 5 that this Court exercises Admiralty jurisdiction and that is defined with reference to a maritime claim. Therefore, a jurisdiction vesting in the respective High Courts is not the repository of all maritime claims under the Admiralty Act and the extent of the jurisdiction is then set out in sub-section (1) of section 3.

107 One finds curiously that section 3 has no further sub-sections. It has only one sub-section. Section 4 deals with the maritime claim. Sub-section (1) of section 4 says that High Court may exercise jurisdiction to hear and determine any question on a maritime claim arising out of the matters enlisted in clauses (a) to (w) and sub-section (2) says that 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 order as it may think fit. Sub-section (3) of section 4 provides for hearing and determining any question arising as to the title to the proceedings of the sale of the vessel directed to be sold. Sub-section (4) of section 4 says that any vessel ordered to be arrested or any proceedings of a vessel on sale under this Act shall be held as security against any claim pending final outcome of the Admiralty proceedings.

108 This sub-section was also read in isolation. It should not be read so. This sub-section must be read with the definition of the term "admiralty proceedings" which, in turn, means any proceeding before a High Court exercising admiralty jurisdiction. Further, the word "admiralty jurisdiction" means the jurisdiction exercisable by a High Court under section 3 of the Admiralty Act in respect of the maritime claims specified under this Act. So read, it would be clear that sub-section (4) of section 4 enables an arrested vessel or the proceeds of the sold vessel under this Act to be held as security against any claim pending final outcome of the

Admiralty proceeding. Then comes section 5 which confers a power of arrest of a vessel in rem. Now, sub-section (1) of this section enables the High Court to order arrest of any vessel which is within its jurisdiction for the purpose of providing security against a maritime claim which is the subject matter of an admiralty proceeding, but the Court must have reason to believe that clauses (a) or (b) or (c) or (d) or (e) of sub-section (1) are attracted. By sub-section (2), discretionary power is conferred in the High Court to order arrest of any other vessel for the purpose of providing security against a maritime claim, in lieu of the vessel against which a maritime claim has been made under the Admiralty Act, subject again to the provisions of sub-section (1) of section 5. However, no vessel shall be arrested under this sub-section in respect of a maritime claim under clause (a) of sub-section (1) of section 4. That clause speaks of a dispute regarding the possession or ownership of a vessel or the ownership of any share therein. Naturally, therefore, the proviso to sub-section (2) of section 5 says that if the maritime claim is of this nature, then, no vessel shall be arrested under sub-section (2) of section 5. In the instant case, the argument is that the claim is in relation to a breach or violation of an agreement pertaining to Siem Marlin.

The plaintiff has said that the defendant vessel is owned by MEDS FZC, a company incorporated under the foreign laws having its office in the United Arab Emirates. The plaintiff has said that there is a breach of the conditions stipulated in the bareboat charterparty dated 13th May, 2015 entered into between the plaintiff and the owners of the defendant vessel. The plaintiffs are owners of a motor vessel Siem Marlin. By the bareboat charterparty, the plaintiff chartered Siem Marlin on bareboat charter to MEDS for a firm period of five years with a purchase obligation at the end of five years or a purchase option at the end of the first / second / third / fourth year from the date of delivery. There was a charterparty drawn and as per its terms, fifteen days prior to delivery of the vessel Siem Marlin to the charterers, the charterers were required to furnish a bank guarantee for USD 4 million as guarantee for full performance of the obligations under the charterparty and which bank guarantee was to be furnished between the time / extended time agreed between the parties. Thus, the charterer / owners of the defendant vessel were required to take delivery of Siem Marlin, but they failed to furnish this bank guarantee. Consequently, the delivery could not be taken.

109 The plaintiffs have said that after committing a breach of the same and not compensating the plaintiffs, the liability to pay the amounts claimed in the suit arises and then the plaintiffs allege that they are constrained to let out this vessel Siem Marlin on short time charterparties; the plaintiff was forced to incur operating costs and expenses (management crewing etc) under these time charterparties which they would not have had to incur under the bareboat charterparty, under which such expenses could have been to the account of the charterers / owners of the defendant vessel. Hence these expenses also have to be reimbursed. There are damages for loss of sale of the vessel Siem Marlin. The claim has been elaborated in that regard and we have noticed how the plaintiffs termed this as a maritime claim. They are saying that the maritime claim as set out in the plaint entitles them to invoke their right in rem against the defendant vessel. The plaintiffs in paragraph 44 of the plaint have clearly stated that they are entitled to arrest the defendant-vessel in the present Admiralty proceedings since the owner of the defendant vessel is liable for the maritime claim and the owner of the defendant vessel was the demise charterer of one of the vessel

Siem Marlin under the bareboat charterparty. Hence, the arrest of any vessel which is within the jurisdiction of this Court for the purpose of providing security against a maritime claim which is a subject matter of an admiralty proceeding enables the plaintiffs to seek an arrest of the defendant-vessel. Clause (a) of sub-section (1) of section 5 enables this Court to order arrest of any vessel within its jurisdiction for the purpose aforesaid where this Court has reason to believe that the person who owned the vessel at the time when the maritime claim arose is liable for the claim and is the owner of the vessel when the arrest is effected. Paragraph 44 of the plaint proceeds on this basis. Now, the whole argument is that this boat or vessel (the defendant vessel) has nothing to do with the claim in the suit. Its owner is not liable for the maritime claim.

110 The application that was made to the learned single Judge in June 2018 is that this Court should set aside an order and/or recall the exparte / ad-interim order dated 1st June, 2018 and release the defendant vessel Altus Uber from the order of arrest.

111 We now refer to the rival versions placed on affidavit by the parties. We clarify that we accept neither. At this stage, their acceptance or otherwise is unnecessary. The application was moved by the defendant. In that application, an affidavit-in-support was filed in which the authorised representative of MEDS says that MEDS is wrongly described as owner of the defendant vessel. In fact, the application for vacating the arrest is moved by MEDS in the capacity of the charterers of the defendant vessel. The plaintiffs have mischievously and erroneously contended that MEDS is the owner of the defendant vessel and got the defendant vessel arrested. It is not MEDS but Swordfish Shipco Limited (for short "Swordfish") which is the owner of the defendant vessel. Reliance in that behalf was placed on Exhibits A and B which are copies of the certificate of registration of bareboat indicating that MEDS as the bareboat charterers of the defendant vessel and the latest Continuous Synopsis Record of the Liberian Maritime indicating Swordfish as the owner and MEDS as bareboat charterers of the defendant vessel.

112 However, the plaintiff has relied upon Exhibit-Y styled as a Seaweb report. This is a third party website which has shown

incorrect information as the owner of the defendant vessel. The plaintiff has annexed no other document showing / proving that MEDS is the owner or the defendant vessel. The Seaweb report is incorrect and has incorrectly shown MEDS as the owner of the vessel. Thus, this information could not have been relied upon.

113 It is then said that the arbitration proceedings between the plaintiffs and MEDS relate to the vessel Siem Marlin and the same are conducted in London. The subject matter of the arbitration is not pertaining to the defendant vessel and, therefore, no claim / right arises to arrest the defendant vessel. For these reasons, it is submitted that the order be vacated.

114 Now, the Provisional Certificate of Bareboat Registry in relation to Altus Uber shows the name of MEDS (see page 89 in the appeal paper-book of Swordfish). The name of Swordfish is shown as 'former name'. The Provisional Certificate of Bareboat Registry shows that pursuant to provisions of chapter 2 of Title 21 of Liberian Code of Laws 1956 as amended, declaration is made by one Ashutosh Choudhary. That is a declaration of ownership and he does depose and that MEDS is the sole Bareboat

Charterer of the named and described vessel. Then there is at page 90, a Continuous Synopsis Record which shows the name of the current registered owner and that is Swordfish Shipco Limited. The registered bareboat charterer is MEDS. The Board Resolution at page 92 of MEDS shows MEDS FZC as the charterers of the vessel Altus Uber.

115 However, to this Notice of Motion (L) No.1392 of 2018, in Judge's Order No.107 of 2018, the plaintiff filed a reply. It, in paragraph 5(a), says that it has not wrongly declared MEDS as owners of the defendant vessel. In fact, MEDS on its official website has provided a company profile in column "About Us" page. In the said company profile MEDS has specifically stated that it continuously strives to maintain the highest standards of compliance to the Global Safety and Environmental policies while operating its fleet. It has the capability to offer three of its own DP2 vessels on time charter basis. It has provided a list of the above mentioned three DP2 vessels. In that list, MEDS has specifically mentioned the defendant vessel with its photograph alongwith two other vessels Altus Exertus and Altus Optimus.

116 These documents are relied upon along with the Seaweb report to establish that the defendant vessel is owned by MEDS and, therefore, it is liable to be arrested and sold for enforcement of the maritime claim against MEDS.

117 Then, in this affidavit-in-reply at Exhibit-B collectively, are copies of documents relating to ownership and other details of the defendant vessel as available on the website of the Classification Society, namely, Indian Register of Shipping are relied upon. This information is provided by MEDS to this Classification Society. Once this information available on the official website of the Classification Society demonstrates that MEDS is the owner of the defendant vessel, then, really we are not concerned with the assertion of Swordfish Shipco that the contents of this documents are not correct.

118 To our mind, it is not as if there is a bald or vague assertion of the plaintiff about the defendant vessel. There is a categoric averment that the defendant vessel is owned by MEDS. There is a reference to specific documents from which the plaintiff has deduced that MEDS is the owner. It is not, therefore, that

ownership is an undisputed position as claimed by the said Swordfish. There is no admission, much less any concession by the plaintiff that the ownership of the defendant vessel vests in somebody else. In fact, they go as far as saying that the documents annexed as exhibits to the affidavit-in-support of M/s. MEDS, namely, purported certificate of registration of bareboat and purported Continuous Synopsis Record purportedly of the Liberian Maritime Authority are disputed and denied. The plaintiff deny their authenticity and veracity. They claim that these documents do not have any probative value. They put MEDS to the strict proof of the existence as well as truth of the contents of these purported documents. In fact, the argument is that these documents appear to be concocted, fabricated and/or manufactured documents solely with a view to create an illusion in order to avoid the liability. Then, the affidavit refers to a complete note and, relying upon that, it is argued that MEDS cannot decisively urge that it is the owner of the defendant vessel. The alleged certificate is only provisional.

119 In addition to that, the purported provisional certificate of the bareboat registry recorded in the ownership

declaration column to which we have referred to in details above says that Ashutosh Chaudhary, the Managing Director of MEDS submitted to the Liberian Maritime Authority that MEDS owns the defendant vessel to the extent of one hundred percent. Thus, every document submitted by MEDS falsifies their arguments.

120 We find much substance in the contentions of Mr. Pratap that at this stage the Court was not concerned with the authenticity and genuineness of the documents. At best, this is a word against word. Mr. Pratap is right in urging that the plaintiff cannot be non-suited by relying on such questionable documents. The plaintiffs have then stated that Altus Uber can still be arrested because the plaintiffs have a maritime claim against the demise charterer MEDS in respect of their vessel Siem Marlin and MEDS is the demise charterer of the vessel Altus Uber on the date of the arrest. The plaintiffs have pointed out that the demise charterer can change the name of the ship, its flag, Port of registry and classification society and even represent to the Indian Register of Shipping to be the owner of the ship as appearing from the documents on record. All this was permitted by the registered owner Swordfish assuming that the documents

produced by Swordfish are genuine and authentic. According to Mr. Pratap, still, Altus Uber can be arrested. Mr. Pratap says that in the event clause (a) of sub-section (1) of section 5 does not help the plaintiff, clause (b) comes to its aid and assistance. Therefore, any vessel which is in the jurisdiction of this Court can be arrested by this Court where there is reason to believe that a demise charterer of the vessel at the time when the maritime claim arose is liable for the claim and is the demise charterer or the owner of the vessel when the arrest is effected. Thus, MEDS is liable for the maritime claim of the plaintiff. The MEDS, at the time when the claim arose, is the demise charterer when the arrest of the vessel is effected. To our mind, sub-sections (1) and (2) of section 5 enable this Court to order arrest of any other vessel for the purpose of providing security against a maritime claim in lieu of the vessel against which a maritime claim has been made under the Admiralty Act. However, that any vessel can also be arrested for the purpose set out in sub-section (1) where this Court has reason to believe that it was on demise charter and its demise charterer was liable for the maritime claim when it arose and is the demise charterer of the said Altus Uber when the arrest is effected.

121 Mr. Pratap has rightly submitted that these two conditions have been satisfied in the instant case.

122 We have carefully perused the order of the learned single Judge and we find that the learned Judge, in paragraph 52 has observed that the plaintiff gave their vessel Siem Marlin on bareboat charter to MEDS under a bareboat charterparty dated 13th May, 2015. Thus, MEDS was the demise charterer of the plaintiffs vessel. The plaintiff has various claims in respect of breach of this charterparty. They are maritime claims under section 4 of the Act. The learned Judge then rightly refers to sub-section (2) of section 5 read with section 5(1)(b) to hold that the plaintiff is entitled to arrest a vessel which is either owned by or on demise charter to MEDS when the arrest is effected. The learned Judge says that the plaintiff has referred to MEDS as owner of the defendant vessel Altus Uber and in support of this assertion, it relies upon the documents, namely, Seaweb Report that shows MEDS as the registered owner, IR Classification documents where the Classification Society IRS confirms that the registered owner of the vessel is MEDS and the former name of

the vessel was Swordfish and the vessel Port of vessel is Monrovia and flag is Liberia. Then, the documents from the website of MEDS have also been referred by the learned single Judge. The learned single Judge says that there is a failure of MEDS to disclose the alleged bareboat charterparty under which it claims to be a demise charterer. Therefore, that assertion cannot be accepted according to the learned single Judge. That is sufficient to *prima facie* demonstrate that MEDS is the owner of the defendant vessel. The learned single Judge has also referred to the denial of MEDS that they are not owners, but are demise charterers of the vessel. The learned Judge rightly says that this makes no difference to the arrest of the defendant vessel. The learned single Judge has also rightly made the distinction between "the vessel" and "any other vessel". Finally, the learned single Judge holds that assuming MEDS to be the demise charterers of Altus Uber as contended by MEDS and Swordfish, still, applying the provisions of section 5 (2) read with section 5(1)(b) of the Admiralty Act, the defendant vessel is liable to be arrested for the purpose of providing security in respect of the maritime claim of the plaintiff for which MEDS is liable as demise charterer of the defendant vessel. This observation is criticised

but what is material for us to note is that if the plea of ownership of Altus Uber fails, still, MEDS claims that it is the demise charterer of Altus Uber.

123 We find that in the Grounds of Appeal of Altus Uber and which denote the stand of MEDS, Ground A of the Memo of Appeal at page 3 [Commercial Appeal (L) 465 of 2018] reads as under :

> *"A The Learned Judge failed to appreciate that the arrest of the vessel was permissible only if the vessel being arrested was owned by or on Demise charter to the MEDS at the time the cause of action arose as well as the demise charterer or owner of the vessel at the time of the arrest or alternatively, the owner or demise charterer of the offending vessel both at the time the cause of action arose and at the time when the arrest was made."*

124 On the other hand, the Memo of Appeal of M/s. Swordfish proceeds on the footing that it is the registered owner of Altus Uber and it cannot be said to be liable for the alleged claim of the plaintiff. The argument was that M/s. Swordfish is not liable for the maritime claim of the plaintiff. The maritime claim could not have been secured by arresting Altus Uber as

Swordfish had denied and disputed the allegation that MEDS was the owner.

125 In this Memo of Appeal of M/s. Swordfish, [Commercial Appeal No. 86 of 2019] Ground N at page 8 reads as under :

> *"N The Learned Single Judge has failed to appreciate that the Registry Certificate of the Defendant Vessel is a document available in the public domain and the Respondent No.1 / Original Plaintiff could have easily obtained full particulars of the actual registered owners of the Defendant Vessel before proceeding to institute the present action. That the Respondent No.1 / Original Plaintiff did not make any enquiry with the Appellant although it knew and was fully aware that MEDS was holding itself out as the charterer of the said vessel and that MEDS was not the registered owner of the Defendant Vessel, shows mala-fide on the part of the Respondent No.1 / Original Plaintiff."*

126 The wording of this ground itself indicates that these are conflicting versions. On the basis of these versions we do not think that the learned single Judge was obliged to hold any detailed inquiry at this stage. The learned single judge has not assumed the jurisdiction which, by law, was not vesting in him.

On the other hand, the observations in the impugned order demonstrate that the learned single Judge was aware of the scheme of Admiralty Courts Act, 2017. He was acting within the parameters of the same. He has not travelled beyond the same. He was not obliged, and as rightly urged by Mr. Pratap, to go into other hypothetical question or issue for neither the bar under the relevant sections of the Arbitration & Conciliation Act, 1996, was invoked nor the argument canvassed goes to such extent as would denote that filing or institution of the instant suit itself was impermissible. Ultimately, as held by us above, the bar to the suit will have to be invoked and within the parameters laid down in the Arbitration and Conciliation Act, 1996. Once we take holistic view and see the matter in a proper perspective, there is no need to elaborate any further. The suit was to enforce a maritime claim. The power to arrest was invoked by urging that in the scheme of the Act, there is no prohibition to arrest a vessel other than Siem Marlin, then, all contentions raised before us fall to the ground. We have to give meaning to the language of sub-section (1) and particularly when it employs the words “may order arrest of any vessel”. This discretionary power is not so uncontrolled as is projected before us. The power is regulated and controlled by

the language of the sub-section itself. The power vesting in the High Court cannot be exercised unless it has reason to believe that the person who owned the vessel at the time when the maritime claim arose is liable for the claim and is the owner of the vessel when the arrest is effected. We cannot accept the argument that because the charterparty was in relation to the vessel Siem Marlin, it is only that vessel which can be arrested. That is not even suggested by the learned counsel appearing for the appellants. To be fair to them, such extreme submission was not canvassed, but the submissions that they canvass, with respect, overlook the clear language of the section. The High Court may order arrest of the vessel which is within its jurisdiction for the purpose of providing security against a maritime claim which is the subject of an Admiralty proceeding, but it must have reason to believe and it had, in fact, reason to believe in this case that MEDS held out itself to be the owner or, in any event, as the language of clause (b) of sub-section (1) would indicate that it was the demise charterer of the vessel at the time when the maritime claim arose and is a demise charterer of the vessel when the arrest is effected. Thus, the preconditions or prerequisites set out in the clear language enables the High Court

in this case to pass the order of arrest. It is now convenient for Swordfish and MEDS to raise distinct versions on the contents of the certificates and documents placed before the learned single Judge. However, this was not the stage where the learned Judge could have proceeded to grant opportunity to the parties to dispute the contents of the certificates and documents placed before him. In fact, the learned single Judge has indicated in clearest terms and from the dates mentioned in the documents with regard to ownership that the defendant vessel was belonging to the applicant / appellant. At this stage, we do not see that finding to be perverse. The learned single Judge has concluded that *prima facie* ownership of MEDS is established.

127 The argument that MEDS failed to produce the demise charter and that now it is produced takes the case nowhere. *Prima facie,* even if we take that document, it is not as if the contents thereof are so conclusive that a *prima facie* conclusion other than the one recorded by the learned single Judge, on the point of jurisdiction, can be recorded. The paper-book in Commercial Appeal (L) No. 465 of 2018 at page 72 contains a communication / notice signed for and on behalf of Swordfish,

which is a wholly owned entity of M/s. Veolia Environmental Services North America Llc. and owners of M.V. Altus Uber, indicating that M/s. Altus Uber is currently on charter to M/s. MEDS. The bareboat charterparty is dated 7th October, 2017. Now, Veolia is stating that Swordfish is its wholly owned entity and that it is the owner of M/s. m.v. Altus Uber. It says that the July hire payment was due on 1st July, 2018, but that has not been confirmed. A breach of clause 11 of the charterparty is alleged. This is a notice threatening to withdraw the vessel and terminate the charterparty. Then, this notice contains a further interesting assertion:

> *"6 As MEDS are aware :*
>
> *(a) the June hire payment of US$225,000 was due on 1st June 2018 and Veolia accordingly served a Clause 25(a)(i) Notice of 6th June 2018; and*
>
> *(b) interest on the June hire payment of US$809.59 was due on 1st July 2018 (calculated on the basis of 30 days at the ICE LIBOR 3 month US$ rate at 1st June 2018, being 2,31781%, plus an additional 2% as per clause 11(f) of the above Charterparty;*
>
> *7 The sum total of items (a) and (b) above, constitutes the outstanding June hire due to Veolia as of 1st July 2018, being US$225,809.59 (and which items are referred to*

effectively below as "the Unpaid June Hire")

8 Pursuant to an Order of the Bombay High Court dated 1st June 2018 (Order No. 107 in the Commercial Admiralty Suit (L) No. 20 of 2018), the Vessel was arrested at Mumbai (hereinafter referred to as "The Arrest"). Bay way of an e-mail to Veolia from Ashutosh Chaudhary (MEDS' Managing Director) dated 9th June 2018 timed at 02:20, MEDS provided an undertaking to Veolia that MEDS would lift the Arrest and release the Vessel."

128 Thus, we find that the notices which are given are without prejudice to any other rights or claims Veolia may have against MEDS under the charterparty. Once this is not the stage to consider the matter in greater details, we can safely rest our conclusion by holding that the *prima facie* view taken by the learned single Judge is correct.

129 After asserting the claim as owners of the vessel Altus Uber, curiously Swordfish in its application seeking to vacate the order of arrest, makes a guarded statement that the applicant Swordfish has a direct and vital interest in the defendant vessel at all material times and as on the date of the filing of the application it was and/or continues to be the registered owner of the

defendant vessel. Reliance is placed on the certificate of ownership and encumbrance dated 22nd November, 2017. It is thereafter said that one M/s. Veolia Environmental Services North America Llc owns all one hundred ordinary shares of the applicant Swordfish and thereafter *inter se* agreement is relied upon.

130 *Prima facie*, we do not think that the charterparty referred in the affidavit in support of the application of Swordfish is a charterparty of the nature projected before us. It is very clear that pursuant to the charterparty MEDS changed the name of the defendant vessel from Swordfish to Altus Uber. This is ordinarily permissible. This, as Mr. Pratap would indicate, is a pointer towards the arrangement being a demise charter. Further, it appears that the vessel was renamed and for a period of 114 days i.e. three months and forty five days with further extensions being permissible by mutual agreement it was under the control of M/s. MEDS, then, all the more we do not think that the learned single Judge was in such error as would require our intervention for its correction in our Appellate jurisdiction. It is in these circumstances that in the teeth of the allegations and

counter allegations between Swordfish and MEDS, above *prima facie* conclusion refusing to vacate the order of arrest was enough to return a finding, on the issue of jurisdiction, against the defendant. This is a finding of fact. It is based on appreciation and appraisal of the material produced and that too at a *prima facie* stage to decide the objection on the competence of the Court and its jurisdiction to entertain and try the instant suit. Beyond that nothing should be read and there is no necessity to then go into the versions projected before us. The divergence in the versions is indicative of the fact that *prima facie* it will be unsafe to uphold either of them. The learned Judge has rightly not given any weightage to the same and at this *prima facie* stage. The reference to the same, as was necessary at this *prima facie* stage, has been made and we do not think that anything further should be read in the impugned order.

131 The criticism that the learned single Judge accepted the one sided version of the plaintiff is, therefore, totally uncalled for. The learned Judge has applied his mind while recording the finding on this court's jurisdiction against the defendant. The finding, as held above, is neither vitiated by perversity nor by

such legal infirmity as would warrant our interference in the Appellate jurisdiction. The finding of fact is based on all the materials produced and can hardly be termed as an approval of a one-sided version of the plaintiff. The criticism, therefore, apart from being uncalled for, is grossly unfair to the learned single Judge. The appreciation and appraisal of the factual materials is carried out by applying correct legal principles and in an overall manner.

132 As a result of the above discussion, we do not find any merit in either Appeals. Both are dismissed with no order as to costs.

133 We do not think that we should burden this judgment by making a reference to all the decisions cited at the bar. We have seen that the learned single Judge has gone by the clear and plain language of the Admiralty Act, 2017. Far from ignoring it, in consonance therewith the order of arrest of the defendant vessel has been made and that order of arrest is to provide security against a maritime claim which is a subject of the Admiralty proceeding. So viewed, this is not a case where a claim in the

arbitration or the likely Award therein is secured by resorting to a mode of arrest for obtaining security. This is a case where within the four corners of the Admiralty Act, 2017, the order of arrest has been made and it is not necessary, therefore, that every judgment cited by Mr. Sen should be referred by us.

134 Now, the only judgment that requires a reference is a judgment cited by Mr. Chinoy in the case of *Sunil B. Naik vs. Geowave Commander (2018) 5 SCC 505*.

135 There, the facts were peculiar. There, Oil & Natural Gas Corporation awarded contract to one Reflect Geophysical Pte. Ltd. (for short "RG"). This contract was awarded for carrying out certain operations for ONGC. In order to carry out these obligations, RG in turn entered into a charterparty agreement vide contract dated 29th June, 2012, to charter the vessel Geowave Commander for a period of three years. The registered owner of Geowave Commander was Master and Commander A S Norway. The vessel is stated to be specialized ship equipped to carry out seismic survey operations. In the terms of the contract this was a bareboat charter. There was an option to purchase the

vessel.

136 All the terms and conditions of the charterparty were, therefore, referred and what is material for us is that RG entered into a charterhire agreement on 30th October, 2012 with M/s. Sunil B. Naik the appellant before the Hon'ble Supreme Court in terms whereof Sunil Naik agreed to supply twenty four fishing trawlers being the chase vessels to assist in survey operations to be conducted by Geowave Commander. The charter was for sixteen chase vehicles out of twenty four fishing trawlers initially. There was an arbitration clause therein. Sunil Naik contended that sixteen vessels were made ready for RG to ensure that fishing vehicles were kept well clear of the towed in water seismic equipment so that their fishing equipment is not damaged. The daily hiring agreement varied. There was another appellant before the Court, but we are not concerned with it because Sunil Naik issued a demand notice to RG for payment of outstanding dues and another party Yusuf Abdul Gani moved the Bombay High Court by filing a suit against Geowave as an Admiralty Suit and obtained an order of arrest of the vessel. Sunil Naik also filed an Admiralty suit and obtained an order of arrest.

137 The owner of the vessel Master and Commander A S Norway filed Notice of Motion in the two proceedings for vacation of the ex parte order of arrest and that order was vacated and the order of the learned single Judge vacating the arrest was unsuccessfully challenged before a Division Bench of this Court which proceeded to dismiss the Appeals. That is how the two Appeals before the Hon'ble Supreme Court.

138 It is in that context that the observations very heavily relied upon by Mr. Chinoy are made. However, in paragraph 14, the Hon'ble Supreme Court has held that a demise charterer like RG who is the owner for services stipulated, assumes in large measure the customary rights and liabilities of vessel owners in relation to third persons, who have dealt with him or with the ship, illustratively, repairs and supplies ordered for the vessel, wages of seamen, etc. It is in that context that the appeal of Sunil Naik was dismissed. It is clear that on the date when the matter was considered by this Court, the Admiralty Act had not been brought in to effect. We are, therefore, of the clear opinion that the Motion of the owner of Geowave Commander was allowed, but

in distinct factual circumstances. Therefore, the observations made in this judgment and particularly highlighted, namely, paragraphs 29, 30, 36 to 38 and 41 ought to be viewed in the peculiar factual backdrop. Sunil B. Naik's case is, therefore, clearly distinguishable. We cannot, unmindful of the language of the Admiralty Act, 2017 and the factual conspectus before us, apply these observations. Therefore, our conclusion is that this decision is distinguishable on facts and also because that when it was delivered the legal scenario was different. The Hon'ble Supreme Court itself noted that the Conventions held that though the draft of the Admiralty Act, 2017 was in place, the Admiralty Act, 2017 received the assent of President of India on 9th August, 2017 and was duly published in the Gazette on the said date, but the date of its coming into force was not notified. In fact, the Hon'ble Supreme Court says that the dispute before it is a reminder to the Government to bring into force the Act.

139 The scenario has undergone a change after the Act is indeed brought into effect and the learned single Judge has decided the issue at hand applying the provisions of the Admiralty Act, 2017.

140 On these grounds, therefore, this decision can be distinguished by us.

141 Before parting, we must again clarify that the observations and findings in the impugned order as endorsed by us are only tentative and *prima facie.* They are recorded for the purpose of disposal of an objection raised to this Court's jurisdiction. Since the argument was that the allegations set out in the Plaint may be assumed to be true and the appellant as also M/s. Swordfish proceeded on a demurrer, the learned single Judge as also we have dealt with the matter accordingly. Needless, therefore, to clarify that these *prima facie* observations and tentative findings will not influence the merits, much less the outcome of the suit. All contentions as far as merits of the claim are, therefore, kept open.

142 In deciding this appeal the principle laid down by the Hon'ble Supreme Court in the case of *Exphar SA & Anr. vs. Eupharma Laboratories Ltd, & Anr.* reported in AIR 2004 SC 1682 have been applied by us. These principles, as summarised

in paragraph 9, read as under :

> *"9 Besides when an objection to jurisdiction is raised by way of demurrer and not of the trial, the objection must proceed on the basis that the facts as pleaded by the initiator of the impugned proceedings are true. The submission in order to succeed must show that granted those facts the Court does not have jurisdiction as a matter of law. In rejecting a plaint on the ground of jurisdiction, the Division Bench should have taken the allegations contained in the plaint to be correct."*

Once we reproduce the relevant paragraph of this judgment, the manner of disposal of this appeal as well as the legal status of our observations becomes apparent.

142 As concluded by us above, both appeals are without any merit. They are dismissed.

143 We would only modify the order of the learned single Judge insofar as it imposes costs of Rs.5,00,000/-. To our mind, the costs have been imposed by the learned single Judge as he concluded that no case is made out for vacating the order of arrest. It was correctly granted under the provisions of the

Admiralty Act, 2017. It is to possibly discourage such proceedings that the costs have been imposed. However, the learned single Judge was not only required to go into the basic facts but several provisions of law. Some issues in relation thereto were raised as well. Hence, in our view this was not a fit case to impose costs. That part of the order of the learned single Judge, namely, imposing costs, is, therefore, set aside.

144 Both the Appeals are, therefore, disposed of accordingly.

B.P. COLABAWALLA, J. ***S.C. DHARMADHIKARI, J.***